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Federal Register

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34–65742]

Reporting Line for the Commission's Ethics Counsel

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is amending its rules to reflect that the Commission's Office of the Ethics Counsel is now a stand-alone Office of the Commission and that the head of the Office, the Ethics Counsel, reports directly to the Chairman of the Commission.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Shira Pavis Minton, Ethics Counsel, at (202) 551–7938, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION

I. Discussion

On September 16, 2011, the Commission's Office of the Inspector General (''OIG'') issued a report recommending, among other things, that the Commission's Ethics Counsel report directly to the Chairman, rather than to the General Counsel.[1] On October 14, 2011, pursuant to Section 1 of Reorganization Plan No. 10 of 1950,[2] the Chairman implemented that recommendation and made the Office of the Ethics Counsel a stand-alone Office of the Commission.

These amendments conform the Commission's regulations, in part 200 of Title 17 of the Code of Federal Regulations, to the changes to the reporting line and organization of the Office of the Ethics Counsel. They do so by removing several references to oversight of the Ethics Counsel by the General Counsel. In addition, the amendments clarify that the Ethics Counsel, not the General Counsel, serves as Counselor to the Commission and its staff with regard to ethical and conflicts of interest questions and acts as the Commission's liaison on such matters with the Office of Administrative and Personnel Management, the Office of the Inspector General and the Department of Justice.

II. Related Matters

A. Administrative Procedure Act and Other Administrative Laws

The Commission has determined that these amendments to its rules relate solely to the agency's organization, procedure, or practice. Accordingly, the provisions of the Administrative Procedure Act regarding notice of proposed rulemaking and opportunity for public participation are not applicable.[3] The Regulatory Flexibility Act, therefore, does not apply.[4] Because these rules relate solely to the agency's organization, procedure, or practice and do not substantially affect the rights or obligations of non-agency parties, they are not subject to the Small Business Regulatory Enforcement Fairness Act.[5] Finally, these amendments do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.[6]

B. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. The amendments adopted today are procedural in nature and will produce the benefit of conforming the Commission's rules to the changes to the reporting line and organizational structure of the Office of the Ethics Counsel. The Commission also believes that these rules will not impose any costs on non-agency parties, or that if there are any such costs, they are negligible.

C. Consideration of Burden on Competition

Section 23(a)(2) of the Exchange Act requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition. The Commission does not believe that the amendments that the Commission is adopting today will have any impact on competition.

Statutory Authority

The amendments to the Commission's rules are adopted pursuant to 15 U.S.C. 77o, 77s, 77sss, 78d, 78d–1, 78d–2, 78w, 78ll(d), 78mm, 80a–37, 80b–11, and 7202.

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

Text of Amendments

In accordance with the preamble, the Commission hereby amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart A—Organization and Program Management

■ 1. The authority citation for Part 200, Subpart A, continues to read, in part, as follows:

Authority: 15 U.S.C. 77o, 77s, 77sss, 78d, 78d–1, 78d–2, 78w, 78*ll*(d), 78mm, 80a–37, 80b–11, and 7202, unless otherwise noted.

* * * * *

■ 2. In § 200.21 paragraph (a), remove the 6th sentence, beginning with ''He or she is responsible'', and the 7th sentence, beginning with ''He or she serves''.

■ 3. In § 200.21a:

■ a. In paragraph (a), remove the phrase ''within the Office of the General Counsel of the Commission shall oversee compliance with subpart M of this part and 5 CFR part 2635.'', and add in its place, ''is responsible for administering the Commission's Ethics Program and for interpreting subpart M of this part and 5 CFR part 2635. He or she serves as Counselor to the Commission and its staff with regard to

[1] Report of Investigation No. OIG–560, Sept. 16, 2011, pp. 116–117.

[2] 15 FR 3175, 64 Stat. 1265 (May 24, 1950).

[3] 5 U.S.C. 553(b).

[4] 5 U.S.C. 601–612.

[5] 5 U.S.C. 804.

[6] 44 U.S.C. 3501–3520.

ethical and conflicts of interest questions and acts as the Commission's liaison on such matters with the Office of Administrative and Personnel Management, the Office of the Inspector General and the Department of Justice.'';

■ b. In paragraph (b), remove the phrase ''Subject to the oversight of the General Counsel or his or her delegate, the'' and add in its place the word ''The'';

Subpart M—Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission

■ 4. The authority citation for Part 200, Subpart M, continues to read as follows:

Authority: 15 U.S.C. 77s, 77sss, 78w, 80a–37, 80b–11; E.O. 11222, 3 CFR, 1964–1965 Comp., p. 36; 5 CFR 735.104 and 5 CFR 2634; and 5 CFR 2635, unless otherwise noted.

■ 5. In § 200.735–11, remove the words ''Commission's Office of the General Counsel's'' in paragraphs (c), (d) and (e);

■ 6. In § 200.735–15:

■ (a) In paragraphs (a), (b), (c), and (d), remove the words ''General Counsel'' wherever they appear and add in their place the words ''Ethics Counsel'';

■ (b) In paragraphs (b), (e), and (f), remove the phrase ''Commission's Office of the General Counsel's''.

■ 7. In § 200.735–17, remove the phrase ''Under the general direction of the General Counsel, the'', and add in its place the word ''The''.

Dated: November 14, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–29802 Filed 11–17–11; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9552]

RIN 1545–BJ24

Deduction for Qualified Film and Television Production Costs; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final and temporary regulations.

SUMMARY: This document contains a correction to final and temporary regulations (TD 9552) that were published in the **Federal Register** on Wednesday, October 19, 2011 (76 FR 64816) relating to deductions for the cost of producing film and television productions.

DATES: This correction is effective on November 18, 2011, and is applicable on October 19, 2011.

FOR FURTHER INFORMATION CONTACT: Bernard P. Harvey, (202) 622–4930 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations that are the subject of this correction are under Section 181 of the Internal Revenue Code.

Need for Correction

As published, final and temporary regulations (TD 9552) contain an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the final and temporary regulations (TD 9552) which were the subject of FR Doc. 2011–26973 published in the **Federal Register** on Wednesday, October 19, 2011 is corrected as follows:

§ 1.181–1 [Corrected]

On page 64817, column 2, under the amendatory instruction, the language ''Par. 2. Section 1.181–1 is amended by revising paragraphs (a)(1)(ii), (a)(6) and (b)(1)(ii) and (b)(2)(vi) to read as follows:'' is removed and is replaced with the new language ''Par. 2. Section 1.181–1 is amended by revising paragraphs (a)(1)(ii), (a)(6), (b)(1)(ii), (b)(2)(vi), and (c)(2) to read as follows:''.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, Procedure and Administration.

[FR Doc. 2011–29922 Filed 11–17–11; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0474; FRL–9494–2]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Determination of Clean Data for the 2006 Fine Particulate Standard for the Charleston Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is making a final determination regarding the Charleston, West Virginia nonattainment area (hereafter referred to as the ''Charleston Area'' or the ''Area'') for the 24-hour 2006 fine particulate matter ($PM_{2.5}$) national ambient air quality standard (NAAQS). EPA is determining that the Charleston Area has clean data for the 24-hour 2006 $PM_{2.5}$ NAAQS. This determination is based upon complete, quality assured, and certified ambient air monitoring data showing that this area has monitored attainment of the 24-hour 2006 $PM_{2.5}$ NAAQS based on the 2007–2009 data and data available to date for 2010 in EPA's Air Quality System (AQS) database. EPA's determination releases the Charleston Area from the requirements to submit an attainment demonstration, associated reasonably available control measures, a reasonable further progress plan, contingency measures, and other planning State Implementation Plans (SIPs) related to attainment of the standard for so long as the Area continues to meet the 24-hour 2006 $PM_{2.5}$ NAAQS.

DATES: *Effective Date:* This final rule is effective on December 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2011–0474. All documents in the docket are listed in the *http://www.regulations.gov* Web site. 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.

FOR FURTHER INFORMATION CONTACT: Asrah Khadr, (215) 814–2071, or by email at *khadr.asrah@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What action is EPA taking?
II. What is the effect of this action?
III. Statutory and Executive Order Reviews

I. What action is EPA taking?

EPA is making a final determination that the Charleston Area has clean data for the 24-hour 2006 $PM_{2.5}$ NAAQS. This determination is based upon complete, quality assured, and certified ambient air monitoring data showing that this area has monitored attainment

of the 2006 $PM_{2.5}$ NAAQS based on the 2007–2009 data and data available to date for 2010 in EPA's AQS database.

On August 19, 2011 (76 FR 51927), EPA proposed its determination of clean data for the Charleston Area. A discussion of the rationale behind this determination and the effect of the determination were included in the notice of proposed rulemaking. EPA received no comments on this notice of proposed rulemaking.

II. What is the effect of this action?

Under the provisions of EPA's $PM_{2.5}$ implementation rule (*See* 40 CFR section 51.1004(c)), the requirements for the Charleston Area to submit an attainment demonstration and associated reasonably available control measures (including reasonably available control technology), a reasonable further progress plan, contingency measures, and any other planning SIPs related to attainment of the 2006 $PM_{2.5}$ NAAQS are suspended for so long as the area continues to meet the 24-hour 2006 $PM_{2.5}$ NAAQS. If EPA subsequently determines that this area violates the 24-hour 2006 $PM_{2.5}$ NAAQS, the basis for the suspension of the specific requirements, set forth at 40 CFR 51.1004(c), would no longer exist and this area would thereafter have to address the pertinent requirements.

This action, does not constitute a redesignation of the Charleston Area to attainment of the 24-hour 2006 $PM_{2.5}$ NAAQS under section 107(d)(3) of the Clean Air Act (CAA). Further, this action does not involve approving maintenance plans for the Area as required under section 175A of the CAA, nor does it find that the Area has met all other requirements for redesignation. Even after a determination of attainment by EPA, the designation status of the Charleston Area is nonattainment for the 24-hour 2006 $PM_{2.5}$ NAAQS until such time as EPA determines that the Area meets the CAA requirements for redesignation to attainment and takes action to redesignate the Charleston Area.

III. 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 January 17, 2012. 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 clean data determination for the 24-hour 2006 $PM_{2.5}$ NAAQS for the Charleston Area 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: November 4, 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 XX—West Virginia

■ 2. In § 52.2526, paragraph (f) is added to read as follows:

§ 52.2526 Control strategy: particulate matter.

* * * * *

(f) *Determination of Attainment.* EPA has determined, as of November 18, 2011, that based on 2007 to 2009 ambient air quality data, the Charleston nonattainment area has attained the 24-hour 2006 $PM_{2.5}$ 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, a reasonable further progress plan,

contingency measures, and other planning SIPs related to attainment of the standard for as long as this area continues to meet the 24-hour 2006 $PM_{2.5}$ NAAQS.

[FR Doc. 2011–29767 Filed 11–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R04–OAR–2009–1010–201158; FRL–9493–5]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; North Carolina: Redesignation of the Hickory-Morganton-Lenoir 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correcting amendment.

SUMMARY: EPA is taking final action to approve a request submitted on December 18, 2009, and supplemented on December 22, 2010, from the State of North Carolina, through the North Carolina Department of Environment and Natural Resources (NC DENR), Division of Air Quality (DAQ), to redesignate the Hickory-Morganton-Lenoir fine particulate matter ($PM_{2.5}$) nonattainment area (hereafter the ''Hickory Area'' or ''Area'') to attainment for the 1997 Annual $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). The Hickory Area is comprised of Catawba County in its entirety. EPA's approval of the redesignation request is based on the determination that the State of North Carolina has met the criteria for redesignation to attainment set forth in the Clean Air Act (CAA or Act), including the determination that the Hickory Area has attained the 1997 Annual $PM_{2.5}$ NAAQS by its applicable attainment date of April 5, 2010. Additionally, EPA is approving a revision to the North Carolina State Implementation Plan (SIP) to include the 1997 Annual $PM_{2.5}$ maintenance plan for the Hickory Area that contains the new motor vehicle emission budgets (MVEBs) for nitrogen oxides (NO_X) for the years 2011 and 2021 for Catawba County and the mobile insignificance determination for direct $PM_{2.5}$ for the Hickory Area. This action also approves the emissions inventory submitted with the maintenance plan. Further, EPA is correcting a typographical error for the citation associated with a previous adequacy determination the Agency made for the NO_X MVEBs for Catawba County and the mobile source insignificance determination for direct $PM_{2.5}$ for the Hickory Area.

DATES: *Effective Date:* This rule will be effective December 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2009–1010. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Madolyn Dominy or Joel Huey, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Madolyn Dominy may be reached by phone at (404) 562–9644 or via electronic mail at *dominy.madolyn@epa.gov.* Joel Huey may be reached by phone at (404) 562–9104 or via electronic mail at *huey.joel@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. What is the background for the actions?
II. What are the actions EPA is taking?
III. Why is EPA taking these actions?
IV. What are the effects of these actions?
V. Final Action
VI. Statutory and Executive Order Reviews

I. What is the background for the actions?

On December 18, 2009, and supplemented on December 22, 2010, the State of North Carolina, through NC DENR, submitted a request to redesignate the Hickory Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS, and for EPA approval of the North Carolina SIP revisions containing a maintenance plan for the Area. In an action published on September 20, 2011 (76 FR 58210), EPA proposed approval of North Carolina's plan for maintaining the 1997 Annual $PM_{2.5}$ NAAQS, including the emissions inventory submitted pursuant to CAA section 172(c)(3) and the NO_X MVEBs for Catawba County and the mobile insignificance determination for direct $PM_{2.5}$ for the Hickory Area as contained in the maintenance plan. At that time, EPA also proposed to approve the redesignation of the Hickory Area to attainment. Additional background for today's action is set forth in EPA's September 20, 2011, proposal.

The MVEBs, specified in kilograms per year (kg/yr), included in the maintenance plan are as follows:

TABLE 1—CATWABA COUNTY MVEBS

[kg/yr]

Conformity MVEB	2011	2021
NO_X	3,996,601	2,236,028

In its September 20, 2011, proposed action, EPA noted that the adequacy public comment period on these MVEBs (as contained in North Carolina's submittal) began on November 23, 2010, and closed on December 23, 2010. No comments were received during the public comment period. Thus, EPA deemed the new MVEBs for Catawba County and the mobile source insignificance determination for $PM_{2.5}$ in the Hickory Area adequate for the purposes of transportation conformity on May 2, 2011 (76 FR 24475).

As stated in the September 20, 2011, proposal, this redesignation addresses the Hickory Area's status solely with respect to the 1997 Annual $PM_{2.5}$ NAAQS, for which designations were finalized on January 5, 2005 (70 FR 944), and as supplemented on April 14, 2005 (70 FR 19844).

EPA reviewed $PM_{2.5}$ monitoring data from ambient $PM_{2.5}$ monitoring stations in the Hickory Area for the $PM_{2.5}$ seasons from 2007–2009. These data have been quality-assured and are recorded in Air Quality System (AQS). The annual arithmetic mean $PM_{2.5}$ concentrations for 2006–2009 and the 3-year averages of these values (*i.e.,* design values) are summarized in Table 2. EPA has reviewed more recent data which indicate that the Hickory Area

continues to attain the 1997 $PM_{2.5}$ NAAQS. The design values for 2007–2009 and 2008–2010 are also included in Table 2 and demonstrate that the Hickory Area continues to meet the $PM_{2.5}$ NAAQS and that the ambient concentrations of $PM_{2.5}$ are continuing to decrease in the Area. Preliminary monitoring data for the 2011 $PM_{2.5}$ season indicate that the Area is continuing to attain the 1997 Annual $PM_{2.5}$ NAAQS based on data from 2009–2011. These preliminary data are available in the docket for today's action although they are not yet certified.

TABLE 2—DESIGN VALUE CONCENTRATIONS FOR THE HICKORY 1997 ANNUAL $PM_{2.5}$ NONATTAINMENT AREA (μg/m³)

County	Site name	Monitor ID	Annual average $PM_{2.5}$ concentrations (μg/m³)				
			2006	2007	2008	2009	2010
Catawba	Hickory	37–035–0004	15.18	14.62	12.75	10.32	11.23
			Three-year $PM_{2.5}$ design values (μg/m³)				
			2006–2008		2007–2009		2008–2010
Catawba	Hickory	37–035–0004	14.2		12.6		11.4

II. What are the actions EPA is taking?

In today's rulemaking, EPA is approving: (1) North Carolina's emissions inventory which was submitted pursuant to CAA section 172(c)(3); (2) North Carolina's 1997 Annual $PM_{2.5}$ maintenance plan (such approval being one of the CAA criteria for redesignation to attainment status) for the Hickory Area, including NO_X MVEBs and mobile source insignificance determination for direct $PM_{2.5}$; and (3) North Carolina's redesignation request to change the legal designation of the Hickory Area from nonattainment to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. The maintenance plan is designed to demonstrate that the Hickory Area will continue to attain the 1997 Annual $PM_{2.5}$ NAAQS through 2021. EPA's approval of the redesignation request is based on EPA's determination that the Hickory Area meets the criteria for redesignation set forth in CAA, sections 107(d)(3)(E) and 175A, including EPA's determination that the Hickory Area has attained the 1997 Annual $PM_{2.5}$ NAAQS. EPA's analyses of North Carolina's redesignation request, emissions inventory, and maintenance plan are described in detail in the September 20, 2011, proposed rule (76 FR 58210).

Consistent with the CAA, the maintenance plan that EPA is approving also includes 2011 and 2021 NO_X MVEBs for Catawba County and the mobile source insignificance determination for direct $PM_{2.5}$ in the Hickory Area. In this action, EPA is approving these NO_X MVEBs for Catawba County and the mobile source insignificance determination for direct $PM_{2.5}$ in the Hickory Area for the purposes of transportation conformity. For required regional emissions analysis years beyond 2011 and prior to 2021, the applicable budgets will be the new 2011 NO_X MVEBs. For required regional emissions analysis years that involve 2021 or beyond, the applicable budgets will be the new 2021 NO_X MVEBs.

EPA is also correcting an inadvertent typographical error for the citation (in EPA's September 20, 2011, proposed rulemaking) associated with EPA's adequacy determination for the NO_X MVEBs for Catawba County and the mobile source insignificance determination for direct $PM_{2.5}$ for the Hickory Area. In EPA's September 20, 2011 proposed rulemaking, EPA provides the citation for the adequacy determination for the NO_X MVEBs for Catawba County and the mobile source insignificance determination for direct $PM_{2.5}$ for the Hickory Area as 76 FR 24472 in the second to last paragraph in the section entitled ''X. Proposed Actions on the Redesignation Request and Maintenance Plan SIP Revision Including Approval of the NO_X MVEBs for 2011 and 2021 and the Direct $PM_{2.5}$ Insignificance Determination for the Hickory Area.'' The correct citation is 76 FR 24475. Through this action, EPA is making this correction.

III. Why is EPA taking these actions?

EPA has determined that the Hickory Area has attained the 1997 Annual $PM_{2.5}$ NAAQS and has also determined that all other criteria for the redesignation of the Hickory Area from nonattainment to attainment of the 1997 Annual $PM_{2.5}$ NAAQS have been met. See CAA section 107(d)(3)(E). One of those requirements is that the Hickory Area has an approved plan demonstrating maintenance of the 1997 Annual $PM_{2.5}$ NAAQS. EPA is also taking final action to approve the maintenance plan for the Hickory Area as meeting the requirements of sections 175A and 107(d)(3)(E) of the CAA. In addition, EPA is approving the emissions inventory as meeting the requirements of section 172(c)(3) of the CAA. Finally, EPA is approving the new NO_X MVEBs for the years 2011 and 2021 for Catawba County and the mobile source insignificance determination for direct $PM_{2.5}$ for the Hickory Area as contained in North Carolina's maintenance plan because these MVEBs and the insignificance determination are consistent with maintenance of the 1997 Annual $PM_{2.5}$ standard in the Hickory Area. The detailed rationale for EPA's determinations and actions are set forth in the proposed rulemaking and in other discussion in this final rulemaking.

IV. What are the effects of these actions?

Approval of the redesignation request changes the legal designation of Catawba County in its entirety from nonattainment to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. EPA is modifying the regulatory table in 40 CFR 81.334 to reflect a designation of attainment for these full and partial counties. EPA is also approving, as a revision to the North Carolina SIP, North Carolina's plan for maintaining the 1997 Annual $PM_{2.5}$ NAAQS in the Hickory Area through 2021. The maintenance plan includes contingency measures to remedy possible future violations of the 1997 Annual $PM_{2.5}$ NAAQS and establishes NO_X MVEBs for the years 2011 and 2021 for Catawba County and an insignificance determination for direct $PM_{2.5}$ for the Hickory Area. Additionally, this action approves the emissions inventory for the Hickory Area pursuant to section 172(c)(3) of the CAA.

V. Final Action

EPA is taking final action to approve the redesignation and change the legal designation of Catawba County in its entirety from nonattainment to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. EPA is also approving into the North Carolina SIP the 1997Annual $PM_{2.5}$ maintenance plan for the Hickory Area, which includes the new NO_X MVEBs of 3,996,601 kg/yr for 2011 and 2,236,028 kg/yr for 2021 for Catawba County. Further, EPA is approving the insignificance determination for direct $PM_{2.5}$ for the Hickory Area.

Additionally, EPA is approving the 2008 emissions inventory for the Hickory Area pursuant to section 172(c)(3) of the CAA. In a previous action, EPA found the new Catawba County NO_X MVEBs and the mobile source direct $PM_{2.5}$ insignificance determination for the Hickory Area adequate for the purposes of transportation conformity (76 FR 24475, May 2, 2011). Within 24 months from the effective date of EPA's adequacy determination, the transportation partners will need to demonstrate conformity to the new NO_X MVEBs pursuant to 40 CFR 93.104(e) and will need to document the mobile source direct $PM_{2.5}$ insignificance determination for the $PM_{2.5}$ NAAQS in future conformity determinations (76 FR 24475).

VI. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA 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 required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA 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 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 these reasons, 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 an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory action 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 CAA; 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 final 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 January 17, 2012. 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

40 CFR Part 52

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

40 CFR Part 81

Environmental protection, Air pollution control, National parks.

Dated: November 7, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR parts 52 and 81 are 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 II—North Carolina

■ 2. Section 52.1770(e) is amended by adding two new entries ''1997 Annual $PM_{2.5}$ Maintenance Plan for the Hickory, North Carolina Area (Catawba County)'' and ''1997 Annual $PM_{2.5}$ Maintenance Plan for the Hickory, North Carolina Area—MOVES Update'' at the end of the table to read as follows:

§ 52.1770 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED NORTH CAROLINA NON-REGULATORY PROVISIONS

Provision	State effective date	EPA approval date	Federal Register citation
* * * * * * *			
1997 Annual $PM_{2.5}$ Maintenance Plan for the Hickory, North Carolina Area (Catawba County).	12/18/09	11/18/11	[Insert citation of publication].
1997 Annual $PM_{2.5}$ Maintenance Plan for the Hickory, North Carolina Area—MOVES Update.	12/22/10	11/18/11	[Insert citation of publication].

PART 81—[AMENDED]

■ 3. The authority citation for part 81 continues to read as follows:

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

■ 4. In § 81.334, the table entitled ''North Carolina—$PM_{2.5}$ (Annual NAAQS)'' is amended under ''Hickory-Morganton-Lenoir, NC'' by revising the entry for ''Catawba County'' to read as follows:

§ 81.334 North Carolina.

* * * * *

NORTH CAROLINA—$PM_{2.5}$ (ANNUAL NAAQS)

Designated area	Designation [a]	
	Date [1]	Type
* * *	* * *	*
Hickory-Morganton-Lenoir, NC:		
Catawba County	This action is effective 11/18/11	Attainment.
* * *	* * *	*

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after January 5, 2005, unless otherwise noted.

* * * * *

[FR Doc. 2011–29769 Filed 11–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R04–OAR–2009–1011–201159; FRL–9493–6]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; North Carolina: Redesignation of the Greensboro-Winston-Salem-High Point 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correcting amendment.

SUMMARY: EPA is taking final action to approve a request submitted on December 18, 2009, and supplemented on December 22, 2010, from the State of North Carolina, through the North Carolina Department of Environment and Natural Resources (NC DENR), Division of Air Quality (DAQ), to redesignate the Greensboro-Winston-Salem-High Point fine particulate matter ($PM_{2.5}$) nonattainment area (hereafter the ''Greensboro Area'' or ''Area'') to attainment for the 1997 Annual $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). The Greensboro Area is comprised of Davidson and Guilford Counties in their entireties. EPA's approval of the redesignation request is based on the determination that the State of North Carolina has met the criteria for redesignation to attainment set forth in the Clean Air Act (CAA or Act), including the determination that the Greensboro Area has attained the 1997 Annual $PM_{2.5}$ NAAQS by its applicable attainment date of April 5, 2010. Additionally, EPA is approving a revision to the North Carolina State Implementation Plan (SIP) to include the 1997 Annual $PM_{2.5}$ maintenance plan for the Greensboro Area that contains the new 2011 and 2021 motor vehicle emission budgets (MVEBs) for nitrogen oxides (NO_X) and $PM_{2.5}$ for both Davidson and Guilford Counties. This action also approves the emissions inventory submitted with the maintenance plan. Further, EPA is correcting a typographical error for the citation associated with a previous adequacy finding the Agency made for the NO_X and $PM_{2.5}$ MVEBs for both Davidson and Guilford Counties.

DATES: *Effective Date:* This rule will be effective December 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2009–1011. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are

Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Madolyn Dominy or Joel Huey, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Madolyn Dominy may be reached by phone at (404) 562–9644 or via electronic mail at *dominy.madolyn@epa.gov.* Joel Huey may be reached by phone at (404) 562–9104 or via electronic mail at *huey.joel@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. What is the background for the actions?

On December 18, 2009, and supplemented on December 22, 2010, the State of North Carolina, through NC DENR, submitted a request to redesignate the Greensboro Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS and for EPA approval of the North Carolina SIP revisions containing a maintenance plan for the Area. In an action published on September 26, 2011 (76 FR 59345), EPA proposed approval of North Carolina's plan for maintaining the 1997 Annual $PM_{2.5}$ NAAQS, including the emissions inventory submitted pursuant to CAA section 172(c)(3) and the NO_X and $PM_{2.5}$ MVEBs for Davidson and Guilford Counties in the Greensboro Area as contained in the maintenance plan. At that time, EPA also proposed to approve the redesignation of the Greensboro Area to attainment. Additional background for today's action is set forth in EPA's September 26, 2011, proposal.

The MVEBs, specified in kilograms per year (kg/yr), included in the maintenance plan are as follows:

TABLE 1—DAVIDSON COUNTY MVEBS

[kg/yr]

Conformity MVEB	2011	2021
NO_X	4,086,413	2,148,938
$PM_{2.5}$	153,313	153,313

TABLE 2—GUILFORD COUNTY MVEBS

[kg/year]

Conformity MVEB	2011	2021
NO_X	11,133,605	6,309,650
$PM_{2.5}$	421,841	421,841

In its September 26, 2011, proposed action, EPA noted that the adequacy public comment period on these MVEBs (as contained in North Carolina's submittal) began on November 23, 2010, and closed on December 23, 2010. No comments were received during the public comment period. Thus, EPA deemed the new MVEBs for Davidson and Guilford Counties in the Greensboro Area adequate for the purposes of transportation conformity on May 2, 2011 (76 FR 24474).

As stated in the September 26, 2011, proposal, this redesignation addresses the Greensboro Area's status solely with respect to the 1997 Annual $PM_{2.5}$ NAAQS, for which designations were finalized on January 5, 2005 (70 FR 944), and as supplemented on April 14, 2005 (70 FR 19844).

EPA reviewed $PM_{2.5}$ monitoring data from ambient $PM_{2.5}$ monitoring stations in the Greensboro Area for the $PM_{2.5}$ seasons from 2007–2009. These data have been quality-assured and are recorded in Air Quality System (AQS). The annual arithmetic mean $PM_{2.5}$ concentrations for 2006–2009 and the 3-year averages of these values (*i.e.,* design values) are summarized in Table 3. EPA has reviewed more recent data which indicate that the Greensboro Area continues to attain the 1997 $PM_{2.5}$ NAAQS. The design values for 2007–2009 and 2008–2010 are also included in Table 3 and demonstrate that the Greensboro Area continues to meet the $PM_{2.5}$ NAAQS and that the ambient concentrations of $PM_{2.5}$ are continuing to decrease in the Area. Preliminary monitoring data for the 2011 $PM_{2.5}$ season indicate that the Area is continuing to attain the 1997 Annual $PM_{2.5}$ NAAQS based on data from 2009–2011. These preliminary data are available in the docket for today's action although they are not yet certified.

TABLE 3—DESIGN VALUE CONCENTRATIONS FOR THE GREENSBORO 1997 ANNUAL $PM_{2.5}$ NONATTAINMENT AREA ($\mu g/m^3$)

County	Site name	Monitor ID	Annual average $PM_{2.5}$ concentrations ($\mu g/m^3$)				
			2006	2007	2008	2009	2010
Davidson	Lexington	37–057–0002	15.13	14.64	13.61	10.61	12.1
Guilford	Mendenhall	37–081–0013	14.5	13.14	11.41	9.31	10.4
Guilford	Colfax	37–035–0014	N/A	N/A	12.32	9.63	10.5
			Three-year $PM_{2.5}$ design values ($\mu g/m^3$)				
			2006–2008		2007–2009		2008–2010
Davidson	Lexington	37–057–0002	14.5		13.0		12.1
Guilford	Mendenhall	37–081–0013	13.0		11.3		10.4
Guilford	Colfax	37–035–0014	N/A		N/A		10.8

II. What are the actions EPA is taking?

In today's rulemaking, EPA is approving: (1) North Carolina's emissions inventory which was submitted pursuant to CAA section 172(c)(3); (2) North Carolina's 1997 Annual $PM_{2.5}$ maintenance plan (such approval being one of the CAA criteria for redesignation to attainment status) for the Greensboro Area, including MVEBs; and (3) North Carolina's redesignation request to change the legal designation of the Greensboro Area from nonattainment to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. The maintenance plan is designed to demonstrate that the Greensboro Area will continue to attain the 1997 Annual $PM_{2.5}$ NAAQS through 2021. EPA's approval of the redesignation request is based on EPA's determination that the Greensboro Area meets the criteria for redesignation set forth in CAA, sections 107(d)(3)(E) and 175A, including EPA's

determination that the Greensboro Area has attained the 1997 Annual $PM_{2.5}$ NAAQS. EPA's analyses of North Carolina's redesignation request, emissions inventory, and maintenance plan are described in detail in the September 26, 2011, proposed rule (76 FR 59345).

Consistent with the CAA, the maintenance plan that EPA is approving also includes 2011 and 2021 MVEBs for NO_X and $PM_{2.5}$ for Davidson and Guilford Counties in the Greensboro Area. In this action, EPA is approving these NO_X and $PM_{2.5}$ MVEBs for the purposes of transportation conformity. For required regional emissions analysis years beyond 2011 and prior to 2021, the applicable budgets will be the new 2011 MVEBs. For required regional emissions analysis years that involve 2021 or beyond, the applicable budgets will be the new 2021 MVEBs.

EPA is also correcting an inadvertent typographical error for the citation (in EPA's September 26, 2011, proposed rulemaking) associated with EPA's adequacy finding for the NO_X and $PM_{2.5}$ MVEB for Davidson and Guilford Counties. In EPA's September 26, 2011, proposed rulemaking, EPA provides the citation for the adequacy determination for the NO_X and $PM_{2.5}$ MVEBs as 76 FR 24472 in the last paragraph of the section entitled ''VIII. What Is the Status of EPA's Adequacy Determination for the Proposed $PM_{2.5}$ and NO_X MVEBs for 2011 and 2021 for the Greensboro Area?'' and in the second to last paragraph in the section entitled ''X. Proposed Actions on the Redesignation Request and Maintenance Plan SIP Revisions Including Approval of the $PM_{2.5}$ and NO_X MVEBs for 2011 and 2021 for the Greensboro Area.'' The correct citation is 76 FR 24474. Through this action, EPA is making this correction.

III. Why is EPA taking these actions?

EPA has determined that the Greensboro Area has attained the 1997 Annual $PM_{2.5}$ NAAQS and has also determined that all other criteria for the redesignation of the Greensboro Area from nonattainment to attainment of the 1997 Annual $PM_{2.5}$ NAAQS have been met. See CAA section 107(d)(3)(E). One of those requirements is that the Greensboro Area has an approved plan demonstrating maintenance of the 1997 Annual $PM_{2.5}$ NAAQS. EPA is also taking final action to approve the maintenance plan for the Greensboro Area as meeting the requirements of sections 175A and 107(d)(3)(E) of the CAA. In addition, EPA is approving the emissions inventory as meeting the requirements of section 172(c)(3) of the CAA. Finally, EPA is approving the new NO_X and $PM_{2.5}$ MVEBs for the years 2011 and 2021 as contained in North Carolina's maintenance plan for Davidson and Guilford Counties in the Greensboro Area because these MVEBs are consistent with maintenance of the 1997 Annual $PM_{2.5}$ standard in the Greensboro Area. The detailed rationale for EPA's findings and actions are set forth in the proposed rulemaking and in other discussion in this final rulemaking.

IV. What are the effects of these actions?

Approval of the redesignation request changes the legal designation of Davidson and Guilford Counties in their entireties from nonattainment to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. EPA is modifying the regulatory table in 40 CFR 81.334 to reflect a designation of attainment for these full and partial counties. EPA is also approving, as a revision to the North Carolina SIP, North Carolina's plan for maintaining the 1997 Annual $PM_{2.5}$ NAAQS in the Greensboro Area through 2021. The maintenance plan includes contingency measures to remedy possible future violations of the 1997 Annual $PM_{2.5}$ NAAQS and establishes NO_X and $PM_{2.5}$ MVEBs for the years 2011 and 2021 for the Greensboro Area. Additionally, this action approves the emissions inventory for the Greensboro Area pursuant to section 172(c)(3) of the CAA.

V. Final Action

EPA is taking final action to approve the redesignation and change the legal designation of Davidson and Guilford Counties in their entireties from nonattainment to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. EPA is also approving into the North Carolina SIP the 1997Annual $PM_{2.5}$ maintenance plan for the Greensboro Area. For Davidson County, the maintenance plan includes the new MVEBs of 4,086,413 kg/yr of NO_X and 153,313 kg/yr of $PM_{2.5}$ for 2011 and 2,148,938 kg/yr of NO_X and 153,313 kg/yr of $PM_{2.5}$ for 2021. Further, for Guilford County, the maintenance plan includes the new MVEBs of 11,133,605 kg/yr of NO_X and 421,841 kg/yr of $PM_{2.5}$ for 2011 and 6,309,650 kg/yr of NO_X and 421,841 kg/yr of $PM_{2.5}$ for 2021.

Additionally, EPA is approving the 2008 emissions inventory for the Greensboro Area pursuant to section 172(c)(3) of the CAA. In a previous action, EPA found the new Greensboro Area MVEBs adequate for the purposes of transportation conformity (76 FR 24474, May 2, 2011). Within 24 months from the effective date of EPA's adequacy finding for the MVEBs, the transportation partners are required to demonstrate conformity to the new $PM_{2.5}$ and NO_X MVEBs pursuant to 40 CFR 93.104(e).

VI. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the status of geographical area and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA 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 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 these reasons, 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 an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory action 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 CAA; 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 final 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 January 17, 2012. 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

40 CFR Part 52

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

40 CFR Part 81

Environmental protection, Air pollution control, National parks.

Dated: November 7, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR parts 52 and 81 are 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 II—North Carolina

■ 2. Section 52.1770(e) is amended by adding new entries ''1997 Annual $PM_{2.5}$ Maintenance Plan for the Greensboro, North Carolina Area (Davidson and Guilford Counties)'' and ''1997 Annual $PM_{2.5}$ Maintenance Plan for the Greensboro, North Carolina Area—MOVES Update'' at the end of the table to read as follows:

§ 52.1770 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED NORTH CAROLINA NON-REGULATORY PROVISIONS

Provision	State effective date	EPA approval date	**Federal Register** citation
* * * *	*	*	*
1997 Annual $PM_{2.5}$ Maintenance Plan for the Greensboro, North Carolina Area (Davidson and Guilford Counties).	12/18/09	11/18/11	[Insert citation of publication].
1997 Annual $PM_{2.5}$ Maintenance Plan for the Greensboro, North Carolina Area—MOVES Update.	12/22/10	11/18/11	[Insert citation of publication].

PART 81—[AMENDED]

■ 1. The authority citation for part 81 continues to read as follows:

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

■ 2. In § 81.334, the table entitled ''North Carolina—$PM_{2.5}$ (Annual NAAQS)'' is amended under ''Greensboro-Winston Salem-High Point, NC'' by revising the entries for ''Davidson County'' and ''Guilford County'' to read as follows:

§ 81.334 North Carolina.

* * * * *

NORTH CAROLINA—$PM_{2.5}$—(ANNUAL NAAQS)

Designated area	Designation [a]	
	Date [1]	Type
Greensboro-Winston Salem-High Point, NC:		
Davidson County	This action is effective 11/18/11	Attainment.
Guilford County	This action is effective 11/18/11	Attainment.
* * *	* * *	*

[a] Includes Indian Country located in each county or area, except as otherwise specified.

[1] This date is 90 days after January 5, 2005, unless otherwise noted.

* * * * *

[FR Doc. 2011–29777 Filed 11–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0780; FRL–9326–4]

Prohexadione Calcium; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of prohexadione calcium in or on sweet cherry. BASF Corporation requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 18, 2011. Objections and requests for hearings must be received on or before January 17, 2012, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0780. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Rose Mary Kearns, Registration Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–5611; email address: *kearns.rosemary@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0780 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 17, 2012. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0780, by one of the following methods:

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

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of October 27, 2010 (75 FR 66092) (FRL–8848–3), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 0F7765) by BASF Corporation, 26 Davis Drive, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.547 be amended by establishing tolerances for residues of the plant growth regulator prohexadione calcium, calcium, 3-oxido-5-oxo-4-propionylcyclohex-3-enecarboxylate, in or on sweet cherries at 0.50 parts per million (ppm). That notice referenced a summary of the petition prepared by BASF Corporation, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing for these changes are explained in Unit IV.D. Based upon review of the data supporting the petition, EPA has lowered the tolerance from 0.5 ppm to 0.4 p.m. The reason for these changes are explained in Unit IV.C

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will

result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue * * *.''

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

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Prohexadione calcium is not acutely toxic by the oral, dermal, and inhalation routes. It is moderately irritating to the eyes and skin and is not a dermal sensitizer.

Following subchronic dietary exposures, no treatment-related effects were seen at doses up to the limit dose in mice, fore-stomach hyperplasia was seen only at very high doses in rats, and kidneys were the target organ for toxicity in the dogs. Following repeated dermal exposures for 28-days, no toxicity was seen at the limit dose of 1,000 milligrams/kilogram/day (mg/kg/day). There was no evidence of neurotoxicity following acute or subchronic exposure to rats.

Following chronic dietary exposures, toxicity was seen only at high doses in dogs, rats, and mice. There was no evidence of carcinogenicity in male and female mice or male and female rats.

In the rat developmental toxicity study, no treatment-related maternal or developmental toxicity was seen at the limit dose. Three rabbit developmental toxicity studies are also available. In one study, maternal toxicity manifested as increased mortality, abortions, and decreases in body-weight gain was seen at the highest dose tested. However, no developmental toxicity was seen at the dose that caused maternal toxicity. The abortions were attributed to the maternal toxicity (*i.e.,* mortality and decreased body-weight gain) and not to toxicity of the test material. In the second developmental toxicity study in rabbits, no maternal or developmental toxicity was seen at the highest dose tested. In the third study, maternal toxicity, manifested as premature deliveries, was seen as a dose where no developmental toxicity was seen. In the reproductive toxicity study with rats, parental toxicity (minimal mortality) occurred at a dose lower than the dose that caused decreases in body weight of the offspring. No reproductive toxicity was seen at the highest dose tested in this study. These results indicate no quantitative or qualitative increase in susceptibility of rats and rabbits to *in utero* and/or post-natal exposure to prohexadione calcium.

Prohexadione calcium was non-carcinogenic in both the rat and mouse. Prohexadione calcium has been classified as ''not likely to be caricinogenic to humans'' based upon lack of evidence of carcinogenicity in rats and mice.

Specific information on the studies received and the nature of the adverse effects caused by prohexadione calcium as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document Notice of Filing for Prohexadione Calcium at 66092 in docket ID number EPA–HQ–OPP–2010–0780. (See pages 8012 in the HED Risk Assessment in the docket number for this rule).

B. Toxicological Points of Departure/Levels of Concern

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

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

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

Exposure/scenario	Dose used in risk assessment, UFs	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary	N/A	N/A	An appropriate endpoint attributable to a single dose (exposure) was not seen in the toxicity database.
Chronic dietary	NOAEL = 20 mg/kg/day UF_A = 10X UF_H = 10X FQPA SF = 1X	Chronic RfD cPAD= 0.2 mg/kg/day.	Chronic toxicity dog LOAEL = 200 mg/kg/day based on histopathological changes in the kidneys (dilated basophilic tubules) and increased urinary volumn and NA^+ ion concentrations.

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

Exposure/scenario	Dose used in risk assessment, UFs	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Incidental oral short-term (1 to 30 days)- and Intermediate (1–6 Months)-Term.	NOAEL= 80 mg/kg/day ..... UF_A = 10X UF_H = 10X FQPA SF = 1X	LOC for MOE = 100 (Residential).	90 day oral toxicity dog LOAEL = 400 mg/kg/day based on moderate cortical areas of dilated basophilic tubules in the kidneys and decreased potassium levels.
Short (1–30 days)- and intermediate (1 to 6 months)—Term Dermal (Occupational/Residential).	Oral Maternal NOAEL = 40 Estimated absorption rate 25%.	LOC for MOE = 100 (Occupational/Residential.	Prenatal developmental Toxicity—rabbit LOAEL = 200 mg/kg/day based on increased mortality, abortions, and decreased maternal body-weight gain.
Short-term (1 to 30 days)- and Intermediate (1–6 months)—Term Inhalation.	Oral Maternal NOAEL = 40 mg/kg/day (inhalation-absorption rate = 100%).	LOC for MOE = 100	Prenatal developmental toxicity—rabbit LOAEL = 200 mg/kg/day based on increased mortality, abortions, and decreased maternal body-weight gain.
Cancer (oral, dermal, inhalation.	Not likely human carcinogen	N/A	No evidence of carcinogenic potential.

[1] UF = uncertainty factor, UF_A = extrapolation from animal to human (interspecies), UF_H = potential variation in sensitivity among members of the human population (intraspecies), FQPA SF = FQPA Safety Factor, NOAEL = no-observed adverse-effect level, LOAEL = lowest-observed adverse-effect level, PAD = population-adjusted dose (a = acute, c = chronic) RfD = reference dose, MOE = margin of exposure; LOC = level of concern; NA = not applicable.

[2] 25% Dermal-absorption factor—Derived from HIARC report 112600HA.002.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to prohexadione calcium, EPA considered exposure under the petitioned-for tolerances as well as all existing prohexadione calcium tolerances in 40 CFR 180.547. EPA assessed dietary exposures from prohexadione calcium in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

No such effects were identified in the toxicological studies for prohexadione calcium therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Continuing Survey of Food Intake by Individuals (CSFII). As to residue levels in food, EPA assumed Dietary Exposure Evaluation Model (DEEM) ™ (ver.7.81) default processing factors, 100 percent crop treated (PCT), and tolerance level residues for all commodities.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that prohexadione calcium does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for prohexadione calcium. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for prohexadione calcium in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of prohexadione calcium. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppfed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI–GROW) models the estimated drinking water concentrations (EDWCs) of prohexadione calcium for acute exposures are estimated to be 52.4 parts per billion for surface water and .158 ppb for ground water.

For chronic exposures for non cancer assessments are estimated to be 9.1 ppb for surface water and 0.0158 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model.

For acute dietary assessment, the water concentration value of 52.4 ppb was used to assess the contribution to drinking water.

For chronic dietary risk assessment, the water concentration of value 9.1 ppb was used to assess the contribution to drinking water.

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

Prohexadione calcium is currently registered for the following uses that could result in residential exposures: Residential lawns, ornamentals, athletic fields, parks, and golf courses. There is a potential for exposure in residential settings during the application process for homeowners who use products containing prohexadione calcium. There is also a potential for exposure of adults and children from entering prohexadione calcium-treated areas. EPA assessed residential exposure using the following assumptions: It has been determined that exposure to pesticide handlers is likely during the residential use of prohexadione calcium on lawns and ornamentals. Intermediate term exposures are not likely because of the intermittent nature of applications by homeowners. Adults were also assessed for potential short-term postapplication dermal exposure from contact with treated residential and recreational turf (home lawns, recreational fields, and golf courses). Youths, ages 10–12 years old, were selected as a representative population to assess postapplication dermal exposure from contact with treated residential and recreational turf (home lawns, fields, and golf courses). Children, ages 3–6 years old, were selected as a representative population to assess for postapplication dermal and incidental oral (hand-to-mouth, object-

to-mouth, and soil ingestion) exposure to residential turf/home lawns. For all residential scenarios, the short-term risk estimates (MOEs) do not exceed the Agency's LOC. Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

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

EPA has not found prohexadione calcium to share a common mechanism of toxicity with any other substances, and prohexadione calcium does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that prohexadione calcium does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* There is no evidence (quantitative or qualitative) evidence of increased susceptibility following *in utero* exposures to rats and rabbits and following pre-and post-natal exposures to rats. In the developmental study in rats, no maternal or developmental toxicity was seen up to the limit dose. Additionally, three developmental studies in rabbits were available, and no developmental toxicity was seen in these studies. The abortions seen in one study were not due to treatment, but rather due to the severe maternal toxicity (deaths and decreased body-weight gain) observed in the dose. In the reproductive toxicity, offspring toxicity was seen at a dose higher than the dose that caused parental/systemic toxicity.

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

i. The toxicity database for prohexadione calcium is complete.

ii. There is no evidence of neurotoxcity following acute and subchronic exposures and there was no evidence of increased susceptibility following in utero and pre/post natal exposures. Therefore, a developmental neurotoxicity study is not required.

iii. The toxicology database for prohexadione calcium does not show any evidence of treatment-related effects on the immune system. The overall weight of evidence suggests that this chemical does not directly target the immune system. In addition, prohexadione calcium does not belong to a class of chemicals (*e.g.,* the organotins, heavy metals, halogenated aromatic hydrocarbons) that would be expected to be immunotoxic. Although an immunotoxicity study is now required as a part of new data requirements in the 40 CFR part 158 for conventional pesticide registration, HED does not believe that conducting this study will result in a lower point of departure (POD) than that currently used for overall risk assessment; therefore, a database uncertainty factor (UF_{DB}) is not needed to account for lack of these studies

iv. There are no residual uncertainties for pre- and post-natal toxicity.

v. There are no residual uncertainties identified in the exposure databases. The dietary exposure analysis is conservative in that tolerance-level residues, 100% crop treated, and modeled drinking water estimates were assumed. The residential exposure analysis is conservative since it is based on the residential Standard Operating Procedures (SOPs). The dietary and residential risk assessments are thus conservative and are not expected to underestimate risk. EPA made conservative (protective) assumptions in the ground water and surface water modeling used to assess exposure to prohexadione calcium in drinking water. EPA used similarly conservative assumptions to assess postapplication of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks exposed by prohexadione calcium.

E. Aggregate Risks and Determination of Safety

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

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

2. *Chronic risk.* Using the exposure assumptions described in this unit or chronic exposure, EPA has concluded that the chronic exposure to prohexadione calcium from food and water will utilize 14% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of prohexadione calcium is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Prohexadione calcium is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to prohexadione calcium. Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 340 or higher for all populations. Because EPA's level of concern for prohexadione calcium is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Because no intermediate-term adverse effect was identified, prohexadione calcium is not expected to pose a intermediate-term risk.

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

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology is available to enforce the tolerance expression. A liquid chromatography with tandem mass spectrometry (LC/MS/MS) method (BASF Method 564/0) is available for the enforcement of the proposed tolerances or sweet cherries. EPA has determined that BASF Method 564/0 is a suitable enforcement method for fruit commodities, as defined in SOP No. ACB–019 (9/15/08).

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

B. International Residue Limits

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

The Codex has not established a MRL for prohexadione calcium.

C. Revisions to Petitioned-For Tolerances

EPA has determined that the tolerance level for prohexadione calcium residues in or on sweet cherry should be lowered from 0.50 ppm as requested in the petition to 0.40 ppm based on a review of the current prohexadione calcium database and utilizing the internationally (OECD) harmonized spreadsheet for calculating pesticide tolerances.

Additonally, the Agency is modifying the tolerance expression for prohexadione calcium to clarify that, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of prohexadione calcium not specifically mentioned; and that compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression.

V. Conclusion

Therefore, a tolerance is established for residues of prohexadione calcium, calcium 3-oxido-5-oco-4-propionylcyclohex-3-enecarboxylate, in or on sweet cherry at 0.40 ppm. The tolerance expression is also being revised to include metabolites and degradates.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides

and pests, Reporting and recordkeeping requirements.

Dated: October 28, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.547 is amended by:

■ i. Revising the introductory text to paragraph (a) and;

■ ii. Alphabetically adding the commodity Cherry, sweet, to the table in paragraph (a) to read as follows:

§ 180.547 Prohexadione calcium, tolerances for residues.

(a) *General.* Tolerances are established for residues of the growth regulator, prohexadione calcium, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only prohexadione calcium (calcium 3-oxido-5-oxo-4-propionylcyclohex-3-enecarboxylate)'' in or on the following commodities.

Commodity	Parts per million
* * * * *	
Cherry, sweet	0.40
* * * * *	

* * * * *

[FR Doc. 2011–29751 Filed 11–17–11; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212 and 252

RIN 0750–AH46

Defense Federal Acquisition Regulation Supplement; Transition to the System for Award Management (DFARS Case 2011–D053)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement for the transition of the Integrated Acquisition Environment systems to the new System for Award Management architecture.

DATES: *Effective date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Julian E. Thrash, (703) 602–0310.

SUPPLEMENTARY INFORMATION:

I. Background

The Integrated Acquisition Environment (IAE) is an electronic Government initiative that aggregates Federal acquisition content by providing one Web site for regulations, systems, resources, opportunities, and training. The Web site at *https://www.acquisition.gov* was designed to create an easily navigable resource that is both more efficient and transparent.

The transition of the IAE to the new System for Award Management (SAM) architecture has begun. Phase One will transition the Central Contractor Registration (CCR), the Excluded Parties List System (EPLS), and Online Representations and Certifications Application (ORCA) to the new SAM architecture. This rule provides the first step in updating the DFARS for these changes by updating Web address in the DFARS for two references to ORCA to show that the application is now available through *https://www.acquisition.gov.* Future DFARS cases are anticipated to actually change the names of the systems to SAM once the transition is complete, as well as to begin the transition of the remaining IAE systems.

A related FAR case, 2011–021, Transition to the System for Award Management, is revising the Federal Acquisition Regulation references for the CCR, EPLS, and ORCA databases as being accessible through *https://www.acquisition.gov.*

DoD has issued this rule as a final rule because this rule is administrative as it only updates existing Web page addresses does not have a significant cost or administrative impact on contractors or offerors. Therefore, public comment is not required in accordance with 41 U.S.C. 1707.

II. DFARS Changes

This rule makes the following DFARS changes to reflect that the relevant database references for ORCA shown in the DFARS references are accessible through the new Web site, *https://www.acquisition.gov:*

- 212.301 Solicitation provisions and contract clauses for the acquisition of commercial items; and
- 252.204–7007 Alternate A, Annual Representations and Certifications.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501–1 and 41 U.S.C. 1707 and does not require publication for public comment.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212 and 252

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 212 and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212–ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 paragraph (f) introductory text by removing the Internet address ''*https://orca.bpn.gov*'' and adding in its place ''*https://www.acquisition.gov/*''.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.204–7007 by—

■ (a) Amending the clause date by removing ''(SEP 2011)'' and adding in its place ''(NOV 2011)''; and

■ (b) Amending paragraph (e) by removing the Internet address ''*https://orca.bpn.gov/*'' and adding in its place ''*https://www.acquisition.gov/*''.

[FR Doc. 2011–29900 Filed 11–17–11; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 215

RIN 0750–AH30

Defense Federal Acquisition Regulation Supplement: Management of Manufacturing Risk in Major Defense Acquisition Programs (DFARS Case 2011–D031)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement a section of National Defense Authorization Act for Fiscal Year 2011 requiring appropriate consideration of the manufacturing readiness and manufacturing-readiness processes of potential contractors and subcontractors as a part of the source selection process for major defense acquisition programs.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Dustin Pitsch, *telephone* 703–602–0289.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 76 FR 38050 on June 29, 2011, to amend Defense Federal Acquisition Regulation Supplement (DFARS) 215.304(c) by adding paragraph (iv) to state that the manufacturing readiness and manufacturing-readiness processes of potential contractors and subcontractors shall be considered as a part of the source selection process for major defense acquisition programs. No public comments were submitted in response to the interim rule.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* and is summarized as follows:

This final rule amends the DFARS to implement section 812 of the National Defense Authorization Act for Fiscal Year 2011, (10 U.S.C. 2430 note). Section 812(b)(5) requires appropriate consideration of the manufacturing readiness and manufacturing-readiness processes of potential contractors and subcontractors as a part of the source selection process for major defense acquisition programs.

No public comments were received in response to the initial regulatory flexibility analysis. No comments were filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the interim rule.

The rule will apply to DoD Major Defense Acquisition Program contractors and subcontractors. Most major defense acquisition programs are awarded to large concerns as these programs are of a scope too large for any small business to perform. As such, it is not expected that this rule will have a significant impact on a significant number of small entities.

The final rule imposes no reporting, recordkeeping, or other information collection requirements.

There are no known significant alternatives to the rule that would meet the requirements of the statute. The impact on small entities is expected to be positive.

IV. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 215

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR part 215, which was published at 76 FR 38050 on June 29, 2011, is adopted as a final rule without change.

[FR Doc. 2011–29894 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 216

RIN 0750–AG66

Defense Federal Acquisition Regulations Supplement; Notification Requirements for Awards of Single-Source Task- or Delivery-Order Contracts (DFARS Case 2009–D036)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement the National Defense Authorization Act for Fiscal Year 2010 regarding the notification requirements to Congress when awarding a single-award task- or delivery-order contract in excess of $103 million.

DATES: *Effective date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Manuel Quinones, telephone (703) 602–8383.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule at 75 FR 40716 on July 13, 2010, to implement section 814 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010, (Pub. L. 111–84, enacted October 28, 2009). The public comment period closed on September 13, 2010. Three respondents submitted comments in response to the interim rule.

The interim rule requires the head of the agency to notify the congressional defense committees within 30 days after any determination made under FAR 16.504(c)(ii)(D)(1), and to provide a copy of the determination and notification to the Deputy Director, Defense Procurement and Acquisition Policy. If the single-award task- or delivery-order contract award concerns intelligence or intelligence-related activities of DoD, notification shall also be provided to the Select Committee on Intelligence of the Senate and Permanent Select Committee on Intelligence of the House of Representatives.

II. Discussion and Analysis of Public Comments

A discussion of the comments received and the changes made to the final rule as a result of those comments are provided as follows:

A. Analysis of Public Comments

Comment: Two respondents wrote that the interim rule's preamble was confusing and would lead to misinterpretations. One of the respondents stated that ''(t)here is a difference between a 'single-source' and a 'sole-source'.'' Further, the respondent stated that the ''Indefinite Quantity Contract itself is the subject of DFARS 216.505, not the resulting delivery or task orders issued under the contract.''

Response: The respondent correctly states that there is a difference between single-source and sole-source, and the preamble of this final rule clarifies the intent of the rule by using the terms ''single-award'' or ''single-source'' contracts, as used in the statute, in lieu of sole-source. In response to the other comment, individual task orders and delivery orders are the subject of DFARS 216.505, Ordering; however, this rule addresses limitations on single-award contracts, and DoD confirms that the rule text is correctly located at DFARS 216.504, Indefinite Quantity Contracts.

Comment: A respondent requested that the preamble to the interim rule be amended to add ''contract'' or ''contracts'' where appropriate in order to better convey the intent of the existing and new regulations. The preamble for the interim rule appears to this respondent to change the reporting requirement from ''task or delivery order contracts'' to ''task or delivery orders.''

Response: In response to the first comment, the title of this final rule has been amended to include ''Contracts'' in the title to more clearly convey the intent of the rule. Concerning the second comment, the agency-head determination and congressional notification are required, in accordance with 10 U.S.C. 2304a(d)(3), only for single-source indefinite-delivery contracts estimated to exceed $100 million (now $103 million). DoD has reviewed and confirms that the interim rule changes at DFARS 216.504(c)(1)(ii)(D) correctly implemented the statutory requirements for single-source contracts, notwithstanding minor clarifications made in this final rule concerning reporting requirements.

Comment: A respondent pointed out that there is a ''disconnect'' between the interim rule published in the **Federal Register** and the on-line version of the DFARS. The on-line version includes, at the end of DFARS 216.504(c)(1)(ii)(d)(2), the sentence ''A copy of any determination made in accordance with FAR 16.504(c)(1)(ii)(D) shall be submitted to: Deputy Director, Defense Procurement (Contract Policy and International Contracting), OUSD (AT&L) DPAP (CPIC), 3060 Defense Pentagon, Washington, DC 20301–3060.'' The respondent notes that this appears to duplicate the same statement that is made earlier in the same paragraph.

Response: In response to this comment, the rule text format, numbering, notification and reporting requirements are clarified in this final DFARS rule and in changes made to the DFARS Procedures Guidance and Information. Agency heads are required to provide a copy of each determination and congressional notification to the Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) Defense Procurement and Acquisition Policy (DPAP) Contract Policy and International Contracting (CPIC). This enables a single office to oversee and manage the DoD-wide use of single-award task- and delivery-order contracts.

Comment: A respondent submitted an editorial comment, asking that DoD add ''216.504, Indefinite-quantity contracts'' with a link to DFARS 216, Table of Contents.

Response: The ability to hyperlink is available in the HTML version of each DFARS subpart.

B. Other Changes

The final rule at DFARS 216.504(c)(1)(ii)(D)*(i)* is revised to clarify that the authority to make any determination authorized by FAR 16.504(c)(1)(ii)(D)*(1)* shall not be delegated below the level of the senior procurement executive. Previously, this limitation on the delegation of approval authority only applied to determinations made because it was necessary in the public interest to award the contract to a single source due to exceptional circumstances, and these determinations had to be reported to Congress. Since the statue and the resultant interim rule expand the reporting requirement to require that any determination made under FAR 16.504(c)(1)(ii)(D)*(1)* be reported to Congress, the limitation on delegation of approval authority is revised to be commensurate with the expanded reporting requirement.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the change solely impacts internal Government operating procedures and will therefore not have a significant cost or administrative impact on contractors, subcontractors, or offerors. The notification requirements are within DoD and between DoD agencies and the Congress. An initial regulatory flexibility analysis was not performed. No comments were received from small entities on this rule.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 216

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Therefore, the Defense Acquisition Regulations System confirms as final the interim rule published at 75 FR 40716 on July 13, 2010, with the following changes:

PART 216—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 216 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Revise section 216.504 to read as follows:

216.504 Indefinite-quantity contracts.

(c)(1)(ii)(D) Limitation on single-award contracts.

(i) The authority to make the determination authorized in FAR 16.504(c)(1)(ii)(D)*(1)* shall not be delegated below the level of the senior procurement executive.

(ii) The head of the agency must notify the congressional defense committees within 30 days after making any determination under FAR 16.504(c)(1)(ii)(D)*(1).* If the award concerns intelligence or intelligence-related activities of DoD, notification shall also be provided to the Select Committee on Intelligence of the Senate and Permanent Select Committee on Intelligence of the House of Representatives. (See sample notification at PGI 216.504(c)(1)(ii)(D)*(iv).*)

(iii) A copy of each determination made in accordance with FAR 16.504(c)(1)(ii)(D) and each congressional notice shall be submitted in accordance with PGI 216.504(c)(1)(ii)(D)*(iii).*

[FR Doc. 2011–29903 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 219 and Appendix I to Chapter 2

RIN 0750–AH44

Defense Federal Acquisition Regulation Supplement; Extension of Department of Defense Mentor-Protégé Pilot Program (DFARS Case 2011–D050)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement to extend the date for submittal of applications under the DoD Mentor-Protégé Pilot Program for new mentor-protégé agreements and the date mentors may incur costs and/or receive credit towards fulfilling their small business subcontracting goals through an approved mentor-protégé agreement.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Lee Renna, *telephone* 703–602–0764.

SUPPLEMENTARY INFORMATION:

I. Background

This Defense Federal Acquisition Regulation Supplement (DFARS) case implements section 8016 of the National Defense Appropriations Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 112–10). The NDAA for FY 2011 was signed into law on April 15, 2011. Section 8016 amends the DoD Mentor-Protégé Pilot Program (DoD MPP), section 831 of Public Law 110–510 (10 U.S.C. 2302, note), by changing the—

- Acceptance date for new DoD MPP agreements from September 30, 2010, to September 30, 2011; and
- Eligibility date DoD mentors may incur costs for the purposes of receiving cost reimbursement or credit toward attainment of subcontracting goals, from September 30, 2013, to September 30, 2014.

This final rule implements these changes in the corresponding DFARS regulations: 219.704(b) and (d); and I–103(a) and (b).

DoD is issuing a final rule because this rule does not have a significant effect beyond the internal operating procedures of DoD and does not have a significant cost or administrative impact on contractors or offerors. This final rule merely extends the effective dates for an existing DoD program. These dates have already been extended by law.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501–1 and 41 U.S.C. 1707 and does not require publication for public comment.

IV. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 219 and Appendix I to Chapter 2

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 219 and 48 CFR chapter 2 appendix I are amended as follows:

■ 1. The authority citation for 48 CFR part 219 and Appendix I continue to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 219—SMALL BUSINESS PROGRAMS

219.7104 [Amended]

■ 2. Section 219.7104 is amended—

■ (a) In paragraph (b), by removing the year ''2013'' and adding in its place ''2014''; and

■ (b) In paragraph (d), by removing the year ''2013'' and adding in its place ''2014''.

APPENDIX I—POLICY AND PROCEDURES FOR THE DOD PILOT MENTOR-PROTÉGÉ PROGRAM

■ 3. Section I–103 is amended—

■ (a) In paragraph (a) by removing the year ''2010'' and adding in its place ''2011''; and

■ (b) In paragraph (b) introductory text by removing the year ''2013'' and adding in its place ''2014''.

[FR Doc. 2011–29897 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 232

RIN 0750–AH19

Defense Federal Acquisition Regulation Supplement: Accelerate Small Business Payments (DFARS Case 2011–D008)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement to accelerate payments to all small business concerns.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Lee Renna, telephone 703–602–0764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 76 FR 23505 on April 27, 2011, amending the Defense Federal Acquisition Regulation Supplement (DFARS) to provide accelerated payments for all small business concerns. The rule removes the term ''disadvantaged'' from the language at DFARS 232.903 and DFARS 232.906(a)(ii), thereby extending the accelerated payment policy uniformly to all small business concerns.

In combination with the change to the regulations, DoD immediately began a phased implementation to update the entitlement and payment systems so that they could accommodate accelerated payments. During the initial phase, the Defense Finance and Accounting Service modified DoD's largest system, the Mechanization of Contract Administration Services (MOCAS) system. MOCAS processes approximately 57 percent of the dollars paid through DFAS. The upgrades to MOCAS were completed on June 1, 2011. Over the course of the next year, subsequent legacy entitlement and payment system upgrades are scheduled for completion and deployment.

Two respondents submitted public comments. DoD reviewed the comments in the development of the final rule. A discussion of the comments is provided as follows.

II. Discussion and Analysis of the Public Comments

Comment: The first respondent commented that the rule would ensure their company had adequate cash flow to promptly pay its vendors.

Response: This positive endorsement of the rule is noted.

Comment: The second respondent stated that the wording of the rule is ambiguous. Rather than stating it is DoD policy to pay small business concerns ''* * * as soon as possible * * *'', the respondent recommended that the rule should specify the number of days for processing payments to small business.

Response: The authority for DoD's payment policy is the Office of Management and Budget's (OMB's) Prompt Payment Regulations at part 1315 of title 5 of the Code of Federal Regulations. The phrase ''* * * as quickly as possible * * *'' was taken verbatim from those regulations.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* and is summarized as follows:

This final rule adopts as final, without change, the interim rule that revised DFARS 232.903 and 232.906(a)(ii) to allow accelerated payment processes for all small business concerns. The objective of the rule is to pay small businesses as quickly as possible.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

There were no comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the rule.

Analysis of the Federal Procurement Data System indicates that approximately 60,000 small businesses had active contracts in Fiscal Year 2010. It is reasonable to assume a similar number of small businesses will be positively affected by the use of accelerated payment procedures.

This final rule imposes no new reporting or recordkeeping requirements on the small business community.

DoD expects this rule to have a significant positive economic impact on all small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because it extends accelerated payments to all small business concerns. There were no significant alternatives identified that would meet the objectives of the rule.

V. Paperwork Reduction Act

This final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Burden Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 232

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR part 232, which was published at 76 FR 23505 on April 27, 2011, is adopted as a final rule without change.

[FR Doc. 2011–29859 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 090130102–91386–02]

RIN 0648–XA780

Western and Central Pacific Fisheries for Highly Migratory Species; 2011 Bigeye Tuna Longline Fishery Closure

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

ACTION: Temporary rule; fishery closure.

SUMMARY: NMFS is closing the U.S. pelagic longline fishery for bigeye tuna in the western and central Pacific Ocean as a result of the fishery reaching the 2011 catch limit.

DATES: Effective November 27, 2011, through December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Tom Graham, NMFS Pacific Islands Region, (808) 944–2219.

SUPPLEMENTARY INFORMATION: Pelagic longline fishing in the western and central Pacific Ocean is managed, in part, under the Western and Central Pacific Fisheries Convention Implementation Act (Act). Regulations governing fishing by U.S. vessels in accordance with the Act appear at 50 CFR part 300, subpart O.

NMFS established a limit (74 FR 63999, December 7, 2009, and codified at 50 CFR 300.224) for calendar year 2011 of 3,763 metric tons (mt) of bigeye tuna (*Thunnus obesus*) that may be caught and retained in the U.S. pelagic longline fishery in the area of application of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention Area). NMFS monitored the retained catches of bigeye tuna using logbook data submitted by vessel captains. NMFS used those data and other available information to determine that the 2011 catch limit is expected to be reached on November 27, 2011. In accordance with § 300.224(d), this rule serves as advance notification to fishermen, the fishing industry, and the general public that the U.S. pelagic longline fishery for bigeye tuna in the Convention Area will be closed starting on November 27, 2011, through the end of the 2011 calendar year. The 2012 fishing year is scheduled to open on January 1, 2012. This rule does not apply to the pelagic longline fisheries of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands (CNMI), as described below.

During the closure, a U.S. fishing vessel may not retain on board, transship, or land bigeye tuna captured by longline gear in the Convention Area, except that any bigeye tuna already on board a fishing vessel upon the effective date of the restrictions may be retained on board, transshipped, and landed, provided that they are landed within 14 days of the start of the closure, that is, by the end of the day on December 10, 2011. This 14-day landing requirement does not apply to a vessel that has declared to NMFS, pursuant to 50 CFR 665.803(a), that the current trip type is shallow-setting.

Furthermore, bigeye tuna caught by longline gear may be retained on board, transshipped, and landed if the fish are caught by a vessel registered for use under a valid NMFS-issued American Samoa Longline Limited Access Permit, or if they are landed in American Samoa, Guam, or the CNMI. In either of these two cases, however, the following conditions must be met:

(1) The bigeye tuna are not caught in the portion of the U.S. Exclusive Economic Zone (EEZ) around the Hawaiian Archipelago;

(2) Such retention, transshipment, and/or landing is in compliance with applicable laws and regulations; and

(3) The bigeye tuna are landed by a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.801.

During the closure, a U.S. vessel is also prohibited from transshipping bigeye tuna caught in the Convention Area by longline gear to any vessel other than a U.S. fishing vessel operated with a valid permit issued under 50 CFR 660.707 or 665.801.

The catch limit and this closure do not apply to bigeye tuna caught by longline gear outside the Convention Area, such as in the eastern Pacific Ocean. To ensure compliance with the restrictions related to bigeye tuna caught by longline gear in the Convention Area, however, the following requirements apply during the closure period:

(1) A U.S. fishing vessel may not be used to fish with longline gear both inside and outside the Convention Area during the same fishing trip, with the exception of a fishing trip that is in progress on November 27, 2011. In that case, the catch of bigeye tuna must be landed by the end of the day on December 10, 2011; and

(2) If a U.S. vessel is used to fish using longline gear outside the Convention Area and the vessel enters the Convention Area at any time during the same fishing trip, the longline gear on the fishing vessel must be stowed in a manner so as not to be readily available for fishing while the vessel is in the Convention Area. Specifically, the hooks, branch or dropper lines, and floats used to buoy the mainline must be stowed and not available for immediate use, and any power-operated mainline hauler on deck must be covered in such a manner that it is not readily available for use.

The above two additional prohibitions do not apply to the following vessels:

(1) Vessels on declared shallow-setting trips pursuant to 50 CFR 665.803(a); and

(2) Vessels registered for use under valid American Samoa Longline Limited Access Permits and vessels landing their bigeye tuna catch in American Samoa, Guam, or the CNMI, so long as these vessels conduct fishing activities in accordance with the conditions described above, that is, the bigeye tuna were not caught in the EEZ around the Hawaiian Archipelago, the retention, transshipment, and/or landing is in compliance with applicable laws and regulations, and the bigeye tuna are landed by a vessel that has a valid permit issued under 50 CFR 660.707 or 665.801.

Classification

There is good cause to waive prior notice and opportunity for public comment pursuant to 5 U.S.C. 553(b)(B). This action is based on the best available information and is necessary for the conservation and management of bigeye tuna. Compliance with the notice and comment requirement would be impracticable and contrary to the public interest, since NMFS would be unable to ensure that the 2011 bigeye tuna catch limit is not exceeded. The annual catch limit is an important mechanism to ensure that the U.S.A. complies with its international obligations in preventing overfishing and managing the fishery at optimum yield. Moreover, NMFS previously solicited public comments on the rule that established the catch limit (74 FR 63999, December 7, 2009). For the same reasons, there is good cause to establish an effective date less than 30 days after date of publication of this notice.

This action is required by § 300.224(d) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 6901 *et seq.*

Dated: November 14, 2011.

Alan D. Risenhoover,

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

[FR Doc. 2011–29850 Filed 11–17–11; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 76, No. 223

Friday, November 18, 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–2011–1230; Directorate Identifier 2011–NM–141–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Model DHC–8–102, –103, and –106 airplanes and Model DHC–8–200, –300, and –400 series airplanes. 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:

> Several reports have been received regarding cracking of the DHC–8 Series 100 rudder actuator mounting bracket. An investigation revealed that the mounting bracket has been under-designed based on the static and endurance loading conditions. The failure of the mounting brackets that attach the power control unit (PCU) to the airframe could result in a loss of the rudder actuating system. The loss of both rudder PCU actuators could result in free play of the rudder control surface and potentially induce a flutter condition.

* * * * *

The unsafe condition is loss of controllability of the airplane. 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 January 3, 2012.

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

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

For service information identified in this proposed AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone (416) 375–4000; fax (416) 375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.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: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; fax (516) 794–5531.

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–2011–1230; Directorate Identifier 2011–NM–141–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

Transport Canada Civil Aviation, which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2011–12, dated June 6, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Several reports have been received regarding cracking of the DHC–8 Series 100 rudder actuator mounting bracket. An investigation revealed that the mounting bracket has been under-designed based on the static and endurance loading conditions. The failure of the mounting brackets that attach the power control unit (PCU) to the airframe could result in a loss of the rudder actuating system. The loss of both rudder PCU actuators could result in free play of the rudder control surface and potentially induce a flutter condition.
>
> This [TCCA] directive mandates the installation of a new design of rudder actuator mounting bracket [adapter].

The unsafe condition is loss of controllability of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Service Bulletins 8–27–110, Revision C, dated May 13, 2011; and 84–27–53, dated November 26, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

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 171 products of U.S. registry. We also estimate that it would take up to 10 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 $2,856 per product. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be up to $633,726, or $3,706 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:

Bombardier, Inc.: Docket No. FAA–2011–1230; Directorate Identifier 2011–NM–141–AD.

Comments Due Date

(a) We must receive comments by January 3, 2012.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier, Inc. airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category.

(1) Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes, serial numbers 003 through 672 inclusive.

(2) Model DHC–8–400, –401, and –402 airplanes, serial numbers 4001 through 4343 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight controls.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Several reports have been received regarding cracking of the DHC–8 Series 100 rudder actuator mounting bracket. An investigation revealed that the mounting bracket has been under-designed based on the static and endurance loading conditions. The failure of the mounting brackets that attach the power control unit (PCU) to the airframe could result in a loss of the rudder actuating system. The loss of both rudder PCU actuators could result in free play of the rudder control surface and potentially induce a flutter condition.

* * * * *

The unsafe condition is loss of controllability of the airplane.

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.

Free-Play Check and Corrective Actions

(g) Within 6,000 flight hours or 3 years after the effective date of this AD, whichever occurs first, do the actions required by paragraph (g)(1) or (g)(2) of this AD, as applicable.

(1) For Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes: Install a new CRES mounting adapter with new bolts by incorporating MODSUM 8Q101890, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 8–27–110, Revision C, dated May 13, 2011.

(2) For DHC–8–400, –401, and –402 airplanes: Replace the existing upper and lower mounting adapters of the PCU with redesigned adapters by incorporating MODSUM 4–113655, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–27–53, dated November 26, 2010.

Credit for Actions Accomplished in Accordance With Previous Service Information

(h) Actions accomplished before the effective date of this AD in accordance with Bombardier Service Bulletins 8–27–110, Revision A, dated December 3, 2010, and Revision B, dated January 31, 2011, are considered acceptable for compliance with the corresponding actions specified in paragraph (g)(1) of this AD.

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, New York ACO, ANE–170, FAA, has the authority to approve

AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7300; fax (516) 794–5531. 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 Canadian Airworthiness Directive CF–2011–12, dated June 6, 2011; Bombardier Service Bulletin 8–27–110, Revision C, dated May 13, 2011; and Bombardier Service Bulletin 84–27–53, dated November 26, 2010; for related information.

Issued in Renton, Washington, on November 7, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate Aircraft Certification Service.

[FR Doc. 2011–29798 Filed 11–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1231; Directorate Identifier 2011–NM–088–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This proposed AD would require inspecting to detect damage to the upper fire seals on the forward edge of the thrust reverser, where the fire seal contacts the 12-o'clock engine strut, and for correct stiffness and vent holes, and doing corrective actions if necessary; and installing a bracket for the fire seal. This proposed AD was prompted by reports of damaged fire seals on the forward edge of the thrust reverser. We are proposing this AD to detect and correct damage to the fire seals, which could result in damage to the strut structure and the thrust reverser firewall. Such damage could significantly deteriorate the protection capacity of the fire extinguishing system and result in an uncontrolled fire.

DATES: We must receive comments on this proposed AD by January 3, 2012.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone (206) 544–5000, extension 1; fax (206) 766–5680; email *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.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 Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Chris R. Parker, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6496; fax: (425) 917–6590; email: *chris.r.parker@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1231; Directorate Identifier 2011–NM–088–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received reports of damaged fire seals on the forward edge of the thrust reverser, where the fire seal contacts the 12-o'clock engine strut. The damage has been reported as light wear marks, tears, and holes in the bulb-part of the fire seal. The damage to the seal is attributed to insufficient seal stiffness and/or missing vent holes. If a damaged seal remained in service for an extended time, damage also could result to the 12-o'clock strut structure and the thrust reverser firewall. Such damage could significantly deteriorate the protection capacity of the fire extinguishing system and result in an uncontrolled fire.

Relevant Service Information

We have reviewed Boeing Special Attention Service Bulletin 737–78–1086, dated October 6, 2010. This service information describes procedures for a general visual inspection on the upper fire seals on the forward edge of the thrust reversers, where the fire seals contact the 12-o'clock engine strut, for damage and correct stiffness, and for sufficient vent holes behind the upper fire seals; and corrective actions if necessary. Corrective actions include replacing any damaged fire seal, drilling vent holes in the upper fire seal if needed. The service information also specifies installing a new bracket behind the fire seal retainer to further stiffen the seal.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or

develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described.

Costs of Compliance

We estimate that this proposed AD will affect 968 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
General visual inspection and bracket installation.	18 work-hours × $85 per hour = $1,530	$756	$2,286	$2,212,848

We estimate the following costs to do necessary repairs and replacements that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need these repairs.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Drill vent holes (up to 8)	1 work-hour × $85 per hour = $85	$0	$85
Replace fire seal (up to 4)	8 work-hours × $85 per hour = $680	8,010	8,690

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

The Boeing Company: Docket No. FAA–2011–1231; Directorate Identifier 2011–NM–088–AD.

Comments Due Date

(a) We must receive comments by January 3, 2012.

Affected ADs

(b) None.

Applicability

(c) This AD applies to The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes with line numbers 1 through 3029 inclusive; certificated in any category.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 78: Engine exhaust.

Unsafe Condition

(e) This AD was prompted by reports of damaged upper fire seals on the forward edge of the thrust reversers. We are issuing this AD to detect and correct damage to the fire seals, which could result in damage to the strut structure and the thrust reverser firewall. Such damage could significantly deteriorate the protection capacity of the fire extinguishing system and result in an uncontrolled fire.

Compliance

(f) Comply with this AD within the compliance times specified, unless already done.

Inspections and Corrective Actions

(g) Within 36 months after the effective date of this AD: Do a general visual inspection of the left and right thrust reverser halves of each engine for damage to the upper fire seal, for stiffness of the upper fire seal, and for missing vent holes as applicable, in accordance with paragraph 3.B. of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–78–1086, dated October 6, 2010.

(1) If, during the inspection required by paragraph (g) of this AD, no upper fire seal damage is found, and the fire seal has the correct stiffness: Before further flight, drill vent holes if they are missing, and install a new bracket behind the upper fire seal retainer, in accordance with paragraph 3.B. of

the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–78–1086, dated October 6, 2010.

(2) If, during the inspection required by paragraph (g) of this AD, upper fire seal damage or insufficient fire seal stiffness is found: Before further flight, install a new upper fire seal, drill vent holes if they are missing, and install a new bracket behind the upper fire seal retainer, in accordance with paragraph 3.B. of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–78–1086, dated October 6, 2010.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

Related Information

(i) For more information about this AD, contact Chris R. Parker, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6496; fax: (425) 917–6590; email: *chris.r.parker@faa.gov.*

Issued in Renton, Washington, on November 8, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–29800 Filed 11–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 1000

[Docket No. FR–5275–P–11]

RIN 2577–AC80

Native American Housing Assistance and Self-Determination Reauthorization Act of 2008: Amendments to Program Regulations

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would make several revisions to the regulations governing the Indian Housing Block Grant (IHBG) Program and the Title VI Loan Guarantee Program. HUD negotiated the proposed rule with active Tribal participation under the procedures of the Negotiated Rulemaking Act of 1990, pursuant to the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008. The proposed regulatory changes would implement statutory amendments and reflect the consensus decisions reached by HUD and the Tribal representatives.

DATES: *Comment Due Date:* January 17, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule. *No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4126, Washington, DC 20410; telephone number (202) 401–7914 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Relay Service at 1–(800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) changed the way that housing assistance is provided to Native Americans. NAHASDA eliminated several separate assistance programs and replaced them with a single block grant program, known as the Indian Housing Block Grant (IHBG) Program. In addition, Title VI of NAHASDA authorizes Federal guarantees for the financing of certain Tribal activities (under the Title VI Loan Guarantee Program). The regulations governing the IHBG and Title VI Loan Guarantee programs are located in part 1000 of HUD's regulations in title 24 of the Code of Federal Regulations. In accordance with section 106 of NAHASDA, HUD developed the regulations with active Tribal participation under the procedures of the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561–570).

The Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (Pub. L. 110–411, approved October 14, 2008) (NAHASDA Reauthorization Act) reauthorizes NAHASDA through September 30, 2013, and makes a number of amendments to the statutory requirements governing the IHBG and Title VI Loan Guarantee programs. The NAHASDA Reauthorization Act amends section 106 of NAHASDA by providing that HUD shall initiate a negotiated rulemaking in order to implement

aspects of the 2008 Reauthorization Act that require rulemaking. On January 5, 2010, at 75 FR 423, HUD published a **Federal Register** notice announcing the final list of members of the Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee (the NAHASDA Rulemaking Committee, or the Committee).

The NAHASDA Rulemaking Committee convened for one, 2-day meeting and five, 3-day meetings in Scottsdale, Arizona; Westminster, Colorado; Seattle, Washington; and St. Paul, Minnesota, from March to August 2010. Under the terms of the charter approved by the Committee, the negotiations were to focus on implementation of NAHASDA, as amended, except that subpart D of 24 CFR part 1000, which governs the NAHASDA allocation formula, was generally to be excluded from the negotiations. (The committee nonetheless agreed by consensus to make minor revisions to regulations in subpart D in order to address issues that primarily involved provisions under subpart C.) HUD also agreed to consider issues that did not directly arise from statutory amendments, if time permitted.

II. This Proposed Rule

This proposed rule would amend HUD's regulations by implementing statutory amendments to NAHASDA. The proposed rule would make changes to the regulations under subpart A of 24 CFR part 1000 regarding the guiding principles of NAHASDA, definitions, labor standards, environmental review procedures, procurement, Tribal and Indian preference, and program income. Proposed changes to subpart B of 24 CFR part 1000 address eligible families, useful life of properties, and criminal conviction records. Proposed changes to subpart C of 24 CFR part 1000 would address the Tribal program year, Indian Housing Plan (IHP) requirements, administrative and planning expenses, reserve accounts, local cooperation agreements, and exemption from taxation. Proposed changes to subpart D of part 24 would address certain formula information that must be included in the IHP and Annual Performance Report (APR), as well as the date by which HUD must provide data used for the formula and projected allocation to a Tribe or Tribally Designated Housing Entity (TDHE). Proposed changes to subpart E of 24 CFR part 1000 would address financing guarantees. Finally, proposed changes to subpart F of 24 CFR part 1000 would address HUD monitoring, APRs, APR review, HUD performance measures, recipient comments on HUD reports, remedial actions in the event of substantial noncompliance, audits, submission of audit reports, and records retention.

Following is a section-by-section description of provisions that HUD proposes under this rule:

Subpart A

Section 1000.2, Guiding Principles

Section 1000.2 would be revised to conform it to the provision of amended NAHASDA section 2, that the Federal government ''shall'' work to provide housing assistance and to assist development of private finance mechanisms, and that Federal assistance ''shall'' be provided in a manner that recognizes Indian self-determination and self-governance. Prior to the NAHASDA Reauthorization Act, these provisions stated that the Federal government and Federal assistance ''should'' comply with the stated principles.

Section 1000.9, Negotiated Rulemaking

Section 1000.9 would establish provisions that apply to the negotiated rulemaking process that is used under NAHASDA. Paragraph (a) would require HUD to appoint representatives of the Federal government and representatives of diverse Tribes and program recipients. Paragraph (b) would codify the requirement of NAHASDA section 106(b)(2)(C) for HUD to initiate negotiated rulemaking within 90 days after enactment of any act reauthorizing NAHASDA, as well as any act that significantly amends NAHASDA. Paragraph (c) would provide that negotiated rulemaking committees may establish workgroups to develop proposals. Paragraph (d) would provide that the committee submits recommended rules to HUD and that once HUD determines what rules it will propose, it will publish notice of the proposal in the **Federal Register**. Finally, it would provide that the committee and HUD will review public comments before HUD makes a determination on the provisions of the final rule.

Section 1000.10, Definitions

Section 1000.10(b) would add a new definition of ''housing related activities,'' which is used in proposed § 1000.64 with respect to permissible use requirements for program income. The proposed definition would be modeled, in significant part, on the new statutory definition of ''housing related community development.'' Section 1000.10(b) would codify in regulations the new statutory definition of ''housing related community development,'' which are those activities that may be financed with notes and other obligations guaranteed by HUD pursuant to section 601 of NAHASDA. It would revise the existing definition of ''Indian Area'' to conform to the amended definition in NAHASDA. It would also add a new definition of ''outcomes,'' which is used in NAHASDA section 102(b) to describe information required to be in the IHP, and which would be used in § 1000.512 to describe items required to be included in IHPs and performance reports. Section 1000.10(b) would also add a new definition of ''Tribal program year,'' which is used in §§ 1000.110, 1000.201, 1000.214, and 1000.216 to specify the basis on which grants are provided and the date by which IHPs must be submitted to HUD. The definition would provide that ''Tribal program year'' means the fiscal year of the recipient.

Section 1000.12, Nondiscrimination Requirements

Section 1000.12(d) would be revised to conform to amended NAHASDA section 201(b)(6), which exempts Federally recognized Tribes and their TDHEs from Title VI of the Civil Rights Act of 1964 and the Fair Housing Act in carrying out activities under NAHASDA. It would also provide that state-recognized Tribes may provide preference to Tribal members and other Indian families pursuant to NAHASDA section 201(b), and in employment and contracting pursuant to NAHASDA section 101(k).

Section 1000.16, Labor Standards

Section 1000.16 would be revised to add a paragraph (e) based on NAHASDA section 104(b)(3), which addresses the applicability of Tribal laws that require payment of not less than prevailing wages to certain workers. The statute provides that if a contract or agreement for assistance, sale, or lease pursuant to NAHASDA is covered by such a Tribal law or laws, then the contract or agreement is not required to contain a provision requiring payment of prevailing wages in accordance with section 104(b)(1). The current paragraph (e) of 1000.16 would be redesignated as paragraph (f). In addition, the citation to the Davis-Bacon Act in paragraph (a) would be revised to reflect current codification of the provision referenced in amended section 104(b)(1) of NAHASDA, and the citation to the Contract Work Hours and Safety Standards Act in paragraph (c) would be

updated to reflect the current codification of the referenced provision.

The Committee draft included a provision that addressed construction and development contracts that are entered into by a recipient. The language sought to clarify that such construction and development contracts, if entered into pursuant to a HUD contract or agreement for assistance, sale, or lease under NAHASDA, are not required to contain the prevailing wage provision referenced in NAHASDA section 104(b)(1) if the contracts are subject to Tribal laws that require payment of not less than prevailing wages. Upon further review, HUD determined that revision of the draft rule provision was needed in order to reconcile the intent of the Committee with language as used in the statute, but the Committee did not take up the draft provision again. Although this proposed rule does not include the described provision, HUD agrees that such construction and development contracts are not required to include the provision referenced in NAHASDA section 104(b)(1) under the described circumstances. HUD notes that in addition to construction and development contracts, contracts for the operation (including maintenance) of NAHASDA-assisted affordable housing are not required to include the provision under the described circumstances, and work performed directly by Tribal or TDHE employees on NAHASDA-assisted housing is also not subject to the provisions in section 104(b)(1) in those circumstances. HUD specifically solicits public comment on whether inclusion of a provision clarifying these exclusions would be necessary or beneficial in the final rule.

Section 1000.21, Waiver of Environmental Review Procedures

A new § 1000.21 would be added to conform to NAHASDA section 105(d), which establishes the circumstances under which HUD may waive certain procedural requirements for the submission of certifications related to environmental reviews performed by Tribes. Following the amendment enacting section 105(d) of NAHASDA, HUD established, through the issuance of program Notice CPD–04–08, procedures [1] for requesting a waiver of the statutory environmental review requirements. It is HUD's policy to follow the procedures in Notice CPD–04–08 when processing environmental review waivers.

Section 1000.26, Procurement

Section 1000.26 would incorporate two statutory provisions related to procurement. The exemption in NAHASDA section 203(g) of procurements of less than $5,000 from competitive requirements would be incorporated in § 1000.26(a)(11)(iii), and the provision in section 101(j) that recipients may use Federal supply sources made available by the General Services Administration would be incorporated in § 1000.26(a)(11)(iv). The existing regulatory provision with respect to bonding requirements in procurement would be redesignated as § 1000.26(a)(11)(ii).

Section 1000.42, Section 3 of the Housing and Urban Development Act of 1968

Section 1000.42 would address section 3 of the Housing and Urban Development Act of 1968, which requires certain HUD recipients (*e.g.,* recipients of more than $200,000 in HUD housing and community development assistance for a covered project) to provide economic opportunities to low- and very low-income residents. New paragraph (c) would clarify that recipients meet the section 3 requirements when they comply with employment and contract preference laws adopted by their Tribe in accordance with section 101(k) of NAHASDA. Paragraph (d) would provide that for purposes of section 3, NAHASDA funding is subject to the requirements applicable to the category of programs entitled ''Other Programs'' that provide housing and community development assistance. The proposed provision would serve to clarify that NAHASDA recipients do not fall under the alternative category of recipients under section 3, which is for public and Indian housing agencies that award contracts in connection with assistance for development, modernization of units, and the operation of programs and projects under the 1937 Act. NAHASDA recipients do not receive assistance under the 1937 Act.

Sections 1000.48, 1000.50, and 1000.52, Tribal and Indian Preference

Sections 1000.48, 1000.50, and 1000.52 would be revised to implement section 101(k) of NAHASDA, which provides that the employment and contract preference laws of a Tribe that receives the benefit of a grant (or portion of a grant) apply to the administration of the grant (or portion of a grant), notwithstanding any other provision of law.

Sections 1000.48, 1000.50, and 1000.52 would clarify that a recipient is required to apply Tribal preference in employment and contracting, if a Tribe has enacted Tribal preference laws, and that only to the extent that such Tribal preference laws have not been enacted, a recipient must instead apply Indian preference, as required under section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

In addition, §§ 1000.48(c) and 1000.52(d) would clarify that the exemption in NAHASDA section 203(g) for procurements of less than $5,000 from competitive rules and procedures serves to exempt such procurements from Indian preference requirements under section 7(b) of the Indian Self-Determination and Education Assistance Act.

Sections 1000.26, 1000.62, and 1000.64, Program Income

The NAHASDA Reauthorization Act amended NAHASDA section 104(a)(1)(B) to change one of the conditions for a recipient to be able to retain program income. The amendment removed the requirement for a recipient to agree to use the program income for ''affordable housing activities'' in accordance with NAHASDA, and replaced it with a requirement for the recipient to agree to use the program income for ''housing related activities'' in accordance with NAHASDA. Accordingly, a new § 1000.64 would address the permissible uses of program income and clarify that the requirement for program income to be used for ''housing related activities'' is the only applicable Federal requirement. (As discussed above, ''housing related activities'' would be defined in § 1000.10(b).) This clarification is consistent with HUD's treatment of proceeds of sale as outlined in the notice titled ''IHBG Program: Notice of Revision to Transition Requirements—Proceeds of Sales of Former 1937 Act

[1] The following is a brief summary of these procedures. When a procedural or nonsubstantive violation of NEPA by a Tribe has been identified, the grantee has the opportunity to request a waiver. The waiver request must be in writing and include all available and relevant information necessary for HUD to complete an environmental review under 24 CFR part 50. HUD conducts a site visit and prepares and signs the environmental assessment. The waiver request, executed environmental assessment, and all supporting documentation are provided to the Headquarters Office of Native American Programs (ONAP) for review. If the waiver request is acceptable, the Deputy Assistant Secretary for Native American Programs forwards it to the Environmental Review Division of the Office of Community Planning and Development (CPD). CPD has NEPA oversight authority for HUD. After appropriate review and consideration, if the waiver package is found to comply with section 105(d) of NAHASDA, it is then approved by the Assistant Secretary for Public and Indian Housing and the Assistant Secretary for CPD, and the grantee is notified that the waiver is approved.

Homeownership Units,'' published in the **Federal Register** on April 1, 1999 (64 FR 15778). In addition, the provision in § 1000.62(b) that reflects the former statutory provision regarding ''affordable housing activities'' would be removed, so that § 1000.62 would address only what constitutes program income, rather than its permissible uses. The heading of § 1000.62 would be revised accordingly. Finally, consistent with the amendments to NAHASDA section 104(a)(2) regarding expenditure of program income, § 1000.26(a)(5) would be revised to provide that a recipient may draw down or expend IHBG funds before expending program income.

Section 1000.58, Investment of IHBG Funds

Paragraph (f) of § 1000.58 would be revised to remove the current restriction on investing IHBG funds that have been allocated for the operating subsidy element of the Formula Current Assisted Housing Stock (FCAS) component of the IHBG formula. Paragraph (g) would be revised to increase the permissible period of investments from 2 to 5 years. These changes would provide recipients greater flexibility in their financial management of IHBG funds pending their expenditure on IHBG activities.

Subpart B

Sections 1000.104, 1000.106, 1000.108, 1000.110, 114, 116, and 118, Eligible Families

The NAHASDA Reauthorization Act amended NAHASDA section 201(b)(3), which provides that, notwithstanding the general requirement for assistance to be provided to low-income Indian families, recipients may provide housing to other families whose presence is essential to the well-being of Indian families. The amendment removed the provision that the exception is for ''non-Indian'' essential families. Accordingly, corresponding regulatory references to ''non-Indian'' essential families would be removed throughout §§ 1000.104, 1000.106, 1000.108, 1000.110, 1000.114, 1000.116, and 1000.118.

Section 1000.110(a) would clarify that a family that is low income at the times specified in redesignated § 1000.147, but which subsequently becomes non low-income due to an increase in income, may continue to participate in the program in accordance with the recipient's admission and occupancy policies. The provision would clarify that NAHASDA does not prohibit the recipient from continuing to serve such families, but that the policy determination is to be made by the recipient. Amounts of assistance expended on such families would not be counted toward the 10 percent limit (or a higher limit approved by HUD) under § 1000.110(c). Such families, as well as a family member or household member who takes ownership of a homeownership unit under § 1000.146, would not be subject to the requirements of redesignated § 1000.110(b), but would be subject to the limitations on benefits that non low-income families may receive under § 1000.110(d) only to the extent provided in the recipient's admission and occupancy policies.

Section 1000.110(b), which enumerates three activities that may serve non low-income families, would be removed to conform to the amendment that removed these enumerated activities in NAHASDA section 201(b)(2). The NAHASDA amendment added a blanket provision that any affordable housing activities may be provided to non low-income families to the extent that HUD approves the activities due to a need that cannot be reasonably met without the assistance. Prior to the statutory amendment, non low-income families could receive only homeownership assistance under section 202(2), model activities under section 202(6), or loan assistance activities under Title VI of NAHASDA.

In addition, redesignated § 1000.110(c) would be revised to provide that a recipient may, without HUD approval, use up to 10 percent of the amount it plans to spend in a Tribal program year, rather than 10 percent of the amount of its annual grant, for families whose income falls within 80 to 100 percent of median income. (Use of amounts in excess of 10 percent would still require HUD approval.) This change would be consistent with HUD's practice of no longer requiring recipients to track expenditures against particular annual grants. Instead, activities and expenditures would be tracked to the grantee's fiscal year on a rolling year-to-year basis.

Redesignated § 1000.110(e) would clarify that amounts of assistance expended on essential families would not be counted toward the 10 percent limit (or a higher limit approved by HUD) under § 1000.110(c). It would retain the existing provision that essential families are not subject to the limitations on benefits that non low-income families may receive under § 1000.110(d).

Finally, § 1000.104(d) would incorporate the provision in NAHASDA section 201(b) that housing assistance may be provided to a law enforcement officer whose presence the recipient determines will deter crime.

Sections 1000.141, 1000.142, 1000.143, 1000.144, 1000.145, and 1000.146, Useful Life

Proposed § 1000.146 would incorporate the provision of NAHASDA section 205(c), which provides that a family or household member who subsequently takes ownership of a homeownership unit is not subject to the binding commitment requiring that a dwelling unit must remain affordable for the useful life of the property. Proposed § 1000.146 would clarify, however, that if such a family or household member then transfers the property to a third party, such a third party is subject to the requirement that the unit remain affordable for its useful life.

Section 1000.141 would codify the definition of ''useful life.'' The question in the heading of § 1000.142 was revised slightly to clarify ''how a recipient determines useful life'' rather than ''what is the useful life.'' The response was also revised slightly to respond to the revised question. Proposed §§ 1000.143 and 1000.144 would clarify that a recipient implements the useful life requirement by placing a binding commitment that is satisfactory to HUD on the assisted property, and that to be satisfactory to HUD, the binding commitment must be a written use restriction agreement that is placed on the property and that has a duration equal to the property's useful life. Existing §§ 1000.144 and 1000.146 would be redesignated as §§ 1000.145 and 1000.147 for organizational clarity.

Redesignated § 1000.147 (formerly § 1000.146) would be revised to codify the provision in section 205(a) of NAHASDA that states when a family must be low-income to participate in a housing program under NAHASDA.

Sections 1000.150 and 1000.152, Criminal Conviction Records

The heading of § 1000.150 would be revised to conform to the NAHASDA Reauthorization Act amendment to NAHASDA section 208(a) that permits Tribes and TDHEs to access criminal conviction records of applicants for employment.

Section 1000.152 would be revised to specify how criminal conviction records may be used with respect to applicants for employment, by referencing permitted purposes under section 208 of NAHASDA.

Subpart C

Section 1000.201, Tribal Program Year

Section 1000.201 would be revised to conform to the amended provision of NAHASDA section 102(a) that IHPs are submitted for a Tribal program year, rather than for the Federal government's fiscal year.

Sections 1000.214, 1000.216, 1000.220, and 1000.230, Indian Housing Plan and Annual Performance Report Requirements

Sections 1000.214 and 1000.216 would be revised to conform to the amended provision of NAHASDA section 102(a) that an IHP must be submitted to HUD 75 days before the beginning of a Tribal program year. The existing regulatory provision requires submission of the IHP by July 1. Section 1000.220 would be revised by removing the statement that IHP requirements are contained in section 102(c) of NAHASDA. The referenced statutory provisions were removed under the NAHASDA Reauthorization Act. Section 1000.220 would be further revised to state that it enumerates the ''requirements,'' rather than the ''minimum requirements,'' for items to be included in the IHP. It would add § 1000.302 to the list of cross-referenced regulatory sections that include items required to be in the IHP, as further discussed below. It would also remove § 1000.504 from the list, in accordance with the proposed removal of that section. Section 1000.230 would clarify that an IHP may use either the HUD estimated grant amount or the grant amount from the most recent compliant IHP.

Sections 1000.224, 1000.225, and 1000.227, Waivers of Indian Housing Plan Requirements

Section 1000.224 would be revised in accordance with the amendment to section 101(b)(2) of NAHASDA. The revision would clarify that a waiver of IHP submission requirements is available when noncompliance is due to exigent circumstances beyond the control of the Indian Tribe. It would also provide that HUD may not withhold the requested waiver unreasonably. Section 1000.225 would provide that a request for a waiver must be submitted not more than 90 days beyond the submission due date. Section 1000.227 would require HUD to decide upon the waiver request and notify the recipient of its decision within 45 days of receiving the request.

Sections 1000.236 and 1000.238, Administrative and Planning Expenses

Section 1000.236(a) would be revised to provide that eligible administrative and planning expenses include expenses associated with the expenditure of non-IHBG funds on affordable housing activities, to the extent that the source of the non-IHBG funds limits expenditure of its funds on such expenses. The provision is intended to encourage recipients to leverage IHBG funds with funds obtained from other sources and recognizes that some sources permit little or none of their funds to be expended on administrative and planning activities. Section 1000.236(b) would be revised to conform to amended NAHASDA section 101(h)'s provision that eligible uses include comprehensive housing and community development planning activities. Section 1000.238 would be revised to provide a two-tiered limit on the amount of IHBG funds that may be used on administrative and planning expenses. (The existing regulation imposes a limit equal to 20 percent of the annual grant amount.) Under the revision, recipients receiving in excess of $500,000 would be permitted to use up to 20 percent of either their annual expenditures of grant funds or of their annual grant amount, whichever is greater, on such expenses. Recipients receiving $500,000 or less would be permitted to use up to 30 percent of either their annual expenditures or of their annual grant amount, whichever is greater, on such expenses. A recipient that is receiving grant funds on behalf of one or more grant beneficiaries would apply these rules to the amounts provided for the benefit of those grant beneficiaries, to determine the amount it may use for administrative and planning expenses. It would also provide that a recipient combining grant funds with other funding may request HUD approval to use a higher percentage and may justify the request based on its total expenditure of funds from all sources for that year.

Section 1000.239, Reserve Accounts

New § 1000.239 would incorporate the provisions of NAHASDA section 202(9), which adds to the list of eligible activities the establishment of a reserve account for the purpose of accumulating funds for administrative and planning activities related to affordable housing activities. The proposed regulation would clarify that the amounts may be invested in accordance with existing regulatory provisions in § 1000.58(c), and would provide that a recipient may have more than one such account, provided that the total amount of reserves in all accounts does not exceed the maximum amount established in NAHASDA. The proposed regulation would also incorporate NAHASDA's formula for calculating the maximum amount. Finally, it would clarify that interest earned on reserves is not program income and is not included in calculating the maximum amount of reserves.

Sections 1000.244 and 1000.246, Local Cooperation Agreements and Exemption From Taxation

Two new sections would implement NAHASDA sections 101(c) and (d). Section 1000.244 would provide the procedure for requesting a waiver of the requirements for a local cooperation agreement and tax-exempt status of dwelling units. Requests would have to be submitted to the Area ONAP and would be required to demonstrate that the recipient had made a good-faith effort to comply. Section 1000.246 would require HUD to make a determination on and respond to a request for a waiver within 30 days of receipt, or to provide a reason for any delay and a timeline within which a determination would be made. It would also require HUD to notify the recipient as to whether the waiver is granted or denied. A granted waiver would remain effective until revoked. If a waiver request is denied, IHBG funds would not be permitted to be spent on housing units, and any amounts expended prior to the denial would have to be reimbursed.

Subpart D

Section 1000.302, IHBG Formula Definitions

Paragraph (2)(i)(B) of the definition of ''Formula area'' in § 1000.302 would be revised to provide that the forms on which a Tribe reports on substantial housing services are the IHP and APR. In the same section, the definition of ''Substantial housing services'' would provide that the required written verification that a Tribe must provide annually is to be included in the IHP and APR.

Section 1000.328, Certification of Households at or Below 80 Percent of Median Income

Section 1000.328 would be revised to provide that for a Tribe receiving minimum funding, it must certify in its IHP, rather than demonstrate, the presence of households at or below 80 percent of median family income.

Section 1000.332, Schedule for HUD To Provide Formula Data and Projected Allocations

Section 1000.332 would revise the date by which HUD is required to provide a Tribe or TDHE with the data used to determine its formula allocation. The existing regulation requires provision of the data by August 1, and under this proposed rule would be revised to June 1. The change is necessary in order to ensure timely provision of the information to a Tribe or TDHE with a program year that begins on October 1.

Subpart E

Sections 1000.408 and 1000.410, Financing Guarantees

Section 1000.408, which sets forth the manner in which a Tribe or TDHE was required to show that it had made efforts to obtain financing, prior to requesting financing guarantees from HUD, would be removed. The removal conforms to the NAHASDA Reauthorization Act's removal of this requirement, which was previously found in section 601(b) of NAHASDA, as a condition for obtaining guarantees from HUD. A new paragraph (e) would be added to § 1000.410 to conform to NAHASDA section 602(d), which requires guarantees made under Title VI to guarantee repayment of 95 percent of the unpaid principal and interest due on guaranteed obligations.

Sections 1000.424 and 1000.428, Financing Guarantees for Housing Related Community Development

Section 1000.424 would be revised to provide that an application for financing guarantees under Title VI of NAHASDA may identify housing-related community development activities, as well as affordable housing activities for which the guarantees are sought. Section 1000.428 would be revised to provide that an application may be disapproved if proposed activities are not within the definitions of these eligible activities. The proposed changes conform to the amended NAHASDA section 601(a)'s provision that housing-related community development is a permissible use for the proceeds of financing guaranteed by HUD under Title VI of NAHASDA.

Subpart F

Section 1000.503, HUD Monitoring

New § 1000.503 would clarify the appropriate frequency and level of monitoring of recipients. Paragraph (a) would codify the standard risk assessment factors that HUD uses to determine the frequency and priority for monitoring a particular recipient, and would provide that HUD may establish other factors, consistent with HUD's Tribal Consultation Policy. In accordance with the policy, HUD would provide written notification and an opportunity for comment when establishing such other factors. The provisions would not apply to monitoring or compliance reviews concerning regulatory requirements that arise independently of NAHASDA, such as those concerning nondiscrimination and accessibility for persons with disabilities. Any new factors would be issued by program guidance.

Paragraph (b) would provide the level of monitoring that HUD would apply once a recipient has been selected for monitoring. Monitoring would typically cover the current and prior 2 Tribal program years, and it would include inspection of no more than the greater of 10 dwelling units or 10 percent of all dwelling units, and review of no more than the greater of 10 client files or 10 percent of client files. HUD would undertake additional sampling and review if this initial sampling indicated noncompliance. Paragraph (c) would provide that, subject to the limitation on time that recipients are required to retain records under § 1000.552, HUD would be permitted to undertake additional sampling and review, notwithstanding these sampling limits, whenever HUD has credible information suggesting noncompliance. HUD would share the information with the recipient, as appropriate. Finally, paragraph (e) would provide that a recipient may request to enter into a self-monitoring agreement with HUD, under which HUD would monitor only the recipient in accordance with the agreement, absent reasonable evidence of fraud, a pattern of noncompliance, or significant unlawful expenditure of IHBG funds.

Section 1000.512, Annual Performance Reports

Paragraphs (b)(1) and (b)(2) of § 1000.512 would be revised by replacing the term ''objectives'' with ''planned activities,'' consistent with the amendment to section 102(b)(2) of NAHASDA. Section 1000.512 would also be revised to list additional items required to be included in APRs. Paragraph (d) would require inclusion of annual performance data, including jobs supported with IHBG funds, and outputs and outcomes by eligible activity. Paragraph (e) would cross-reference items that may be required to be included in the APR under §§ 1000.302 and 1000.544, as further discussed in this preamble.

Section 1000.520, Annual Performance Report Review

Section 1000.520 would be revised to clarify that HUD's review of an APR takes place upon submission and that there is only one such review.

Sections 1000.504 and 1000.524, HUD's Performance Measures

Section 1000.524 would be revised by removing the requirement that 90 percent of grant funds must be obligated within 2 years of the grant award. The revision would conform to NAHASDA section 203(f)(1)'s provision that HUD may not require commitment of funds earlier than provided for in the IHP. In addition, section 1000.524(e) would be revised to remove reference to a 5-year plan and its contents, which were eliminated from NAHASDA section 102 by the NAHASDA Reauthorization Act. Section 1000.504, which describes performance objectives, would also be removed, because of the elimination of the 5-year plan and because performance objectives are no longer required to be included in the one-year plan.

Section 1000.528, Recipient Comments on HUD Reports

Section 1000.528 would be revised to increase from 30 days to 60 days the time from HUD's completion of its review that HUD will have to issue its draft report. The section would also be revised to increase from 30 days to 60 days the time that a recipient and Indian Tribe will have to review the draft report from HUD. It would also provide for an additional 30-day review period, available upon notification to HUD, as well as the possibility of additional extensions as mutually agreed to by HUD and the recipient.

Sections 1000.532 and 1000.538, Remedial Actions in the Event of Substantial Noncompliance

Section 1000.538, which addresses remedies that are available to HUD in the event of substantial noncompliance, would be removed, and provisions addressing remedies for substantial noncompliance would be provided in a revised and expanded § 1000.532. The existing provision at § 1000.532(c), which addresses a recipient's significant noncompliance with a major activity of its IHP, would be removed. A new paragraph (a) would include a broad provision addressing remedies HUD may take if HUD finds, after reasonable notice and opportunity to be heard, that a recipient has failed to comply substantially with any provision of NAHASDA or the implementing regulations in 24 CFR part 1000. The

provision would cover significant noncompliance with a major activity of a recipient's IHP, which is specifically addressed in the existing provision at § 1000.532(c), and corresponds to the existing provision at § 1000.538(a).

Paragraph (b) of § 1000.532 would provide the procedures that HUD would follow for providing notice and the opportunity to be heard, prior to taking any action under paragraph (a). The procedures would include notification in writing of the action it intends to take and the opportunity for an informal meeting with HUD to resolve the deficiency. Prior to taking any remedial action under paragraph (a), HUD would provide the opportunity no less than 30 days prior to taking the action, in accordance with the procedures at 24 CFR part 26. Amounts would not be reallocated until 15 days after the hearing has been conducted and HUD has rendered a final decision.

Paragraph (c) of § 1000.532 would incorporate NAHASDA section 401(a)(4)'s expedited procedures for HUD's limitation of the availability of funds, when HUD determines that the substantial noncompliance of a recipient is resulting, and would continue to result, in a continuing expenditure of funds that is not authorized by law. The procedures would allow HUD to limit the availability of such funds, provided that it gives notice of the action and then provides a hearing within 60 days.

Paragraph (d) of § 1000.532 would correspond to the provision in existing § 1000.538(c), which provides that HUD may provide technical assistance to a recipient if HUD determines that the failure to comply substantially is not willful and is a result of limited capacity or capability. The provision in paragraph (d) would clarify that HUD shall provide the technical assistance if, upon HUD's determination, the recipient requests the technical assistance. It would also incorporate NAHASDA section 401(b)'s requirement that a recipient must enter into a performance agreement with HUD as a condition of receiving the technical assistance.

Paragraph (e) of § 1000.532 would include the substance of the provision in paragraph (d) of existing § 1000.538, which provides that HUD may refer matters involving substantial noncompliance to the Attorney General, with a recommendation for taking civil action.

Finally, cross-references to remove § 1000.538 found in § 1000.60, § 1000.530, and § 1000.536 would be revised to refer to § 1000.532.

Section 1000.534, Substantial Noncompliance

The reference to ''goals and objectives'' in § 1000.534(a) would be changed to ''planned activities'' in a recipient's IHP. The change would conform to the amendment to NAHASDA section 102(b)(2), which describes information required to be included in the IHP.

Section 1000.544, Audits

Technical changes would be made to § 1000.544 by adding statutory citations for NAHASDA and the Single Audit Act, and by removing the dollar amount that is the threshold for the annual audit requirement. In place of the dollar amount, § 1000.544 would reference the section of OMB Circular A–133 that establishes the threshold, which may change from time to time. If applicable, a certification that the recipient has not expended Federal funds in excess of the audit threshold that is set by OMB would be required to be included in the recipient's APR.

Section 1000.548, Submission of Audit Reports

Section 1000.548 would be revised to require the recipient to submit a copy of its audit report to the appropriate HUD ONAP Area Office at the time the recipient submits the audit report to the Federal Audit Clearinghouse.

Section 1000.552, Records Retention

Section 1000.552(b) would be revised to provide that records must be retained for 3 years from the end of the Tribal program year in which funds are expended. The provision would be consistent with HUD's practice of no longer requiring recipients to track expenditures against particular annual grants.

III. Other Statutory Amendments Addressed

The NAHASDA Reauthorization Act added two demonstration programs. Subtitle B of Title II of NAHASDA provides for Self Determined Housing Activities for Tribal Communities and section 606 created the demonstration program for guaranteed loans to finance Tribal community and economic development activities. The Committee agreed that HUD would implement both programs by PIH notice. The full Committee both reviewed and commented on the draft PIH notices before they were published.

IV. Nonconsensus Items

The following section of the preamble summarizes issues that the Committee discussed but on which it did not reach consensus. Summaries of positions taken on nonconsensus items were drafted by the proponents of the positions.

Hearing Requirements for FCAS Overcounts

The NAHASDA Reauthorization Act added a new section 401(a)(2) to provide that ''[t]he failure of a recipient to comply with section 302(b)(1) (regarding the counting of FCAS units) * * * shall not, in itself, be considered to be substantial noncompliance for the purposes of this title.'' HUD and Tribal Committee members disagreed on the meaning of this paragraph. HUD construes this paragraph to mean that FCAS overcounts do not constitute substantial noncompliance under section 401(a)(1) of NAHASDA so as to require HUD to afford recipients an opportunity for a hearing prior to adjusting grant amounts. The Tribal Committee members construed this paragraph as, at least, requiring such a hearing where the amount in controversy was of sufficient magnitude. A proposal to define this paragraph in the manner proposed by the Tribal Committee members failed to achieve consensus, the two HUD committee members being the dissenting votes. As a result, the Committee did not propose any rule interpreting section 401(a)(2) of NAHASDA.

Recapturing Expenditures on Affordable Housing Activities

In 2000, Congress, in Public Law 106–568, removed a portion of then-section 405(c) of NAHASDA that had provided that ''grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian Tribe.'' However, a regulation containing that same restriction remains at 24 CFR 1000.532(a). Since enactment of this 2000 statutory change, HUD's position has been that this statutory change removed the statutory basis for the corollary regulation, and required the regulation's repeal. The Tribal Committee members believed that HUD still has discretion under NAHASDA to retain the regulatory restriction, despite the removal from the statute of language requiring this restriction. The Committee was unable to achieve consensus on the inclusion of the disputed regulatory language in the new, consolidated § 1000.532, the two HUD Committee members being opposed to its inclusion. As a result, the subject provision is not included in the revision of § 1000.532 in this proposed rule.

Time Limitations on Noncompliance Claims

The majority of the workgroup that examined limitations on noncompliance claims had proposed that administrative enforcement actions be barred if not commenced within 3 years of the alleged noncompliance, and recommended that this limitation be placed in the new, consolidated § 532 of the regulations. HUD and some other Committee members did not support the adoption of a ''statute of limitations'' on enforcement actions. HUD's position was that the Committee had already adopted a regulation limiting the scope and frequency of monitoring, including a records retention schedule that essentially functions as a limitation similar to a statute of limitations. The proposal to add a statute of limitations to the new, consolidated § 532 did not achieve consensus.

Line of Credit Control System (LOCCS) edits

The Tribes proposed language for a new § 1000.532(a) that did not have the consensus from HUD participants in the workgroup, because the language had been drafted specifically to prohibit HUD from continuing to use the process known as a ''LOCCS [Line of Credit Control System] edit,'' through which HUD can put a hold on a Tribe's/TDHE's ability to continue to draw down their IHBG funds through LOCCS unless and until the Tribe/TDHE submits certain required documentation. The Tribes and HUD disagree as to whether a ''LOCCS edit'' is a ''limitation on the availability of payments to programs, projects, or activities not affected by a failure to comply,'' as described under section 401(a)(1) of NAHASDA, which requires that HUD must provide notice and opportunity for a hearing before terminating, reducing, or limiting the availability of payments. HUD's interpretation, provided in a memorandum from HUD's Office of General Counsel (OGC), is that the LOCCS edit does not conflict with the statutory language because the funds remain ''available,'' and can be accessed by the Tribe/TDHE as soon as they submit the documentation required by HUD. Further, while a LOCCS edit will remain in place if the basis for the edit is ''documented concerns on the part of ONAP regarding the use of grant funds,'' a recipient will be able to continue to draw down grant funds despite the edit even though the concerns remain unresolved, subject to the submission of appropriate supporting documentation. The memo also described the LOCCS edit as a permissible form of ''pre-drawdown monitoring,'' through which HUD can determine—ahead of drawdown—whether a Tribe/TDHE is going to use the funds for a permissible purpose and according to legal requirements. HUD described the LOCCS edit not as a limitation on availability of payments, but as a change in the method of payment requiring certain documentation before payments are released. HUD reviewed the relevant case law on other HUD programs with similar governing statutory language and found that all cases were clearly distinguishable because they involved HUD action that amounted to either outright termination of grants, or refusal to enter into grant agreements to obligate funds.

The Tribes responded that the HUD memorandum did not provide a legal basis for the practice of a LOCCS edit, for the following reasons: (1) The LOCCS edit process set out in the HUD memo (and in PIH Notice 2009–49) is a limit on the availability of payments because it is a means by which HUD can and does impose certain specific conditions prior to the release of funds, which meets the dictionary definition of the statutory language; (2) even if the IHBG funds were to remain ''available'' (per HUD's reasoning), the LOCCS edit places an impermissible ''limit'' on that availability; (3) HUD's ''pre-drawdown monitoring'' justification is invalid because the monitoring process ends with the notice and hearing opportunity for substantial noncompliance, and a ''pre-drawdown monitoring'' that limits access to funding would circumvent the entirety of the monitoring process; (4) the cases cited by HUD OGC in the memo undermined HUD's position because those cases indicated the courts' rejection of prior, similar efforts by HUD to avoid the kind of due process requirements set out in NAHASDA 401(a)(1) (in similar provisions of other HUD statutes) through ''hyper-technical'' reasoning and on the impermissible assertion of the need for agency ''flexibility.''

The Tribes then put forward the language that they had proposed previously for a new § 1000.532(a) that would in effect prohibit HUD from using the LOCCS edit. The HUD representatives on the committee did not agree to the proposal.

Content of Annual Performance Reports

HUD held eight Tribal consultation meetings throughout the country from January through May 2005 to solicit comments and recommendations on the existing IHP and APR. A Tribal workgroup consisting of 12 Tribal representatives selected by the Regional Housing Associations worked with HUD staff to incorporate the suggestions gathered at the Tribal consultations into a revised form. The recommendations from the Tribal workgroup formed the basis for the majority of statutory revisions to the IHP and APR. In addition, the Tribal workgroup agreed to include more detailed data collection in the APR in order to better document the positive effects of the IHBG program. Proposals were developed to regulate the data collection in the APR to more fully prescribe the content required under NAHASDA section 404(b), consistent with the recommendations of the Tribal workgroup. The two HUD Committee members advocated for the full data collection recommended by the Tribal workgroup; however, some Tribal Committee members disagreed with most of the data collection items as being too burdensome. As a result, the Committee reached consensus only on the collection of jobs data, units completed or assisted, families assisted, and outcomes by eligible activity under new § 1000.512(d). The Committee did not reach consensus on collecting housing unit cost information, a finite list of specific outcomes by eligible activity, or reduction in criminal activity data.

Indian Housing Plan and Annual Performance Report Formats

Tribal representatives supported proposed revisions to permit HUD to accept alternative IHP and APR formats developed by each Tribe, as a means to enhance the congressional finding and guiding principle of NAHASDA implementation of providing assistance in a manner similar to that accorded in Public Law 93–638. HUD committee members objected.

V. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review.* This rule was determined to be a ''significant regulatory action,'' as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). The docket file is available for public inspection in the Regulations Division, Office of General Counsel, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling

the Regulations Division at (202) 402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by OMB in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB Control Number 2577–0218. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis for any rule that is subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The requirements of this proposed rule apply to Indian Tribal governments and their Tribal housing authorities. Tribal governments and their Tribal housing authorities are not covered by the definition of ''small entities'' under the RFA. Accordingly, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD's view that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and Tribal governments, and on the private sector. This rule will not impose any Federal mandate on any state, local, or Tribal government, or on the private sector, within the meaning of UMRA.

Environmental Review

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the FONSI by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance Number (CFDA) for Indian Housing Block Grants is 14.867, and the CFDA for Title VI Federal Guarantees for Financing Tribal Housing Activities is 14.869.

List of Subjects in 24 CFR Part 1000

Aged, Community development block grants, Grant programs—housing and community development, Grant programs—Indians, Indians, Individuals with disabilities, Public housing, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR part 1000 as follows:

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

1. The authority citation for 24 CFR part 1000 continues to read as follows:

Authority: 25 U.S.C. 4101 *et seq.;* 42 U.S.C. 3535(d).

2. Revise § 1000.2(a)(6) and (a)(7) to read as follows:

§ 1000.2 What are the guiding principles in the implementation of NAHASDA?

(a) * * *

(6) The need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute and the Federal government shall work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for Indian Tribes and their members.

(7) Federal assistance to meet these responsibilities shall be provided in a manner that recognizes the right of Indian self-determination and Tribal self-governance by making such assistance available directly to the Indian Tribes or Tribally designated entities under authorities similar to those accorded Indian Tribes in Public Law 93–638 (25 U.S.C. 450 *et seq.*).

* * * * *

3. Add § 1000.9, to read as follows:

§ 1000.9 How is negotiated rulemaking conducted when promulgating NAHASDA regulations?

The negotiated rulemaking procedures and requirements set out in section 106(b) of NAHASDA shall be conducted as follows:

(a) *Committee membership.* In forming a negotiated rulemaking committee, HUD shall appoint as committee members representatives of the Federal government and representatives of diverse Tribes and program recipients.

(b) *Initiation of rulemaking.* HUD shall initiate a negotiated rulemaking not later than 90 days after the enactment of any act to reauthorize or significantly amend NAHASDA.

(c) *Work groups.* Negotiated rulemaking committees may form workgroups made up of committee members and other interested parties to meet during committee sessions and between sessions to develop specific rulemaking proposals for committee consideration.

(d) *Further review.* Negotiated rulemaking committees shall provide recommended rules to HUD. Once rules are proposed by HUD, they shall be published for comment in the **Federal Register**. Any comments will be further reviewed by the committee and HUD before HUD determines if the rule or rules will be adopted.

4. In § 1000.10(b), revise the definition of ''*Indian area*'' and add, in alphabetical order, the definitions for the terms ''*Housing related activities,*''

''*Housing related community development,*'' ''*Outcomes,*'' and ''*Tribal program year,*'' to read as follows:

§ 1000.10 What definitions apply in these regulations?

* * * * *

(b) * * *

Housing related activities, for purposes of program income, means any facility, community building, infrastructure, business, program, or activity, including any community development or economic development activity, that:

(1) Is determined by the recipient to be beneficial to the provision of housing in an Indian area, and that:

(2) Would meet at least one of the following conditions:

(i) Would help an Indian Tribe or its Tribally designated housing entity to reduce the cost of construction of Indian housing;

(ii) Would make housing more affordable, energy efficient, accessible, or practicable in an Indian area; or

(iii) Would otherwise advance the purposes of NAHASDA.

* * * * *

Housing related community development:

(1) Means any facility, community building, business, activity, or infrastructure that:

(i) Is owned by an Indian Tribe or a Tribally designated housing entity;

(ii) Is necessary to the provision of housing in an Indian area; and

(iii)(A) Would help an Indian Tribe or Tribally designated housing entity reduce the cost of construction of Indian housing;

(B) Would make housing more affordable, energy efficient, accessible, or practicable in an Indian area; or

(C) Would otherwise advance the purposes of NAHASDA.

(2) Does not include any activity conducted by any Indian Tribe under the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*)

* * * * *

Indian Area means the area within which an Indian Tribe operates affordable housing programs or the area in which a TDHE, as authorized by one or more Indian Tribes, operates affordable housing programs. Whenever the term ''jurisdiction'' is used in NAHASDA, it shall mean ''Indian Area,'' except where specific reference is made to the jurisdiction of a court.

* * * * *

Outcomes are the intended results or consequences important to program beneficiaries, the IHBG recipient, and the Tribe generally from carrying out the housing or housing-related activity as determined by the Tribe (and/or its TDHE).

* * * * *

Tribal program year means the fiscal year of the IHBG recipient.

* * * * *

5. In § 1000.12, revise paragraph (d), to read as follows:

§ 1000.12 What nondiscrimination requirements are applicable?

* * * * *

(d) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*) apply to Indian Tribes that are not covered by the Indian Civil Rights Act. The Title VI and Title VIII requirements do not apply to actions under NAHASDA by Federally recognized Indian Tribes and their TDHEs. State-recognized Indian Tribes and their TDHEs may provide preference for Tribal members and other Indian families pursuant to NAHASDA sections 201(b) and 101(k) (relating to Tribal preference in employment and contracting).

6. In § 1000.16, revise paragraphs (a)(1) and (c), redesignate paragraph (e) as paragraph (f), and add new paragraph (e), to read as follows:

§ 1000.16 What labor standards are applicable?

(a) * * *

(1) As described in section 104(b) of NAHASDA, contracts and agreements for assistance, sale, or lease under NAHASDA must require prevailing wage rates determined by the Secretary of Labor under the Davis-Bacon Act (40 U.S.C. 3141–44, 3146, and 3147) to be paid to laborers and mechanics employed in the development of affordable housing.

* * * * *

(c) *Contract Work Hours and Safety Standards Act.* Contracts in excess of $100,000 to which Davis-Bacon or HUD-determined wage rates apply are subject by law to the overtime provisions of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701).

* * * * *

(e) Paragraphs (a) through (d) of this section shall not apply to any contract or agreement for assistance, sale, or lease pursuant to NAHASDA, if such contract or agreement is otherwise covered by one or more laws or regulations adopted by an Indian Tribe that requires the payment of not less than prevailing wages, as determined by the Indian Tribe.

* * * * *

7. Add § 1000.21, to read as follows:

§ 1000.21 Under what circumstances are waivers of the environmental review procedures available to Tribes?

A Tribe or recipient may request that the Secretary waive the requirements under section 105 of NAHASDA. The Secretary may grant the waiver if the Secretary determines that a failure on the part of a recipient to comply with provisions of this section:

(a) Will not frustrate the goals of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) or any other provision of law that furthers the goals of that Act;

(b) Does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community;

(c) Is a result of inadvertent error, including an incorrect or incomplete certification provided under section 105(c)(1) of NAHASDA; and

(d) May be corrected through the sole action of the recipient.

8. In § 1000.26, revise paragraphs (a)(5) and (a)(11) to read as follows:

§ 1000.26 What are the administrative requirements under NAHASDA?

(a) * * *

(5) Section 85.21, ''Payment,'' except that HUD shall not require a recipient to expend retained program income before drawing down or expending IHBG funds.

* * * * *

(11)(i) *General.* Section 85.36 of this title, ''Procurement,'' except paragraph (a), subject to paragraphs (a)(11)(ii) and (a)(11)(iii) of this section.

(ii) *Bonding requirements.* There may be circumstances under which the bonding requirements of § 85.36(h) are inconsistent with other responsibilities and obligations of the recipient. In such circumstances, acceptable methods to provide performance and payment assurance may include:

(A) Deposit with the recipient of a cash escrow of not less than 20 percent of the total contract price, subject to reduction during the warranty period, commensurate with potential risk;

(B) Letter of credit for 25 percent of the total contract price, unconditionally payable upon demand of the recipient, subject to reduction during any warranty period commensurate with potential risk; or

(C) Letter of credit for 10 percent of the total contract price unconditionally payable upon demand of the recipient, subject to reduction during any warranty period commensurate with potential risk, and compliance with the procedures for monitoring of disbursements by the contractor.

(iii) *De minimis procurement.* A recipient shall not be required to comply with § 85.36 of this title with respect to any procurement, using a grant provided under NAHASDA, of goods and services with a value of less than $5,000.

(iv) *Utilizing Federal supply sources in procurement.* In accordance with Section 101(j) of NAHASDA, recipients may use Federal supply sources made available by the General Services Administration pursuant to 40 U.S.C. 501.

* * * * *

9. In § 1000.42, add paragraphs (c) and (d), to read as follows:

§ 1000.42 Are the requirements of section 3 of the Housing and Urban Development Act of 1968 applicable?

* * * * *

(c) *Tribal preference.* Recipients meet the section 3 requirements when they comply with employment and contract preference laws adopted by their Tribe in accordance with section 101(k) of NAHASDA.

(d) *Applicability.* For purposes of section 3, NAHASDA funding is subject to the requirements applicable to the category of programs entitled ''Other Programs'' that provide housing and community development assistance (12 U.S.C. 1701u(c)(2), (d)(2)).

10. Revise § 1000.48, to read as follows:

§ 1000.48 Are Indian or Tribal preference requirements applicable to IHBG activities?

Grants under this part are subject to Indian preference under section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) or, if applicable under section 101(k) of NAHASDA, Tribal preference in employment and contracting.

(a)(1) Section 7(b) provides that any contract, subcontract, grant, or subgrant pursuant to an act authorizing grants to Indian organizations or for the benefit of Indians shall require that, to the greatest extent feasible:

(i) Preference and opportunities for training and employment shall be given to Indians; and

(ii) Preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452).

(2) The following definitions apply:

(i) The Indian Self-Determination and Education Assistance Act defines ''Indian'' to mean a person who is a member of an Indian Tribe and defines ''Indian Tribe'' to mean any Indian Tribe, band, nation, or other organized group or community including any Alaska Native village or regional or village corporation as defined or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(ii) In section 3 of the Indian Financing Act of 1974, ''economic enterprise'' is defined as any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, except that Indian ownership must constitute not less than 51 percent of the enterprise. This act defines ''Indian organization'' to mean the governing body of any Indian Tribe or entity established or recognized by such governing body.

(b) If Tribal employment and contract preference laws have not been adopted by the Indian Tribe, section 7(b) Indian preference provisions shall apply.

(c) Exception for *de minimis* procurements. A recipient shall not be required to apply Indian preference requirements under Section 7(b) of the Indian Self-Determination and Education Assistance Act with respect to any procurement, using a grant provided under NAHASDA, of goods and services with a value less than $5,000.

11. Revise § 1000.50, to read as follows:

§ 1000.50 What Tribal or Indian preference requirements apply to IHBG administration activities?

(a) In accordance with Section 101(k) of NAHASDA, a recipient shall apply the Tribal employment and contract preference laws (including regulations and Tribal ordinances) adopted by the Indian Tribe that receives a benefit from funds granted to the recipient under NAHASDA.

(b) In the absence of Tribal employment and contract preference laws, a recipient must, to the greatest extent feasible, give preference and opportunities for training and employment in connection with the administration of grants awarded under this part to Indians in accordance with section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

12. Revise § 1000.52, to read as follows:

§ 1000.52 What Tribal or Indian preference requirements apply to IHBG procurement?

(a) In accordance with Section 101(k) of NAHASDA, a recipient shall apply the Tribal employment and contract preference laws (including regulations and Tribal ordinances) adopted by the Indian Tribe that receives a benefit from funds granted to the recipient under NAHASDA.

(b) In the absence of Tribal employment and contract preference laws, a recipient must, to the greatest extent feasible, give preference in the award of contracts for projects funded under this part to Indian organizations and Indian-owned economic enterprises in accordance with Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

(c) The following provisions apply to the application of Indian preference under paragraph (b) of this section:

(1) In applying Indian preference, each recipient shall:

(i) Certify to HUD that the policies and procedures adopted by the recipient will provide preference in procurement activities consistent with the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) (An Indian preference policy which was previously approved by HUD for a recipient will meet the requirements of this section); or

(ii) Advertise for bids or proposals limited to qualified Indian organizations and Indian-owned enterprises; or

(iii) Use a two-stage preference procedure, as follows:

(A) *Stage 1.* Invite or otherwise solicit Indian-owned economic enterprises to submit a statement of intent to respond to a bid announcement or request for proposals limited to Indian-owned firms.

(B) *Stage 2.* If responses are received from more than one Indian enterprise found to be qualified, advertise for bids or proposals limited to Indian organizations and Indian-owned economic enterprises.

(2) If the recipient selects a method of providing preference that results in fewer than two responsible qualified organizations or enterprises submitting a statement of intent, a bid, or a proposal to perform the contract at a reasonable cost, then the recipient shall:

(i) Re-advertise the contract, using any of the methods described in paragraph (a) of this section; or

(ii) Re-advertise the contract without limiting the advertisement for bids or proposals to Indian organizations and Indian-owned economic enterprises; or

(iii) If one approvable bid or proposal is received, request Area ONAP review and approval of the proposed contract and related procurement documents, in accordance with 24 CFR 85.36, in order

to award the contract to the single bidder or offeror.

(3) Procurements that are within the dollar limitations established for small purchases under 24 CFR 85.36 need not follow the formal bid or proposal procedures of paragraph (a) of this section, since these procurements are governed by the small purchase procedures of 24 CFR 85.36. However, a recipient's small purchase procurement shall, to the greatest extent feasible, provide Indian preference in the award of contracts.

(4) All preferences shall be publicly announced in the advertisement and bidding or proposal solicitation documents and the bidding and proposal documents.

(5) A recipient, at its discretion, may require information of prospective contractors seeking to qualify as Indian organizations or Indian-owned economic enterprises. Recipients may require prospective contractors to provide the following information before submitting a bid or proposal, or at the time of submission:

(i) Evidence showing fully the extent of Indian ownership and interest;

(ii) Evidence of structure, management, and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; materials or equipment supply arrangements; management salary or profit-sharing arrangements; and evidence showing the effect of these on the extent of Indian ownership and interest; and

(iii) Evidence sufficient to demonstrate to the satisfaction of the recipient that the prospective contractor has the technical, administrative, and financial capability to perform contract work of the size and type involved.

(6) The recipient shall incorporate the following clause (referred to as the section 7(b) clause) in each contract awarded in connection with a project funded under this part:

(i) The work to be performed under this contract is on a project subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) (the Indian Act). Section 7(b) requires that, to the greatest extent feasible:

(A) Preferences and opportunities for training and employment shall be given to Indians; and

(B) Preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises.

(ii) The parties to this contract shall comply with the provisions of section 7(b) of the Indian Act.

(iii) In connection with this contract, the contractor shall, to the greatest extent feasible, give preference in the award of any subcontracts to Indian organizations and Indian-owned economic enterprises, and preferences and opportunities for training and employment to Indians.

(iv) The contractor shall include this section 7(b) clause in every subcontract in connection with the project; shall require subcontractors at each level to include this section 7(b) clause in every subcontract they execute in connection with the project; and shall, at the direction of the recipient, take appropriate action pursuant to the subcontract upon a finding by the recipient or HUD that the subcontractor has violated the section 7(b) clause of the Indian Act.

(d) A recipient shall not be required to apply Indian preference requirements under Section 7(b) of the Indian Self-Determination and Education Assistance Act with respect to any procurement, using a grant provided under NAHASDA, of goods and services with a value less than $5,000.

13. In § 1000.58, revise paragraphs (f) and (g) to read as follows:

§ 1000.58 Are there limitations on the investment of IHBG funds?

* * * * *

(f) A recipient may invest its IHBG annual grant in an amount equal to the annual formula grant amount.

(g) Investments under this section may be for a period no longer than 5 years.

14. Revise § 1000.60, to read as follows:

§ 1000.60 Can HUD prevent improper expenditure of funds already disbursed to a recipient?

Yes. In accordance with the standards and remedies contained in § 1000.532 relating to substantial noncompliance, HUD will use its powers under a depository agreement and take such other actions as may be legally necessary to suspend funds disbursed to the recipient until the substantial noncompliance has been remedied. In taking this action, HUD shall comply with all appropriate procedures, appeals, and hearing rights prescribed elsewhere in this part.

15. In § 1000.62, revise the heading and paragraph (b), to read as follows:

§ 1000.62 What is considered program income?

* * * * *

(b) If the amount of income received in a single year by a recipient and all its subrecipients, which would otherwise be considered program income, does not exceed $25,000, such funds may be retained but will not be considered to be or treated as program income.

* * * * *

16. Add § 1000.64, to read as follows:

§ 1000.64 What are the permissible uses of program income?

Program income may be used for any housing or housing related activity and is not subject to other Federal requirements.

17. In § 1000.104, revise paragraphs (b) and (c), and add paragraph (d), to read as follows:

§ 1000.104 What families are eligible for affordable housing activities?

* * * * *

(b) A non low-income family may receive housing assistance in accordance with § 1000.110.

(c) A family may receive housing assistance on a reservation or Indian area if the family's housing needs cannot be reasonably met without such assistance and the recipient determines that the presence of that family on the reservation or Indian area is essential to the well-being of Indian families.

(d) A recipient may provide housing or housing assistance provided through affordable housing activities assisted with grant amounts under NAHASDA for a law enforcement officer on an Indian reservation or other Indian area, if:

(1) The officer:

(i) Is employed on a full-time basis by the Federal government or a state, county, or other unit of local government, or lawfully recognized Tribal government; and

(ii) In implementing such full-time employment, is sworn to uphold, and make arrests for, violations of Federal, state, county, or Tribal law; and

(2) The recipient determines that the presence of the law enforcement officer on the Indian reservation or other Indian area may deter crime.

18. Revise § 1000.106, to read as follows:

§ 1000.106 What families receiving assistance under title II of NAHASDA require HUD approval?

(a) Housing assistance for non low-income families requires HUD approval only as required in §§ 1000.108 and 1000.110.

(b) Assistance for essential families under section 201(b)(3) of NAHASDA does not require HUD approval but only requires that the recipient determine that the presence of that family on the reservation or Indian area is essential to the well-being of Indian families and that the family's housing needs cannot

be reasonably met without such assistance.

19. Revise § 1000.108, to read as follows:

§ 1000.108 How is HUD approval obtained by a recipient for housing for non low-income families and model activities?

Recipients are required to submit proposals to operate model housing activities as defined in section 202(6) of NAHASDA and to provide assistance to non low-income families in accordance with section 201(b)(2) of NAHASDA. Assistance to non low-income families must be in accordance with § 1000.110. Proposals may be submitted in the recipient's IHP or at any time by amendment of the IHP, or by special request to HUD at any time. HUD may approve the remainder of an IHP, notwithstanding disapproval of a model activity or assistance to non low-income families.

20. Revise § 1000.110, to read as follows:

§ 1000.110 Under what conditions may non low-income Indian families participate in the program?

(a) A family that was low-income at the times described in § 1000.147 but subsequently becomes a non low-income family due to an increase in income may continue to participate in the program in accordance with the recipient's admission and occupancy policies. The 10 percent limitation in paragraph (c) of this section shall not apply to such families. Such families may be made subject to the additional requirements in paragraph (d) of this section based on those policies. This includes a family member or household member who takes ownership of a homeownership unit under § 1000.146.

(b) A recipient must determine and document that there is a need for housing for each family that cannot reasonably be met without such assistance.

(c) A recipient may use up to 10 percent of the amount planned for the Tribal program year for families whose income falls within 80 to 100 percent of the median income without HUD approval. HUD approval is required if a recipient plans to use more than 10 percent of the amount planned for the Tribal program year for such assistance or to provide housing for families with income over 100 percent of median income.

(d) Non low-income families cannot receive the same benefits provided low-income Indian families. The amount of assistance non low-income families may receive will be determined as follows:

(1) The rent (including homebuyer payments under a lease purchase agreement) to be paid by a non low-income family cannot be less than: (Income of non low-income family/ Income of family at 80 percent of median income) × (Rental payment of family at 80 percent of median income), but need not exceed the fair market rent or value of the unit.

(2) Other assistance, including down payment assistance, to non low-income families, cannot exceed: (Income of family at 80 percent of median income/ Income of non low-income family) × (Present value of the assistance provided to family at 80 percent of median income).

(e) The requirements set forth in paragraphs (c) and (d) of this section do not apply to non low-income families which the recipient has determined to be essential under § 1000.106(b).

21. Revise § 1000.114, to read as follows:

§ 1000.114 How long does HUD have to review and act on a proposal to provide assistance to non low-income families or a model housing activity?

Whether submitted in the IHP or at any other time, HUD will have 60 calendar days after receiving the proposal to notify the recipient in writing that the proposal to provide assistance to non low-income families or for model activities is approved or disapproved. If no decision is made by HUD within 60 calendar days of receiving the proposal, the proposal is deemed to have been approved by HUD.

22. Revise § 1000.116, to read as follows:

§ 1000.116 What should HUD do before declining a proposal to provide assistance to non low-income families or a model housing activity?

HUD shall consult with a recipient regarding the recipient's proposal to provide assistance to non low-income families or a model housing activity. To the extent that resources are available, HUD shall provide technical assistance to the recipient in amending and modifying the proposal, if necessary. In case of a denial, HUD shall give the specific reasons for the denial.

23. In § 1000.118, revise the heading and paragraph (a), to read as follows:

§ 1000.118 What recourse does a recipient have if HUD disapproves a proposal to provide assistance to non low-income families or a model housing activity?

(a) Within 30 calendar days of receiving HUD's denial of a proposal to provide assistance to non low-income families or a model housing activity, the recipient may request reconsideration of the denial in writing. The request shall set forth justification for the reconsideration.

* * * * *

24. Add § 1000.141, to read as follows:

§ 1000.141 What is ''useful life'' and how is it related to affordability?

Useful life is the time period during which an assisted property must remain affordable, as defined in section 205(a) of NAHASDA.

25. Revise § 1000.142, to read as follows:

§ 1000.142 How does a recipient determine the ''useful life'' during which low-income rental housing and low-income homebuyer housing must remain affordable as required in sections 205(a)(2) and 209 of NAHASDA?

To the extent required in the IHP, each recipient shall describe its determination of the useful life of the assisted housing units in its developments in accordance with the local conditions of the Indian area of the recipient. By approving the plan, HUD determines the useful life in accordance with section 205(a)(2) of NAHASDA and for purposes of section 209.

26. Add § 1000.143, to read as follows:

§ 1000.143 How does a recipient implement its useful life requirements?

A recipient implements its useful life requirements by placing a binding commitment, satisfactory to HUD, on the assisted property.

§§ 1000.144 and 1000.146 [Redesignated]

27. Redesignate § 1000.144 and § 1000.146 as § 1000.145 and § 1000.147, respectively.

28. Add § 1000.144, to read as follows:

§ 1000.144 What are binding commitments satisfactory to HUD?

A binding commitment satisfactory to HUD is a written use restriction agreement, developed by the recipient, and placed on an assisted property for the period of its useful life.

29. Add § 1000.146, to read as follows:

§ 1000.146 Are binding commitments for the remaining useful life of property applicable to a family member or household member who subsequently takes ownership of a homeownership unit?

No. The transfer of a homeownership unit to a family member or household member is not subject to a binding commitment for the remaining useful life of the property. Any subsequent transfer by the family member or household member to a third party (not a family member or household member)

is subject to any remaining useful life under a binding commitment.

30. Revise redesignated § 1000.147, to read as follows:

§ 1000.147 When does housing qualify as affordable housing under NAHASDA?

(a) Housing qualifies as affordable housing, provided that the family occupying the unit is low-income at the following times:

(1) In the case of rental housing, at the time of the family's initial occupancy of such unit;

(2) In the case of a contract to purchase existing housing, at the time of purchase;

(3) In the case of a lease-purchase agreement for existing housing or for housing to be constructed, at the time the agreement is signed; and

(4) In the case of a contract to purchase housing to be constructed, at the time the contract is signed.

(b) Families that are not low-income as described in this section may be eligible under § 1000.104 or § 1000.110.

31. In § 1000.150, revise the heading to read as follows:

§ 1000.150 How may Indian Tribes and TDHEs receive criminal conviction information on applicants for employment and on adult applicants for housing assistance, or tenants?

32. Revise § 1000.152 to read as follows:

§ 1000.152 How is the recipient to use criminal conviction information?

(a) With regard to adult tenants and applicants for housing assistance, the recipient shall use the criminal conviction information described in § 1000.150 only for applicant screening, lease enforcement, and eviction actions.

(b) With regard to applicants for employment, the recipient shall use the criminal conviction information described in § 1000.150 for the purposes set out in section 208 of NAHASDA.

(c) The criminal conviction information described in § 1000.150 may be disclosed only to any person who has a job-related need for the information and who is an authorized officer, employee, or representative of the recipient or the owner of housing assisted under NAHASDA.

33. Revise § 1000.201, to read as follows:

§ 1000.201 How are funds made available under NAHASDA?

Every fiscal year HUD will make grants under the IHBG program to recipients who have submitted to HUD for a Tribal program year an IHP in accordance with § 1000.220 to carry out affordable housing activities.

34. Revise § 1000.214, to read as follows:

§ 1000.214 What is the deadline for submission of an IHP?

IHPs must be initially sent by the recipient to the Area ONAP no later than 75 days before the beginning of a Tribal program year. Grant funds cannot be provided until the plan due under this section is determined to be in compliance with section 102 of NAHASDA and funds are available.

35. Revise § 1000.216, to read as follows:

§ 1000.216 What happens if the recipient does not submit the IHP to the Area ONAP by not later than 75 days before the beginning of the Tribal program year?

If the IHP is not initially sent by at least 75 days before the beginning of the Tribal program year, the recipient will not be eligible for IHBG funds for that fiscal year. Any funds not obligated because an IHP was not received before this deadline has passed shall be distributed by formula in the following year.

36. Revise § 1000.220, to read as follows:

§ 1000.220 What are the requirements for the IHP?

The IHP requirements are set forth in section 102(b) of NAHASDA. In addition, §§ 1000.56, 1000.108, 1000.120, 1000.134, 1000.142, 1000.238, 1000.302, and 1000.328, require or permit additional items to be set forth in the IHP for HUD determinations required by those sections. Recipients are only required to provide IHPs that contain these elements in a form prescribed by HUD. If a TDHE is submitting a single IHP that covers two or more Indian Tribes, the IHP must contain a separate certification in accordance with section 102(d) of NAHASDA and IHP Tables for each Indian Tribe when requested by such Indian Tribes. However, Indian Tribes are encouraged to perform comprehensive housing needs assessments and develop comprehensive IHPs and not limit their planning process to only those housing efforts funded by NAHASDA. An IHP should be locally driven.

37. Revise § 1000.224, to read as follows:

§ 1000.224 Can any part of the IHP be waived?

Yes. HUD has general authority under section 101(b)(2) of NAHASDA to waive any IHP requirements when an Indian Tribe cannot comply with IHP requirements due to exigent circumstances beyond its control, for a period of not more than 90 days. The waiver authority under section 101(b)(2) of NAHASDA provides flexibility to address the needs of every Indian Tribe, including small Indian Tribes. The waiver may be requested by the Indian Tribe or its TDHE (if such authority is delegated by the Indian Tribe), and such waiver shall not be unreasonably withheld.

38. Add § 1000.225, to read as follows:

§ 1000.225 When may a waiver of the IHP submission deadline be requested?

A recipient may request a waiver for a period of not more than 90 days beyond the IHP submission due date.

39. Add § 1000.227, to read as follows:

§ 1000.227 What shall HUD do upon receipt of a IHP submission deadline waiver request?

The waiver shall be decided upon by HUD within 45 days of receipt of the waiver request. HUD shall notify the recipient in writing within 45 days of receipt of the waiver request whether the request is approved or denied.

40. In § 1000.230, revise paragraph (a)(1), to read as follows:

§ 1000.230 What is the process for HUD review of IHPs and IHP amendments?

* * * * *

(a) * * *

(1) Comply with the requirements of section 102 of NAHASDA, which outlines the IHP submission requirements; however, the recipient may use either the HUD-estimated IHBG amount or the IHBG amount from their most recent compliant IHP;

* * * * *

41. In § 1000.236, revise paragraphs (a)(4), (a)(5), and (b), and add paragraph (a)(6), to read as follows:

§ 1000.236 What are eligible administrative and planning expenses?

(a) * * *

(4) Preparation of the annual performance report;

(5) Challenge to and collection of data for purposes of challenging the formula; and

(6) Administrative and planning expenses associated with expenditure of non-IHBG funds on affordable housing activities if the source of the non-IHBG funds limits expenditure of its funds on such administrative expenses.

(b) Staff and overhead costs directly related to carrying out affordable housing activities or comprehensive and community development planning activities can be determined to be eligible costs of the affordable housing activity or considered administration or

planning at the discretion of the recipient.

42. Revise § 1000.238, to read as follows:

§ 1000.238 What percentage of the IHBG funds can be used for administrative and planning expenses?

Recipients receiving in excess of $500,000 may use up to 20 percent of their annual expenditures of grant funds or may use up to 20 percent of their annual grant amount, whichever is greater. Recipients receiving $500,000 or less may use up to 30 percent of their annual expenditures of grant funds or up to 30 percent of their annual grant amount, whichever is greater. When a recipient is receiving grant funds on behalf of one or more grant beneficiaries, the recipient may use up to 30 percent of the annual expenditure of grant funds or up to 30 percent of their annual grant amount, whichever is greater, of each grant beneficiary whose allocation is $500,000 or less, and up to 20 percent of the annual expenditure of grant funds or up to 20 percent of their annual grant amount, whichever is greater, of each grant beneficiary whose allocation is greater than $500,000. HUD approval is required if a higher percentage is requested by the recipient. Recipients combining grant funds with other funding may request HUD approval to use a higher percentage based on its total expenditure of funds from all sources for that year. When HUD approval is required, HUD must take into consideration any cost of preparing the IHP, challenges to and collection of data, the recipient's grant amount, approved cost allocation plans, and any other relevant information with special consideration given to the circumstances of recipients receiving minimal funding.

43. Add § 1000.239, to read as follows:

§ 1000.239 May a recipient establish and maintain reserve accounts for administration and planning?

Yes. In addition to the amounts established for planning and administrative expenses under §§ 1000.236 and 1000.238, a recipient may establish and maintain separate reserve accounts only for the purpose of accumulating amounts for administration and planning relating to affordable housing activities. These amounts may be invested in accordance with § 1000.58(c). Interest earned on reserves is not program income and shall not be included in calculating the maximum amount of reserves. The maximum amount of reserves, whether in one or more accounts, that a recipient may have available at any one time is calculated as follows:

(a) Determine the 5-year average of administration and planning amounts, not including reserve amounts, expended in a Tribal program year.

(b) Establish ¼ of that amount for the total eligible reserve.

44. Add § 1000.244, to read as follows:

§ 1000.244 If the recipient has made a good-faith effort to negotiate a cooperation agreement and tax-exempt status but has been unsuccessful through no fault of its own, may the Secretary waive the requirement for a cooperation agreement and a tax exemption?

Yes. Recipients must submit a written request for waiver to the recipient's Area ONAP. The request must detail a good-faith effort by the recipient, identify the housing units involved, and include all pertinent background information about the housing units. The recipient must further demonstrate that it has pursued and exhausted all reasonable channels available to it to reach an agreement to obtain tax-exempt status, and that failure to obtain the required agreement and tax-exempt status has been through no fault of its own. The Area ONAP will forward the request, its recommendation, comments, and any additional relevant documentation to the Deputy Assistant Secretary for Native American Programs for processing to the Assistant Secretary.

45. Add § 1000.246, to read as follows:

§ 1000.246 How must HUD respond to a request for waiver of the requirement for a cooperation agreement and a tax exemption?

(a) HUD shall make a determination to such request for a waiver within 30 days of receipt or provide a reason to the requestor for the delay, identify all additional documentation necessary, and provide a timeline within which a determination will be made.

(b) If the waiver is granted, HUD shall notify the recipient of the waiver in writing and inform the recipient of any special condition or deadlines with which it must comply. Such waiver shall remain effective until revoked by the Secretary.

(c) If the waiver is denied, HUD shall notify the recipient of the denial and the reason for denial in writing. If the request is denied, IHBG funds may not be spent on the housing units. If IHBG funds have been spent on the housing units prior to the denial, the recipient must reimburse the grant for all IHBG funds expended.

46. In § 1000.302, revise paragraph (2)(i)(B) of the definition of ''Formula area'' and paragraph (3) of the definition of ''Substantial housing services,'' to read as follows:

§ 1000.302 What are the definitions applicable for the IHBG formula?

* * * * *

Formula area. * * *

(2)(i) * * *

(B) Is providing substantial housing services and will continue to expend or obligate funds for substantial housing services, as reflected in its Indian Housing Plan and Annual Performance Report for this purpose.

* * * * *

Substantial housing services are:

* * *

(3) HUD shall require that the Indian Tribe annually provide written verification, in its Indian Housing Plan and Annual Performance Report, that the affordable housing activities it is providing meet the definition of substantial housing services.

* * * * *

47. In § 1000.328, revise paragraph (b)(2), to read as follows:

§ 1000.328 What is the minimum amount that an Indian Tribe may receive under the need component of the formula?

* * * * *

(b) * * *

(2) Certify in its Indian Housing Plan the presence of any households at or below 80 percent of median income.

48. Revise § 1000.332, to read as follows:

§ 1000.332 Will data used by HUD to determine an Indian Tribe's or TDHE's formula allocation be provided to the Indian Tribe or TDHE before the allocation?

Yes. HUD shall provide notice to the Indian Tribe or TDHE of the data to be used for the formula and projected allocation amount by June 1.

§ 1000.408 [Removed]

49. Remove § 1000.408.

50. In § 1000.410, revise paragraphs (c) and (d), and add paragraph (e) to read as follows:

§ 1000.410 What conditions shall HUD prescribe when providing a guarantee for notes or other obligations issued by an Indian Tribe?

* * * * *

(c) The repayment period may exceed 20 years, and the length of the repayment period cannot be the sole basis for HUD disapproval;

(d) Lender and issuer/borrower must certify that they acknowledge and agree to comply with all applicable Tribal laws; and

(e) A guarantee made under Title VI of NAHASDA shall guarantee

repayment of 95 percent of the unpaid principal and interest due on the notes or other obligations guaranteed.

51. In § 1000.424, revise paragraph (a), remove paragraph (d)(2), and redesignate paragraphs (d)(3) and (d)(4) as paragraphs (d)(2) and (d)(3), respectively, to read as follows:

§ 1000.424 What are the application requirements for guarantee assistance under title VI of NAHASDA?

* * * * *

(a) An identification of each of the activities to be carried out with the guaranteed funds and a description of how each activity qualifies:

(1) As an affordable housing activity as defined in section 202 of NAHASDA; or

(2) As a housing related community development activity under section 601(a) of NAHASDA.

* * * * *

52. In § 1000.428, revise paragraphs (b) and (e) to read as follows:

§ 1000.428 For what reasons may HUD disapprove an application or approve an application for an amount less than that requested?

* * * * *

(b) The loan or other obligation for which the guarantee is requested exceeds any of the limitations specified in sections 601(c) or section 605(d) of NAHASDA.

* * * * *

(e) The activities to be undertaken are not eligible under either:

(1) Section 202 of NAHASDA; or

(2) Section 601(a) of NAHASDA.

* * * * *

53. Add § 1000.503, to read as follows:

§ 1000.503 What is an appropriate extent of HUD monitoring?

(a) Subject to any conflicting or supplementary requirement of specific legislation, and upon the effective date of this regulation, the frequency of HUD monitoring of a particular recipient will be determined by application of the HUD standard risk assessment factors, provided that when a recipient requests to be monitored, HUD shall conduct such monitoring as soon as practicable. The HUD standard risk assessment factors may be but are not limited to the following:

(1) Annual grant amount;

(2) Disbursed amounts—all open grants;

(3) Months since last on-site monitoring;

(4) Delinquent audits;

(5) Open audit findings;

(6) Conclusions of auditor;

(7) Open monitoring findings;

(8) Delinquent Annual Performance Reports or Annual Status and Evaluation Reports;

(9) Status of Corrective Action Plan (CAP) or Performance Agreement (PA);

(10) Recipient Self-Monitoring;

(11) Inspection of 1937 Act units;

(12) Preservation of 1937 Act units; and

(13) Any other additional factors that may be determined by HUD, consistent with HUD's Tribal Consultation Policy, by which HUD will send written notification and provide a comment period. Such additional factors shall be provided by program guidance.

(b) Provided that if monitoring indicates noncompliance, HUD may undertake additional sampling and review to determine the extent of such noncompliance, the level of HUD monitoring of a recipient once that recipient has been selected for HUD monitoring is as follows:

(1) Review recipient program compliance for the current program year and the 2 prior program years;

(2) On-site inspection of no more than 10 dwelling units or 10 percent of total dwelling units, whichever is greater;

(3) Review of no more than 10 client files or 10 percent of client files, whichever is greater.

(c) Notwithstanding paragraph (b) of this section, HUD may at any time undertake additional sampling and review of prior program years, subject to the records retention limitations of § 1000.552, if HUD has credible information suggesting noncompliance. HUD will share this information with the recipient as appropriate.

(d) A recipient may request ONAP to enter into self-monitoring mutual agreements or other self-monitoring arrangements with recipients. ONAP will monitor the recipient only in accordance with such agreement or arrangement, unless ONAP finds reasonable evidence of fraud, a pattern of noncompliance, or the significant unlawful expenditure of IHBG funds.

§ 1000.504 [Removed]

54. Remove § 1000.504.

55. In § 1000.512, revise paragraphs (b) and (c), and add paragraphs (d) and (e), to read as follows:

§ 1000.512 Are performance reports required?

* * * * *

(b) Brief information on the following:

(1) A comparison of actual accomplishments to the planned activities established for the period;

(2) The reasons for slippage if established planned activities were not met; and

(3) Analysis and explanation of cost overruns or high unit costs;

(c) Any information regarding the recipient's performance in accordance with HUD's performance measures, as set forth in section § 1000.524; and

(d) Annual performance data to reflect the accomplishments of the recipient to include, as specified in the IHP:

(1) Permanent and temporary jobs supported with IHBG funds;

(2) Outputs by eligible activity, including:

(i) Units completed or assisted, and

(ii) Families assisted; and

(3) Outcomes by eligible activity.

(e) As applicable, items required under §§ 1000.302 and 1000.544.

56. In § 1000.520, revise the heading, introductory text, and paragraph (c), to read as follows:

§ 1000.520 What are the purposes of HUD's review of the Annual Performance Report?

HUD will review each recipient's Annual Performance Report when submitted to determine whether the recipient:

* * * * *

(c) Whether the Annual Performance Report of the recipient is accurate.

57. In § 1000.524, remove paragraph (a), redesignate paragraphs (b) through (f) as paragraphs (a) through (e), and revise redesignated paragraph (d), to read as follows:

§ 1000.524 What are HUD's performance measures for the review?

* * * * *

(d) The recipient has met the IHP—planned activities in the one-year plan.

* * * * *

58. Revise § 1000.528, to read as follows:

§ 1000.528 What are the procedures for the recipient to comment on the result of HUD's review when HUD issues a report under section 405(b) of NAHASDA?

HUD will issue a draft report to the recipient and Indian Tribe within 60 days of the completion of HUD's review. The recipient will have at least 60 days to review and comment on the draft report, as well as provide any additional information relating to the draft report. Upon written notification to HUD, the recipient may exercise the right to take an additional 30 days to complete its review and comment to the draft report. Additional extensions of time for the recipient to complete review and comment may be mutually agreed upon in writing by HUD and the recipient. HUD shall consider the comments and any additional information provided by the recipient. HUD may also revise the

draft report based on the comments and any additional information provided by the recipient. HUD shall make the recipient's comments and a final report readily available to the recipient, grant beneficiary, and the public not later than 30 days after receipt of the recipient's comments and additional information.

59. In § 1000.530, revise the heading and paragraph (b), to read as follows:

§ 1000.530 What corrective and remedial actions will HUD request or recommend to address performance problems prior to taking action under § 1000.532?

* * * * *

(b) Failure of a recipient to address performance problems specified in paragraph (a) of this section may result in the imposition of sanctions as prescribed in § 1000.532.

60. Revise § 1000.532, to read as follows:

§ 1000.532 What are the remedial actions that HUD may take in the event of recipient's substantial noncompliance?

(a) If HUD finds after reasonable notice and opportunity for hearing that a recipient has failed to comply substantially with any provision of NAHASDA or these regulations, HUD shall carry out any of the following actions with respect to the recipient's current or future grants, as appropriate:

(1) Terminate payments under NAHASDA to the recipient;

(2) Reduce payments under NAHASDA to the recipient by an amount equal to the amount of such payments that were not expended in accordance with NAHASDA or these regulations;

(3) Limit the availability of payments under NAHASDA to programs, projects, or activities not affected by the failure to comply; or

(4) In the case of noncompliance described in § 1000.542, provide a replacement TDHE for the recipient.

(b) Before undertaking any action in accordance with paragraph (a) of this section, HUD will notify the recipient in writing of the action it intends to take and provide the recipient an opportunity for an informal meeting to resolve the deficiency. Before taking any action under paragraph (a) of this section, HUD shall provide the recipient with the opportunity for a hearing no less than 30 days prior to taking the proposed action. The hearing shall be held in accordance with § 1000.540. The amount in question shall not be reallocated under the provisions of § 1000.536, until 15 days after the hearing has been conducted and HUD has rendered a final decision.

(c) Notwithstanding paragraphs (a) and (b) of this section, if HUD makes a determination that the failure of a recipient to comply substantially with any material provision of NAHASDA or these regulations is resulting, and would continue to result, in a continuing expenditure of funds provided under NAHASDA in a manner that is not authorized by law, HUD may, in accordance with section 401(a)(4) of NAHASDA, take action under paragraph (a)(3) of this section prior to conducting a hearing under paragraph (b) of this section. HUD shall provide notice to the recipient at the time that HUD takes that action and conducts a hearing, in accordance with section 401(a)(4)(B) of NAHASDA, within 60 days of such notice.

(d) Notwithstanding paragraph (a) of this section, if HUD determines that the failure to comply substantially with the provisions of NAHASDA or these regulations is not a pattern or practice of activities constituting willful noncompliance, and is a result of the limited capability or capacity of the recipient, if the recipient requests HUD shall provide technical assistance for the recipient (directly or indirectly) that is designed to increase the capability or capacity of the recipient to administer assistance under NAHASDA in compliance with the requirements under NAHASDA. A recipient's eligibility for technical assistance under this subsection is contingent on the recipient's execution of, and compliance with, a performance agreement pursuant to Section 401(b) of NAHASDA.

(e) In lieu of, or in addition to, any action described in this section, if the Secretary has reason to believe that the recipient has failed to comply substantially with any provisions of NAHASDA or these regulations, HUD may refer the matter to the Attorney General of the United States, with a recommendation that appropriate civil action be instituted.

61. In § 1000.534, revise paragraph (a) to read as follows:

§ 1000.534 What constitutes substantial noncompliance?

* * * * *

(a) The noncompliance has a material effect on the recipient meeting its planned activities as described in its Indian Housing Plan;

* * * * *

62. In § 1000.536, revise the heading to read as follows:

§ 1000.536 What happens to NAHASDA grant funds adjusted, reduced, withdrawn, or terminated under § 1000.532?

* * * * *

§ 1000.538 [Removed]

63. Remove § 1000.538.

64. Revise § 1000.544 to read as follows:

§ 1000.544 What audits are required?

Pursuant to NAHASDA Section 405(a), the recipient must comply with the requirements of the Single Audit Act (chapter 75 of title 31, United States Code), including OMB Circular A–133, which require annual audits of recipients that expend Federal funds equal to or in excess of an amount specified by the Office of Management and Budget (OMB), as set out in OMB Circular A–133, subpart B, section 200. If applicable, a certification that the recipient has not expended Federal funds in excess of the audit threshold that is set by OMB shall be included in the recipient's Annual Performance Report.

65. Revise § 1000.548, as follows:

§ 1000.548 Must a copy of the recipient's audit pursuant to the Single Audit Act relating to NAHASDA activities be submitted to HUD?

Yes. A copy of the latest recipient audit under the Single Audit Act relating to NAHASDA activities must be submitted to the appropriate HUD ONAP area office at the same time it is submitted to the Federal Audit Clearinghouse pursuant to OMB Circular A–133.

66. Revise § 1000.552 paragraph (b), to read as follows:

§ 1000.552 How long must the recipient maintain program records?

* * * * *

(b) Except as otherwise provided herein, records must be retained for 3 years from the end of the Tribal program year during which the funds were expended.

* * * * *

Dated: October 4, 2011.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2011–29642 Filed 11–17–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 20

[REG–112196–07]

RIN 1545–BH64

Gross Estate; Election to Value on Alternate Valuation Date

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that provide guidance respecting the election to use the alternate valuation method under section 2032 of the Internal Revenue Code (Code). The proposed regulations will affect estates that file Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return and elect to use the alternate valuation method. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by February 16, 2012. Outlines of topics to be discussed at the public hearing scheduled for March 9, 2012, at 10 a.m. must be received by February 17, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–112196–07), Internal Revenue Service, Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–112196–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224; or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS–REG–112196–07). The public hearing will be held in the Auditorium, beginning at 10 a.m., at the Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Theresa M. Melchiorre, (202) 622–3090; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard Hurst at *Richard.A.Hurst@irscounsel.treas.gov* or at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 2001 imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States. Section 2033 provides that the value of the gross estate includes the value of all property to the extent of the interest of the decedent at the time of his death. Section 2031(a) provides that the value of the decedent's gross estate includes the value at the time of the decedent's death of all property, real or personal, tangible or intangible, wherever situated. Section 2032(a) provides that the value of the gross estate may be determined, if the executor so elects, by valuing all the property includible in the gross estate as follows. Property distributed, sold, exchanged, or otherwise disposed of during the 6-month period immediately after the date of death (alternate valuation period) is valued as of the date of distribution, sale, exchange, or other disposition (transaction date). I.R.C. section 2032(a)(1). Property not distributed, sold, exchanged, or otherwise disposed of during the alternate valuation period is valued as of the date that is 6 months after the decedent's death (6-month date). I.R.C. section 2032(a)(2). Any interest or estate that is affected by the mere lapse of time is includible at its value as of the date of death (instead of any later date), with adjustment for any difference in its value as of the later date that is not due to the mere lapse of time. I.R.C. section 2032(a)(3).

Section 2031(c) was enacted by the Taxpayer Relief Act of 1997, 105 Public Law 34 section 508(a), 111 Stat. 788 (August 5, 1997). Pursuant to this section, a decedent's estate may elect to exclude from the gross estate a portion of the fair market value of property includible in the decedent's gross estate by granting a qualified conservation easement on that property after the date of the decedent's death but on or before the due date (including extensions) for filing the Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

On April 25, 2008, a notice of proposed rulemaking (Reg–112196–07) relating to amendments to the Estate Tax Regulations (26 CFR part 20) under section 2032 of the Code was published in the **Federal Register** (73 FR 22300). Those regulations (73 FR 22300) proposed to clarify that the election to use the alternate valuation method under section 2032 is available to estates that experience a reduction in the value of the gross estate during the alternate valuation period, but only to the extent that the reduction in value is due to market conditions and not to other post-death events (events occurring during the alternate valuation period). The term ''market conditions'' was defined as events outside of the control of the decedent (or the decedent's executor or trustee) or other person whose property is being valued that affect the fair market value of the property includible in the decedent's gross estate. Changes in value due to mere lapse of time or to other post-death events would be ignored in determining the value of the decedent's gross estate under the alternate valuation method.

No hearing was held because no person or organization requested to speak at a hearing. However, written comments were received. Some commentators expressed concern that the proposed regulations (73 FR 22300) would create administrative problems because an estate would be required to trace property and to obtain appraisals based on hypothetical property. Some commentators stated that the current and the proposed regulations (73 FR 22300) did not adequately address the application of section 2032 to certain types of property, such as property the title to which passes at death due to contract, and to transactions carried out during the alternate valuation period between an estate and partnerships, corporations, or other entities. For example, § 20.2032–1(c)(1) does not address the consequences of the estate contributing property to a partnership during the alternate valuation period.

In addition, commentators requested guidance on the effect of a section 2032 election in calculating the portion of a trust includible in the decedent's gross estate under section 2036. This would arise in the situation where the decedent had retained the right to an annuity, unitrust, or other payment from the trust for life, for any period not ascertainable without reference to the grantor's death, or for a period that does not in fact end before the grantor's death. Further, some commentators requested guidance on the treatment of the grant, during the alternate valuation period, of a qualified conservation easement under section 2031(c).

Many commentators acknowledged that estates may enter into a transaction during the alternate valuation period that could result in the abuse of the section 2032 election. They suggested that the IRS and Treasury Department would better serve taxpayers and address any potential abuse by ensuring that the regulations address the issues described in this preamble rather than finalizing the approach taken in the proposed regulations.

In view of the comments, the Treasury Department and the IRS are withdrawing the proposed regulations (73 FR 22300) by the publication of these proposed regulations in the **Federal Register**. Nevertheless, see the background section of those proposed regulations (73 FR 22300) for a summary of the legislative history of section 2032 and the purpose for issuing these proposed regulations.

This document contains revised proposed amendments to the regulations promulgated under section 2032. These proposed regulations make irrelevant, for purposes of determining the value of property as of the transaction date or the 6-month date, whichever is applicable (alternate valuation date), the percentage of ownership or control in an entity includible in the gross estate and the extent of participation by the estate (or other holder of property includible in the gross estate) in the relevant post-death events.

Certain provisions in the current regulations that have been in effect since 1954 are restated in the proposed regulations for purposes of clarity. The effective date of those provisions is not changed.

Explanation of Provisions

These regulations propose to amend several sections of § 20.2032–1. Generally, paragraph (c)(1)(i) identifies transactions that constitute distributions, sales, exchanges, or dispositions of property. If an estate's (or other holder's) property is subject to such a transaction during the alternate valuation period, the estate must value that property on the transaction date. The value included in the gross estate is the fair market value of that property on the date of and immediately prior to the transaction. The term ''property'' refers to the property includible in the decedent's gross estate under section 2033.

Sections 20.2032–1(c)(1)(ii) and (c)(1)(iii)(A) identify two exceptions to the rule in § 20.2032–1(c)(1)(i). If either exception applies, the estate may use the 6-month date and value the property held on that date. The exception in § 20.2032–1(c)(1)(ii) applies only to transactions in which an interest in a corporation, partnership, or other entity (entity) includible in the decedent's gross estate is exchanged for one or more different interests (for example, a different class of stock) in the same entity or in an acquiring or resulting entity or entities during the alternate valuation period. Such transactions may include, without limitation, reorganizations, recapitalizations, mergers, or similar transactions. This exception substitutes a fair market value test for the corporate provisions in the current regulations. Specifically, this paragraph proposes that, if, during the alternate valuation period, the interest in an entity includible in the gross estate is exchanged for a different interest in the same entity, or in an acquiring or resulting entity or entities, and if the fair market value of the interest on the date of the exchange equals the fair market value of the property for which it was exchanged, then the transaction will not be treated as an exchange for purposes of section 2032(a)(1). As a result, the estate may use the 6-month date to value the interest in the same entity or in the acquiring or resulting entity or entities received in the exchange. For this purpose, the fair market values of the surrendered property and received interest are deemed to be equal if the difference between the fair market values of the surrendered property and the received interest does not exceed 5 percent of the fair market value of the surrendered property as of the transaction date. This section has no effect on any other provision of the Code that is applicable to the transaction. For example, the provisions of chapter 14 may apply even if the transaction does not result in a deemed exchange for section 2032 purposes as a result of satisfying the provisions of § 20.2032–1(c)(1)(ii).

Section 20.2032–1(c)(1)(iii)(A) proposes that, if, during the alternate valuation period, an estate (or other holder) receives a distribution from a business entity, bank account, or retirement trust (entity) and an interest in that entity is includible in the decedent's gross estate, the estate may use the 6-month date to value the property held in the estate if the following requirement is satisfied. The fair market value of the interest in the entity includible in the gross estate immediately before the distribution must equal the sum of the fair market value of the distributed property on the date of the distribution and the fair market value of the interest in the entity includible in the gross estate immediately after the distribution. If this requirement is not satisfied, the estate must use the fair market value as of the distribution date and immediately prior to the distribution of the entire interest in the entity includible in the gross estate. For purposes of this section, any distribution is deemed to consist first of excluded property (as defined in § 20.2032–1(d)), if any, and then of included property.

Section 20.2032–1(c)(1)(iv) proposes an aggregation rule to use in calculating the fair market value of each portion of property that is, or is deemed to be distributed, sold, exchanged, or otherwise disposed of during the alternate valuation period, and that remains in the gross estate on the 6-month date.

Section 20.2032–1(c)(iii)(B) provides a special rule to use in determining the portion of a trust includible, by reason of a retained interest, in the decedent's gross estate under section 2036 as of the alternate valuation date. An example is added to § 20.2032–1(e) to illustrate this special rule and the effect of the provisions of § 20.2032–1(d) and § 20.2032–1(f)(2)(i) on this calculation.

Section 20.2032–1(c)(2) is amended to clarify when property, the title to which passes by contract or by operation of law, is deemed to be distributed, sold, exchanged, or otherwise disposed of for section 2032 purposes. Section 20.2032–1(c)(3) is amended to clarify the person or entity that will be treated as having sold, exchanged, or otherwise disposed of the property for section 2032 purposes.

Section 20.2032–1(c)(4) is added to provide that if Congress, by statute, has deemed that a post-death event has occurred on the decedent's date of death, the post-death event will not result in a distribution, sale, exchange, or other disposition of the property for section 2032 purposes. To date, the only post-death event that satisfies this exception is the grant, during the alternate valuation period, of a conservation easement in accordance with section 2031(c). With respect to such a grant, for section 2032 purposes, the estate must determine the fair market value of the property as of the date of death and as of the alternate valuation date, taking into account the effect of the easement on each of those valuation dates.

Section 20.2032–1(c)(5) provides examples, not intended to be exclusive, illustrating the provisions of § 20.2032–1(c).

Section 20.2032–1(f) is revised to clarify the types of factors that impact the fair market value of property and the effect of which will be recognized under section 2032. This paragraph also explains and illustrates these rules.

Proposed Effective/Applicability Date

Section 20.2032–1(c)(2) except the second sentence of the introductory text, § 20.2032–1(c)(3) except § 20.2032–1(c)(3)(i)(C), the chart in *Example 1* of § 20.2032–1(e), § 20.2032–1(f)(2) except the last sentence, and the first and third sentences in § 20.2032–1(f)(2)(ii) are

applicable to decedents dying after August 16, 1954. Sections 20.2032–1(a) introductory text, 20.2032–1(a)(1), 20.2032–1(a)(2), 20.2032–1(c)(1)(i), (c)(1)(ii), (c)(1)(iii), (c)(1)(iv), (c)(3)(i)(C), (c)(4), (c)(5), (f)(1), (f)(2)(i), and (f)(3), the second sentence in § 20.2032–1(c)(2) introductory text, § 20.2032–1(e) except the chart in *Example 1,* the last sentence in § 20.2032–1(f)(2) introductory text, and the second sentence in § 20.2032–1(f)(2)(ii) are applicable to estates of decedents dying on or after the date of publication of the Treasury decision adopting these rules as final in the **Federal Register**.

Special Analyses

It has been determined that this proposed regulation is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department also request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for March 9, 2012 at 10 a.m. in Auditorium, Internal Revenue Building. Due to building security procedures, visitors must use the main building entrance 1111 Constitution Avenue NW., Washington, DC. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For more information about having your name placed on the list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written (a signed original and eight (8) copies) or electronic comments by February 16, 2012 and an outline of the topics to be discussed and the time to be devoted to each topic by February 17, 2012. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Theresa M. Melchiorre, Office of Associate Chief Counsel (Passthroughs and Special Industries).

List of Subjects in 26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

Withdrawal of Notice of Proposed Rulemaking

Under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (Reg–112196–07) that was published in the **Federal Register** on April 25, 2008 (73 FR 22300) is withdrawn.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 20 is proposed to be amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Paragraph 1. The authority citation for part 20 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

§ 20.2032–1 [Amended]

Par. 2. For each entry in the table, each paragraph in the ''Old Paragraph'' column is redesignated as indicated in the ''New Paragraph'' column:

Old paragraph	New paragraph
20.2032–1(c)(1)	20.2032–1(c)(1)(i)
20.2032–1(c)(3)	20.2032–1(c)(3)(i)
20.2032–1(c)(3)(i)	20.2032–1(c)(3)(i)(A)
20.2032–1(c)(3)(ii)	20.2032–1(c)(3)(i)(B)
20.2032–1(c)(3)(iii)	20.2032–1(c)(3)(i)(C)
20.2032–1(c)(3)(iv)	20.2032–1(c)(3)(i)(D)
20.2032–1(c)(3)(v)	20.2032–1(c)(3)(i)(E)
20.2032–1(f)	20.2032–1(f)(2)
20.2032–1(f)(1)	20.2032–1(f)(2)(i)
20.2032–1(f)(2)	20.2032–1(f)(2)(ii)

Par. 3. Section 20.2032–1 is amended by:

1. Revising paragraph (a) introductory text.
2. Revising paragraphs (a)(1) and (a)(2).
3. Revising newly-designated paragraph (c)(1)(i), newly-designated paragraph (c)(3)(i)(C), paragraph (e) introductory text, the introductory text of paragraph (e) *Example 1* preceding the table, the last sentence in newly-designated paragraph (f)(2) introductory text, newly-designated paragraph (f)(2)(i), and the second sentence in newly-designated paragraph (f)(2)(ii).
4. Adding new paragraphs (c)(1)(ii), (c)(1)(iii), (c)(1)(iv), (c)(4), (c)(5), (f)(1), and (f)(3).
5. Adding a paragraph heading and a new second sentence in paragraph (c)(2) introductory text.
6. Adding a paragraph heading to paragraph (c)(3).
7. Designating the undesignated language following newly-designated paragraph (c)(3)(i)(E) as paragraph (c)(3)(ii) and adding a paragraph heading to this paragraph.
8. Designating the table in paragraph (e) as *Example 1* and adding paragraph (e) *Example 2* following the table.
9. Revising the paragraph heading and adding two sentences at the end of paragraph (h).

The additions and revisions read as follows.

§ 20.2032–1 Alternate valuation.

(a) *In general.*—In general, section 2032 provides for the valuation of a decedent's gross estate at a date (alternate valuation date) other than the date of the decedent's death. More specifically, if an executor elects the alternate valuation method under section 2032, the property includible in the decedent's gross estate on the date of death (decedent's interest) is valued as of whichever of the following dates is applicable:

(1) Any property distributed, sold, exchanged, or otherwise disposed of within 6 months (1 year, if the decedent died on or before December 31, 1970) after the decedent's death (alternate valuation period) is valued as of the date on which it is first distributed, sold, exchanged, or otherwise disposed of (transaction date).

(2) Any property not distributed, sold, exchanged, or otherwise disposed of during the alternate valuation period is valued as of the date 6 months (1 year, if the decedent died on or before December 31, 1970) after the date of the decedent's death (6-month date).

* * * * *

(c) *Meaning of ''distributed, sold, exchanged, or otherwise disposed of''*—(1) *In general*—

(i) *Transactions included.* The phrase ''distributed, sold, exchanged, or otherwise disposed of'' comprehends all possible ways by which property ceases to form a part of the gross estate. This phrase includes, but is not limited to:

(A) The use of money on hand at the date of the decedent's death to pay funeral or other expenses of the decedent's estate;

(B) The use of money on hand at the date of the decedent's death to invest in other property;

(C) The exercise of employee stock options;

(D) The surrender of stock for corporate assets in partial or complete liquidation of a corporation, and similar transactions involving partnerships or other entities;

(E) The distribution by the estate (or other holder) of included property as defined in paragraph (d) of this section;

(F) The transfer or exchange of property for other property, whether or not gain or loss is currently recognized for income tax purposes;

(G) The contribution of cash or other property to a corporation, partnership, or other entity, whether or not gain or loss is currently recognized for income tax purposes;

(H) The exchange of interests in a corporation, partnership, or other entity (entity) for one or more different interests (for example, a different class of stock) in the same entity or in an acquiring or resulting entity or entities (see, however, paragraph (c)(1)(ii) of this section); and

(I) Any other change in the ownership structure or interests in, or in the assets of, a corporation, partnership, or other entity, an interest in which is includible in the gross estate, such that the included property after the change does not reasonably represent the included property at the decedent's date of death (see, however, paragraph (c)(1)(iii)(A) of this section). Such a change in the ownership structure or interests in or in the assets of an entity includes, without limitation—

(*1*) The dilution of the decedent's ownership interest in the entity due to the issuance of additional ownership interests in that entity;

(*2*) An increase in the decedent's ownership interest in the entity due to the entity's redemption of the interest of a different owner;

(*3*) A reinvestment of the entity's assets; and

(*4*) A distribution or disbursement of property (other than excluded property as defined in paragraph (d) of this section) by the entity (other than expenses, such as rents and salaries, paid in the ordinary course of the entity's business), with the effect that the fair market value of the entity before the occurrence does not equal the fair market value of the entity immediately thereafter.

(ii) *Exchange of an interest in an existing corporation, partnership, or other entity includible in the gross estate.* If an interest in a corporation, partnership, or other entity (entity) is includible in the gross estate at death and that interest is exchanged as described in paragraph (c)(1)(i)(H) of this section for one or more different interests in the same entity or in an acquiring or resulting entity or entities, the transaction does not result in an exchange or disposition under section 2032(a)(1) and paragraph (c)(1)(i)(H) of this section if, on the date of the exchange, the fair market value of the interest in the entity equals the fair market value of the interest(s) in the same entity or the acquiring or resulting entity or entities. Such transactions may include, without limitation, reorganizations, recapitalizations, mergers, or similar transactions. In determining whether the exchanged properties have the same fair market value, a difference in value equal to or less than 5 percent of the fair market value, as of the transaction date, of the property interest includible in the gross estate on the decedent's date of death is ignored. If the transaction satisfies the requirements of this paragraph, the property to be valued on the 6-month date (or on the transaction date, if any, subsequent to this transaction) is the property received in the exchange, rather than the property includible in the decedent's gross estate at the date of death. This paragraph has no effect on any other provision of the Internal Revenue Code that is applicable to the transaction. For example, even if the transaction does not result in a deemed exchange as a result of satisfying the requirements of this paragraph, the provisions of chapter 14 may be applicable to determine fair market value for Federal estate tax purposes.

(iii) *Distributions from an account or entity in which the decedent held an interest at death.*

(A) *In general.* If during the alternate valuation period, an estate (or other holder of the decedent's interest) receives a distribution or disbursement (to the extent the distribution or disbursement consists of included property, as defined in paragraph (d) of this section) (payment) from a partnership, corporation, trust (including an IRA, Roth IRA, 403(b), 401(k), Thrift Savings Plan, etc.), bank account or similar asset, or other entity (entity), and an interest in that entity is includible in the gross estate, the payment does not result in a distribution under paragraph (c)(1)(i)(I) of this section. However, this rule applies only if, on the date of the payment, the fair market value of the decedent's interest in the entity before the payment equals the sum of the fair market value of the payment made to the estate (or other holder of the decedent's interest in the entity) and the fair market value of the decedent's interest in the entity, not including any excluded property, after the payment. In this case, the alternate valuation date of the payment is the date of the payment, and the alternate valuation date of the decedent's remaining interest in the entity, if any, is the 6-month date (or the transaction date, if any, subsequent to this payment). If this requirement is not met, the payment is a distribution under paragraph (c)(1)(i) of this section, and the alternate valuation date of the decedent's entire interest in the entity is the date of the payment. For purposes of this section, a distribution or disbursement is deemed to consist first of excluded property, if any, and then of included property, as those terms are defined in paragraph (d) of this section.

(B) *Special rule.* If the decedent's interest in an entity that is includible in the gross estate consists of the amount needed to produce an annuity, unitrust, remainder, or other such payment valued under section 2036, then assuming the distribution satisfies the general rule set forth in paragraph (c)(1)(iii)(A) of this section, the value of each distribution (to the extent it is deemed to consist of included property) payable (whether or not actually paid) during the alternate valuation period shall be added to the value of the entity on the alternate valuation date. The sum of the fair market value of these distributions when made and the fair market value of the entity on the alternate valuation date shall be used as the fair market value of the entity in computing the amount, valued as of the alternate valuation date, to be included in the decedent's gross estate under

section 2036. See *Example 2* of paragraph (e) of this section.

(iv) *Aggregation.* For purposes of this section, a special aggregation rule applies in two situations to determine the value to be included in the gross estate pursuant to an alternate valuation election. Those two situations arise when, during the alternate valuation period, less than all of the interest includible in the decedent's gross estate in a particular property is the subject of a transaction described in paragraphs (c)(1)(i), (c)(1)(ii), (c)(1)(iii), or (c)(2) of this section. In one situation, one or more portions of the includible interest are subject to such a transaction and a portion is still held on the 6-month date. In the other situation, the entire interest includible in the gross estate is disposed of in two or more such transactions during the alternate valuation period, so that no part of that interest remains on the 6-month date. In both of these situations, the fair market value of each portion of the interest includible in the gross estate is to be determined as follows. The fair market value of each portion subject to such a transaction, and the portion remaining, if any, on the 6-month date, is the fair market value, as of the transaction date, or the 6-month date for any remaining portion, of the entire interest includible in the gross estate on the decedent's date of death, multiplied by a fraction. The numerator of that fraction is the portion of the interest subject to that transaction, or the portion remaining on the 6-month date, and the denominator is the entire interest includible in the gross estate at the decedent's date of death.

(2) *Property distributed.* * * * Property is not considered ''distributed'' merely because property passes directly at death as a result of a beneficiary designation or other contractual arrangement or by operation of law. * * *

(3) *Person able to sell, exchange, or otherwise dispose of property includible in the gross estate.* (i) * * *

(A) * * *

(B) * * *

(C) An heir, devisee, or other person to whom title to property passes directly on death by reason of a beneficiary designation or other contractual arrangement or by operation of law;

(D) * * *

(E) * * *

(ii) *Binding contracts.* * * *

(4) *Certain post-death events.* If the effect of any other provision of the Internal Revenue Code is that a post-death event is deemed to have occurred on the date of death, the post-death event will not be considered a transaction described in paragraph (c)(1)(i) of this section. For example, the grant, during the alternate valuation period, of a qualified conservation easement in accordance with section 2031(c) is not a transaction described in paragraph (c)(1)(i) of this section. Pursuant to section 2031(c), the post-death grant of the easement is effective for Federal estate tax purposes as of the date of the decedent's death. As a result, for purposes of determining both the estate's eligibility to make an election under this section and the value of the property on the alternate valuation date, the fair market value of the property as of the date of death must be compared to the fair market value of that property as of the alternate valuation date, in each case as that value is adjusted by reason of the existence of the section 2031(c) qualified easement.

(5) *Examples.* The application of paragraph (c) of this section is illustrated in the following examples. In each example, decedent's (D's) estate elects to value D's gross estate under the alternate valuation method, so that the alternate valuation date of the property includible in the gross estate on D's date of death is either the transaction date or the 6-month date. In each example, assume that the only factors affecting value during the alternate valuation period, and the only occurrences described in paragraphs (c)(1)(i) and (c)(2) of this section, are those described in the example.

Example 1. At D's death, D owned property with a fair market value of $100X. Two months after D's death (Date 1), D's executor and D's family members formed a limited partnership. D's executor contributed all of the property to the partnership and received an interest in the partnership in exchange. The investment of the property in the partnership is a transaction described in paragraph (c)(1)(i)(F) and/or (G) of this section. As a result, the alternate valuation date of the property is the date of its contribution and the value to be included in D's gross estate is the fair market value of the property immediately prior to its contribution to the partnership. The result would be the same if D's estate instead had contributed property to a limited partnership formed prior to D's death by D and/or other parties, related or unrelated to D. Further, the result would be the same if D's estate had contributed the property to a corporation, publicly traded or otherwise, or other entity after D's death and prior to the 6-month date.

Example 2. At D's death, D held incentive stock options that were qualified under section 422. D's executor exercised all of the stock options prior to the 6-month date. The exercise of the stock options is a transaction described in paragraph (c)(1)(i)(C) of this section. Thus, the alternate valuation date of the stock options is the date of their exercise and the value to be included in D's gross estate is the fair market value of the stock options immediately prior to their exercise. The result would be the same if the stock options were not qualified under section 422 and were taxable under section 83 upon exercise.

Example 3. D's gross estate includes a controlling interest in Y, a corporation. During the alternate valuation period, Y issued additional shares of stock and awarded them to certain key employees. D's interest in Y was diluted to a non-controlling interest by Y's issuance of the additional stock. Y's issuance of the stock is a transaction described in paragraph (c)(1)(i)(I) of this section. The value to be included in D's gross estate is the fair market value of D's stock immediately prior to Y's issuance of the additional stock. The result would be the same if D's estate included a minority interest in Y on the date of death and that interest became a controlling interest during the alternate valuation period as the result of Y's redemption of the shares of another shareholder.

Example 4. At D's death, D owned stock in Y, a corporation. During the alternate valuation period, the Board of Directors of Y contributed all of Y's assets to a partnership in exchange for interests therein. The contribution is a transaction described in paragraph (c)(1)(i)(I)(*3*) of this section. Therefore, the alternate valuation date of D's stock in Y is the date of the reinvestment of Y's assets and the value to be included in D's gross estate is the fair market value of D's stock in Y immediately prior to the reinvestment. The result would be the same even if the Board of Directors had contributed only a portion of Y's assets to the partnership during the alternate valuation period.

Example 5. (i) At D's death, D owned common stock in Y, a corporation. Two months after D's death (Date 1), there was a reorganization of Y. In the reorganization, D's estate exchanged all of its stock for a new class of stock in X. On the date of the reorganization, the difference between the fair market value of the stock D's estate received and the fair market value on that date of the stock includible in D's gross estate at death was greater than 5% of the fair market value, as of the date of the reorganization, of the stock D held at death. The reorganization is a transaction described in paragraph (c)(1)(i)(H) of this section and does not satisfy the exception described in paragraph (c)(1)(ii) of this section. Thus, the alternate valuation date is the date of the reorganization and the value to be included in D's gross estate is the fair market value of the stock immediately prior to the reorganization. This result is not affected by whether or not the reorganization is a tax-free reorganization for Federal income tax purposes. The result would be the same if the stock had been held, for example, in an IRA with designated beneficiaries. See paragraph (c)(3)(i)(C) of this section.

(ii) If, instead, the difference between the two fair market values as of the date of the reorganization was equal to or less than 5% of the fair market value, as of the date of the reorganization, of the stock D held at death, the reorganization would satisfy the exception provided in paragraph (c)(1)(ii) of

this section. Thus, the alternate valuation date would be the 6-month date. The value to be included in D's gross estate would be the fair market value, determined as of the 6-month date, of the new class of stock in Y that D's estate received in the reorganization.

Example 6. (i) At D's death, D owned an interest in Partnership X that is includible in D's gross estate. During the alternate valuation period, X made a cash distribution to each of the partners. The distribution consists entirely of included property as defined in paragraph (d) of this section. The distribution is a transaction described in paragraph (c)(1)(i)(I)(*4*) of this section. On the date of the distribution, the fair market value of D's interest in X before the distribution equaled the sum of the distribution paid to D's estate and the fair market value of D's interest in X immediately after the distribution. Thus, pursuant to paragraph (c)(1)(iii)(A) of this section, the alternate valuation date of the property distributed is the date of the distribution, and the alternate valuation date of D's interest in X is the 6-month date.

(ii) If, instead, the fair market value of D's interest in X before the distribution did not equal the sum of the distribution paid to D's estate and the fair market value of D's interest in X (not including any excluded property) immediately after the distribution, then pursuant to paragraph (c)(1)(i)(I)(*4*) of this section, the alternate valuation date of D's entire interest in X would be the date of the distribution.

Example 7. D died owning 100% of Blackacre. D's will directs that an undivided 70% interest in Blackacre is to pass to Trust A for the benefit of D's surviving spouse, and an undivided 30% interest is to pass to Trust B for the benefit of D's surviving child. Three months after D's death (Date 1), the executor of D's estate distributed a 70% interest in Blackacre to Trust A. Four months after D's death (Date 2), the executor of D's estate distributed a 30% interest in Blackacre to Trust B. The following values are includible in D's gross estate pursuant to paragraphs (c)(1)(i)(E) and (c)(1)(iv): The fair market value of the 70% interest in Blackacre, determined by calculating 70% of the fair market value of all (100%) of Blackacre as of Date 1; and the fair market value of the 30% interest in Blackacre, determined by calculating 30% of the fair market value of all (100%) of Blackacre as of Date 2.

Example 8. At D's death, D owned 100% of the units of a limited liability company (LLC). Two months after D's death (Date 1), D's executor sold 20% of the LLC units to an unrelated third party. Three months after D's death (Date 2), D's executor sold 40% of the LLC units to D's child. On the 6-month date, the estate held the remaining 40% of the units in the LLC. The alternate valuation date of the units sold is their sale date (Date 1 and Date 2, respectively) pursuant to paragraph (a) of this section. The alternate valuation date of the units remaining in the estate is the 6-month date, as these units have not been distributed, sold, exchanged, or otherwise disposed of in a transaction described in paragraphs (c)(1)(i) or (c)(2) of this section prior to this date. Pursuant to paragraph (c)(1)(iv) of this section, the value of the units disposed of on Date 1 and Date 2 is the fair market value of the 20% and 40% interests, determined by calculating 20% and 40% of the fair market value as of Date 1 and Date 2, respectively, of all the units (100%) includible in the gross estate at D's death. Similarly, the value of the units held on the 6-month date to be included in D's gross estate is the fair market value of those units, determined by taking 40% of the fair market value on the 6-month date of all of the units (100%) includible in the gross estate at D's death. As a result, the fact that the partial sales resulted in the creation of three minority interests is not taken into account in valuing under section 2032 any portion of the LLC interests held by D at D's death.

Example 9. Husband died owning an interest in a brokerage account titled in the names of Husband and Wife with rights of survivorship. On Husband's death, the account held marketable securities, corporate bonds, municipal bonds, certificates of deposit, and cash. During the alternate valuation period, Wife's stockbroker advised her that the account could not be held under the social security number of a deceased individual. Accordingly, approximately one month after Husband's death, Wife directed the stockbroker to transfer the account into an account titled in Wife's sole name. Because title to the joint account passes to Wife at the moment of Husband's death by operation of law, the transfer of the joint account into an account in Wife's sole name is not a transaction described in paragraph (c)(1)(i) of this section. Accordingly, the value of the assets held in Wife's solely owned account will be includible in Husband's gross estate at their fair market value on the 6-month date. The result would be the same if the brokerage firm automatically transferred title to the account into Wife's name, or if Wife changed the beneficiary designation for the account. Finally, the result would be the same if, instead of an account with a brokerage firm, the assets were held in Husband's retirement account (IRA or similar trust such as a Roth IRA, 403(b) plan, or 401(k) plan) or Wife's ownership of the account was the result of a contract (a beneficiary designation form) rather than operation of law.

Example 10. Assume the same facts as in *Example 9* except that, during the alternate valuation period, Wife directed the stockbroker to sell a bond in the account. The sale is a transaction described in paragraph (c)(1)(i)(I)(*4*) of this section. Wife is an individual described in paragraph (c)(3)(i)(D) of this section. Thus, the alternate valuation date of the bond is the date of its sale. The values to be included in D's gross estate are the fair market value of the bond on date of its sale, and the fair market value of the balance of the account on the 6-month date. The result would be the same if the bond had matured and was retired during the alternate valuation period. The result also would be the same if the bond was held within a retirement account (IRA or similar trust such as a Roth IRA, 403(b) plan, or 401(k) plan).

Example 11. Assume the same facts as in *Example 9* except that, during the alternate valuation period, Wife withdrew cash from the account or otherwise received income or other disbursements from the account. Each such withdrawal or disbursement from the account (to the extent it consists of included property as defined in paragraph (d) of this section) is a distribution described in paragraph (c)(1)(i)(I)(*4*) of this section. Provided that, on the date of each distribution, the fair market value of the account before the distribution (not including excluded property) equals the sum of the included property distributed and the fair market value of the included property in the account immediately after the distribution in accordance with paragraph (c)(1)(iii)(A) of this section, the alternate valuation date for each distribution is the date of the distribution and the alternate valuation date for the account is the 6-month date. The value to be included in the gross estate is the fair market value of each distribution of included property (determined as of the date of distribution) and the fair market value of the account on the 6-month date. The result would be the same if the assets were held in an IRA or similar trust, such as a Roth IRA, 403(b) plan, or 401(k) plan.

Example 12. Husband died with a retirement account, having named his three children, in specified shares totaling 100%, as the designated beneficiaries of that account. During the alternate valuation period, the account was divided into three separate retirement accounts, each in the name of a different child and funded with that child's designated share. The division of the retirement account is not a transaction described in paragraph (c)(1)(i) of this section by reason of paragraph (c)(2) of this section, so the alternate valuation date for each of the new accounts is the 6-month date.

Example 13. (i) D's gross estate includes real property. During the alternate valuation period, D's executor grants a conservation easement that restricts the property's use under local law but does not satisfy the requirements of section 2031(c). The easement reduces the fair market value of the property. The executor's grant of the conservation easement is a transaction described in paragraph (c)(1)(i)(E) of this section and does not satisfy the exception described in paragraph (c)(4) of this section. Therefore, the alternate valuation date for the property is the date the easement was granted, and the value to be included in D's gross estate is the fair market value of the property immediately prior to the grant.

(ii) Assume, instead, that the easement satisfied the requirements of section 2031(c) and, thus, satisfied the exception described in paragraph (c)(4) of this section. Pursuant to paragraph (c)(4), for purposes of determining both the estate's eligibility to make an election under section 2032 and the value of the property on the 6-month date, the section 2031(c) qualified easement is taken into account in determining both the fair market value of the property on D's date of death and the fair market value of the property on the 6-month date.

* * * * *

(e) *Examples.* –The application of paragraph (d) of this section regarding ''included property'' and ''excluded property'' is illustrated by the following examples.

Example 1. Assume that the decedent (D) died on January 1, 1955: * * *

Example 2. (i) At death, D held a qualified interest described in section 2702(b) in the form of an annuity in a grantor retained annuity trust (GRAT) D had created and funded with $150,000. The trust agreement provides for an annual annuity payment of $12,000 per year to D or D's estate for a term of 10 years. At the expiration of the 10-year term, the remainder is to be distributed to D's child. D dies prior to the expiration of the 10-year term. On D's date of death, the fair market value of the property in the GRAT is $325,000.

(ii) The only assets in the GRAT are an apartment building and a bank account. Three months after D's date of death, an annuity payment of $12,000 is paid in cash to D's estate. The monthly rents from the apartment building total $500. After the date of death and prior to the payment date, the GRAT received $1,500 in excluded property in the form of rent. Pursuant to paragraph (c)(1)(iii)(A) of this section, $1,500 of the $12,000 distributed is deemed to be excluded property for purposes of section 2032. The distribution is a transaction described in paragraph (c)(1)(i)(I)(*4*) of this section. On the date of the distribution, the fair market value of D's interest in the GRAT before the distribution equals the sum of the distribution paid to D's estate and the fair market value of D's interest in the GRAT immediately after the distribution. Thus, pursuant to paragraph (c)(1)(iii)(A) of this section, the alternate valuation date for the $10,500 cash distribution, which is included property, is the date of its distribution, and the alternate valuation date of the GRAT is the 6-month date.

(iii) The calculation of the value of D's interest in the GRAT includible in D's gross estate at D's death pursuant to section 2036 must be computed under the special rule of paragraph (c)(1)(iii)(B) of this section as a result of the estate's election to use the alternate valuation method under section 2032. On the 6-month date, the section 7520 interest rate is 6% and the fair market value of the property in the GRAT is $289,500. Pursuant to paragraph (c)(1)(iii)(B) of this section, the fair market value of the GRAT property deemed to be included property is $300,000 ($289,500 plus $10,500). Accordingly, for purposes of determining the fair market value of the corpus includible in D's gross estate under section 2036(a)(1) as of the 6-month date, see § 20.2036–1(c)(2), using a GRAT corpus of $300,000 and, pursuant to paragraph (f)(2)(i) of this section, a section 7520 rate of 6%.

(f) *Post-death factors and occurrences.*—(1) *In general.* The election to use the alternate valuation method under section 2032 permits property includible in the gross estate on the decedent's date of death to be valued on the 6-month date, rather than on the date of death. Thus, the election permits a valuation for Federal estate tax purposes that reflects the impact of factors such as economic or market conditions, occurrences described in section 2054 (to the extent not compensated by insurance or otherwise, and not deducted under that section), and other factors or occurrences during the alternate valuation period, as set forth in guidance issued by the Secretary. Those factors and occurrences do not include the mere lapse of time described in paragraph (f)(2) of this section, or transactions described in paragraph (c)(1)(i) or (c)(2) of this section that are not excluded under paragraphs (c)(1)(ii), (c)(1)(iii)(A), and (c)(4) of this section. Generally, management decisions made in the ordinary course of operating a business, such as a corporation, a partnership, or other business entity, are taken into account under this section as occurrences related to economic or market conditions. To the extent, however, that these decisions change the ownership or control structure of the business entity, or otherwise are included in paragraph (c)(1)(i) or (c)(2) of this section and are not excluded by paragraphs (c)(1)(ii), (c)(1)(iii)(A), or (c)(4) of this section, they will be treated as described in paragraph (c)(1)(i) of this section.

(2) *Mere lapse of time.* * * * The application of this paragraph is illustrated in paragraphs (f)(2)(i) and (f)(2)(ii) of this section:

(i) *Life estates, remainders, and similar interests.* (A) The fair market value of a life estate, remainder, term interest or similar interest as of the alternate valuation date is determined by applying the methodology prescribed in § 20.2031–7, subject to the following two sentences. The age of each person whose life expectancy may affect the fair market value of the interest shall be determined as of the date of the decedent's death. The fair market value of the property and the applicable interest rate under section 7520 shall be determined using values applicable on the alternate valuation date.

(B) *Examples.* The application of paragraph (f)(2)(i)(A) of this section is illustrated in the following examples.

Example 1. Assume that the decedent (D) or D's estate was entitled to receive certain property upon the death of A, who was entitled to the income from the property for life. At the time of D's death after April 30, 2009, the fair market value of the property was $50,000, and A was 47 years and 5 months old. In the month in which D died, the section 7520 rate was 6.2%, but rose to 7.4% on the 6-month date. The fair market value of D's remainder interest as of D's date of death was $9,336.00 ($50,000 x 0.18672, the single life remainder factor from Table S for a 47 year old at a 6.2% interest rate), as illustrated in *Example 1* of § 20.2031–7T(d)(5). If, because of economic conditions, the property declined in value during the alternate valuation period and was worth only $40,000 on the 6-month date, the fair market value of the remainder interest would be $5,827 ($40,000 X 0.14568, the Table S value for a 47 year old at a 7.4% interest rate), even though A would have been 48 years old on the 6-month date.

Example 2. D created an intervivos charitable remainder annuity trust (CRAT) described in section 664(d)(1). The trust instrument directs the trustee to hold, invest, and reinvest the corpus of the trust and to pay to D for D's life, and then to D's child (C) for C's life, an amount each year equal to 6% of the initial fair market value of the trust. At the termination of the trust, the corpus, together with the accumulated income, is to be distributed to N, a charitable organization described in sections 170(c), 2055(a), and 2522(a). D died, survived by C. D's estate is entitled to a charitable deduction under section 2055 for the present value of N's remainder interest in the CRAT. Pursuant to § 1.664–2(c) and § 20.7520–2, in determining the fair market value of the remainder interest as of the alternate valuation date, D's executor may elect to use the section 7520 rate in effect for either of the two months immediately preceding the month in which the alternate valuation date occurs. Regardless of the section 7520 rate selected, however, the factor to be used to value the remainder interest is the appropriate factor for C's age on the date of D's death.

(2)(ii) *Patents.* * * * Six months after the date of the decedent's death, the patent was sold for its then fair market value that had decreased to $60,000 because of the lapse of time. * * *

(3) *Examples.* The following examples illustrate the application of this paragraph (f). In each example, decedent's (D's) estate elects to value D's gross estate under the alternate valuation method, so that the alternate valuation date of the property includible in the gross estate on D's date of death is either the transaction date or the 6-month date. In each example, assume that the only factors affecting value, and the only occurrences described in paragraph (c)(1)(i) or (c)(2) of this section, taking place during the alternate valuation period are those described in the example.

Example 1. At D's death, D's gross estate includes a residence. During the alternate valuation period, the fair market value of the residence (as well as the residential market in the area generally) declines due to a reduction in the availability of credit throughout the United States and, consequently, a decline in the availability of mortgages. The decline in the availability of mortgages is an economic or market condition. Therefore, in valuing the residence on the 6-month date, the effect of this decline on the fair market value of the residence is to be taken into account.

Example 2. (i) At D's death, D is the sole shareholder of corporation Y, a manufacturing company. Four months after

D's death, Y's physical plant is destroyed as a result of a natural disaster. The disaster affects a large geographic area and, as a result, the economy of that area is negatively affected. Five months after D's death, Y's Board of Directors votes to liquidate and dissolve Y. The liquidation and dissolution proceeding is not completed as of the 6-month date. The natural disaster is a factor that affects economic and market conditions. Therefore, the disaster, to the extent not compensated by insurance or otherwise, is taken into account in valuing the Y stock on the 6-month date.

(ii) Assume instead that Y's plant is severely damaged due to flooding from the failure of pipes in the facility. The damage is an occurrence described in section 2054. Therefore, the damage, to the extent not compensated by insurance or otherwise, is taken into account in valuing the property on the 6-month date.

Example 3. At D's death, D has an interest in an S corporation, W. During the alternate valuation period, it is discovered that an employee of W has embezzled significant assets from W. W does not reasonably expect to recover the funds or any damages from the employee, and insurance proceeds are not sufficient to cover the loss. The theft is an occurrence described in section 2054. Therefore, the theft, to the extent not compensated by insurance or otherwise, is taken into account in valuing D's interest in W on the 6-month date.

(h) *Effective/applicability date.* * * * All of paragraph (c)(2) of this section except the second sentence of the introductory text, all of paragraph (c)(3) of this section except paragraph (c)(3)(i)(C) of this section, the chart in *Example 1* of paragraph (e) of this section, all of paragraph (f)(2) of this section except the last sentence, and the first and third sentences in paragraph (f)(2)(ii) of this section are applicable to decedents dying after August 16, 1954. All of paragraphs (a) introductory text, (a)(1), (a)(2), (c)(1)(i), (c)(1)(ii), (c)(1)(iii), (c)(1)(iv), (c)(3)(i)(C), (c)(4), (c)(5), (f)(1), (f)(2)(i), and (f)(3) of this section, the second sentence of the introductory text in paragraph (c)(2) of this section, all of paragraph (e) of this section except the chart in *Example 1,* the last sentence in the introductory text of paragraph (f)(2) of this section, and the second sentence in paragraph (f)(2)(ii) of this section are applicable to estates of decedents dying on or after the date of publication of the Treasury decision adopting these rules as final in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2011–29921 Filed 11–17–11; 8:45 am]

BILLING CODE 4830–01–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2012–1; Order No. 963]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is establishing a docket in response to a Postal Service request for an informal rulemaking on proposed changes in certain analytical methods used in periodic reporting. The proposed changes affect Foreign Origin mail; Undeliverable As Addressed Parcel Select pieces; Express Mail; Standard Mail Presort Letters; Media Mail/Library Mail; Special Services; and Return Receipt. Establishing this docket will allow the Commission to consider the Postal Service's proposal and comments from the public.

DATES: *Comments are due:* December 5, 2011.

ADDRESSES: Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at (202) 789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: On November 1, 2011, the Postal Service filed a petition pursuant to 39 CFR 3050.11 requesting that the Commission initiate an informal rulemaking proceeding to consider changes in the analytical methods approved for use in periodic reporting.[1] These changes are contained in Proposals Nine through Fifteen, which are described below.

Proposal Nine: proposed change in method for Inbound Revenue, Pieces, and Weight (RPW) reporting. The purpose of Proposal Nine is to improve the method for distributing cost segment 14 (domestic transportation) costs of Foreign Origin mail to countries and country groups in the International Cost and Revenue Analysis (ICRA). *Id.* at 3. Specifically, Proposal Nine would substitute a weight-based method for the current piece-based method. *Id.*

The Postal Service explains that the ICRA began reporting inbound mail statistics separately by country or country group in FY 2008. *Id.* It contends that at that time, the method for distributing domestic transportation costs for inbound mail should have changed from the piece-based method to a weight-based method to align with the weight-based method for distributing domestic transportation costs for U.S. Origin international mail. *Id.*

The Postal Service concludes that Proposal Nine would be an improvement over the piece-based method because of the requirement that inbound mail statistics be reported by country or country group, and because weight per piece varies significantly across countries and country groups. *Id.* at 4.

The Postal Service illustrates the impact that Proposal Nine would have had in FY 2010 in the Excel workbook ''Proposal9.xls,'' filed under seal. *Id.* It states that the results for products are not affected and that the impact is most significant for inbound mail from Canada. *Id.*

Proposal Ten: proposed change in the In-Office Cost System (IOCS) for Parcel Select Pieces that are Undeliverable As Addressed (UAA). The purpose of Proposal Ten is to change the way that the costs of UAA Parcel Select pieces are attributed, which would improve the accuracy of Parcel Select attributed costs. *Id.* at 6. The Postal Service proposes that IOCS designate costs for UAA Parcel Select to Parcel Select. *Id.*

The Postal Service explains that it charged Parcel Post prices for UAA Parcel Select pieces for most of FY 2011 and that the IOCS tallies relating to these pieces are currently designated as Parcel Post. *Id.* Beginning on June 24, 2011, the Postal Service began charging UAA Parcel Select pieces the Parcel Select non-presort price plus an additional $3.00 fee. *Id.* The revenue for these pieces is ascribed to Parcel Select. *Id.*

Thus, the Postal Service concludes that UAA Parcel Select pieces should also be assigned to Parcel Select in IOCS. *Id.* It illustrates the impact that Proposal Ten would have on FY 2010 IOCS dollar-weighted tallies in a table titled ''Changes in IOCS dollar-weight tallies due to change in treatment of UAA parcel select'' of its Petition. *Id.*

Proposal Eleven: proposed change for delivery cost savings for Negotiated Service Agreement (NSA) Express Mail.

[1] Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposals Nine–Fifteen), November 1, 2011 (Petition).

The purpose of Proposal Eleven is to change the method for calculating the delivery cost savings of Express Mail from NSAs. *Id.* at 7.

The Postal Service explains that it has begun to implement changes regarding signatures for Express Mail and that new data on delivered Express Mail are now available from the Carrier Cost Systems (CCS). *Id.* It states that these earlier developments led to Proposal Eight: New Treatment of Express Mail as Accountable Mail on City Carrier Letter Routes, which the Commission recently approved in Order No. 920.[2] The Postal Service contends that the approval of Proposal Eight requires corresponding updates to the method for calculating delivery cost savings for Express Mail from NSAs. Petition at 7. It asserts that Proposal Eleven would also provide an opportunity to replace a proxy with actual data from a data system. *Id.*

The Postal Service proposes three major revisions to the Excel workbook ''Express Mail Delivery Savings Update FY 2010.xls,'' which it filed as a library reference in the FY 2010 Annual Compliance Report (ACR).[3] Proposal Eleven would make the costing method consistent with Proposal Eight, replace a former proxy with data specific to Express Mail now available from the CCS data system, and remove the assumption that carriers seek to obtain signatures on 10 percent of pieces that have signature waivers. Petition at 7–8.

The Postal Service also revised the Excel workbook ''SupportExpress_FY10.xls'' to incorporate the cost savings now calculated for deviation parcels in addition to the former flats and small parcels. *Id.* at 8. The Postal Service filed both of the revised workbooks under seal. *Id.* The Postal Service illustrates the impact of Proposal Eleven in the Excel workbook ''Proposal11Impact.xls,'' filed under seal. *Id.*

Proposal Twelve: proposed modification of the Standard Mail Presort Letters mail processing cost model. The purpose of Proposal Twelve is to modify the Standard Mail presort letters mail processing cost model consistent with the Commission's directive in the FY 2010 Annual Compliance Determination (ACD) to disaggregate the cost estimates for nonautomation machinable mixed automated area distribution center (MAADC) and automated area distribution center (AADC) presort Standard Mail letters. *Id.* at 9.

The Postal Service explains that the two Standard Mail nonautomation machinable presort letters price categories currently listed in the price schedule are MAADC presort letters and AADC presort letters. *Id.* However, the mail processing cost model for Standard Mail presort letters has historically included only an aggregate cost estimate for these two price categories. *Id.* Because of this aggregate cost estimate, the Commission was unable to evaluate the presort discount for nonautomation AADC machinable letters in both the FY 2009 and FY 2010 ACDs.[4] In the FY 2010 ACD, the Commission directed the Postal Service to ''develop the necessary cost data to permit a meaningful analysis of this discount.'' *Id.*

The Postal Service states that the Standard Mail presort letters mail processing cost model contains one mail flow spreadsheet and one cost spreadsheet that are supposed to represent the aggregate mail flow and costs for the two nonautomation machinable presort letters price categories combined. Petition at 9–10. It explains that the mail flow spreadsheet lists the outgoing input sub system (ISS) operation as the first operation through which both MAADC presort and AADC presort letters are processed. *Id.* at 10. It asserts that while this is true for MAADC letters, the first operation for AADC presort letters should be the incoming ISS operation. *Id.*

The Postal Service's proposed revisions to the Standard Mail presort letters mail processing cost model are contained in the Excel workbook ''Proposal12.xls.'' *Id.* at 11. Specific changes to the cost model include updating tab names and titles for spreadsheets currently in the model, adding mail flow and cost spreadsheets for nonautomation machinable AADC presort letters, and removing the Management Operating Data System (MODS) spreadsheet from the model. *Id.* at 10–11.

The Postal Service illustrates the impact of Proposal Twelve in Table 1 of the Petition. *Id.* at 12. The table compares the instant modification to the FY 2010 Standard Mail presort letter model and the FY 2010 Standard Mail presort letter model that incorporates the Proposal Nine modifications made by the Commission in Order No. 741.[5]

Proposal Thirteen: proposed development of a new mail processing cost model for Media Mail/Library Mail. The purpose of Proposal Thirteen is to develop a new mail processing cost model for Media Mail and Library Mail. Petition at 13. The Postal Service explains that in Docket Nos. RM2010–12, RM2011–5, and RM2011–6, it presented new or revised mail processing cost models for Standard Mail Parcel/Non-Flat Machinables (Proposal Seven), Media Mail—Library Mail (Proposal Twelve), and Parcel Select/Parcel Return Service (Proposal Thirteen), respectively. *Id.* at 13–14. The Commission conditionally approved each proposal and required the Postal Service to perform the analysis using the Commission's cost pool classification methodology from Docket No. R2006–1. *Id.*

The Postal Service states that it has developed a new mail processing cost model for Media Mail—Library Mail that relies on the format and input data from Proposals Seven and Thirteen and incorporates methodological changes approved in Proposal Twelve. *Id.* at 14. These methodological changes include the use of the Commission's cost pool classification methodology in Docket No. R2006–1. *Id.* Details about the new mail processing cost model for Media Mail—Library Mail are described in the Petition and contained in Excel workbook ''Proposal13.xls.'' *Id.* at 14–18.

The Postal Services illustrates the impact of Proposal Thirteen on the cost estimates in a table entitled ''Mail Processing Unit Cost Impact'' of the Petition. *Id.* at 18.

Proposal Fourteen: proposed changes in Special Services cost models. The purpose of Proposal Fourteen is to resolve a number of inconsistent cost treatments of window-related activities among the Special Services cost models, which were filed as library references in the FY 2010 ACR. *Id.* at 19.

The Postal Service explains that the cost models document the unit cost estimates for certain domestic Special Services and supplement the cost information provided in library reference USPS–FY10–1.[6] Some of the costing elements commonly incorporated into the cost models now were not available or not common practice when the models were first created several decades ago. Petition at 19. These costing elements include the Waiting Time Adjustment Factor, the Miscellaneous Factor for window-

[2] Docket No. RM2011–12, Order Concerning Analytical Principles for Periodic Reporting (Proposals Four through Eight), October 21, 2011 (Order No. 920).

[3] *Id.;* Docket No. ACR2010, USPS–FY10–NP27, 2010 Competitive NSA & Nonpostals Materials, December 29, 2010.

[4] Docket No. ACR2010, Annual Compliance Determination Report Fiscal Year 2010, March 29, 2011, at 110.

[5] Docket No. RM2011–5, Order Concerning Analytical Principles for Periodic Reporting (Proposal Nine), June 3, 2011 (Order No. 741).

[6] *Id.;* Docket No. ACR2010, USPS–FY10–1, FY 2010 Public Cost and Revenue Analysis (PCRA) Report, December 29, 2010.

related activities, and the Miscellaneous Factor for mail processing-related activities. *Id.*

To be more consistent with the current Cost and Revenue Analysis (CRA) methodology, Proposal Fourteen seeks to update several Special Services cost models by adding the appropriate Waiting Time Adjustment Factor and Miscellaneous Factors. *Id.* These cost models include Caller Service, Certificate of Mailing, Correction of Mailing List, Signature Confirmation, Periodicals Applications, P.O. Box Key and Lock, Restricted Delivery, and Zip Coding of Mailing List. *Id.* at 19–20. The Postal Service submitted updated cost models in files ''Proposal14NonPublic.xls,'' filed under seal, and ''Proposal14Public.zip.'' *Id.* at 20.

The Postal Service illustrates the impact that Proposal Fourteen would have had on the unit costs reported in the FY 2010 ACR in a table on page 20 of the Petition. It includes an unredacted version of the table in Excel workbook ''Proposal14Impact.xls,'' filed under seal. *Id.*

Proposal Fifteen: proposed changes in cost models related to Return Receipt service. The purpose of Proposal Fifteen is to correct and improve the cost models related to Return Receipt service, which are filed as a library reference in the FY 2010 ACR.[7] The Postal Service states that several Return Receipt options are available to customers: The traditional Return Receipt (PS Form 3811), electronic Return Receipt (eRR), Return Receipt for Merchandise, and Return Receipt after Mailing. Petition at 21. It explains that the original cost study and models for Return Receipt service were developed in 1976 and updated in Docket Nos. MC96–3, R2000–1, and R2001–1. *Id.*

The Postal Service notes that the studies are being updated again because some of the steps in the model are no longer performed, and some inadvertent errors appear in the current models. *Id.* It asserts that Proposal Fifteen will better align the Return Receipt service cost models with current operations and correct errors in those models. *Id.*

Specifically, to be consistent with current CRA methodology, the Postal Service proposes to add Waiting Time and Miscellaneous (window overhead) factors to the window activities cost estimation for Return Receipt (PS Form 3811), eRR, and Return Receipt after Mailing.[8] It seeks to add an overhead factor to the delivery activities for Return Receipt (PS Form 3811) and remove printing costs from the eRR model that were erroneously included in the original model. *Id.* at 23.

Proposal Fifteen would also incorporate the Return Receipt (PS Form 3811) material costs into the model for Return Receipt for Merchandise. *Id.* The Postal Service explains that these costs were excluded from the original model. *Id.* It asserts that the overall costs of Return Receipt for Merchandise decrease in the revised model because the time to collect the signature is lower than that in the original model. *Id.* The Postal Service illustrates the impact that Proposal Fifteen would have had on the unit costs reported in the FY 2010 ACR in a table on page 24 of the Petition.

The Petition and spreadsheets illustrating Proposals Nine through Fifteen are available for review on the Commission's Web site, *http://www.prc.gov.* The Postal Service filed certain materials under seal.[9]

Pursuant to 39 U.S.C. 505, Lawrence Fenster is designated as the Public Representative to represent the interests of the general public in this proceeding. Comments are due no later than December 5, 2011.

It is ordered:

1. The Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposals Nine–Fifteen), filed November 1, 2011, is granted.
2. The Commission establishes Docket No. RM2012–1 to consider the matters raised by the Postal Service's Petition.
3. Interested persons may submit comments on Proposals Nine through Fifteen no later than December 5, 2011.
4. The Commission will determine the need for reply comments after review of the initial comments.
5. Lawrence Fenster is appointed to serve as the Public Representative to represent the interests of the general public in this proceeding.
6. The Secretary shall arrange for publication of this Notice in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–29813 Filed 11–17–11; 8:45 am]

BILLING CODE 7710–FW–P

[7] *Id.* at 21; Docket No. ACR2010, USPS–FY10–28, FY 2010 Special Cost Studies Workpapers—Special Services (Public Portion), December 29, 2010.

[8] *Id.* at 23–24. Appendix A describes the details of a cost study conducted to identify and measure the costs associated with Return Receipt service.

[9] Notice of the United States Postal Service of Filing of USPS–RM2012–1/NP1, November 1, 2011; USPS–RM2012–1/NP1, Nonpublic Materials Supporting Proposals Nine Through Fifteen (Non-Public), November 1, 2011.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–R04–SFUND–2011–0749; FRL–9494–1]

National Oil and Hazardous Substances Pollution Contingency Plan National Priorities List: Deletion of the Martin-Marietta/Sodyeco Superfund Site

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule, reopening of comment period.

SUMMARY: The Environmental Protection Agency (EPA) Region 4 issued a Notice of Intent to Delete the Martin-Marietta/Sodyeco Superfund Site from the National Priorities List (NPL) on September 30, 2011, (76 FR 60777). The NPL, promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). EPA, with the concurrence of the State of North Carolina, through the Department of Environment and Natural Resources (DENR), has determined that all appropriate response actions under CERCLA, other than operation, maintenance, and five-year reviews, have been completed.

The rationale for deleting the Martin-Marietta/Sodyeco Superfund Site has not changed. The **Federal Register** notice for the proposed deletion (76 FR 60777) discusses this rationale in detail.

DATES: Comments concerning the proposed deletion may be submitted to EPA on or before December 19, 2011.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–R04–SFUND–2011–0749, by one of the following methods:

- *Online: http://www.regulations.gov.* Follow instructions for submitting comments.
- *Email: townsend.michael@epa.gov.*
- *Fax:* (404) 562–8788 Attention: Michael Townsend.
- *Mail:* Michael Townsend, Remedial Project Manager, Superfund Remedial Section, Superfund Remedial Branch, Superfund Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
- *Hand delivery:* U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

Such deliveries are only accepted during the public docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional EPA Office is open for business Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID no. EPA–R04–SFUND–2011–0749. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless a 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 email. 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 email comment directly to EPA without going through *http://www.regulations.gov,* your email 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 electronic files you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statue. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at:

Regional Site Information Repository: U.S. EPA Record Center, Attn: Ms. Debbie Jourdan, Atlanta Federal Center, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Hours of Operation (by appointment only): 8 a.m. to 4 p.m., Monday through Friday.

Local Site Information Repository: Mt. Holly Public Library, 235 West Catawba Avenue, Mt. Holley, North Carolina 28120–1603.

Hours of operation: 10 a.m.–6 p.m., Monday, Tuesday, Thursday and Friday. 10 a.m.–2 p.m., Wednesday and Saturday.

FOR FURTHER INFORMATION CONTACT: Michael Townsend, Remedial Project Manager, Superfund Remedial Section, Superfund Remedial Branch, Superfund Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. (404) 562–8813. Electronic mail at: *townsend.michael@epa.gov.*

SUPPLEMENTARY INFORMATION:

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous Waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water Supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Dated: November 7, 2011.

Gwendolyn Keyes Fleming,

Regional Administrator, Region 4.

[FR Doc. 2011–29907 Filed 11–17–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 697

[Docket No.110722404–1405–01]

RIN 0648–BA56

Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes new Federal American lobster regulations that would limit entry into the lobster trap fishery in Lobster Conservation Management Area 1 (Federal inshore waters–Gulf of Maine). Upon qualification, permit holders would be allowed to fish in Area 1 with up to 800 lobster traps. The proposed limited entry program responds to the recommendations for Federal action in the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan for American Lobster.

DATES: We must receive your comments no later than 5 p.m. eastern standard time on January 3, 2012.

You may submit comments on this document, identified by NOAA–NMFS–2011–0234, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *http://www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2011–0234 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Mail:* Submit written comments to: Robert Ross, Supervisory Fishery Policy Analyst, Sustainable Fisheries Division, NMFS, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: ''Comments on Lobster Area 1 Proposed Rule.''
- *Fax:* (978) 281–9135; Attn: Robert Ross

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, 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 for public viewing on *http://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*) submitted voluntarily by the sender will 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). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only. You may obtain copies of the draft Environmental Assessment (EA), including the Regulatory Impact Review (RIR) and the Initial Regulatory Flexibility Analysis (IRFA), prepared for this action at the mailing address specified above; telephone (978) 675–2162. The documents are also available online at *http://www.nero.noaa.gov.*

You may submit written comments regarding the burden-hour estimates or

other aspects of the collection-of-information requirements contained in this proposed rule to the mailing address listed above and by email to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Peter Burns, Fishery Policy Analyst, phone (978) 675–2162, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Statutory Authority

The proposed regulations would modify Federal lobster fishery management measures in the Exclusive Economic Zone (EEZ) under the authority of section 803(b) of the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act) 16 U.S.C. 5101 *et seq.,* which states, in the absence of an approved and implemented Fishery Management Plan under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*) and, after consultation with the appropriate Fishery Management Council(s), the Secretary of Commerce may implement regulations to govern fishing in the EEZ, *i.e.,* from 3 to 200 nautical miles (nm) offshore. The regulations must be (1) compatible with the effective implementation of an Interstate Fishery Management Plan (ISFMP) developed by the Commission and (2) consistent with the national standards set forth in section 301 of the Magnuson-Stevens Act.

Purpose and Need for Management

The purpose of the proposed action is to manage the American lobster fishery in a manner that maximizes resource sustainability, recognizing that Federal management occurs in consort with state management. To achieve this purpose, NMFS needs to respond to recently-approved state management measures that control effort within the lobster fishery. Specifically, the Commission's ISFMP seeks to limit entry into the Area 1 lobster trap fishery. Of the seven Lobster Conservation Management Areas (LCMAs, Areas) only Area 1 remains open and accessible to all Federal lobster permit holders. Commissioners and Area 1 permit holders alike are concerned that restrictions in these other LCMAs could cause a shift of trap fishing effort into Area 1, potentially flooding Area 1 with new fishers, upsetting local lobster stock stability, frustrating rebuilding efforts, and undermining existing social and cultural lobster fishing traditions in Area 1.

Background

American lobsters are managed within the framework of the Commission. The Commission serves to develop fishery conservation and management strategies for certain coastal species and coordinates the efforts of the states and Federal Government toward concerted sustainable ends. The Commission, under the provisions of the Atlantic Coastal Act, decides upon a management strategy as a collective and then forwards that strategy to the states and Federal Government, along with a recommendation that the states and Federal Government take action (*e.g.,* enact regulations) in furtherance of this strategy. The Federal Government is obligated by statute to support the Commission's ISFMP and overall fishery management efforts (See *Statutory Authority*). Consistent with these requirements, NMFS proposes the foregoing rule to address the potential for increased lobster trap fishing effort in Area 1 which would support the Commission's ISFMP.

Area 1, the most productive lobster management area with respect to landings, is within the Gulf of Maine stock area. The most recent lobster stock assessment (2009) indicated that Gulf of Maine lobster stock abundance is relatively high, with stable levels of fishing mortality. Despite favorable conditions, the stock assessment cautioned that unchecked trap fishing effort in Area 1 could negatively impact the sustainability of the Gulf of Maine lobster fishery if lobster abundance declined to long-term median levels.

At this same time, lobster managers and Area 1 lobster fishers became aware that trap fishing effort in Area 1 was indeed relatively unchecked. Some fishers provided anecdotal evidence that Area 1 Federal waters fishing effort might be on the increase. Specifically, the Area 1 Lobster Conservation Management Team (LCMT), an advisory group comprised of lobster fishermen, worried that limited access programs in the other lobster management areas might cause, and perhaps were already causing, non-qualifiers to move their businesses into Area 1—the only remaining non-limited access area. The Area 1 LCMT recommended that the Commission limit access to the trap fishery in Area 1 Federal waters to those fishers who could document having fished there with trap gear in the past. The Area 1 LCMT worried that speculators would newly declare into Area 1 upon hearing the news and, therefore, the LCMT recommended establishing an immediate control date after which fishing history could not be credited towards qualification.

The Commission agreed with the scientists and LCMT that a potential shift of trap fishing effort into Area 1 could jeopardize the sustainability of the Gulf of Maine lobster stock and Area 1 fishery and, consequently, the Commission's Lobster Board began to develop, in 2008, Addendum XV to Amendment 3 of the ISFMP. Addendum XV and Amendment 3 are available at the Commission's Web site at *http://www.asmfc.org.* Addendum XV intends to control lobster trap fishing effort by limiting the transfer of Federal lobster permits into Area 1 from other areas and from the non-trap fishery.

As the Commission developed Addendum XV in October 2008, they asked NMFS to immediately publish a control date to prevent speculators from flooding into Area 1. On January 2, 2009, NMFS published an Advance Notice of Proposed Rulemaking (ANPR) in the *Federal Register* (74 FR 67) to notify the public that any further investment in the Area 1 trap fishery may not guarantee future access if a limited entry program is implemented and to solicit public comments on the issue (See Comments and Responses). Knowing that Federal action would be needed to restrict the migration of Federal lobster permits into Area 1, the Commission adopted the publication date of the ANPR (January 2, 2009) as a control date for determination of Area 1 eligibility.

The Commission approved Addendum XV in November 2009 after receiving public input in numerous public meetings. In Addendum XV, the Commission recommended an Area 1 limited access program with the following three eligibility criteria: (1) Possession of a Federal limited access lobster permit; (2) proof of an Area 1 designation on the Federal lobster permit as of the January 2, 2009, control date; and, (3) proof of purchase of an Area 1 lobster trap tag during any year from 2004–2008, inclusive. Addendum XV did not recommend making any change to the trap cap in Area 1, currently set at 800 traps.

Proposed Changes to the Current Regulations

NMFS proposes to limit access into the Federal Area 1 lobster trap fishery using qualification criteria similar to those recommended by the Area 1 LCMT and by the Commission's Lobster Board in Addendum XV. The most recent stock assessment warned that unbridled effort in Area 1 could jeopardize the sustainability of the stock if lobster abundance fell to more normal

levels. If such an event occurred, NMFS would be in less of a position to provide an immediate and decisive response, given the lengthy rulemaking apparatus available. Consequently, NMFS believes it most prudent to heed the scientists' advice and proactively respond to the issue before the situation becomes critical.

The timing of this proposed rule is also appropriate given the limited access programs currently being implemented in other lobster management areas. Specifically, lobster trap fishing access was recently limited in the state waters of Area 2 and the Outer Cape Cod Area, and NMFS is presently developing a rule that could limit trap fishing access in the Federal waters of those areas as well. Trap fishing access to Areas 3, 4, 5 and 6 is already restricted in both state and Federal waters. Accordingly, to the extent that a lobster permit did not qualify for trap fishing access in any of those other areas, there is potentially great incentive for that permit to be sold into Area 1—that last remaining area without access limitations—where it could be used to fish with traps, thus proliferating effort in the area. Area 1 lobster fishers were greatly concerned by such a scenario, as was the Commission. Our analysis of the data suggests that the feared effort shift into Area 1 has probably not yet occurred, but that the potential for such an effort shift certainly exists.

NMFS therefore agrees with the scientists, the industry-based Area 1 LCMT, and the Commission that effort control is needed in Area 1 to protect the stock. This proposed rule does so by seeking to limit further effort into Area 1 in the manner recommended by the industry-based Area 1 LCMT and Commission. Additionally, this proposed rule would not change the 800-trap cap in Area 1, which is consistent with Commission Addendum XV.

This proposed rule differs from the Commission's Addendum XV recommendation only in that it would extend the qualification period cut-off date from January 2, 2009, to April 30, 2009. The April 30 date makes sense because it coincides with the Federal lobster fishing year (May 1, 2008, through April 30, 2009) and because it provides added months for those permit holders who were in the process of conducting business prior to the January 2, 2009, control date to have settled their affairs and renewed their Federal lobster permits during the normal course of the Federal fishing year. In other words, the proposed action would qualify the Federal lobster permits that were renewed at any time during the 2008 fishing year that had an Area 1 trap gear designation and a record of purchasing one or more trap tags during any one year from 2004 through 2008. This slight extension in the qualification period remains consistent with the Commission's overall recommendation and would result in negligible additional impact because our analysis suggests that speculation did not occur during this time period as originally feared. Accordingly, despite the slight differences in the qualification period compared to the Commission's criteria, NMFS expects that this proposed rule would be supported by the stock assessment scientists, the Area 1 lobster industry and the Commission's Lobster Board because it would reflect the full complement of 2008 Federal Area 1 permit holders with recent trap tag purchases.

NMFS assessed the impacts of this action in a preliminary Environmental Assessment (EA) pursuant to the National Environmental Policy Act. The EA, based predominantly on Federal vessel permit data and state and Federal trap tag records, shows that 1,643 Federal lobster permits would likely qualify under the proposed action. Of this total, approximately 32 qualifiers would benefit from the proposed extension of the qualification cut-off date from January 2, 2009, to April 30, 2009. In other words, if NMFS adopted the January 2, 2009, control date originally recommended by the Commission, approximately 1,611 permit holders would qualify, 32 less than would qualify under the extended qualification date in this proposed action. Our analysis suggests that these 32 individuals do not represent new effort (the majority of these individuals have fished with traps in Area 1 in the past) and the relative additional effort from these 32 permits holders is negligible when compared to the overall level of trap fishing effort in Area 1.

Of the 3,152 Federal lobster permits in existence, NMFS analysis suggests that 1,509 permit holders would likely not qualify into the Area 1 trap fishery (calculated at 3,152 total permit holders minus the 1,643 permit holders expected to qualify). Of this 1,509 total, the vast majority (1,419 permit holders) are from locales south of Area 1 waters and/or have never sought to fish with traps in Area 1 in the past.

For the vast majority of current Area 1 permit holders, NMFS already has the necessary documentation to show that the permit meets the eligibility requirements for Area 1. In such cases, we will notify those Area 1 permit holders, on or around the time when they receive their annual permit renewal paperwork, that they are pre-qualified into the Area 1 trap fishery. Those pre-qualified permit holders will need to simply confirm their intent to qualify their permit for the Area 1 trap fishery by signing a pre-printed application form and sending it back to NMFS by a specified date. Once we receive the application, we will confirm that the permit meets the eligibility requirements and inform the permit holder in writing that the permit has officially qualified for the Area 1 trap fishery.

Permit holders who do not pre-qualify will be notified that NMFS does not have information on hand to show that the permit meets the eligibility criteria. Permit holders in this category who wish to qualify their permit for Area 1 will need to submit the signed pre-printed application form provided to them by NMFS. In addition, the application package must include documentary proof to show that the permit meets the eligibility criteria. Specifically, to show that the vessel has a current Federal limited access lobster permit, they must provide a copy of the current Federal lobster permit or such data that would allow NMFS to identify the permit in its database (such as the applicant's name, address, vessel name and permit number). To show that the permit had a valid Area 1 designation during the 2008 fishing year, the applicant must include a copy of the 2008 permit exhibiting the Area 1 designation or such information to allow NMFS to identify the permit in its database as previously explained. Third, as proof that the permit purchased trap tags in any year from 2004–2008, the applicant must provide documentation created during the 2004–2008 trap tag purchase period from the trap tag vendor or from the state or Federal Government affirming the purchase of the tags (See the Regulatory Text for details).

We will review the applications and supporting documentation and make a ruling on each permit's eligibility. Those who apply and are denied eligibility may appeal to the Regional Administrator within 45 days of the date of the determination of ineligibility. An appeal will be approved only when there is clear and convincing evidence that NMFS erred clerically in concluding that the permit did not qualify. The Regional Administrator may authorize a vessel pending appeal to fish with traps in Area 1 while the appeal is under review.

Comments and Responses

The ANPR published in the **Federal Register** on January 2, 2009, informed the public that NMFS was considering a rule to limit future access to the lobster trap fishery in Area 1 and to solicit public comments on the issue. The comment period closed on February 2, 2009. We received a total of nine comments in response to the ANPR. Four respondents were concerned about the loss of their current state lobster fishing license; two were concerned that Maine lobster fisher apprentices would be unable to obtain a Federal permit; one was concerned that the ability to transfer permits would be taken away; one wanted to know what documentation would be needed in order to qualify for an Area 1 permit; one was concerned about seal and cormorant predation on lobsters; one asked for exceptions for fishers who bought a vessel holding an American lobster permit, or were in the process of transferring a vessel holding an American lobster permit before the control date; and one supported the proposal to limit or restrict future access to the American lobster trap fishery in the Federal waters of Area 1. The specific comments and NMFS's responses are as follows:

Comment 1: Four respondents were concerned that they would lose their state lobster fishing license.

Response: This proposed rule is limited to the qualification of vessels carrying Federal lobster permits to fish in the Federal waters of Area 1. It does not involve any qualification decision or ruling on an individual's state lobster license; therefore, it does not follow that individuals would ''lose'' their state lobster permit as a result of the proposed Federal qualification process (or at least it is not sufficiently clear from the comment to determine how this would occur).

Comment 2: Two respondents were concerned that apprentice lobster fishers would not be able to purchase a Federal lobster permit if this proposed rule were approved.

Response: Under the proposed action, NMFS would determine whether a Federal lobster permit will remain eligible to fish for lobster with traps in Area 1 based on the permit's fishing history as it pertains to the eligibility criteria. It would not alter the current allowances for the purchase of a vessel and permit or the transfer of a permit to another vessel or entity.

Comment 3: One respondent feared that the control date would effectively eliminate the transfer of permits.

Response: This proposed rule places no restriction on the transfer of Federal lobster permits from one vessel to another. If a Federal lobster permit that qualifies for Area 1 under the proposed rule is transferred to another vessel, the Area 1 trap eligibility would remain part of the permit and would be attributed to the replacement vessel.

Comment 4: One respondent was concerned that the January 2, 2009, control date and forthcoming rule would result in his Federal lobster permit being taken away.

Response: This proposed rule would not take away any Federal lobster permits. This proposed rule responds to recommendations made by the Commission's Lobster Board and industry-based Area 1 LCMT to prevent the expansion of trap fishing effort into the Federal waters of Area 1. Those Federal lobster vessels that were actively fishing with traps in Area 1 during the 2008 fishing year—meaning that they had a valid Area 1 lobster trap permit during the 2008 Federal fishing year and purchased a lobster trap tag during any year from 2004 through 2008—would be allowed to continue to fish there with trap gear in the future. Those that do not meet the eligibility criteria would not be allowed to fish with traps in the Federal waters of Area 1. But, regardless of whether a vessel carrying a Federal permit qualifies to fish with traps in Area 1, that Federal vessel would be allowed to retain its Federal lobster permit and fish for and possess lobsters wherever allowed under Federal regulation, including fishing for lobster in Area 1. However, it would not be allowed to fish with trap gear in Area 1.

Comment 5: One respondent asked what documentation would be needed in order to qualify for a Federal permit into Area 1.

Response: The qualifying documentation can be found in the **BACKGROUND** section of this proposed rule. Most of the information is available to NMFS through state or Federal records/databases. NMFS has access to trap tag data and can determine which vessels qualify. Those permit holders would only need to submit an application form and no additional supporting documentation would be needed since sufficient evidence is already available to NMFS. If NMFS does not have sufficient evidence on-hand to pre-qualify a permit, those permit holders would be notified and may submit an application including documentation to support the eligibility criteria. If a permit is ruled to be ineligible for Area 1 access and a case arises where an error occurred, the lobster fisher may request an appeal, as described in the Background section of this proposed rule.

Comment 6: One respondent expressed concerns about predation of lobsters by seals and cormorants.

Response: Although there is a recent scientific report by the American Lobster Technical Committee dated April 17, 2010, that discusses increased natural mortality in shallow waters by some mid-Atlantic predators whose abundance has increased substantially in the last decade, this issue is beyond the scope of the proposed rule.

Comment 7: Two respondents were against the control date and one stated that lobster fishers could not have known of this proposed control date or the criteria used to determine who would be eligible for a permit.

Response: Although NMFS cannot speak to the specific circumstances of the respondents, the agency can state with certainty that the Commission's Area 1 Limited Access Program, including the control date, was the subject of much public debate both before and after January 2, 2009. As a preliminary matter, it was the Area 1 LCMT, which is made up of lobstermen from Maine, New Hampshire and Massachusetts (including representatives from the Maine Lobstermen's Association, New Hampshire Lobstermen's Association and Massachusetts Lobstermen's Association), that initially proposed the idea of a limited access program with a control date. More specifically, the industry-based Area 1 LCMT had numerous public meetings and discussions on the issue and ultimately voted on and approved the concept in the summer of 2008. Next, the Commission's Lobster Board took the Area 1 LCMT's concept and, after public discussion, formally recommended the use of a control date at the Lobster Board's October 2008 public meeting. Media coverage of the Lobster Board's approval appeared in the Commercial Fisheries News in November 2008. NMFS published notice of the control date in the **Federal Register** on January 2, 2009. The Area 1 LCMT and the Commission's Lobster Board continued to conduct public meetings on the issue after the January 2009 control date publication. Ultimately, the Lobster Board adopted the Area 1 Limited Access Plan at a public meeting on November 3, 2009, which was also reported in the media. Public comments on the specific dates and criteria used were sought and received throughout this time period. NMFS, in fact, is proposing to liberalize the control date cut-off used in this rule based upon

information that it has received during this time period in consideration of those permit holders who did not renew their 2008 Federal lobster permits prior to the control date (See Background).

Comment 8: One respondent asked for exceptions for fishers who bought a vessel holding an American lobster permit, or were in the process of transferring a vessel before the control date.

Response: The proposed April 30, 2009, limited entry cut-off date attempts to strike a balance between two competing interests: (1) The desire to have a cut-off date that is flexible enough to accommodate Area 1 fishers who were in the process of transferring permits and caught off-guard by the January 2009 control date notice; and, (2) the need to have a quick and specific cut-off date so speculators would not be able to take advantage of the January 2009 control date notice and declare into the Area 1 fishery, not to fish, but simply to satisfy potential permit qualification criteria. More specifically, in 2008, members of the industry-based Area 1 LCMT expressed concern that effort in other LCMAs was shifting and/or would shift into Area 1, especially as other LCMAs began their own limited entry programs. The Area 1 LCMT was adamant that Area 1 trap fishery access needed to be restricted to ensure stock and fishery stability in Area 1 and that a clear and definitive control date needed to be established immediately—some suggested retroactively—to prevent the influx of speculation that they feared would occur as more and more individuals became aware of the limited access proposal. In other words, the LCMT worried that non-Area 1 permit holders might try to designate Area 1 on their permits and purchase Area 1 trap tags without any intention of ever fishing there, simply so they could stake a claim for future Area 1 access. The Commission's Lobster Board agreed with the Area 1 LCMT and urged, by letter dated October 22, 2008, that NMFS set a control date immediately, which NMFS did by **Federal Register** publication January 2, 2009.

In proposing the April 30, 2009, cut-off date, instead of the January 2, 2009, cut-off date, NMFS specifically rejected the suggestions of some who thought the cut-off date should be set at a time before the January 2, 2009, control date notice. In fact, our proposed cut-off date is more than 4 months after the January 2009 control date, which could potentially include those fishers who were renewing their permits at the time of the control date. We believe that the proposed choice provides flexibility for those few fishers who were potentially transferring permits in January 2009, and those who renewed after January 2009, while still addressing the overall goals of capping effort and discouraging speculation as articulated by the Area 1 LCMT and Lobster Board. Our choice of this date was analyzed in the draft EA for this action.

Comment 9: One respondent supported the proposal to limit or restrict future access to the American lobster trap fishery in the EEZ of Area 1.

Response: We agree with the respondent and with the Commission's reasoning behind its adoption of Addendum XV. This proposed rule addresses the Area 1 industry's concerns that lobster fishers, restricted from other limited conservation management areas, may shift their lobster trap fishing effort into Area 1. The potential for shifting effort into Area 1 may threaten Gulf of Maine lobster stock stability and stock rebuilding efforts, and this proposed rule would cap lobster trap fishing effort and promote the stability of the stock and stock rebuilding efforts.

Classification

This proposed rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866.

This proposed rule does not contain policies with federalism implications as defined in E.O. 13132. The proposed measures are based upon the lobster ISFMP that was created by and is overseen by the states. The proposed measures are a result of Addendum XV, which was approved by the states, recommended by the states through the Commission for Federal adoption, and is in place at the state level. Consequently, NMFS has consulted with the states in the creation of the ISFMP, which makes recommendations for Federal action. Additionally, these proposed measures would not pre-empt state law and would do nothing to directly regulate the states.

This proposed rule contains a collection of information requirement subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). A PRA analysis, including a revised Form 83i and supporting statement have been submitted to OMB for approval. The PRA analysis evaluates the burden on Federal lobster permit holders and the Federal Government resulting from the Area 1 application and appeals process.

There are two types of applicants evaluated in the PRA analysis as summarized here—those whose permits pre-qualify and need only to sign and remit an application form, and those who do not pre-qualify and would need to remit an application form along with documentation to support the qualification criteria. For pre-qualifiers, NMFS would notify the approximately 1,643 permit holders for whom there is sufficient evidence to show that the permit would qualify for Area 1 access, should the permit holder decide to return a pre-printed letter with his/her signature. The estimated burden for each of these applicants is 2 minutes, and the cost is estimated at $0.74 to mail the letter. NMFS expects all such permit holders to submit an application, with a total burden of 54.8 hours (hr) and $1,216 to the permit holders.

The remaining permit holders, those whose permits would not pre-qualify, would be sent a letter indicating that insufficient information is on-hand to qualify the permit. NMFS estimates that 288 permit holders would apply in this fashion. The burden is estimated at 22 minutes to allow for the search for documents to support the qualification criteria and sign the application. The estimated cost per applicant is $1.14. The cumulative cost for this category of applicants is 105.6 hr and $328. NMFS hypothesizes that roughly 28 applicants who are denied might appeal. The estimated appeals burden on each appellant is 30 minutes and $4.22. The cumulative burden on all appellants is 14 hr and $118. Overall, the total program burden on permit holder is calculated at 174 hr and $1,662.

Burden on the Federal Government to implement the program includes the labor and material costs of communicating with the applicants, reviewing and making a determination on the applications, and processing appeals. The total burden of the program on the Federal Government is 941 hr of labor, calculated to cost $19,406. Material costs to the Federal Government include those for paper, envelopes, postage and other supplies associated with processing the applications and appeals. When the estimated material costs of $2,811 are considered, the overall costs to the Federal Government are estimated at $22,217.

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 shall 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 though the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to the Sustainable Fisheries Division at the **ADDRESSES** above, and by email to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, the reason for consideration, and its legal basis are contained in the **SUMMARY** section of the preamble in this proposed rule.

The proposed management measures would affect small entities engaged in several different aspects of the lobster fishery. The affected entities include Federal lobster trap and non-trap permit holders and would limit future participation in the Area 1 lobster trap fishery to those historical participants that meet the proposed eligibility requirements as described in the **SUPPLEMENTARY INFORMATION** section.

Economic Impacts of the Proposed Rule on Small Entities

The proposed action would limit entry to the Area 1 lobster trap fishery for any small entity engaged in the harvesting of lobsters that hold a Federal limited access lobster permit. During fishing year 2008 there were a total of 3,152 such permitted vessels. Note that fishing year 2008 permit data were used in the assessment of economic impacts in the EA. A review of fishing year 2009 and fishing year 2010 permit application data found that there was no change in either gear (trap/non-trap) or LCMA designations for more than 98 percent of all valid permits issued during fishing year 2008, fishing year 2009, and fishing year 2010. For this reason, fishing year 2008 permit data are considered reasonably representative of fishing year 2009 and fishing year 2010 permit status and are used herein for purposes of analysis.

Under current regulations any fishing business may fish for lobsters with trap gear in Area 1 provided it has been issued a valid limited access lobster permit, it designates Area 1 as part of the annual permit renewal process, and it purchases Area 1 trap tags. However, of the 3,152 limited access permit holders, 1,867 permits elected to fish using trap gear in Area 1 while the remainder either elected to fish for lobster with non-trap gear or did not designate Area 1 on their 2008 permit application. Thus, while the option to fish in Area 1 with trap gear sometime in the future would be curtailed for about 40 percent of limited access lobster permit holders, the proposed action would have a more immediate impact on permitted vessels that may already be participating in the Area 1 trap fishery. Note that the proposed action would only limit entry to the Area 1 lobster trap fishery. Any Federal limited access lobster vessel that may not qualify would still be able to fish for lobster in Area 1 using non-trap gear.

The small business size standard for businesses engaged in a commercial fishing activity is $4 million in gross sales. The number of regulated entities most likely to be affected by the proposed action is expected to be 1,867 limited access permit holders that designated Area 1 on their 2008 permit application. The number of these entities that may be above or below the SBA size standard is indeterminate. Unlike most other federally managed fisheries, the lobster fishery is not subject to mandatory reporting. This means that gross sales for entities that possess only a Federal limited access lobster permit, which is the case for a majority of permitted vessels, particularly in Area 1, cannot be reliably determined. For purposes of further analysis, all 1,867 regulated entities are considered small entities.

The proposed action would qualify any Federal permit holder that designated Area 1 on their 2008 permit application at any time during the 2008 fishing year (May 1, 2008 to April 30, 2009), and had a record of purchasing Area 1 trap tags in any year during 2004–2008. The proposed action qualification criterion regarding the date of when the 2008 permit application had to be received is less restrictive than that recommended by the Commission. Specifically, the Commission alternative would have required that fishing year 2008 permits be renewed by January 2, 2009. Consequently, the proposed action would be less burdensome for regulated small entities than the Commission's alternative, because it provides an opportunity for more affected entities to qualify for limited access to the Area 1 trap fishery.

Based on the proposed action qualification criteria, 1,643 (88 percent) of the 1,867 affected small entities would qualify for the Area 1 trap fishery. Note that the Commission's alternative would have qualified 32 fewer regulated small entities. The 224 potential non-qualifiers—calculated by taking the 1,867 permit holders that designated Area 1 in 2008 and subtracting the 1,643 expected qualifiers—are permit holders for which NMFS has no record of having purchased Area 1 trap tags in any year from 2004 to 2008. Further analysis of these non-qualifiers suggest that the majority had selected non-trap as a gear type during 2008, or had selected other LCMA's in addition to Area 1, or based their fishing operation in states that do not border the Gulf of Maine. NMFS believes that they likely elected Area 1 on their permit out of speculation, not because they were fishing there. Specifically, 49 of the 224 non-qualifiers listed a homeport state of Rhode Island, New York, New Jersey, Virginia, North Carolina, or other state. Of the 175 non-qualifiers from Maine, Massachusetts, or New Hampshire, 106 selected non-trap gear on their permit and 55 had elected to use trap gear in an LCMA other than Area 1. Thus, available data suggest that 92 percent of the non-qualifiers may not be economically affected by the proposed action because they are not engaged in the Area 1 trap fishery. The potential economic impact on the remaining 14 non-qualifiers is uncertain. These non-qualifiers did not select non-trap gear, nor did they select a trap area alternative to Area 1. Given the absence of any indication of trap fishing in Area 1, these 14 vessels may not be actively fishing for lobster at all.

The proposed action would not implement any regulatory measures that would affect the manner in which qualifiers prosecute the Area 1 trap fishery and would not, therefore, have any direct economic impact on qualifying entities. As noted above, the majority of non-qualifiers that listed Area 1 are most likely using non-trap gear to fish for lobster or are engaged in a lobster trap fishery in other LCMAs. The direct economic impact on these non-qualifying vessels is likely to be negligible in terms of their gross sales or profitability. However, these non-qualifiers, as well as the 1,285 permit holders that did not elect Area 1 on their 2008 permit (most of which did not select Area 1 in other years since) may suffer some economic loss in terms of the value of their fishing vessel. That is, the value of a fishing vessel depends on the condition of the physical asset itself, its fishing history, and the suite of limited access permits (*i.e.,* an open

access permit conveys no added value since there is no scarcity) that are attached to the vessel. To the extent that limited access fishing permits may themselves be considered assets, any change in the rights or conditions affecting the current or future use of the permit affects its asset value. Limiting access to the Area 1 trap fishery will restrict the future use of a limited access lobster permit for non-qualifiers, hence some diminution of the contribution of the lobster permit to the value of the fishing business may occur. Notably, the permit value of Area 1 qualifiers may increase, since these permits would retain the access rights that would no longer be available to non-qualifiers. The magnitude of any such changes in permit value to either non-qualifiers or qualifiers is highly uncertain. There certainly is no indication or available data to suggest that the proposed action would have anything other than a small, if any, impact on permit values.

Federal Lobster Permits in Confirmation of Permit History

If a Federal lobster permit was in Confirmation of Permit History (CPH) status during the entire 2008 fishing year, then it was inactive and the permit holder was not fishing under the permit. Consequently, the permit would not have an Area 1 designation for that year and thus would likely fail to satisfy that criterion in the proposed rule. There were five permits that went into CPH status prior to the start of the 2008 fishing year that remained in CPH throughout the entire fishing year. Preliminary analysis indicates that only one of these permits was from a vessel hailing from an Area 1 port. These permits would likely not qualify under either the Commission's Alternative or the Preferred Alternative, nor would any permits that were in CPH during the 2004–2008 trap tag purchase period that did not purchase trap tags or elect Area 1 on their 2008 Federal permit. In contrast, under the status quo alternative, these permits could transition into the Area 1 fishery if taken out of CPH and transferred to a vessel in the future. On balance, this appears to be a negligible number of permits that were inactive and not representative of the Area 1 lobster trap fleet.

Impacts to Federal Lobster Permit Holders With Federal Multispecies Permits

To address industry concerns that catch limitations under the multispecies sector management program may prompt traditional multispecies fishermen to re-direct their efforts into the lobster trap fishery, we analyzed the potential impact of the proposed action on multispecies vessels that also hold Federal lobster permits. The sector management program implemented by Amendment 16 to the Northeast Multispecies Fishery Management Plan allows federally permitted multispecies (groundfish) vessels to form cooperative groups called sectors. Within each sector, the participating vessels combine their respective historical groundfish quotas, allowing them the flexibility to share and manage the cumulative quota of their sector. Those Federal multispecies vessels that do not participate in a sector may harvest groundfish on an individual basis, but must adhere to trip-based catch limits and days-at-sea. This component of the fleet is known as the common pool.

As part of this analysis, we analyzed the potential impacts of the proposed action on the dual lobster and multispecies vessels that participate in the common pool and would not qualify for the Area 1 trap fishery. We considered that these vessels may be most susceptible to restrictions in the multispecies fishery and may be most inclined to pursue the directed lobster trap fishery. Common pool vessels make up about half of the groundfish fleet, but share less than 10 percent of the overall groundfish quota for all species combined.

Of the 967 vessels that have both a Federal lobster and multispecies permit, 758 would not qualify for the Area 1 trap fishery under the proposed action. Of these, 51 permits are in the common pool category and hail from Area 1 ports. Adoption of the proposed action would prohibit these permit holders from transitioning into the Area 1 lobster trap fishery if restrictions on groundfishing, particularly those impacts on the more vulnerable common pool vessels, necessitate a change in fishing operations from groundfishing to the lobster trap fishery. On balance, we believe that this would result only in indirect negative impacts on these common pool fishers, since they do not have a previous history of fishing with traps, they had not previously taken advantage of the long-standing opportunity to transition into the Area 1 trap fishery, and refitting their vessels for trap fishing may be cost-prohibitive. Furthermore, restricting these non-historical participants from the Area 1 trap fishery is consistent with the Commission's recommendations in Addendum XV to cap effort at recent (2004–2008) levels.

In contrast to the number of dual multispecies and lobster permits that would not qualify for the Area 1 trap fishery under the proposed action, 209 vessels with both a Federal lobster and multispecies permit would qualify. Compared to the Commission's Alternative, five more Federal lobster permits with a multispecies permit would qualify under the proposed action—two from Massachusetts and three from Maine. All five are in the common pool and hail from Gulf of Maine ports, thus the proposed action decreases the number of affected common pool participants hailing from the Gulf of Maine ports, since the extension of the eligibility period would allow these vessels to qualify for the Area 1 trap fishery.

Economic Impacts of Non-Selected Alternatives

We analyzed two other management alternatives in addition to the proposed action: The Commission's Alternative that requires renewal of the Area 1 permit prior to the January 2, 2009, control date; and a Status Quo Alternative that would continue to allow all Federal lobster permit holders the ability to gain access into the Area 1 trap fishery.

Under the Commission's Alternative, 1,541 Federal lobster permits would not qualify for the Area 1 lobster trap fishery. Of these, 1,285 have no history of fishing in Area 1 with traps. These same permits would not qualify under the proposed action. The remaining 256 non-qualifying permits elected Area 1 on the 2008 Federal permit but did not purchase a trap tag during the established 2004–2008 trap tag purchase period. Forty-three of the 256 renewed their permits in 2008, but did so after the control date. Thirty-two of these purchased a trap tag during the required period and would qualify under the proposed action. Overall, the Commission's Alternative would qualify 32 fewer permits compared to the proposed action. These 32 non-qualifiers would likely suffer losses in value to their Federal fishing permits through loss of access to Area 1. The remaining non-qualifiers would also lose permit value, but were not actively fishing in Area 1. Therefore, any negative impacts due to ineligibility would be indirect and would not interfere with current or historical fishing practices.

Under the status quo alternative, all Federal lobster permits would maintain the option to prosecute the Area 1 lobster trap fishery, regardless of any historical participation. Traditional Area 1 trap fishery participants may be negatively impacted if fishing effort increases due to lack of effort controls. Unchecked effort may impact stock

stability and could result in losses in income due to deteriorating stock conditions and increased competition. Gear conflicts may increase with potential increases in traps. Non-traditional participants may benefit by gaining access to the Area 1 lobster trap fishery, the most prolific lobster producing area. Such benefits may be short-lived if unchecked effort results in de-stabilization of the stock and fishery.

List of Subjects in 50 CFR Part 697

Fisheries, fishing.

Dated: November 14, 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 697 is proposed to be amended as follows:

PART 697—ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT

1. The authority citation for part 697 continues to read as follows:

Authority: 16 U.S.C. 5101 *et seq.*

2. In § 697.4, revise paragraph (a)(7)(ii), redesignate paragraphs (a)(7)(vi) through (a)(7)(x) to (a)(7)(vii) through (a)(7)(xi), and add a new paragraph (a)(7)(vi) to read as follows:

§ 697.4 Vessel permits and trap tags.

(a) * * *

(7) * * *

(ii) Each owner of a fishing vessel that fishes with traps capable of catching lobster must declare to NMFS in his/her annual application for permit renewal which management areas, as described in § 697.18, the vessel will fish in for lobster with trap gear during that fishing season. The ability to declare into Lobster Conservation Management Areas 1, 3, 4 and/or 5, however, will be first contingent upon a one-time initial qualification as set forth in paragraphs (a)(7)(vi) through (a)(7)(ix) of this section.

* * * * *

(vi) *Participation requirements for EEZ Nearshore Management Area 1.* To fish for lobster with traps in Area 1, a Federal lobster permit holder must initially qualify into the area. To qualify, the permit holder seeking initial qualification must satisfy the following requirements in an application to the Regional Administrator:

(A) *Qualification criteria.* To initially qualify into Area 1, the applicant must establish with documenting proof the following:

(*1*) That the applicant has a valid and current Federal Lobster permit as of the date of the application; and

(*2*) That the involved Federal Lobster Permit had an Area 1 trap designation at some time during the 2008 fishing year, which was May 1, 2008, through April 30, 2009; and

(*3*) That at least one trap tag was purchased to fish with traps under the involved Federal Lobster Permit in any one fishing year from 2004 to 2008.

(B*) Documentary proof.* To satisfy the Area 1 Initial Qualification and Trap Allocation Criteria set forth in paragraph (a)(7)(vi)(A) of this section, the applicants will be limited to the following documentary proof:

(*1*) As proof of a valid Federal lobster permit, the applicant must provide a copy of the vessel's current Federal lobster permit. The potential qualifier may, in lieu of providing a copy, provide NMFS with such data that would allow NMFS to identify the Federal Lobster Permit in its data base, which would at a minimum include: The applicant's name and address, vessel name and permit number.

(*2*) As proof of the Lobster Permit's 2008 Area 1 trap designation, the applicant must provide a copy of the vessel's Federal Lobster Permit for the 2008 fishing year. The potential qualifier may, in lieu of providing a copy, provide NMFS with such data that would allow NMFS to identify the Federal Lobster Permit in its data base, which would at a minimum include: The applicant's name and address, vessel name, and permit number.

(*3*) As proof of trap tag purchases in any one fishing year from 2004 to 2008, the applicant must provide documentation from those years, either from the trap tag vendor supplying the tags or from the state or Federal government agency, affirming the purchase of the tags from the vendor.

(*4*) The Regional Administrator may, at his or her discretion, waive documentary obligations for certain elements of the qualification criteria for an applicant if NMFS itself has clear and credible evidence that would satisfy that qualification criteria for the applicant.

(C) *Application period.* Federal lobster permit holders seeking entry into the Area 1 trap fishery must apply for qualification by November 1, 2012. Failure to apply for Area 1 access by that date shall be considered a waiver of any future claim for trap fishery access into Area 1.

(D) *Appeal of denial of permit.* Any applicant having first applied for initial qualification into the Area 1 trap fishery pursuant to paragraph (a)(7)(vi) of this section, but having been denied access, may appeal to the Regional Administrator within 45 days of the date indicated on the notice of denial. Any such appeal must be in writing.

(*1*) *Grounds for appeal:* The sole grounds for administrative appeal shall be that NMFS erred clerically in concluding that the vessel did not meet the criteria in paragraph (a)(7)(vi) of this section. Errors arising from oversight or omission such as ministerial, mathematical, or typographical mistakes would form the basis of such an appeal. Alleged errors in substance or judgment do not form a sufficient basis of appeal under this paragraph. The appeal must set forth the basis for the applicant's belief that the Regional Administrator's decision was made in error. If the appealing applicant does not clearly and convincingly prove that an error occurred, the appeal must be denied.

(*2*) *Appellate timing and review.* All appeals must be in writing and must be submitted to the Regional Administrator postmarked no later than 45 days after the date on NMFS's Notice of Denial of Initial Qualification application. Failure to register an appeal within 45 days of the date of the Notice of Denial will preclude any further appeal. The appellant may notify the Regional Administrator of his or her intent to appeal within the 45 days and request a time extension to procure the necessary documentation. Time extensions shall be limited to 30 days and shall be calculated as extending 30 days beyond the initial 45-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadlines stated herein will not be accepted. Upon receipt of a complete written appeal with supporting documentation in the time frame allowable, the Regional Administrator will then appoint an appeals officer who will review the appellate documentation. After completing a review of the appeal, the appeals officer will make findings and a recommendation, which shall be advisory only, to the Regional Administrator, who shall make the final agency decision whether to qualify the applicant.

(*3*) *Status of vessels pending appeal.* The Regional Administrator may authorize a vessel to fish with traps in Area 1 during an appeal. The Regional Administrator may do so by issuing a letter authorizing the appellant to fish up to 800 traps in Area 1 during the pendency of the appeal. The Regional Administrator's letter must be present onboard the vessel while it is engaged in such fishing in order for the vessel to be authorized to fish. If the appeal is

ultimately denied, the Regional Administrator's letter authorizing fishing during the appeal will become invalid 5 days after receipt of the notice of appellate denial or 15 days after the date on the notice of appellate denial, whichever occurs first.

* * * * *

[FR Doc. 2011–29845 Filed 11–17–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 76, No. 223

Friday, November 18, 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.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Meeting of the Assembly of the Administrative Conference of the United States

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of a meeting of the Assembly of the Administrative Conference of the United States to consider proposed recommendations which deal with: (1) Innovations in e-rulemaking, (2) international regulatory cooperation, (3) the Federal Advisory Committee Act, and (4) incorporation by reference. To facilitate public participation, the Conference is inviting public comment on the recommendations that will be considered at the meeting.

DATES: Meeting dates are Thursday, December 8, 2011, 2 p.m. to 6 p.m.; and Friday, December 9, 2011, 9 a.m. to 12:30 p.m. Comments on the recommendations must be received by noon, Friday, December 2, 2011.

ADDRESSES: The Public Meeting will be held at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581 (Main Conference Room).

Submit comments to either of the following: email *comments@acus.gov,* with ''December 2011 Plenary Session Comments'' in the subject line; or mail to December 2011 Plenary Session Comments, Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Shawne McGibbon, General Counsel (the Designated Federal Officer), Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW., Washington, DC 20036; *Telephone* (202) 480–2088.

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States makes recommendations to administrative agencies, the President, Congress, and the Judicial Conference of the United States regarding the improvement of Federal administrative procedures (5 U.S.C. 594). The objectives of these recommendations are to ensure that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest, to promote more effective public participation and efficiency in the rulemaking process, reduce unnecessary litigation in the regulatory process, improve the use of science in the regulatory process, and improve the effectiveness of laws applicable to the regulatory process (5 U.S.C. 591).

The membership of the Conference meeting in plenary session constitutes the Assembly of the Conference (5 U.S.C. 595). The Assembly will meet in plenary session to consider four proposed recommendations:

(1) The recommendation ''Agency Innovations in e-Rulemaking'' addresses how Federal agency rulemaking can be improved by better use of Internet-based technologies. The goal of the project was to assess the landscape of existing innovative rulemaking technologies, and identify the most useful innovations and best practices that might be spread to other agencies. The recommendation proposes ways agencies can make rulemaking information, including open dockets, comment polices, and materials from completed rulemakings, more accessible electronically. The recommendation also addresses the issue of improving e-rulemaking participation by those who have historically faced barriers to access, including non-English speakers, users of low-bandwidth Internet connections, and individuals with disabilities.

(2) The recommendation ''International Regulatory Cooperation'' addresses how U.S. regulators can interact with their foreign counterparts to accomplish their domestic regulatory missions and eliminate unnecessary non-tariff barriers to trade more effectively. This project is intended to update Recommendation 91–1, ''Federal Agency Cooperation with Foreign Government Regulators,'' which was adopted by the Administrative Conference in 1991. The recommendation includes proposals for enhanced cooperation and information gathering, more efficient deployment of limited resources, and better information exchanges that result in evidence-based decision making.

(3) The recommendation on the ''Federal Advisory Committee Act (FACA)'' addresses the issue of whether FACA is functioning effectively and efficiently almost 40 years after its enactment. Some of the relevant questions regarding FACA are whether it is hampering Federal agencies' ability to obtain outside advice and whether it provides sufficient transparency in the advisory committee process. The recommendation offers three sets of proposed revisions to the existing FACA regime to make the law more relevant in light of agency experience with FACA and 21st century technologies. Specifically, the recommendation includes proposals designed to clarify the scope of FACA and its implementing regulations, alleviate certain procedural burdens associated with the existing regime, and promote ''best practices'' aimed at enhancing the transparency and objectivity of the advisory committee process.

(4) The recommendation ''Incorporation by Reference'' addresses the legal and policy issues related to agencies' adoption of or references to standards or other materials that have been published elsewhere. Incorporation by reference is common partly because Federal policy requires regulatory agencies to use voluntary consensus standards in lieu of government-designed standards when doing so is not impractical or inconsistent with the statutory mission. That policy builds upon Recommendation 78–4, ''Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation,'' adopted by the Conference in 1978. That recommendation encouraged the use of voluntary consensus standards in health and safety regulation. In the ensuing years, many agencies have promulgated thousands of regulations using standards that incorporate by reference standards published elsewhere. This practice raises common issues that individual agencies deal with differently, and the aim of the recommendation is to consolidate the

dispersed knowledge of affected agencies, identify best practices, and recommend ways to improve the process.

This meeting will be open to the public and may end prior to the designated end time if business is concluded earlier. Members of the public are invited to attend the meeting in person, subject to space limitations. The Conference will also provide remote public access to the meeting via webcast. Anyone who wishes to attend the meeting in person is asked to RSVP to *comments@acus.gov,* no later than December 6, 2011, in order to facilitate entry. Members of the public who attend the meetings of the full Assembly are only permitted to speak with the consent of the Chairman and the unanimous approval of the members. The Conference welcomes the attendance of the public and will make every effort to accommodate persons with physical disabilities or special needs. If you need special accommodations due to disability, please inform the contact person noted above no later than 7 days in advance of the meeting.

Members of the public may submit written comments on any or all of the recommendations to either of the addresses listed above no later than noon, December 2, 2011. Copies of the proposed recommendations and information on remote access will be available at *http://www.acus.gov.* Comments relating to the individual proposed recommendations will be delivered to the Designated Federal Officer listed on this notice and will be posted on the Conference's Web site when received. Comments received at this stage will be available to the full Assembly prior to their consideration of the final recommendations.

Dated: November 14, 2011.

Shawne McGibbon,

General Counsel.

[FR Doc. 2011–29812 Filed 11–17–11; 8:45 am]

BILLING CODE 6110–01–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; 2012 Company Organization Survey

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before January 17, 2012.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Joy P. Pierson, Economic Planning and Coordination Division, U.S. Census Bureau, Room 8K319, Washington, DC 20233–6100 (or by email at *Joy.P.Pierson@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau conducts the annual Company Organization Survey (COS) to update and maintain a central, multipurpose Business Register (BR) database. In particular, the COS supplies critical information on the composition, organizational structure, and operating characteristics of multi-location companies.

The BR serves two fundamental purposes:

—First and most important, it provides sampling populations and enumeration lists for the Census Bureau's economic surveys and censuses, and it serves as an integral part of the statistical foundation underlying those programs. Essential for this purpose is the BR's ability to identify all known United States business establishments and their parent companies. Further, the BR must accurately record basic business attributes needed to control sampling and enumeration. These attributes include industrial and geographic classifications, and name and address information.

—Second, it provides establishment data that serve as the basis for the annual County Business Patterns (CBP) statistical series. The CBP reports present data on the number of establishments, first quarter payroll, annual payroll, and mid-March employment summarized by industry and employment size class for the United States, the District of Columbia, island areas, counties, and county-equivalents. No other annual or more frequent series of industry statistics provides comparable detail, particularly for small geographic areas.

II. Method of Collection

The Census Bureau will conduct the 2012 COS in conjunction with the 2012 Economic Census and will coordinate these collections to minimize response burden. The consolidated COS/census mail canvass will direct inquiries to the entire universe of multi-location enterprises, which comprises roughly 164,000 parent companies and more than 1.6 million establishments. The decrease in response burden for the 2012 COS of 36,733 hours is the result of obtaining most multi-location establishment data as part of the 2012 Economic Census. Additionally, the panel will include approximately 100,000 large single-location companies to capture data for the Enterprise Statistics Program (ESP). In 2010 the Census Bureau pretested ESP questions under its Generic Clearance for pretesting research. In 2011 the COS collected data from all multi-location companies and will use these data to baseline the 2012 Economic Census data. The primary collection medium for the COS and Economic Census is a paper questionnaire; however, many enterprises will submit automated/electronic COS and Economic Census reports. For 2012, electronic reporting will be available to all COS and Economic Census respondents. Companies will receive and return responses by secure Internet transmission. Companies that cannot use the Internet will receive a CD–ROM containing their electronic data. All respondents will be allowed to mail the data via diskette or CD–ROM or submit their response data via the Internet. COS content is identical for all of the reporting modes.

The 2012 COS will include company-level questions to approximately 164,000 multi-location enterprises with industrial activities out-of-scope of the 2012 Economic Census. The company-level portion will include inquiries on ownership or control by domestic or foreign parents, ownership of foreign affiliates, research and development, leased employment, and manufacturing activities related to the Enterprise Statistics Program. Additional COS inquiries will apply to the 15,000 multi-unit establishments classified in industries that are out-of-scope of the economic census. The additional inquiries will list an inventory of those out-of-scope establishments and request

updates to these inventories, including: Additions, deletions, and changes to information on EIN, name and address, industrial classification, end-of-year operating status, mid-March employment, first quarter payroll, and annual payroll. The economic census will collect data for all other establishments of multi-establishment enterprises, including those items listed above. Also for 2012, we will collect data for single-location companies on Form NC–99801 to further capture data for the Enterprise Statistics Program.

III. Data

OMB Control Number: 0607–0444.

Form Number: NC–99001 (for multi-establishment enterprises) and NC–99801 (for single-location companies).

Type of Review: Regular submission.

Affected Public: Business and not-for-profit institutions.

Estimated Number of Respondents: 264,000 (164,000 enterprises and 100,000 single units).

Estimated Time per Response: .44 hours.

Estimated Total Annual Burden Hours: 90,784.

Estimated Total Annual Cost: $2,692,653.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C. Sections 131, 182, 224, and 225.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 15, 2011.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–29815 Filed 11–17–11; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–807]

Polyethylene Terephthalate Film, Sheet, and Strip From Korea: Final Results of Antidumping Duty Administrative Review and Revocation in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 8, 2011, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (PET film) from Korea, covering the June 1, 2009, to May 31, 2010, period of review (POR).[1]

The respondent subject to this review is Kolon Industries, Inc., (Kolon). Based on a ministerial error allegation from Kolon, we have made changes in the margin calculation, as explained below in the section entitled ''Changes from Preliminary Results.'' As a result, the final results differ from the preliminary results. In addition, the Department is revoking the antidumping order on PET film from Korea with respect to Kolon.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Tyler Weinhold or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1121 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 8, 2011, the Department published the preliminary results of the administrative review of the antidumping duty order covering PET film from Korea for the POR of June 1, 2009, through May 31, 2010. See Preliminary Results.

On July 8, 2011, Kolon submitted a ministerial error allegation with respect to the Department's Preliminary Results.[2] On September 21, 2011, the Department issued a memorandum to the file addressing Kolon's ministerial error allegation. See Memorandum from Tyler Weinhold to the File, ''Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review: Allegations of Ministerial Errors,'' dated September 21, 2011 (Ministerial Error Memorandum).

Also on September 21, 2011, the Department issued a memorandum informing interested parties of its intent to revoke the antidumping duty order with respect to Kolon on the condition that, in the final results, Kolon is found to have a de minimis or zero dumping margin and has met all the other requirements for revocation.[3] The Department also reset the deadlines for parties to submit case briefs to October 6, 2011, and reset the deadlines for parties to submit rebuttal briefs to October 11, 2011. Id.

We allowed interested parties an opportunity to comment on the Preliminary Results. Kolon submitted a case brief on October 6, 2011, but subsequently withdrew its case brief on October 11, 2011. Petitioners[4] did not submit a case brief.

Period of Review

The POR is June 1, 2009, through May 31, 2010.

Scope of the Order

Imports covered by this order are shipments of all gauges of raw, pretreated, or primed polyethylene terephthalate film, sheet, and strip, whether extruded or coextruded. The films excluded from this review are metalized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches (0.254 micrometers) thick.

PET film is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 3920.62.00. The HTSUS subheading is provided for convenience and for customs purposes. The written

[1] See Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review, 76 FR 40325 (July 8, 2011) (Preliminary Results).

[2] See Kolon's letter regarding ''Polyethylene Terephthalate Film, Sheet, and Strip from Korea: Ministerial Errors in the Preliminary Results of the 2009/10 Administrative Review,'' dated July 8, 2011.

[3] See Memorandum from Richard D. Weible to Ronald K. Lorentzen, ''Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review: Post-Preliminary Analysis and Calculation Memorandum and Intent to Revoke the Antidumping Order with Regard to Kolon Industries, Inc. (Kolon),'' dated September 21, 2011 (Revocation Memorandum).

[4] The petitioners in this proceeding are DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. (collectively, petitioners).

description remains dispositive as to the scope of the product coverage.

Changes From Preliminary Results

We confirm that an error was made in the manner described by Kolon in its July 8, 2011, allegation. The changes made to the margin calculation programs to correct this error from the Preliminary Results are explained further in the Ministerial Error Memorandum.

Revocation of Antidumping Duty Order in Part

Based upon the reasons cited in Kolon's June 30, 2010, November 17, 2010, and July 8, 2011, submissions, and upon the absence of dumping in each of the three most recent administrative reviews, the Department concludes that Kolon has met its burden of providing proper certification to satisfy the requirements for revocation in accordance with 19 CFR 351.222. The Department's preliminary analysis of the factors related to our decision to revoke the order with regard to Kolon is described in further detail in the Revocation Memorandum. The Department hereby adopts the conclusions described in the Revocation Memorandum and determines the following: (a) Kolon has made the proper certifications as described under 19 CFR 351.222(e) and 19 CFR 351.222(b); (b) Kolon has not made sales at less than fair value for three consecutive years covered by the three most recently completed administrative review periods, in accordance with 19 CFR 351.222(b)(2)(i)(A); (c) Kolon has made sales to the United States in commercial quantities over the three consecutive years covered by the three most recently completed administrative review periods in accordance with 19 CFR 351.222(d)(1); and d) in accordance with 19 CFR 351.222(b)(2)(i)(C), that the continued application of the antidumping order with respect to Kolon is not otherwise necessary to offset dumping. Therefore, the Department is revoking the antidumping order on PET film from the Korea with respect to Kolon, effective for entries made after May 31, 2010.

The Department revoked in whole the antidumping duty order on PET film Korea, effective October 20, 2010. See Polyethylene Terephthalate Film, Sheet, and Strip from Korea: Revocation of Antidumping Duty Order, 76 FR 57715 (September 16, 2011) (Revocation Notice); see also ''Termination of Suspension of Liquidation,'' below, for further information. As a result of Kolon's revocation in part from the order, Kolon's entries of PET film made from June 1, 2010, through October 19, 2010, are no longer subject to the antidumping duty order on PET film from Korea. Accordingly, the Department will rescind the ongoing administrative review for Kolon for the period June 1, 2010, through May 31, 2011.[5] See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocations in Part and Deferral of Administrative Reviews, 76 FR 45227 (July 28, 2011).

Final Results of Review

The Department has determined that the following margin exists for the period June 1, 2009, through May 31, 2010:

Manufacturer	Weighted average margin (percentage)
Kolon Industries, Inc.	0.32

[1] (de minimis).

Assessment Rates

Pursuant to these final results, the Department has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions for Kolon to CBP 15 days after the date of publication of these final results. Pursuant to 19 CFR 351.212(b)(1), we calculated importer-specific (or customer-specific) ad valorem duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer-specific (or customer-specific) assessment rate calculated in the final results of this review is above de minimis.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 FR 23954 (May 6, 2003) (Assessment of Antidumping Duties). This clarification will apply to entries of subject merchandise during the POR produced by Kolon for which Kolon did not know the merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate un-reviewed entries at the 21.50 percent all-others rate from the less-than-fair-value investigation if there is no company-specific rate for an intermediary involved in the transaction. See Polyethylene Terephthalate Film, Sheet, and Strip From the Republic of Korea; Notice of Final Court Decision and Amended Final Determination of Antidumping Duty Investigation, 62 FR 50557 (September 26, 1997). See Assessment of Antidumping Duties for a full discussion of this clarification.

Termination of Suspension of Liquidation

As explained above, on September 16, 2011, the Department revoked the antidumping duty order on PET film from Korea effective October 20, 2010. See Revocation Notice. Pursuant to the revocation of the order, the Department instructed CBP, on October 3, 2011, to terminate suspension of liquidation and collection of cash deposits on entries of the subject merchandise entered, or withdrawn from warehouse, on or after October 20, 2010. Accordingly, entries of subject merchandise after October 20, 2010, are not subject to suspension of liquidation or antidumping duty deposit requirements. Therefore we are not issuing antidumping duty deposit instructions to CBP.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(0 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act.

[5] Because Kolon is the only respondent subject to the 2010–2011 administrative review, the Department will rescind the 2010–2011 review in its entirety.

Dated: November 4, 2011.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2011–29491 Filed 11–17–11; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

Minority Business Development Agency

Meeting of the National Advisory Council on Minority Business Enterprise

AGENCY: Minority Business Development Agency, U.S. Department of Commerce.

ACTION: Notice of an Open Meeting.

SUMMARY: The National Advisory Council for Minority Business Enterprise (NACMBE) will hold its fourth meeting to discuss the work of the three subcommittees and deliverables to fulfill the NACMBE's charter mandate. The agenda may change to accommodate Council business.

DATES: The meeting will be held on Monday, December 12, 2011 from 9 a.m. to 5 p.m. Eastern Time (ET).

ADDRESSES: This meeting will be held at the Grand Hyatt New York, Park Avenue at Grand Central Station, 109 East 42nd Street New York, NY 10017.

FOR FURTHER INFORMATION CONTACT: Demetria Gallagher, National Director's Office, Minority Business Development Agency (MBDA), U.S. Department of Commerce at (202) 482–1624, *email: dgallagher@mbda.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Secretary of Commerce established the NACMBE pursuant to his discretionary authority and in accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. App. 2) on April 28, 2010. The NACMBE is to provide the Secretary of Commerce with recommendations from the private sector on a broad range of policy issues that affect minority businesses and their ability to access successfully the domestic and global marketplace.

Topics to be considered: During the meeting the three subcommittees will report on their work and the Council will discuss and deliberate on possible recommendations. The Subcommittee topics include: (1) Definition of Minority Business Enterprises (MBEs) and MBDA's role, (2) Creation of an MBE Forum, and (3) Strategic Alliances & Exports.

Public Participation: The meeting is open to the public. Public seating is limited and available on a first-come, first-served basis. Members of the public wishing to attend the meeting must notify Demetria Gallagher at the contact information above by 5 p.m. EST on Thursday, December 1, 2011, to preregister. Please specify any requests for reasonable accommodation at least ten (10) business days in advance of the meeting. Last minute requests will be accepted, but may not be possible to fulfill.

A limited amount of time, in the afternoon, will be available for pertinent brief oral comments from members of the public attending the meeting. Any member of the public may submit pertinent written comments concerning affairs of the NACMBE at *http://www.mbda.gov/main/nacmbe-submit-comments.* To be considered during the meeting, comments must be received no later than 5 p.m. ET on Wednesday, December 7, 2011, to ensure transmission to the Council prior to the meeting. Comments received after that date will be distributed to the members but may not be considered at the meeting.

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Demetria Gallagher, at (202) 482–1624, or *dgallagher@mbda.gov,* at least ten (10) days before the meeting date.

Copies of the NACMBE open meeting minutes will be available to the public upon request.

Dated: November 14, 2011.

David A. Hinson,

National Director, Minority Business Development Agency.

[FR Doc. 2011–29865 Filed 11–17–11; 8:45 am]

BILLING CODE 3510–21–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Malcolm Baldrige National Quality Award Board of Overseers

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of Open Meeting.

SUMMARY: The Board of Overseers of the Malcolm Baldrige National Quality Award (Board of Overseers) will meet in open session on December 13, 2011. The purpose of this meeting is to discuss and review information received from the National Institute of Standards and Technology and from the Chair of the Judges Panel of the Malcolm Baldrige National Quality Award. The agenda will include: Report from the Judges' Panel, Baldrige Performance Excellence Program (BPEP) Update, Baldrige Fellows Program Status Report, Baldrige Program Changes in 2011, and Recommendations for the NIST Director.

DATES: The meeting will convene December 13, 2011, at 8:30 a.m. and adjourn at 3 p.m. on December 13, 2011.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, Advanced Chemical Sciences Laboratory (Building 227), Room A302, Gaithersburg, Maryland 20899. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of the notice.

FOR FURTHER INFORMATION CONTACT: Dr. Harry Hertz, Director, BPEP, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975–2361.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. App., the Board of Overseers will meet in open session on December 13, 2011. The Board of Overseers is composed of 11 members prominent in the fields of quality, innovation, and performance management and appointed by the Secretary of Commerce, assembled to advise the Secretary of Commerce on the conduct of the Baldrige Award. The agenda will include: Report from the Judges' Panel, BPEP Update, Baldrige Fellows Program Status Report, Baldrige Program Changes in 2011, and Recommendations for the NIST Director.

All visitors to the National Institute of Standards and Technology site will have to pre-register to be admitted. Please submit your name, time of arrival, email address and phone number to Diane Harrison no later than Wednesday, December 8, 2011, and she will provide you with instructions for admittance. Non-U.S. citizens must also submit their passport number, country of citizenship, title, employer/sponsor, address and telephone. Ms. Harrison's email address is *diane.harrison@nist.gov* and her phone number is (301) 975–2361.

Dated: November 10, 2011.

Phillip Singerman,

Associate Director for Innovation & Industry Services.

[FR Doc. 2011–29646 Filed 11–17–11; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA826

Endangered Species; File No. 16174

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that Michael Salmon, Ph.D., Florida Atlantic University, 777 Glades Road, P.O. Box 3091, Boca Raton, FL 33431, has been issued a permit to take green sea turtles (*Chelonia mydas*) for the purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Southeast Region, NMFS, 263 13th Ave. South, St. Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

FOR FURTHER INFORMATION CONTACT: Colette Cairns or Amy Hapeman, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On April 5, 2011, notice was published in the **Federal Register** (76 FR 18725) that a request for a scientific research permit to take green sea turtles had been submitted by the above-named individual. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The five-year permit authorizes Dr. Salmon to take juvenile green sea turtles to characterize abundance and distribution in nearshore developmental habitats off the East coast of southern Florida. Dr. Salmon is authorized to capture by hand, transport to shore, measure, weigh, photograph, passive integrated transponder and flipper tag, temporarily mark the carapace, satellite tag, hold overnight, transport to site of capture, release, and recapture turtles at the conclusion of the study for gear removal up to 30 green sea turtles annually. No mortalities are authorized under the permit. These efforts would aid in the development and refinement of management efforts to recover this species.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: November 14, 2011.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–29889 Filed 11–17–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA827

South Atlantic Fishery Management Council Meeting

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

ACTION: Meeting of the South Atlantic Fishery Management Council.

SUMMARY: The South Atlantic Fishery Management Council will hold meetings of its Spiny Lobster Committee; Law Enforcement Committee; Ecosystem-Based Management Committee; Advisory Panel Selection Committee (Closed Session); Information and Education Committee; Executive Finance Committee; Personnel Committee (Closed Session); King and Spanish Mackerel Committee; Southeast Data, Assessment and Review (SEDAR) Committee; Golden Crab Committee; Snapper Grouper Committee; and a meeting of the Full Council. The Council will take action as necessary.

The Council will also hold a public hearing, an informal public question and answer session regarding agenda items, and a public comment session. See **SUPPLEMENTARY INFORMATION** for additional details.

DATES: The Council meeting will be held December 5–9, 2011. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the Holiday Inn Brownstone Hotel, 1707 Hillsborough Street, Raleigh, NC 27605; *telephone:* 1–(800) 331–7919 or (919) 828–0811; *fax:* (919) 834–0904. Copies of documents are available from Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer; *telephone:* (843) 571–4366 or toll free at (866)/SAFMC–10; *fax:* (843) 769–4520; *email: kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION:

Meeting Dates

1. *Spiny Lobster Committee Meeting:* December 5, 2011, 1:30 p.m. until 3 p.m.

The Spiny Lobster Committee will: Receive a presentation on the process for preparing Biological Opinions; a presentation on gear marking requirements of the Large Whale Take Reduction Plan; and an overview of Spiny Lobster Amendment 11 that includes measures to help protect threatened corals including area closures for the commercial trap fishery and gear marking requirements for trap lines. The Committee will develop recommendations for approval of Amendment 11/Supplemental Environmental Impact Statement (SEIS) for public hearing.

2. *Law Enforcement Committee Meeting:* December 5, 2011, 3 p.m. until 4 p.m.

The Law Enforcement Committee will receive a briefing on headboat misreporting issues, a presentation on ''Optimization of Surveillance and Enforcement in Remote Marine Protected Areas'', and will discuss other issues as appropriate.

3. *Ecosystem-Based Management Committee Meeting:* December 5, 2011, 4 p.m. until 5:30 p.m.

The Ecosystem-Based Management Committee will receive presentations on lionfish and invasive species. The Committee will review: the status of Comprehensive Ecosystem-Based Amendment (CE–BA) 2/Environmental Assessment (EA), including actions relative to octocorals, Special Management Zones (SMZs), release gear requirements in the snapper grouper fishery, and designations of Essential Fish Habitat (ESH) and Habitat Areas of Particular Concern (HAPC); the Coral Advisory Panel (AP) Meeting report; and the Habitat and Environmental Protection AP Meeting report. The Committee will provide recommendations for public scoping of CE–BA 3 and receive an update on ecosystem activities.

4. *Advisory Panel Selection Committee Meeting:* December 6, 2011, 8:30 a.m. until 9:30 a.m. (Closed Session).

The Advisory Panel Selection Committee will review advisory panel

applications and develop recommendations for appointments.

5. *Information and Education Committee Meeting:* December 6, 2011, 9:30 a.m. until 11 a.m.

The Information and Education Committee will receive a briefing on the status of current outreach activities, including the recent Social Media Workshop, Special Management Zones (SMZs) and Strategic Planning. The Committee will also receive an overview of the NOAA/Council Readability Report. The Committee will develop recommendations for staff and Council consideration.

6. *Executive Finance Committee Meeting:* December 6, 2011, 11 a.m. until 11:30 a.m.

The Executive Finance Committee will receive a status report on the Calendar Year (CY) 2011 Council expenditures and activities; and review and discuss the development of the CY2012 Council activities' schedule and budget.

7. *Personnel Committee Meeting:* December 6, 2011, 11:30 a.m. until 12 noon (CLOSED).

The Personnel Committee will discuss the Executive Director performance review.

8. *King and Spanish Mackerel Committee Meeting:* December 6, 2011, 1:30 p.m. until 3 p.m.

The King and Spanish Mackerel Committee will review: The status of commercial and recreational catches versus quotas for species under quota management; the status of recreational catches versus quotas for species under quotas; and the status of Mackerel Amendment 18, which establishes Annual Catch Limits (ACLs) and Accountability Measures (AMs) for mackerel and cobia. The Committee will provide guidance to staff on items in draft Amendment 19, including management alternatives for prohibiting the sale of coastal migratory pelagic (CMP) species harvested under the bag limit, permit requirements, and other issues.

9. *SEDAR Committee Meeting:* December 6, 2011, 3 p.m. until 5 p.m.

The SEDAR Committee will receive an overview of SEDAR activities and develop SEDAR 28 appointments as necessary. The Committee will review the SEDAR Steering Committee report and develop recommendations for the next SEDAR Steering Committee meeting. The Committee will also receive a presentation on the Marine Recreational Information Program (MRIP) Electronic Logbook Study and a report from the Southeast Fisheries Science Center (SEFSC) on red snapper stock assessment possibilities in 2013.

Note: A public hearing will be held on December 6, 2011, beginning at 5:30 p.m., on Snapper Grouper Amendment 18A regarding black sea bass and improvements in data reporting, on Snapper Grouper Amendment 24 regarding red grouper, and on Snapper Grouper Amendment 20A regarding wreckfish. In addition, the Council will accept public comment on Emergency Action to modify the Annual Catch Limit (ACL) for wreckfish.

10. *Golden Crab Committee Meeting:* December 7, 2011, 8:30 a.m. until 10 a.m.

The Golden Crab Committee will: review the status of commercial catches versus quotas (amount landed to date); review Golden Crab Amendment 6 addressing catch shares; provide direction to staff; and approve Amendment 6 for public hearing.

11. *Snapper Grouper Committee Meeting:* December 7, 2011, 10 a.m. until 5 p.m. and December 8, 2011, 8:30 a.m. until 12 noon.

The Snapper Grouper Committee will: receive a report on Oculina monitoring reports; review the status of commercial catches versus quotas for species under quota management; review the status of recreational catches versus quotas for species under quotas; and address any necessary actions as the result of these reports. The Committee will also receive an update on the status of Regulatory Amendment 11, which proposes elimination of the current 240′ restriction on the harvest of some deepwater species within the snapper grouper management unit, and on the status of the corrected final Comprehensive Annual Catch Limit (ACL) Amendment, which establishes ACLs and Accountability Measures (AMs) for species that are not currently undergoing overfishing.

Additionally, the Committee will: review public hearing and draft environmental impact statements (DEIS) comments for Amendment 18A/Environmental Impact Statement (EIS) pertaining to black sea bass and data collection; modify Amendment 18A as appropriate; and approve the document for formal review by the Secretary of Commerce.

The Committee will also: Review public hearing comments for Amendment 24/Environmental Assessment (EA) regarding a rebuilding plan for red grouper, and Amendment 20A/EA pertaining to the wreckfish Individual Transferable Quotas (ITQ); modify the amendments as appropriate; and approve the documents for formal review by the Secretary of Commerce. The Committee will review the status of Amendment 18B/EA, pertaining to golden tilefish, modify the amendment as necessary and approve the document for public hearings. The Committee will also review proposed Emergency Action regarding the ACL for wreckfish and provide recommendations for Council consideration.

Note: There will be an informal public question and answer session with the Regional Administrator from the NMFS and the Council Chairman on December 7, 2011, beginning at 5:30 p.m.

Council Session: December 8, 2011, 1:30 p.m. until 5:30 p.m. and December 9, 2011, 8:30 a.m. until 12 noon.

Council Session: December 8, 2011, 1:30 p.m. until 5:30 p.m.

From 1:30 p.m. until 2 p.m., the Council will call the meeting to order, adopt the agenda, approve the September 2011 meeting minutes, and present the Law Enforcement Officer of the Year Award.

Note: A public comment period on Council agenda items will be held on December 8, 2011, beginning at 2 p.m. Please note that a Public Hearing on Snapper Grouper Amendments 18A, 24 and 20A and Emergency Action to modify the ACL for wreckfish will be held on December 6, 2011, beginning at 5:30 p.m.

From 3 p.m. until 3:15 p.m., the Council will receive a report from the Law Enforcement Committee, consider recommendations and take action as appropriate.

From 3:15 p.m. until 3:30 p.m., the Council will receive a report from the Spiny Lobster Committee, approve Amendment 11 for public hearing, consider recommendations and take action as appropriate.

From 3:30 p.m. until 3:45 p.m., the Council will receive a report from the King and Spanish Mackerel Committee, consider recommendations, and take action as appropriate.

From 3:45 p.m. until 4 p.m., the Council will receive a report from the Ecosystem-Based Management Committee, approve items in CE–BA3 for the public scoping process, consider recommendations and take action as appropriate.

From 4 p.m. until 4:15 p.m., the Council will receive a report from the Golden Crab Committee, approve Amendment 6 for public hearings, consider recommendations and take action as appropriate.

From 4:15 p.m. until 4:30 p.m., the Council will receive a report from the SEDAR Committee, appoint SEDAR 28 representatives as necessary, consider recommendations and take action as appropriate.

From 4:30 p.m. until 4:45 p.m., the Council will receive a report from the Executive Finance Committee, consider

recommendations and take action as appropriate.

From 4:45 p.m. until 5 p.m., the Council will receive a report from the Advisory Panel Selection Committee, review applications and make appointments, consider recommendations and take action as appropriate.

From 5 p.m. until 5:15 p.m., the Council will receive a report from the Information and Education Committee, consider recommendations and take action as appropriate.

From 5:15 p.m. until 5:30 p.m., the Council will receive a legal briefing on litigation. (Closed Session).

Council Session: December 9, 2011, 8:30 a.m. until 12 noon.

From 8:30 a.m. until 9:30 a.m., the Council will: Receive a report from the Snapper Grouper Committee; approve Amendment 18A/EIS, Amendment 20A/EA and Amendment 24/EA for formal review by the Secretary of Commerce; approve Amendment 18B for public hearing; consider Emergency Action for modifying the ACL for wreckfish and other recommendations; and take action as appropriate.

From 9:30 a.m. until 10:45 a.m., the Council will receive status reports from the NOAA Southeast Regional Office (SERO), review and develop recommendations on Experimental Fishing Permits as necessary, and receive reports from the NMFS SEFSC.

From 10:45 a.m. until 12 noon, the Council will review agency and liaison reports and discuss other business, including upcoming meetings.

Documents regarding these issues are available from the Council office (see **ADDRESSES**).

Although non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subjects of formal final Council action during these meetings. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Except for advertised (scheduled) public hearings and public comment, the times and sequence specified on this agenda is subject to change.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) by November 28, 2011.

Dated: November 15, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–29826 Filed 11–17–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA628

Takes of Marine Mammals During Specified Activities; Blasting Operations by the U.S. Army Corps of Engineers During the Port of Miami Construction Project in Miami, FL

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

ACTION: Notice; proposed Incidental Harassment Authorization; request for comments.

SUMMARY: NMFS has received an application from the U.S. Army Corps of Engineers (ACOE) for an Incidental Harassment Authorization (IHA) to take small numbers of marine mammals, by harassment, incidental to blasting operations in the Port of Miami in Miami, Florida. NMFS has reviewed the application, including all supporting documents, and determined that it is adequate and complete. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to ACOE to incidentally harass, by Level B harassment only, marine mammals during the specified activity.

DATES: Comments and information must be received no later than December 19, 2011.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Goldstein@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

A copy of the application containing a list of the references used in this document may be obtained by writing to the above address, telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**) or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

This project was previously evaluated by the ACOE under an Environmental Impact Statement (EIS) and a Record of Decision (ROD) for the proposed project was signed on May 22, 2006, which is also available at the same Internet address. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the MMPA (16 U.S.C. 1361(a)(5)(D)) directs the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for the incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring and reporting of such takings. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS's review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small number of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (I) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

16 U.S.C. 1362(18).

Summary of Request

On May 17, 2011, NMFS received a letter from the ACOE, requesting an IHA. The requested IHA would authorize the take, by Level B (behavioral) harassment, of small numbers of Atlantic bottlenose dolphins (*Tursiops truncatus*) incidental to blasting operations in the Miami Harbor, Port of Miami, in Miami-Dade County, Florida. The IHA application was considered adequate and complete on September 9, 2011. The ACOE proposes to conduct four components as part of the project in Miami Harbor. These components are:

(1) The widening of Cut 1 and deepening of Cut 1 and Cut 2;

(2) Adding a turn widener and deepening at the southern intersection of Cut 3 within Fisherman's Channel;

(3) Widening and deepening the Fisher Island Turning Basin; and

(4) Expanding the Federal Channel and Port of Miami berthing areas in Fisherman's Channel and the Lummus Island Turning Basin.

The construction will likely be completed using a combination of mechanical dredge (*i.e.,* a clamshell or backhoe), cutterhead dredge, and rock pre-treatment by confined blasting. The dredging will remove approximately 5,000,000 cubic yards (3,822,774.3 cubic meters [m^3]) of material from the harbor. Material removed from the dredging will be placed in Miami Harbor Ocean Dredged Material Disposal Site, or used to construct seagrass and reef mitigation projects.

The blasting is proposed to take place beginning during the summer of 2012 (June, 2012), and is expected to take up to 24 months in Miami, Florida. Additional information on the construction project is contained in the application, which is available upon request (see **ADDRESSES**).

Description of the Proposed Specified Activities

The ACOE proposes to deepen and widen the Federal channels at Miami Harbor, Port of Miami, in Miami-Dade County, Florida. The recommended plan (Alternative 2 of the Environmental Impact Statement [EIS]) includes four components:

(1) Widen the seaward portion of Cut 1 from 500 to 800 feet (ft) (152.4 to 243.8 meters [m]) and deepen Cut 1 and Cut 2 from a project depth of −44 to −52 ft (13.4 to 15.9 m);

(2) Add a turn widener at the southern intersection of Cut 3 within Fisherman's Channel and deepen to a project depth of −50 ft (−15.2 m);

(3) Increase the Fisher Island Turning Basin from 1,200 to 1,500 ft (365.8 to 457.2 m), truncate the northeast section of the turning basin to minimize seagrass impacts, and deepen from −42 ft (−12.8 m) to a project depth of −50 ft; and

(4) The Federal Channel and Port of Miami berthing areas in Fisherman's Channel and in the eastern end of the Lummus Island Turning Basin (LITB) will be expanded by 60 ft (18.3 m) to the south for a total of a 160 ft (48.8 m) wide berthing area and will be deepened from −42 ft to a project depth of −50 ft. The Federal Channel will be widened 40 ft (12.2 m) to the south, for a 100 ft (30.5 m) total width increase in Fisherman's Channel. Component 5 will deepen Fisherman's Channel and the LITB from −42 ft to a project depth of −50 ft. See Figure 1 of ACOE's IHA application for a map of the proposed project's components.

Disposal of the estimated five million cubic yards of dredged material would occur at up to three disposal sites (seagrass mitigation area, offshore artificial reef mitigation areas, and the Miami Offshore Dredged Material Disposal Site). This project was previously evaluated under an Environmental Impact Statement (EIS) titled ''Miami Harbor Miami-Dade County, Florida Navigation Study, Final General Reevaluation Report and Environmental Impact Statement,'' prepared under the National Environmental Policy Act, and a Record of Decision for the proposed project was signed on May 22, 2006. The original proposed project included six components, two of which (four and six) have been removed. The EIS provides a detailed explanation of project location as well as all aspects of project implementation. It is also available online for public review at: *http://www.saj.usace.army.mil/Divisions/Planning/Branches/Environmental/DOCS/OnLine/Dade/MiamiHarbor/NAV_STUDY_VOL-1_MIAMI.pdf.*

To achieve the deepening of the Miami Harbor from the existing depth of −45 ft (−13.7 m) to project depth of −52 ft, pretreatment of some of the rock areas may be required using confined underwater blasting, where standard construction methods are unsuccessful due to the hardness of the rock. The ACOE has used two criteria to determine which areas are most likely to need blasting for the Miami Harbor expansion: (1) Areas documented by core borings to contain hard and/or massive rock; and (2) areas previously blasted in the harbor during the 2005 blasting and dredging project.

The duration of the blasting is dependent upon a number of factors including hardness of rock, how close the drill holes are placed, and the type of dredging equipment that will be used to remove the pretreated rock. Without this information, an exact estimate of how many ''blast days'' will be required for the project cannot be determined. The harbor deepening project at Miami Harbor in 2005 to 2006 estimated between 200 to 250 days of blasting with one shot per day (a blast day) to pre-treat the rock associated with that project; however, the contractor completed the project in 38 days with 40 blasts. The upcoming expansion at Miami Harbor scheduled to begin in summer/fall of 2012 currently estimates a maximum of 600 blast days for the entire project footprint. While blasting events will occur only during the day, other operations associated with the proposed action will take place 24 hours a day, typically six days a week. The contractor may drill the blast array at night and then blast after at least two hours after sunrise (1 hour, plus one hour of monitoring). After detonation of the first explosive array, a second array may be drilled and detonated before the one-hour before sunset prohibition is triggered. Blasting activities normally will not take place on Sundays due to local ordinances.

At this time, the ACOE has not selected a contractor and thus, does not have a contractor-developed blasting plan from the contractor specifically identifying the number of holes that will be drilled, the amount of explosives that will be used for each hole, the number of blasts per day (usually no more than two per a day) or the number of days the construction is anticipated to take to complete. The ACOE is required to have

all authorizations and permits completed (including the possession of an IHA) prior to the request for proposal and advertising the contract, per the Competition in Contracting Act, and the Federal Acquisition Regulations. While the ACOE does not have contract bids at this time, it is possible to make reasonable estimates of the bounds based on previous similar projects that have been conducted by the ACOE here and at other locations. NMFS concurs with the use of the worse case scenarios in order to estimate blasting activities and associated potential impacts.

Blast holes are small in diameter and only 5 to 10 ft (1.5 to 3.1 m) deep, drilling activities take place for a short time duration, with no more than three holes being drilled at the same time (based on the current drill-rigs available in the industry that range from one to three drills). During the 2005 blasting event, dolphins were seen near the drill barge during drilling events and the ACOE did not observe avoidance behavior. No measurements associated with noise from drilling small blast holes have been recorded. The ACOE does not expect incidental harassment from drilling operations and is not requesting take associated with this activity.

Although the ACOE does not have a specific contractor-provided blasting plan, the ACOE developed plans and specifications for the project that direct the contractor to do certain things in certain ways and are basing these plans and specifications on the previous deepening project in Miami Harbor (construction was conducted in 2005 to 2006).

The previous ACOE project in Miami Harbor required a maximum weight of explosives used in each delay of 376 pounds (lb) (170.6 kilograms [kg]) and the contractors blasted once or twice daily from June 25 to August 25, 2005, for a total of 40 individual blasts in 38 days of blasting. The 2005 project blasting was limited to Fisherman's Channel and the Dodge-Lummus Island Turning Basin (see Figure 2 of ACOE's IHA application, which shows the blasting footprint for the 2005 project), whereas the project described in the ACOE's application includes Fisherman's Channel, Dodge-Lummus Island Turning Basin, Fisher Island Turning Basin, and Inner and Outer Entrance Channel. This larger area will result in more blasting for this project than was completed in 2005, as it includes areas not previously blasted in 2005.

A copy of the **Federal Register** notice of issuance for the IHA from 2003 (68 FR 32016, May 29, 2003), the IHA renewal from 2005 (70 FR 21174, April 25, 2005), and the final biological monitoring report from the ACOE's Miami Harbor Phase II project (completed in 2006) is attached to the ACOE's application and available on NMFS's Web site at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha.* For the new construction at Miami Harbor, the ACOE expects the proposed project may take multiple years, and the ACOE will seek subsequent renewals of this IHA after issuance, with sufficient time to prevent any delay to the project.

For the proposed deepening at Miami Harbor, the ACOE has consulted with blasting industry experts and believe, that based on the rock hardness and composition at Miami Harbor, a maximum charge weight per delay of 450 lbs (204.1 kg) should be expected. The minimum charge weight will be 10 lbs (4.5 kg).

The focus of the proposed blasting work at the Miami Harbor is to pre-treat the massive limestone formation that makes up the base of Miami Harbor prior to removal by a dredge utilizing confined blasting, meaning the explosive shots would be ''confined'' in the rock. Typically, each blast array is set up in a square or rectangle area divided into rows and columns (see Figures 3, 4, and 5 in the ACOE's IHA application). An average blast array is 10 holes long by 4 holes wide with holes being spaced 40 ft (12.2 m) apart covering an area of 4,000 ft^2 (371.6 m^2). Blast arrays near bulkheads can be long-linear feature of one-hole wide by 8 or 10 holes long (see Figure 4 of the IHA application).

In confined blasting, each charge is placed in a hole drilled in the rock approximately 5 to 10 ft (1.5 to 3.0 m) deep; depending on how much rock/concrete needs to be broken and the intended project depth. The hole is then capped with an inert material, such as crushed rock. This process is referred to as ''stemming the hole'' (see Figure 6 and 7 of ACOE's IHA application; each bag as shown contains approximate volume of material used per discharge). The ACOE used this technique previously at the Miami Harbor Phase II project in 2005. NMFS issued an IHA for that operation on May 22, 2003 (68 FR 32016, May 29, 2003) and renewed the IHA on April 19, 2005 (70 FR 21174, April 25, 2005).

For the Port of Miami expansion project (Miami Harbor Phase II) that used blasting as a pre-treatment technique, the stemming material was angular crushed rock. (Stemming is the process of filling each borehole with crushed rock after the explosive charge has been placed. After the blasting charge has been set, then the chain of explosives within the rock is detonated. Stemming reduces the strength of the outward pressure wave produced by blasts.) The optimum size of stemming material is material that has an average diameter of approximately 0.05 times the diameter of the blast-hole. The selected material must be angular to perform properly (Konya, 2003). For the ACOE's proposed project, specifications will be prepared by the geotechnical branch of the Jacksonville District.

In the Miami Harbor Phase II project, the following requirements were in the specifications regarding stemming material:

1.22.9.20 Stemming

All blast holes shall be stemmed. The Blaster or Blasting Specialist shall determine the thickness of stemming using blasting industry conventional stemming calculations. The minimum stemming shall be 2 ft (0.6 m) thick. Stemming shall be placed in the blast hole in a zone encompassed by competent rock. Measures shall be taken to prevent bridging of explosive materials and stemming within the hole. Stemming shall be clean, angular to sub-angular, hard stone chips without fines having an approximate diameter of ½ inch (in; 1.3 centimeters [cm]) to ⅜ in (1 cm). A barrier shall be placed between the stemming and explosive product, if necessary, to prevent the stemming from setting into the explosive product. Anything contradicting the effectiveness of stemming shall not extend through the stemming (see Figure 6 of ACOE's IHA application for a typical drill hole configuration with stemming).

The specifications for any construction utilizing the blasting for the deepening of Miami Harbor would have similar stemming requirements as those that were used for the Miami Harbor Phase II project in 2005 to 2006. The length of stemming material would vary based on the length of the hole drilled, however minimum lengths would be included in the project specific specifications. Studies have shown that stemmed blasts have up to a 60 to 90 percent decrease in the strength of the pressure wave released, compared to open water blasts of the same charge weight (Nedwell and Thandavamoorthy, 1992; Hempen *et al.,* 2005; Hempen *et al.,* 2007). However, unlike open water (unconfined) blasts (see Figure 8 of ACOE's IHA application), very little peer-reviewed research exists on the effects that confined blasting can have on marine animals near the blast (Keevin *et al.,* 1999). The visual evidence from a typical confined blast is shown in Figure 9 of ACOE's IHA application.

In confined blasting, the detonation is conveyed from the drill barge to the

primer and the charge itself by Primacord and Detaline. These are used to safety fire the blast from a distance to ensure human safety from the blast. The Primacord and Detaline used on this project have a specific grain weight, and they burn like a fuse. They are not electronic. The time delay from activation to detonation of the charge is less than one second.

As part of the development of the protected species monitoring and mitigation protocols, which will be incorporated into the plans and specification for the proposed project, ACOE will continue to coordinate with the resource agencies and non-governmental organizations (NGOs) to address concerns and potential impacts associated with the use of blasting as a construction technique.

To estimate the maximum poundage of explosives that may be utilized for this proposed project, the ACOE has reviewed two previous blasting projects, one at San Juan Harbor, Puerto Rico in 2000, and one at Miami Harbor, Florida in 2005. The San Juan Harbor project's heaviest blast event using explosives was 375 lbs (170.1 kg) per delay and in Miami it was 376 lbs (170.6 kg) per delay. Based on discussion with the ACOE's geotechnical engineers, it is expected that the maximum weight of delays for Miami Harbor will be larger since the rock is much harder than what is seen at the Port of Miami.

Based upon industry standards and ACOE Safety & Health Regulations, the blasting program may consist of the following:

- The weight of explosives to be used in each blast will be limited to the lowest poundage of explosives that can adequately break the rock.
- Drill patterns are restricted to a minimum of 8 ft (2.4 m) separation from a loaded hole.
- Hours of blasting are restricted from two hours after sunrise to one hour before sunset to allow for adequate observation of the proposed project area for marine mammals.
- Selection of explosive products and their practical application method must address vibration and air blast (overpressure) control for protection of existing structures and marine wildlife.
- Loaded blast holes will be individually delayed to reduce the maximum lbs per delay at point detonation, which in turn will reduce the mortality radius.
- The blast design will consider matching the energy in the ''work effort'' of the borehole to the rock mass or target for minimizing excess energy vented into the water column or hydraulic shock.
- Delay timing adjustments with a minimum of 8 milliseconds (ms) between delay detonations to stagger the blast pressures and prevent cumulative addition of pressures in the water.

Test Blast Program

Prior to implementing a construction blasting program, a test blast program will be completed. The test blast program will have all the same protective monitoring and mitigation measures in place for protected species as blasting operations for construction purposes. The purpose of the test blast program is to demonstrate and/or confirm the following:

- Drill boat capabilities and production rates;
- Ideal drill pattern for typical boreholes;
- Acceptable rock breakage for excavation;
- Tolerable vibration level emitted;
- Directional vibration; and
- Calibration of the environment.

The test blast program begins with a single range of individually delayed holes and progresses up to the maximum production blast intended for use. The test blast program will take place in the proposed project area and will count toward the pre-treatment of material, since the blasts of the test blast program will be cracking rock. Each test blast is designed to establish limits of vibration and air blast overpressure, with acceptable rock breakage for excavation. The final test event simulates the maximum explosive detonation as to size, overlying water depth, charge configuration, charge separation, initiation methods, and loading conditions anticipated for the typical production blast.

The results of the test blast program will be formatted in a regression analysis with other pertinent information and conclusions reached. This will be the basis for developing a completely engineered procedure for the construction blasting plan.

During the test blast program, the following data will be used to develop a regression analysis:

- Distance;
- Pounds per delay;
- Peak particles velocities (Threshold Limit Value [TVL]);
- Frequencies (TVL);
- Peak vector sum; and
- Air blast, overpressure.

Additional details regarding the proposed blasting and dredging project can be found in the ACOE's IHA application and EIS. The EIS can also be found online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

Description of the Proposed Dates, Duration, and Specified Geographic Region

At this time the ACOE has not yet a specific date for the initiation of construction activities within the Port of Miami. However, the ACOE requests that the IHA to be issued by NMFS by November 30, 2011, to allow for the advertisement of the contract for construction in January, 2012; award the contract and provide the notice to proceed to the selected in May, 2012 to the selected contractor, resulting in construction work beginning after June, 2012. The proposed construction activities are expected to take up to 24 months and at this time, it is possible that blasting could take place at any time during construction. The ACOE also notes that multiple IHAs (up to three) will be needed and requested for this project due to the project duration.

The proposed blasting activities will be limited to waters shallower than 60 ft (18.3 m), and located entirely on the continental shelf and will not take place seaward of the outer reef. The specified geographic area of the construction will be within the boundaries of the Port of Miami, in Miami, Florida (see Figure 11 of the ACOE's IHA application). The Port of Miami is an island facility consisting of 518 upland acres and is located in the northern portion of Biscayne Bay in South Florida. The City of Miami is located on the west side of the Biscayne Bay; the City of Miami Beach is located on an island on the northeast side of Biscayne Bay, opposite of Miami. Both cities are located in Miami-Dade County, Florida, and are connected by several causeways crossing the bay. The Port of Miami is the southernmost major port on the Atlantic Coast. The Port of Miami's landside facilities are located on Dodge-Lummus Island, which has a GPS location 25° 46′05″ North 80° 09′40″ West. See Figure 11 of the ACOE's IHA application for more information on the location of the proposed project area in the Port of Miami.

Description of Marine Mammals in the Area of the Proposed Specified Activity

Several cetacean species and a single species of sirenian are known to or could occur in the Miami Harbor action area and off the Southeast Atlantic coastline (see Table 1 below). Species listed as endangered under the U.S. Endangered Species Act (ESA), includes the humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), fin (*Balaenoptera physalus*), blue (*Balaenoptera musculus*), North Atlantic right (*Eubalaena glacialis*), and

sperm (*Physeter macrocephalus*) whale, and West Indian (Florida) manatee (*Trichechus manatus latirostris).* The marine mammals that occur in the Atlantic Ocean off the U.S. southeast coast belong to three taxonomic groups: mysticetes (baleen whales), odontocetes (toothed whales), and sirenians (the manatee). The West Indian manatee in Florida and U.S. waters is managed under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS) and therefore is not considered further in this analysis.

Table 1 below outlines the marine mammal species and their habitat in the region of the proposed project area.

TABLE 1—THE HABITAT AND CONSERVATION STATUS OF MARINE MAMMALS INHABITING THE PROPOSED STUDY AREA IN THE ATLANTIC OCEAN OFF THE U.S. SOUTHEAST COAST

Species	Habitat	ESA [1]	MMPA [2]
Mysticetes:			
North Atlantic right whale (*Eubalaena glacialis*).	Coastal and shelf	EN	D.
Humpback whale (*Megaptera novaeangliae*).	Pelagic, nearshore waters, and banks.	EN	D.
Bryde's whale (*Balaenoptera brydei*).	Pelagic and coastal	NL	NC.
Minke whale (*Balaenoptera acutorostrata*).	Shelf, coastal, and pelagic	NL	NC.
Blue whale (*Balaenoptera musculus*).	Pelagic and coastal	EN	D.
Sei whale (*Balaenoptera borealis*).	Primarily offshore, pelagic	EN	D.
Fin whale (*Balaenoptera physalus*).	Slope, mostly pelagic	EN	D.
Odontocetes:			
Sperm whale (*Physeter macrocephalus*).	Pelagic, deep seas	EN	D.
Cuvier's beaked whale (*Ziphius cavirostris*).	Pelagic	NL	NC.
Gervais' beaked whale (*Mesoplodon europaeus*).	Pelagic	NL	NC.
True's beaked whale (*Mesoplodon mirus*).	Pelagic	NL	NC.
Blainville's beaked whale (*Mesoplodon densirostris*).	Pelagic	NL	NC.
Dwarf sperm whale (*Kogia sima*)	Offshore, pelagic	NL	NC.
Pygmy sperm whale (*Kogia breviceps*).	Offshore, pelagic	NL	NC.
Killer whale (*Orcinus orca*)	Widely distributed	NL EN (Southern Resident)	NC. D (Southern Resident, AT1 Transient).
Short-finned pilot whale (*Globicephala macrorhynchus*).	Inshore and offshore	NL	NC.
False killer whale (*Pseudorca crassidens*).	Pelagic	NL	NC.
Mellon-headed whale (*Peponocephala electra*).	Pelagic	NL	NC.
Pygmy killer whale (*Feresa attenuata*).	Pelagic	NL	NC.
Risso's dolphin (*Grampus griseus*).	Pelagic, shelf	NL	NC.
Bottlenose dolphin (*Tursiops truncatus*).	Offshore, Inshore, coastal, and estuaries.	NL	NC. S (Biscayne Bay and Central Florida Coastal stocks). D (Western North Atlantic Coastal).
Rough-toothed dolphins (*Steno bredanensis*).	Pelagic	NL	NC.
Fraser's dolphin (*Lagenodelphis hosei*).	Pelagic	NL	NC.
Striped dolphin (*Stenella coeruleoalba*).	Pelagic	NL	NC.
Pantropical spotted dolphin (*Stenella attenuata*).	Pelagic	NL	NC. D (Northeastern Offshore).
Atlantic spotted dolphin (*Stenella frontalis*).	Coastal to pelagic	NL	NC.
Spinner dolphin (*Stenella longirostris*).	Mostly pelagic	NL	NC. D (Eastern).
Clymene dolphin (*Stenella clymene*).	Pelagic	NL	NC.
Sirenians:			

TABLE 1—THE HABITAT AND CONSERVATION STATUS OF MARINE MAMMALS INHABITING THE PROPOSED STUDY AREA IN THE ATLANTIC OCEAN OFF THE U.S. SOUTHEAST COAST—Continued

Species	Habitat	ESA [1]	MMPA [2]
West Indian (Florida) manatee (*Trichechus manatus latirostris*).	Coastal, rivers, and estuaries ..	EN	D.

[1] U.S. Endangered Species Act: EN = Endangered, T = Threatened, NL = Not listed.
[2] U.S. Marine Mammal Protection Act: D = Depleted, S = Strategic, NC = Not classified.

The one species of marine mammal under NMFS jurisdiction known to commonly occur in close proximity to the proposed blasting area of the Port of Miami is the Atlantic bottlenose dolphin, specifically the stocks living near the Port of Miami within Biscayne Bay (the Biscayne Bay stock) or transiting the outer entrance channel (Western North Atlantic Central Florida Coastal stock).

Atlantic Bottlenose Dolphin

Atlantic bottlenose dolphins are distributed worldwide in tropical and temperate waters, and in U.S. waters occur in multiple complex stocks along the U.S. Atlantic coast. The coastal morphotype of bottlenose dolphins is continuously distributed along the Atlantic coast south of Long Island, New York, to the Florida peninsula, including inshore waters of the bays, sounds, and estuaries. Except for animals residing within the Southern North Carolina and Northern North Carolina Estuarine Systems (*e.g.,* Waring *et al.,* 2009), estuarine dolphins along the U.S. east coast have not been previously included in stock assessment reports. Several lines of evidence support a distinction between dolphins inhabiting coastal waters near the shore and those present in the inshore waters of the bays, sounds, and estuaries. Photo-identification (photo-ID) and genetic studies support the existence of resident estuarine animals in several inshore areas of the southeastern United States (Caldwell, 2001; Gubbins, 2002; Zolman, 2002; Mazzoil *et al.,* 2005; Litz, 2007), and similar patterns have been observed in bays and estuaries along the Gulf of Mexico coast (Well *et al.,* 1987; Balmer *et al.,* 2008). Recent genetic analyses using both mitochondrial DNA and nuclear microsatellite markers found significant differentiation between animals biopsied along the coast and those biopsied within the estuarine systems at the same latitude (NMFS, unpublished data). Similar results have been found off the west coast of Florida (Sellas *et al.,* 2005).

Biscayne Bay Stock

Biscayne Bay is a shallow estuarine system located along the southeast coast of Florida in Miami-Dade County. The Bay is generally shallow (depths greater than 5 m [16.4 ft]) and includes a diverse range of benthic communities including seagrass beds, soft coral and sponge communities, and mud flats. The northern portion of Biscayne Bay is surrounded by the cities of Miami and Miami Beach and is therefore heavily influenced by industrial and municipal pollution sources. The water flow in this portion of Biscayne Bay is very restricted due to the construction of dredged islands (Bialczak *et al.,* 2001). In contrast, the central and southern portions of Biscayne Bay are less influenced by development and are better flushed. Water exchange with the Atlantic Ocean occurs through a broad area of grass flats and tidal channels termed the Safety Valve. Biscayne Bay extends south through Card Sound and Barnes Sound, and connects through smaller inlets to Florida Bay.

The Biscayne Bay stock of bottlenose dolphins is bounded by Haulover Inlet to the north and Card Sound Bridge to the south. This range corresponds to the extent of confirmed home ranges of bottlenose dolphins observed residing in Biscayne Bay by a long-term photo-ID study conducted by the Southeast Fisheries Science Center (Litz, 2007; SEFSC unpublished data). It is likely that the range of Biscayne Bay dolphins extends past these boundaries; however, there have been few surveys outside of this range. These boundaries are subject to change upon further study of dolphin home ranges within the Biscayne Bay estuarine system and comparison to an extant photo-ID catalog from Florida Bay to the south.

Dolphins residing within estuaries north of this stock along the southeastern coast of Florida are currently not included in a stock assessment report. There are insufficient data to determine whether animals in this region exhibit affiliation to the Biscayne Bay stock, the estuarine stock further to the north in the Indian River Lagoon Estuarine System (IRLES), or are simply transient animals associated with coastal stocks. There is relatively limited estuarine habitat along this coastline; however, the Intracoastal Waterway extends north along the coast to the IRLES. It should be noted that during 2003 to 2007, there were three stranded bottlenose dolphins in this region in enclosed waters. One of these had signs of human interaction from a boat strike and another was identified as an offshore morphotype of bottlenose dolphin.

Bottlenose dolphins have been documented in Biscayne Bay since the 1950's (Moore, 1953). Live capture fisheries for bottlenose dolphins are known to have occurred throughout the southeastern U.S. and within Biscayne Bay during the 1950's and 1960's; however, it is unknown how many individuals may have been removed from the population during this period (Odell, 1979; Wells and Scott, 1999).

The Biscayne Bay bottlenose dolphin stock has been the subject of an ongoing photo-ID study conducted by the NMFS SEFSC since 1990. From 1990 to 1991, preliminary information was collected focusing on the central portion of Biscayne Bay. The survey was re-initiated in 1994, and it was expanded to include the northern portion of Biscayne Bay and south to the Card Sound Bridge in 1995 (SEFSC unpublished data; Litz, 2007). Through 2007, the photo-ID catalog included 229 unique individuals. Approximately 80% of these individuals may be long-term residents with multiple sightings over the 17 years of the study (SEFSC, unpublished data). Analyses of the sighting histories and associations of individuals from the Biscayne Bay segregated along a north/south gradient (Litz, 2007).

Remote biopsy samples of Biscayne Bay animals were collected between 2002 and 2004 for analyses of population genetic structure and persistent organic pollutant concentrations in blubber. Genetic structure was investigated using both mitochondrial DNA and nuclear (microsatellite) markers, and the data from Biscayne Bay were compared to data from Florida Bay dolphins to the south (Litz, 2007). Within Biscayne Bay, dolphins sighted primarily in the northern half of Biscayne Bay were significantly differentiated from those sighted primarily in the southern half at the microsatellite loci but not at the

mitochondrial locus. There was not sufficient genetic information between these groups to indicate true population subdivision (Litz, 2007). However, genetic differentiation was found between the Biscayne Bay and Florida Bay dolphins in both markers (Litz, 2007). The observed genetic differences between resident animals in Biscayne Bay and those in an adjacent estuary combined with the high levels of sight fidelity observed, demonstrate that the resident Biscayne Bay bottlenose dolphins are a demographically distinct population stock.

The total number of bottlenose dolphins in the Biscayne Bay stock is unknown. During small boat surveys between 2003 and 2007, 157 unique individuals were identified using standard methods, however, this catalog size does not represent a valid estimate of population size because the residency patterns of dolphins in Biscayne Bay is not fully understood. Litz (2007) determined that 69 animals in Biscayne Bay have a northern home range. Based on Waring *et al.* (2010), the maximum population of animals that may be in the proposed project area is equal to the total number of uniquely identified animals for the entire photo-ID study of Biscayne Bay—229 individuals. Present data are insufficient to calculate a minimum population estimate, and to determine the population trends, for the Biscayne Bay stock of bottlenose dolphins. The total human-caused mortality and serious injury for this stock is unknown and there is insufficient information available to determine whether the total fishery-related mortality and serious injury for this stock is insignificant and approaching zero mortality and serious injury rate. Documented human-caused mortalities in recreational fishing gear entanglement and ingestion of gear reinforce concern for this stock. Because the stock size is currently unknown, but likely small and relatively few mortalities and serious injuries would exceed potential biological removal, NMFS considers this stock to be a strategic stock.

Western North Atlantic Central Florida Coastal Stock

On the Atlantic coast, Scott *et al.* (1988) hypothesized a single coastal migratory stock ranging seasonally from as far north as Long Island, to as far south as central Florida, citing stranding patterns during a high mortality event in 1987 to 1988 and observed density patterns. More recent studies demonstrate that the single coastal migratory stock hypothesis is incorrect, and there is instead a complex mosaic of stocks (McLellan *et al.,* 2003; Rosel *et al.,* 2009).

The coastal morphotype is morphologically and genetically distinct from the larger, more robust morphotype primarily occupying habitats further offshore (Hoelzel *et al.,* 1998; Mead and Potter, 1995; Rosel *et al.,* 2009). Aerial surveys conducted between 1978 and 1982 (CETAP, 1982) north of Cape Hatteras, North Carolina, identified two concentrations of bottlenose dolphins, one inshore of the 82 ft (25 m) isobath and the other offshore of the 164 ft (50 m) isobath. The lowest density of bottlenose dolphins was observed over the continental shelf, with higher densities along the coast and near the continental shelf edge. It was suggested, therefore, that north of Cape Hatteras, North Carolina, the coastal morphotype is restricted to waters less than 82 ft deep (Kenney, 1990). Similar patterns were observed during summer months in more recent aerial surveys (Garrison and Yeung, 2001; Garrison *et al.,* 2003). However, south of Cape Hatteras during both winter and summer months, there was no clear longitudinal discontinuity in bottlenose dolphin sightings (Garrison and Yeung 2001; Garrison *et al.,* 2003). To address the question of distribution of coastal and offshore morphotypes in waters south of Cape Hatteras, tissue samples were collected from large vessel surveys during the summers of 1998 and 1999, from systematic biopsy sampling efforts in nearshore waters from New Jersey to central Florida conducted in the summers of 2001 and 2002, and from winter biopsy collection effort in 2002 and 2003 in nearshore continental shelf waters of North Carolina and Georgia. Additional biopsy samples were collected in deeper continental shelf waters south of Cape Hatteras during the winter of 2002. Genetic analyses using mitochondrial DNA sequences of these biopsies identified individual animals to the coastal or offshore morphotype. Using the genetic results from all surveys combined, a logistic regression was used to model the probability that a particular bottlenose dolphin group was of the coastal morphotype as a function of environmental variables including depth, sea surface temperature, and distance from shore. These models were used to partition the bottlenose dolphin groups observed during aerial surveys between the two morphotypes (Garrison *et al.,* 2003).

The genetic results and spatial patterns observed in aerial surveys indicate both regional and seasonal differences in the longitudinal distribution of the two morphotypes in coastal Atlantic waters. Generally, from biopsy samples collected, the coastal morphotype is found in nearshore waters, the offshore morphotype in deeper waters and a spatial overlap between the two morphotypes in intermediate waters. More information on the seasonal differences and genetic studies off of the Carolina's, Georgia, and Florida, differentiating morphotypes of bottlenose dolphins can be found online in the NMFS stock assessment reports.

In summary, the primary habitat of the coastal morphotype of bottlenose dolphin extends from Florida to New Jersey during summer months and in waters less than 65.6 ft (20 m) deep, including estuarine and inshore waters.

In addition to inhabiting coastal nearshore waters, the coastal morphotype of bottlenose dolphin also inhabits inshore estuarine waters along the U.S. east coast and Gulf of Mexico (Wells *et al.,* 1987; Wells *et al.,* 1996; Scott *et al.,* 1990; Weller, 1998; Zolman, 2002; Speakman *et al.,* 2006; Stolen *et al.,* 2007; Balmer *et al.,* 2008; Mazzoil *et al.,* 2008). There are multiple lines of evidence supporting demographic separation between bottlenose dolphins residing within estuaries along the Atlantic coast. In Biscayne Bay, Florida, there is a similar community of bottlenose dolphins with evidence of year-round residents that are genetically distinct from animals residing in a nearby estuary in Florida Bay (Litz, 2007). A few published studies demonstrate that there are significant genetic distinctions and differences between animals in nearshore coastal waters and estuarine waters (Caldwell, 2001; Rosel *et al.,* 2009). Despite evidence for genetic differentiation between estuarine and nearshore populations, the degree of spatial overlap between these populations remains unclear. Photo-ID studies within estuaries demonstrate seasonal immigration and emigration and the presence of transient animals (*e.g.,* Speakman *et al.,* 2006). In addition, the degree of movement of resident estuarine animals into coastal waters on seasonal or shorter time scales is poorly understood. However, for the purposes of this analysis, bottlenose dolphins inhabiting primarily estuarine habitats are considered distinct from those inhabiting coastal habitats. Initially, a single stock of coastal morphotype bottlenose dolphins was thought to migrate seasonally between New Jersey (summer months) and central Florida based on seasonal patterns in strandings during a large scale mortality event occurring during 1987 to 1988 (Scott *et al.,* 1988). However, re-analysis of

stranding data (McLellan *et al.,* 2003) and extensive analysis of genetic (Rosel *et al.,* 2009), photo-ID (Zolman, 2002) and satellite telemetry (NMFS, unpublished data) data demonstrate a complex mosaic of coastal bottlenose dolphin stocks. Integrated analysis of these multiple lines of evidence suggests that there are five coastal stocks of bottlenose dolphins: The Northern Migratory and Southern Migratory stocks, a South Carolina/Georgia Coastal stock, a Northern Florida Coastal stock, and a Central Florida Coastal stock.

The spatial extent of these stocks, their potential seasonal movements, and their relationships with estuarine stocks are poorly understood. More information on the migratory movements and genetic analyses of bottlenose dolphins can be found online in the NMFS stock assessment reports.

The NMFS stock assessment report addresses the Central Florida Coastal stock, which is present in coastal Atlantic waters from 29.4° North south to the western end of Vaca Key (approximately 24.69° North to 81.11° West) where the stock boundary for the Florida Keys stock begins (see Figure 1 of the NMFS Stock Assessment Report). There has been little study of bottlenose dolphin stock structure in coastal waters of southern Florida; therefore the southern boundary of the Central Florida stock is uncertain. There is no obvious boundary defining the offshore extent of this stock. The combined genetic and logistic regression analysis (Garrison *et al.,* 2003) indicated that in waters less than 32.8 ft (10 m) depth, 70% of the bottlenose dolphins were of the coastal morphotype. Between 32.8 ft and 65.6 ft depth, the percentage of animals of the coastal morphotype dropped precipitously, and at depths greater than 131.2 ft (40 m) nearly all (greater than 90%) animals were of the offshore morphotype. These spatial patterns may not apply in the Central Florida Coastal stock, as there is a significant change in the bathymetric slope and a close approach of the Gulf Stream to the shoreline south of Cape Canaveral.

Aerial surveys to estimate the abundance of coastal bottlenose dolphins in the Atlantic were conducted during winter (January to February) and summer (July to August) of 2002. Abundance estimates for bottlenose dolphins in each stock were calculated using line-transect methods and distance analysis (Buckland *et al.,* 2001). More information on the survey tracklines, design, effort, animals sighted, and methods for calculating estimated abundance can be found online in the NMFS stock assessment reports.

The estimated best and minimum population for the Central Florida Coastal Stock is 6,318 and 5,094 animals, respectively. There are insufficient data to determine the population trends for this stock. From 1995 to 2001, NMFS recognized only a single migratory stock of coastal bottlenose dolphins in the western North Atlantic, and the entire stock was listed as depleted. This stock structure was revised in 2002 to recognize both multiple stocks and seasonal management units and again in 2008 and 2010 to recognize resident estuarine stocks and migratory and resident coastal stocks. The total U.S. fishery-related mortality and serious injury for the Central Florida Coastal stock likely is less than 10% of the calculated PBR, and thus can be considered to be insignificant and approaching zero mortality and serious injury rate. However, there are commercial fisheries overlapping with this stock that have no observer coverage. This stock retains the depleted designation as a result of its origins from the originally delineated depleted coastal migratory stock. The species is not listed as threatened or endangered under the ESA, but this is a strategic stock due to the depleted listing under the MMPA.

Further information on the biology and local distribution of these species and others in the region can be found in ACOE's IHA application, which is available upon request (see **ADDRESSES**), and the NMFS Marine Mammal Stock Assessment Reports, which are available online at: *http://www.nmfs.noaa.gov/pr/species/.*

Potential Effects on Marine Mammals

In general, potential impacts to marine mammals from explosive detonations could include mortality, serious injury, as well as Level A harassment (injury) and Level B harassment. In the absence of monitoring and mitigation, marine mammals may be killed or injured as a result of an explosive detonation due to the response of air cavities in the body, such as the lungs and bubbles in the intestines. Effects are likely to be most severe in near surface waters where the reflected shock wave creates a region of negative pressure called ''cavitation.''

A second potential possible cause of mortality is the onset of extensive lung hemorrhage. Extensive lung hemorrhage is considered debilitating and potentially fatal. Suffocation caused by lung hemorrhage is likely to be the major cause of marine mammal death from underwater shock waves. The estimated range for the onset of extensive lung hemorrhage to marine mammals varies depending upon the animal's weight, with the smallest mammals having the greatest potential hazard range.

NMFS's criteria for determining non-lethal injury (Level A harassment) from explosives are the peak pressure that will result in: (1) The onset of slight lung hemorrhage, or (2) a 50 percent probability level for a rupture of the tympanic membrane (TM). These are injuries from which animals would be expected to recover on their own.

NMFS has established dual criteria for what constitutes Level B harassment: (1) An energy based temporary threshold shift (TTS) received sound levels 182 dB re 1 μPa^2-s cumulative energy flux in any ⅓ octave band above 100 Hz for odontocetes (derived from experiments with bottlenose dolphins (Ridgway *et al.,* 1997; Schlundt *et al.,* 2000); and (2) 12 psi peak pressure cited by Ketten (1995) as associated with a safe outer limit for minimal, recoverable auditory trauma (*i.e.,* TTS). The Level B harassment zone, therefore, is the distance from the mortality, serious injury, injury (Level A harassment) zone to the radius where neither of these criterion is exceeded.

TABLE 2—NMFS'S THRESHOLD CRITERIA AND METRICS UTILIZED FOR IMPACT ANALYSES FROM THE USE OF EXPLOSIVES

Mortality	Level A Harassment (Non-lethal injury)		Level B Harassment (Non-injurious; TTS and associated behavioral disruption [dual criteria])	Level B Harassment (Non-injurious behavioral, Sub-TTS)
31 psi-msec (onset of severe lung injury [mass of dolphin calf]).	205 dB re 1 μPa²·s EFD (50 percent of animals would experience TM rupture).	13 psi-msec positive pressure (onset of slight lung injury).	182 dB re 1 μPa²·s EFD*; 23 psi peak pressure (< 2,000 lb) 12 psi peak pressure (≤ 2,000 lb).	177 dB re 1 μPa²·s EFD* (for multiple detonations only)

* Note: In greatest ⅓-octave band above 10 Hz or 100 Hz.

The primary potential impact to the Atlantic bottlenose dolphins occurring in the Port of Miami action area from the proposed detonations is Level B harassment incidental to noise generated by explosives. In the absence of any monitoring or mitigation measures, there is a very small chance that a marine mammal could be injured, seriously injured, or killed when exposed to the energy generated from an explosive force on the sea floor. However, the ACOE and NMFS believes that the proposed monitoring and mitigation measures will preclude this possibility in the case of this particular proposed activity.

Non-lethal injurious impacts (Level A harassment) are defined in this proposed IHA as TM rupture and the onset of slight lung injury. The threshold for Level A harassment corresponds to a 50 percent rate of TM rupture, which can be stated in terms of an energy flux density (EFD) value of 205 dB re 1 μPa²s. TM rupture is well-correlated with permanent hearing impairment (Ketten, 1998) indicates a 30 percent incidence of permanent threshold shift (PTS) at the same threshold. The farthest distance from the source at which an animal is exposed to the EFD level for the Level A harassment threshold is unknown at this time.

Level B (non-injurious) harassment includes temporary (auditory) threshold shift (TTS), a slight, recoverable loss of hearing sensitivity. One criterion used for TTS is 182 dB re 1 μPa² s maximum EFD level in any ⅓-octave band above 100 Hz for toothed whales (*e.g.,* dolphins). A second criterion, 23 psi, has been established by NMFS to provide a more conservative range of TTS when the explosive or animals approaches the sea surface, in which case explosive energy is reduced, but the peak pressure is not. For the proposed project in Miami Harbor, the distance from the blast array at which the 23 psi threshold could be met for various charge detonation weights can be, and has been calculated.

Level B harassment may also include behavioral modifications resulting from repeated noise exposures (below TTS) to the same animals (usually resident) over a relatively short period of times. Threshold criteria for this particular type of harassment are currently still being considered. One recommendation is a level of 6 dB below TTS (see 69 FR 21816, April 22, 2004), which would be 177 dB re 1 μPa²s. The Level B harassment (behavioral) threshold criteria would not apply to the ACOE's proposed activity because there will only two blasting events a day, and the multiple (staggered) detonations are within a few microseconds of each other and do not last more than a few seconds in total duration per a blasting event.

For an open-water, unconfined blast, the pressure edge of the danger zone is expected to be 23 psi. For a fully confined blast, the pressure at the edge of the danger zone is expected to be 6 psi. Utilizing the pressure data collected the Miami Harbor Phase II project in 2005, for a maximum charge weight of 450 lbs in a fully confined blast, the pressure is expected to be 22 psi approximately 700 ft (213.4 m) from the blast, which is below the threshold for Level B harassment (*i.e.,* 23 psi criteria for explosives less than 2,000 lb). However to ensure the protection of marine mammals, and in case of an incident where a detonation is not fully confined, the ACOE assumes that any animal within the boundaries of a designated ''danger zone'' would be taken by Level B harassment.

The ACOE is planning to implement a series of monitoring and mitigation measures to protect marine mammals from the potential impacts of the proposed blasting activities. The ACOE has designated a ''danger zone'' as the area within which the potential for Level B harassment occurs, and the ''exclusion zone'' as the area within which if an animal crosses and enters that zone then the blast will be delayed until the animal leaves the zone of its own volition. The exclusion zone is larger than the area where the ACOE has determined that Level B harassment will occur, so if the monitoring and mitigation measures implemented are successful as expected, and no detonation occurs when an animals is inside of the exclusion zone, no take by Level B harassment is likely to occur. However, to be conservative, the ACOE has calculated the potential exists for Level B harassment and is pursuing an IHA from NMFS. More information on how the danger and exclusion zones are determined is included in the ''Proposed Mitigation'' section of this document (see below).

It has been noted on one previous occasion at the ACOE's Miami Harbor Phase II project in 2005 that a bottlenose dolphin outside the exclusion zone, in the deeper water channel, exhibited a startle response immediately following a blast. Details of that event from the monitoring report are included below:

> Any animals near the exclusion zone were watched carefully during the blast for any changes in behavior or noticeable reaction to the blast. The only observation that showed signs of a possible reaction to the blast was on July 27, when two dolphins were in the channel west of the blast. The dolphins were stationary at approximately 2,400 ft (731.5 m) from the blast array, feeding and generally cavorting. Due to the proximity of the dolphins, the drill barge was contacted prior to the blast to confirm that the exclusion zone calculation was 1,600 ft (487.7 m) for the lower weight of explosives used that day. The topography of the bottom in that area is very shallow (approximately 3.3 ft [1 m]) to the south, then an exceptionally steep drop off into the channel at 40 plus ft ending at the bulkhead wall to the north. Westward, the channel continues and has a more gradual upward slope. At the time of the blast, one of the dolphins was at the surface in the shallows, while the other dolphin was underwater within the channel. The dolphin that was underwater showed a strong reaction to the blast. The animal jumped fully out of the water in a 'breaching' fashion; behavior that had not been exhibited prior to the blast. The animal was observed jumping out of the water immediately before the observers heard the blast suggesting that the animal reacted to the blast and not some other stimulus. It is probable that, because this animal was located in the channel, the sound and pressure of the blast traveled either farther or was more focused through

the channeling and the reflection from the bulkhead, thus causing the animal to react even though it was well outside the safety radius. These two dolphins were tracked for the entire 30 min post blast period and no obvious signs of distress or behavior changes were observed. Other animals observed near the safety radius during the blast were all to the south of the blasting array, well up on the seagrass beds or in the pipe channel that runs through the seagrass beds. None of these animals showed any reaction to the blast.

Individual dolphins from other stocks and within the Biscayne Bay and Western North Atlantic Central Florida Coastal stocks potentially move both inshore and offshore of Biscayne Bay due to the openness of this bay system and closeness of the outer continental shelf. These movements are not fully understood and the possibility exists that these other stocks may be affected in the same manner as the Biscayne Bay and Western North Atlantic Central Florida Coastal stocks.

Based on the data from the Miami Harbor project in 2005 and the implementation of the proposed monitoring and mitigation measures, the ACOE and NMFS expects limited potential effects of the proposed construction and blasting activities on marine mammals in the Port of Miami action area.

Potential Effects on Marine Mammal Habitat

The ACOE and NMFS are unable to determine if resident bottlenose dolphins in the proposed action area utilize the inner and outer channels, walls, and substrate of the Port of Miami as habitat for feeding, resting, mating, or other biologically significant functions. The bottom of the channel has been previously blasted, and the rock and sand dredged. The walls of the channels are composed of vertical rock. The ACOE acknowledges that while the port may not be suitable foraging habitat for bottlenose dolphins in Biscayne Bay, it is likely that dolphins may use the area to traverse to and from North Biscayne Bay or offshore via the main channel (*i.e.,* Government Cut).

The ACOE and NMFS are unable to determine how the temporary modification of the action area by the proposed construction and blasting activities will potentially impact the two stocks of bottlenose dolphins expected to be present in the Port of Miami. If animals are using the Port of Miami to travel from south to north Biscayne Bay or vice-versa and/or exiting the bay via the main shipping channel, the proposed construction and blasting activities may delay or detour their movements.

Blasting within the boundaries of the Port of Miami will be limited both spatially and temporally. The explosives utilized in the proposed blasting operations are water soluble and non-toxic. If an explosive charge is unable to be fired and must be left in the drill hole, it is designed to break down. Also, each drill hole has a booster with detonator and detonation cord. Most of the detonation cord is recovered onto the drill barge by pulling it back onboard the drill barge after the blasting event. Small amounts of detonation cord may remain in the water after the blasting event has taken place, and will be recovered by small vessels with scoop nets. Any material left in the drill hole after the blast event will be recovered through the dredging process, when the cutterhead dredge excavates the fractured rock material.

With regard to prey species (mainly fish), a very small number of fish are expected to be impacted by the proposed Miami Harbor project, based on the results of the 2005 blasting project in Miami Harbor. That project consisted of 40 blast events over a 38 day time frame. Of these 40 blast events, 23 were monitored (57.5% of the total) by the state and injured and dead fish were collected after the all clear was given (the ''all-clear'' is normally at least two to three min after the shot is fired, since seagulls and frigate birds quickly learned to approach the blast site and swoop in to eat some of the stunned, injured, and dead fish floating on the surface of the water). State biologists and volunteers collected the carcasses of the floating fish (note that not all dead fish float after a blasting event, and due to safety concerns, there are no plans to put divers on the bottom of the channel in the blast zone to collect non-floating fish carcasses. The fish were described to the lowest taxonomic level possible (usually species) and the injury types were categorized. The data forms are available from the FWC and ACOE upon request.

A summary of those data shows that 24 different genera were collected during the previous Miami Harbor blasting project. The species with the highest abundance were white grunts (*Haemulon plumier,* N = 51), scrawled cowfish (*Lactophrys quadricornis,* N = 43), and pygmy filefish (*Monocanthus setifer,* N = 30). The total fish collected during the 23 blasts was 288 or an average of 12.5 fish per blast (range 3 to 38). In observation of the three blasts with the greatest number of fish killed (see Table 4 of ACOE's application) and reviewing the maximum charge weight per delay for the Miami Harbor project, it appears that there is no direct correlation between the charge weight and fish killed that can be determined from such a small sample. Reviewing the 23 blasting events where dead and injured fish were collected after the ''all-clear'' signal was given, no discernable pattern exists. Factors that affect fish mortality include, but are not limited to fish size, body shape (fusiform, *etc.*), proximity of the blast to a vertical structure like a bulkhead (*e.g.,* see the August 10, 2005 blast event, a much smaller charge weight resulted in a higher fish kill due to the closeness of a bulkhead).

TABLE 3—CONFINED BLAST MAXIMUM CHARGE WEIGHT AND NUMBER OF FISH KILLED DURING MIAMI HARBOR 2005 PROJECT

Date	Max charge weight/delay (lb)	Fish killed
July 25, 2005	112	35
July 26, 2005	85	38
August 10, 2005	17	28

In the past, to reduce the potential for fish to be injured or killed by the blasting, the resource agencies have requested, and ACOE has allowed that blasting contractors utilize a small, unconfined explosive charge, usually a 1 lb (0.5 kg) booster, detonated about 30 seconds before the main blast, to drive fish away from the blasting zone. It is assumed that noise or pressure generated by the small charge will drive fish from the immediate area, thereby reducing impacts from the larger and potentially more-damaging blast. Blasting companies use this method as a ''good faith effort'' to reduce the potential impacts to aquatic natural resources. The explosives industry

recommends firing a ''warning shot'' to frighten fish out of the area before seismic exploration work is begun (Anonymous, 1978 in Keevin *et al.,* 1997).

There are limited data available on the effectiveness of fish scare charges at actually reducing the magnitude of fish kills, and the effectiveness may be based on the fish's life history. Keevin *et al.* (1997) conducted a study to rest if fish scare charges are effective in moving fishes away from blast zones. They used three freshwater species (*i.e.,* largemouth bass (*Micropterus salmoides*), channel catfish (*Ictalurus punctatus*), and flathead catfish (*Pylodictis olivaris*), equipping each fish with an internal radio tag to allow the fishes movements to be tracked before and after the scare charge. Fish movement was compared with a predicted lethal dose (LD) 0% mortality distance for an open water shot (no confinement) for a variety of charge weights. Largemouth bass showed little response to repelling charges and none would have moved from the kill zone calculated for any explosive size. Only one of the flathead catfish and two of the channel catfish would have moved to a safe distance for any blast. This means that only 11% of the fish used in the study would have survived the blast events.

These results call into question the true effectiveness of this minimization methodology; however, some argue that based on the monetary value of fish (American Fishery Society, 1992 in Keevin *et al.,* 1997), including the high value commercial or recreational species like snook (*Centropomus undecimalis*) and tarpon (*Megalops atlanticus*) found in southeast Florida inlets like Port Everglades, the low cost associated with repelling charge use would be offset if only a few fish moved from the kill zone (Keevin *et al.,* 1997).

To calculate the potential loss of prey species from the proposed project area as an impact of the blasting events, the ACOE used a 12.5 fish kill per blasting event estimate based on the Miami Harbor 2005 project, and multiplied it by the 40 shots, reaching a total estimate of 500 floating fish. As stated previously, not all carcasses float to the surface and there is no way to estimate how many carcasses did not float. Using an estimate of 12.5 fish kill per blasting event, and the maximum 600 detonations for the entire multi-year proposed project, the minimum number of fish expected to be killed by the proposed project is approximately 7,500 fish across the entire 28,500 ft (8,686.8 m) long channel footprint, assuming the worst case scenario and the entire channel needs to be blasted.

NMFS anticipates that the proposed action will result in no significant impacts to marine mammal habitat beyond rendering the areas immediately around the Port of Miami less desirable shortly after each blasting event and during dredging operations and potentially eliminating a relatively small amount of locally available prey. The impacts will be localized and instantaneous. Impacts to marine mammal habitat, as well as invertebrate and fish species are not expected to be significantly detrimental.

Proposed Mitigation

In order to issue an Incidental Take Authorization (ITA) under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

Over the last 10 years, the ACOE's Jacksonville District has been collecting data concerning the effects of confined blasting projects on marine mammals. This effort began in the early 1990's when the ACOE contracted with Dr. Calvin Koyna, Precision Blasting Services, to review previous ACOE blasting projects. The ACOE also received recommendations from the Florida Fish and Wildlife Conservation Commission (FWC, then known as the Florida Department of Natural Resources) and the USFWS to prepare for a harbor deepening project at Port Everglades, Florida, which was conducted in the mid-1980's. The recommendations prepared for the project were specifically aimed at protecting endangered manatees and endangered and threatened sea turtles.

The ACOE will develop and implement four zones as protective measures that are based on the use of an unconfined blast. The use of unconfined blast in development of these protective zones for a confined blast will increase the conservation measures afforded marine mammals in the proposed action area. These four zones are referred to as the danger zone (*i.e.,* inner most zone, located closest to the blast), the exclusion zone (*i.e.,* the danger zone plus 500 ft (152.4 m) to add an additional layer of conservatism for marine mammals), the safety zone (*i.e.,* the third zone), and the watch zone (*i.e.,* the outer most zone). All of these zones are noted in Figure 11 of ACOE's IHA application and described in further detail in this section of the document (see below). Of these four zones, only the danger zone, is associated with an MMPA threshold. The danger zone has been determined to be larger than or equal to the threshold for Level B harassment, as defined by the MMPA. Injury (Level A harassment), serious injury, or mortality, as defined by the MMPA, are expected to occur at closer distances to the blasting array within the danger zone.

These four zone calculations will be included as part of the specifications package that the contractors will bid on before the project is awarded.

As part of the ACOE's Miami Harbor Phase II project, the ACOE monitored the blasting project and collected data on the pressures associated with confined blasts, while employing a formula to calculate buffer and exclusion zones that would protect marine mammals. Results from the pressure monitoring at Miami Harbor Phase II demonstrate that stemming each drill hole reduces the blast pressure entering the water (Nedwell and Thandavamoorthy, 1992; Hemen *et al.,* 2005; Hempen *et al.,* 2007).

The following standard conditions have been incorporated into the proposed project specifications to reduce the risk to marine mammals in the proposed project area. While this application is specific to bottlenose dolphins, these specifications are written for all protected species that may be in the proposed project area.

If blasting is proposed during the period of November 1 through March 31, significant operational delays should be expected due to the increased likelihood of manatees being present within the proposed project area. If possible, avoid scheduling proposed blasting during the period from November 1 through March 31. In the area where blasting could occur or any area where blasting is required to obtain channel design depth, the following marine mammal protective measures shall be employed, before, during, and after each blast:

(A) The FWC, the USFWS, and NMFS must review the contractor's approved Blasting Plan prior to any blasting activities. Copies of this blasting plan shall be provided to FDEP and FWC as a matter of comity. This blasting proposal must include information concerning a watch program and details of the blasting events. This information must be submitted at least 30 days prior to the proposed date of the blast(s) to the following addresses:

(1) FWC–ISM, 620 South Meridian Street, Mail Stop 6A, Tallahassee, FL 32399–1600 or *ImperiledSpecies@myfwc.com.*

(2) NMFS Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

(3) USFWS, 1339 20th Street, Vero Beach, Florida 32960–3559 or 6620 Southpoint Drive South, Suite 310, Jacksonville, FL 32216–0912 (project location dependent).

(4) NMFS Southeast Regional Office, Protected Species Management Branch, 263 13th Avenue South, St. Petersburg, FL 33701.

In addition to plan review, Dr. Allen Foley should be notified at the initiation and completion of all in-water blasting (*allen.foley@myfwc.com*).

(B) The proposed project specifications shall include at least the following information:

(1) A list of Protected Species Observers (PSOs), their qualifications, and positions for the watch, including a map depicting the proposed locations for boat or land-based PSOs. Qualified PSOs must have prior on-the-job experience observing for protected species during previous in-water blasting events where the blasting activities were similar in nature to this project.

(2) The amount of explosive charge proposed, the explosive charge's equivalency in TNT, how it will be executed (depth of drilling, stemming, in-water, *etc.*), a drawing depicting the placement of the charges, size of the exclusion zone, and how it will be marked (also depicted on a map), tide tables for the blasting event(s), and estimates of times and days for blasting events (with an understanding this is an estimate, and may change due to weather, equipment, *etc.*).

(C) For each explosive charge placed, three zones will be calculated, denoted on monitoring reports and provided to PSOs before each blast for incorporation in the watch plan for each planned detonation. All of the zones will be noted by buoys for each of the blasts. These zones are:

(1) *Danger Zone:* The danger zone radius is equal to 260 (79.25 m) times the cube root of the weight of the explosive charge in lbs per delay (equivalent weight of tetryl or TNT). The radius of the danger zone has been determined to be equal to or larger than the distance from the charge to a location where a marine mammal would experience Level B harassment.

Danger zone (ft) = 260 (lbs/delay) $^{1/3}$

Danger Zone Development: The radius of the danger zone will be calculated to determine the maximum distance from the blast at which mortality to marine mammals is likely to occur. The danger zone was determined by the amount of explosives used within each delay (which can contain multiple boreholes). The original basis of this calculation was to protect human U.S. Navy Seal divers from underwater detonations of underwater mines (Goertner, 1982). Goertner's calculations were based on impacts to terrestrial animals in water when exposed to a detonation suspended in the water column (unconfined blast) as researched by the U.S. Navy in the 1970's (Yelverton *et al.,* 1973; Richmond *et al.,* 1973). Additionally, observations of sea turtle injury and mortality associated with unconfined blasts for the cutting of oil rig structures in the Gulf of Mexico (Young, 1991; Young and O'Keefe, 1994) were also incorporated in this radius beyond its use by the Navy. The State of Florida has adopted this method for the protection of marine mammals (particularly the Florida manatee) within state waters (FWC, 2005) in the document entitled, ''May 2005 Guidelines for the Protection of Marine Mammals and Sea Turtles during the Use of Explosives in the Waters of the State of Florida.''

The U.S. Navy Dive Manual and the FWC Guidelines (2005) set the danger zone formula for an unconfined blast suspended in the water column, which is as follows:

$R = 260(W)^{1/3}$

Where:

R = radius of the danger zone in ft
W = weight of the explosive charge in lbs (tetryl or TNT)

This formula is conservative for the blasting being done by the ACOE in the Port of Miami since the blast will be confined with the rock and not suspended in the water column. The reduction of impact by confining the shots more than compensates for the presumed higher sensitivity of marine mammals. The ACOE and NMFS believes that the radius of the danger zone, coupled with a strong marine mammal monitoring and protection plan is a conservative, but prudent approach to the protection of marine mammals in the action area.

(2) *Exclusion Zone:* The exclusion zone radius is equal to the danger zone plus a buffer of 500 ft. Detonation will not occur if a marine mammal is known to be (or based on previous sightings, may be) within the exclusion zone.

Exclusion zone (ft) = danger zone + 500 ft

Exclusion Zone Development: The exclusion zone is not associated with any threshold of take, as defined by the MMPA, as it is larger than the danger zone, where Level B harassment is expected. The exclusion zone was developed during consultations with the FWC during the 2005 to 2006 Phase II dredging and blasting project in Miami Harbor. FWC requested a larger ''no blast'' radius due to the high number of manatees documented in the vicinity of the Port of Miami, particularly utilizing the Bill Sadowski Wildlife Area directly south of the port and north of Virginia Key. The ACOE concurred with this request and added a second zone with an additional 500 ft radius above the calculated radius of the danger zone. To be consistent with the previous blasting activities at Miami Harbor, and since the blasting will take place in the same area, with the same concerns about the proximity of manatees to the blasting sites along Fisherman's Channel, the ACOE proposes to maintain the exclusion zone.

(3) *Safety Zone:* The safety zone is equal to 520 (158.50 m) times the cube root of the weight of the explosive charge in lbs per delay (equivalent weight of tetryl or TNT).

Safety zone (ft; two times the size of the danger zone) = 520 (lbs/delay) $^{1/3}$

Safety Zone Development: The safety zone is not associated with any threshold of take, as defined by the MMPA, as it is larger than the danger zone, where Level B harassment is expected. The safety zone was developed to be an area of ''heightened awareness'' of protected species (*e.g.* dolphins, manatees, and sea turtles) entering the blast area, without triggering a shut-down. This area triggers individual specific monitoring of each individual or group of animals as they transit in, out, or through the designated zones.

(4) *Watch Zone:* The watch zone is three times the radius of the danger zone to ensure that animals entering or traveling close to the exclusion zone are sighted and appropriate actions can be implemented before or as the animal enters the any impact areas (*i.e.,* a delay in blasting activities).

Watch zone (ft; three times the size of the Danger Zone) = 3 [260 (lbs/delay) $^{1/3}$]

Watch Zone Development: The watch zone is not associated to any threshold of take, as defined by the MMPA, as it is larger than the danger zone, where Level B harassment is expected. The watch zone is the area that can be typically covered by a small helicopter based on the blasting site, flight speed,

flight height, and available fuel to ensure effective mitigation-monitoring of the proposed project area.

(D) The watch program shall begin at least one hour prior to the scheduled start of blasting to identify the possible presence of marine mammals. The watch program shall continue for at least 30 minutes (min) after detonations are complete.

(E) The watch program shall consist of a minimum of six PSOs. Each PSO shall be equipped with a two-way radio that shall be dedicated exclusively to the watch. Extra radios should be available in case of failures. All of the PSOs shall be in close communication with the blasting sub-contractor in order to halt the blast event if the need arises. If all PSOs do not have working radios and cannot contact the primary PSO and the blasting sub-contractor during the pre-blast watch, the blast shall be postponed until all PSOs are in radio contact. PSOs will also be equipped with polarized sunglasses, binoculars, a red flag for back-up visual communication, and a sighting log with a map to record sightings. All blasting events will be weather dependent. Climatic conditions must be suitable for optimal viewing conditions, to be determined by the PSOs.

(F) The watch program shall include a continuous aerial survey to be conducted by aircraft, as approved by the Federal Aviation Administration (FAA). The blasting event shall be halted if an animal(s) is sighted within the exclusion zone, within the five min before the explosives are scheduled to be detonated. An ''all clear'' signal must be obtained from the aerial PSO before the detonation can occur. The blasting event shall be halted immediately upon request of any of the PSOs. If animals are sighted, the blast event shall not take place until the animal(s) moves out of the exclusion zone under its own volition. Animals shall not be herded away or intentionally harassed into leaving. Specifically, the animals must not be intentionally approached by project watercraft or aircraft. If the animal(s) is not sighted a second time, the event may resume 30 min after the last sighting.

(G) An actual delay in blasting only occurs when a marine mammal was located within the exclusion zone at the point where the blast countdown reaches the T-minus five min. At that time, if an animal is in or near the safety zone, the countdown is put on hold until the zone is completely clear of marine mammals and all 30 min sighting holds have expired. Animal movements into the safety zone prior to that point are monitored closely, but do not necessarily stop the countdown. The exception to this would be stationary animals that do not appear to be moving out of the area or animals that begin moving into the safety zone late in the countdown. For these cases, holds on the T-minus 15 min may be called to keep the shipping channel open and minimize the impact on the Port of Miami operations.

(H) The PSOs and contractors shall evaluate any problems encountered during blasting events and logistical solutions shall be presented during blasting events and logistical solutions shall be presented to the Contracting Officer. Corrections to the watch shall be made prior to the next blasting event. If any one of the aforementioned conditions is not met prior to or during the blasting, the watch PSOs shall have the authority to terminate the blasting event, until resolution can be reached with the Contracting Officer. The Contracting Officer will contact FWC, USFWS, and NMFS.

(I) If an injured or dead marine mammal is sighted after the blast event, the PSOs on watch shall contact the ACOE and the ACOE will then contact the proper Federal and/or state natural resource agencies.

The PSOs shall maintain contact with the injured or dead marine mammal until authorities have arrived. Blasting shall be postponed until consultations are reinitiated and completed, and determinations can be made of the cause of injury or mortality. If blasting injuries are documented, all demolition activities shall cease. The ACOE will then submit a revised blasting plan to FWC, USFWS, and NMFS for review.

(J) Within 30 days after completion of all blasting events, the primary PSO shall submit a report the ACOE, who will provide it to the FWC, USFWS, and NMFS, providing a description of the event, number and location of animals seen and what actions were taken when animals were seen. Any problems associated with the event and suggestions for improvements shall also be documented in the report.

Proposed Monitoring for Mitigation

The ACOE will rely upon the same monitoring protocol developed for the Port of Miami project in 2005 (Barkaszi, 2005) and published in Jordan *et al.* (2007), which can be found online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* The monitoring protocol is summarized here:

A watch plan will be formulated based on the required monitoring radii and optimal observation locations. The watch plan will consist of at least five PSOs including at least one aerial PSO, two boat-based PSOs, and two PSOs stationed on the drill barge (see Figures 13, 14, 15, and 16 of the ACOE's IHA application). This watch plan will be consistent with the program that was utilized successfully at Miami Harbor in 2005. The sixth PSO will be placed in the most optimal observation location (boat, barge, or aircraft) on a day-by-day basis depending on the location of the blast and the placement of dredging equipment. This process will ensure complete coverage of the four zones as well as any critical areas. The watch will begin at least one hour prior to each blast and continue for one half hour after each blast (Jordan *et al.,* 2007).

The aerial PSO will fly in a turbine engine helicopter (bell jet ranger) with the doors removed. This provided maximum visibility of the watch and safety zones as well as exceptional maneuverability and the needed flexibility for continual surveillance without fuel stops or down time, minimization of delays due to weather or visibility and the ability to deliver post-blast assistance. Additionally, at least six commercial helicopter, small Cessna, and ultra-light companies operate on Key Biscayne, immediately south of the Port of Miami and offer ''flight-seeing'' operations over downtown Miami, Bayfront, and the Port of Miami. Recreational use of ultra-lights launching from Key Biscayne is also common in the area, as are overflights of commercial seaplanes, jet aircraft, and helicopters. The proposed action area being monitored is a high traffic area, surrounded by an urban environment where animals are potentially exposed to multiple overflights daily. ACOE conferred with Mary Jo Barkaszi, owner and chief PSO of ECOES, Inc., a protected species monitoring company with 25 years experience, and has worked on the last five blasting events involving marine mammal concerns for the ACOE throughout the country. All of these blasting events had bottlenose dolphins commonly occur in the project area. Ms. Barkaszi states that in her experience, she has not observed bottlenose dolphins diving or fleeing the area because a helicopter is hovering nearby at 500 ft (pers. comm., September 12, 2011). During monitoring events, the helicopter hovers at 500 ft above the watch zone and only drops below that level when helping to confirm identification of something small in the water, like a sea turtle. The ACOE and NMFS do not expect the incidental take of bottlenose dolphins, by Level B harassment, from helicopter-based

monitoring of the blasting operations and the ACOE is not requesting take.

Boat-based PSOs are placed on one of two vessels, both of which have attached platforms that place the PSOs eyes at least 10 ft (3 m) above the water surface enabling optimal visibility of the water from the vessels. The boat-based PSOs cover the safety zone where waters are deep enough to safely operate the boats without any impacts to seagrass resources. The shallow seagrass beds south of the proposed project site relegate the PSO boats mainly to the channel east and west of the blast zone. At no time are any of the PSO boats allowed in shallow areas where propellers could potentially impact the fragile seagrass.

At times, turbidity in the water may be high and visibility through the water column may be reduced so that animals are not seen below the surface as they should be under normal conditions. This may be more common on an ebb tide. However, animals surfacing in these conditions are still routinely sighted from the air and from the boats, thus the overall PSO program is not compromised, only the degree to which animals were tracked below the surface. Adjustments to the program are made accordingly so that all protected species are confirmed out of the safety zone prior to the T-minus five min, just as they are under normal visual conditions. The waters within the proposed project area are exceptional for observation so that the decreased visibility below the surface during turbid conditions make the waters more typical of other port facilities where PSO programs are also effective throughout the U.S., for example New York and Boston harbors, where this monitoring method has also been employed.

All PSOs are equipped with marine-band VHF radios, maps of the blast zone, polarized sunglasses, and appropriate data sheets. Communications among PSOs and with the blaster is of critical importance to the success of the watch plan. The aerial-based PSO is in contact with vessel and drill barge-based PSOs and the drill barge with regular 15 min radio checks throughout the watch period. Constant tracking of animals spotted by any PSO is possible due to the amount and type of PSO coverage and the excellent communications plan. Watch hours are restricted to between two hours after sunrise and one hour before sunset. The watch begins at least one hour prior to the scheduled blast and is continuous throughout the blast. Watch continues for at least 30 min post blast at which time any animals that were seen prior to the blast are visually relocated whenever possible and all PSOs in boats and in the aircraft assisted in cleaning up any blast debris.

If any marine mammals are spotted during the watch, the PSO notifies the aerial-based PSO and/or the other PSOs via radio. The animals is located by the aerial-based PSO to determine its range and bearing from the blast array. Initial locations and all subsequent re-acquisitions are plotted on maps. Animals within or approaching the safety zone are tracked by the aerial and boat-based PSOs until they exited the safety zone. Anytime animals are sighted near the safety zone, the drill barge is alerted as to the animal's proximity and some indication of any potential delays it might cause.

If any animal(s) is sighted inside the safety zone and not re-acquired, no blasting is authorized until at least 30 min has elapsed since the last sighting of that animal(s). The PSOs on watch will continue the countdown up until the T-minus five min point. At this time, the aerial-based PSO confirms that all animals are outside the safety zone and that all holds have expired prior to clearing the drill barge for the T-minus five min notice. A fish scare charge will be fired at T-minus five min and T-minus one min to minimize effects of the blast on fish that may be in the same area of the blast array by scaring them from the blast area.

An actual delay in blasting only occurs when a marine mammal is located within the exclusion zone at the point where the blast countdown reaches the T-minus five min. At that time, if an animal is in or near the safety zone, the countdown is put on hold until the zone is completely clear of marine mammals and all 30 min sighting holds have expired. Animal movements into the safety zone prior to that point are monitored closely, but do not necessarily stop the countdown. The exception to this would be stationary animals that do not appear to be moving out of the area or animals that begin moving into the safety zone late in the countdown. For these cases, holds on the T-minus 15 min may be called for to keep the shipping channel open and minimize the impact on the Port of Miami operations.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implanting regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

The ACOE will be conducting a study on fish kill associated with confined underwater blasting that will provide information on the effects of confined underwater blasting on prey species for dolphins in the proposed project area. This study will determine the maximum distance from the blast array, based on charge weight, that fish will not be killed, or injured (the ''lethal dose of zero'' distance) by confined underwater blasting. Similar studies have been completed for open water (unconfined) blasts as cited by Hempen and Keevin (1995), Keevin *et al.* (1995a, 1995b, and 1997), and Keevin (1998), but no such studies have been conducted for confined underwater blasting. This data will be useful for future confined blasting projects where pisciverous marine mammals are found, since it will allow resource managers to assess the impacts of the blasting activities on marine mammal prey, where species composition and density data have been collected for that project.

Additionally, ACOE will provide sighting data for each blast to researchers at NMFS Southeast Fisheries Science Center's marine mammal program and any other researchers working on dolphins in the project area to add to their database of animal usage of the proposed project area. The ACOE will rely upon the same monitoring protocol developed for the Port of Miami project in 2005 (Barkaszi, 2005) and published in Jordan *et al.* (2007).

The ACOE plan to coordinate monitoring with the appropriate Federal and state resource agencies, and will provide copies of all relevant monitoring reports prepared by their contractors. After completion of all detonation and dredging events, the ACOE would submit a summary report to regulatory agencies.

Within 30 days after completion of all proposed blasting events, the lead PSO shall submit a report to the ACOE, who will provide it to NMFS. The report will contain the PSO's logs (including names and positions during the blasting events), provide a description of the events, environmental conditions, number and location of animals sighted, the behavioral observations of the marine mammals, and what actions were taken when animals were sighted in the action area of the proposed

project. Any problems associated with the even and suggestions for improvements shall also be documented in the report. A draft final report must be submitted to NMFS within 90 days after the conclusion of the proposed blasting activities. The report would include a summary of the information gathered pursuant to the monitoring requirements set forth in the IHA, including dates and times of detonations as well as pre- and post-blasting monitoring observations. A final report must be submitted to the Regional Administrator within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report would be considered to be the final report.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as an injury, serious injury or mortality, ACOE will immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation, Office of Protected Resources, NMFS at (301) 427–8401 and/or by email to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov*, and the NMFS Southeast Region Marine Mammal Stranding Network at (877) 433–8299 (*Blair.Mase@noaa.gov* and *Erin.Fougeres@noaa.gov*) (Florida Marine Mammal Stranding Hotline at (888) 404–3922). The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Description of the incident;
- Status of all noise-generating source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with ACOE to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. ACOE may not resume their activities until notified by NMFS via letter or email, or telephone.

In the event that ACOE discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition as described in the next paragraph), ACOE will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401, and/or by email to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov*, and the NMFS Southeast Region Marine Mammal Stranding Network (877) 433–8299) and/or by email to the Southeast Regional Stranding Coordinator (*Blair.Mase@noaa.gov*) and Southeast Regional Stranding Program Administrator (*Erin.Fougeres@noaa.gov*). The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with ACOE to determine whether modifications in the activities are appropriate.

In the event that ACOE discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), ACOE will report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401, and/or by email to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov*, and the NMFS Southeast Region Marine Mammal Stranding Network (877) 433–8299), and/or by email to the Southeast Regional Stranding Coordinator (*Blair.Mase@noaa.gov*) and Southeast Regional Stranding Program Administrator (*Erin.Fougeres@noaa.gov*), within 24 hours of discovery. ACOE will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

The ACOE is requesting the take of Atlantic bottlenose dolphins, by Level B harassment only, incidental to proposed blasting activities at Miami Harbor. The ACOE notes that multiple IHAs (up to three) will likely be needed and requested for the proposed project due to the duration of the planned blasting activities. See Table 2 (above) for NMFS's threshold criteria and metrics utilized for impact analyses from the use of explosives.

Biscayne Bay Stock

The Biscayne Bay stock of Atlantic bottlenose dolphins is bounded by Haulover Inlet to the north and Card Sound Bridge to the south. Biscayne Bay is 428 square mi (mi^2) (1,108.5 square km [km^2]) in area. The Port of Miami channel, within the boundaries of Biscayne Bay, is approximately 7,200 ft (2,194.6 m) long by 500 ft (152.4 m) wide, with the 3,425 ft (1,044 m) long by 1,400 ft (426.7 m) wide Dodge-Lummus Island turning basin (total area 0.3 mi^2 [0.8 km^2]) at the western terminus of Fisherman's Channel. The Port of Miami's channels consist of approximately 0.1% of the entire area of Biscayne Bay. To determine the maximum area of Biscayne Bay in which bottlenose dolphins may experience pressure levels greater than or equal to the 23 psi threshold for explosives less than 2,000 lb (907.2 kg), which has the potential to result in Level B harassment due to temporary threshold shift (TTS) and associated behavioral disruption, the ACOE may utilize a maximum charge weight of 450 lb (204.1 kg) with a calculated danger zone of 1,995 ft (608.1 m). Using this radius, the total area of this zone is approximately 0.1% of Biscayne Bay (12,503,617 ft^2 [1,161,624 m^2]).

For an open-water, unconfined blast, the pressure edge of the danger zone is expected to be 23 psi. For a fully confined blast, the pressure at the edge of the danger zone is expected to be 6 psi. Utilizing the pressure data collected the Miami Harbor Phase II project in 2005, for a maximum charge weight of 450 lbs in a fully confined blast, the pressure is expected to be 22 psi approximately 700 ft (213.4 m) from the blast, which is below the threshold for Level B harassment (*i.e.,* 23 psi criteria for explosives less than 2,000 lb). However to ensure the protection of marine mammals, and in case of an incident where a detonation is not fully confined, the ACOE assumes that any animal within the boundaries of the

danger zone would be taken by Level B harassment.

Litz (2007) identified 69 individuals of the Biscayne Bay stock that she classified as the ''northern dolphins'' meaning animals with a mean sighting history from 1994 to 2004 north of 25.61° North. The photo-ID study that Litz's data is based on encompassed an area of approximately 200 mi² (518 km²), approximately 50% of Biscayne Bay. The estimated maximum population of animals that may be in the proposed project area is equal to the total number of uniquely identified animals for the entire photo-ID study of Biscayne Bay is 229 individuals (Waring *et al.,* 2010). The best population estimate for Biscayne Bay is 157 individuals, which is based on SEFSC's most consistent survey effort conducted during the 2003 to 2007 photo-ID survey seasons (Waring *et al.,* 2010).

Table 4 (below) presents the estimated incidental take, by Level B harassment, for varying charge weight delays likely to be used during the proposed blasting activities and the estimated impacts based on the population estimates used in this analysis. In all cases, less than one bottlenose dolphin is expected to be taken incidental to each blasting event (0.049 minimum to 0.162 maximum). This assumes that the distribution of bottlenose dolphins is equal throughout all of Biscayne Bay.

TABLE 4—THE ESTIMATED INCIDENTAL TAKE OF BOTTLENOSE DOLPHINS FROM THE BISCAYNE BAY STOCK, PER EACH BLASTING EVENT, BASED ON THE MAXIMUM CHARGE WEIGHT/DELAY AND POPULATION DENSITY

Maximum (lbs/delay)	Danger zone (ft)	Estimated take based on minimum population estimate	Estimated take based on best population estimate	Estimated take based on maximum population estimate
450	1,995	0.049	0.111	0.162
200	1,525	0.042	0.096	0.140
119	1,280	0.030	0.038	0.099
50	960	0.017	0.038	0.056
17	670	0.008	0.019	0.027

The ACOE accessed the NMFS SEFSC photo-ID survey data from 1990 to 2004 in Biscayne Bay via the OBIS-Seamap database (*http://seamap.env.duke.edu/*) and downloaded the Google Earth overlay of the data. Figure 12 of the ACOE's IHA application shows the general area of the Port of Miami and hot spots of bottlenose dolphin sightings both north and south of Miami Harbor. The data were used to see if sightings across all parts of the Biscayne Bay were equal. This sighting frequency data was not used to calculate the potential take numbers of marine mammals incidental to the proposed blasting activities.

Reviewing the data from the Miami Harbor Phase II project in 2005, the ACOE noted that for the 40 detonations, 28% of all animals sighted within the proposed action area (Fisherman's Channel) were bottlenose dolphins (the other animals sighted were manatees and sea turtles). Bottlenose dolphins were sighted inside the exclusion zone 12 times with a total of 30 individuals, with an average of 2.5 animals per sighting out of the total 58 bottlenose dolphins recorded during the project; therefore, groups of dolphins entered the exclusion zone multiple times. Also, dolphins entered the exclusion zone during 30% of the blasting events. Not all of the incidents where dolphins entered the exclusion zone resulted in a project delay, it is dependent upon when during the countdown the animals cross the line demarcating the exclusion zone, and how long they stay in the exclusion zone.

During the Miami Harbor Phase II project in 2005, bottlenose dolphins in the exclusion zone triggered delays on four occasions during the 13 blasting events (31%). If the maximum 313 planned detonations for the duration of the one year IHA have an equal percentage of delays as the 2005 project (assuming construction starts in June with blasting June, 2012 to June, 2013 timeframe, with no blasting on Sundays), 94 of the detonations would be delayed for some period of time due to the presence of protected species and 29 of those delays would specifically be for bottlenose dolphins.

As a worst case, using the area of the danger zone, and recognizing that the Port of Miami is within the boundaries of the northern area described in Litz (2007), and that the danger zone of any blasting event using equal to or less than 450 lbs/delay will be approximately 0.1% of Biscayne Bay, the ACOE assumes that because animals are not evenly distributed throughout Biscayne Bay, that they travel as single individuals or in groups (as documented in the OBIS-Seamap data and the monitoring data from the Miami Harbor Phase II project in 2005), and that without any monitoring and mitigation measures to minimize potential impacts, up to three bottlenose dolphins from the Biscayne Bay stock may be taken, by Level B harassment, incidental to each blasting event.

Assuming that the delays will be spread equally across the proposed action area and using the calculation of 29 delays and that three bottlenose dolphins would be inside the danger zone, 15 of the delayed blasting events would take place in Biscayne Bay since it compromises 52% of the proposed action area. Three bottlenose dolphins times 15 detonations is equal to 45 bottlenose dolphins may be exposed to an underwater sound and pressure over a 1-year period for an IHA incidental to the proposed blasting activities at the Port of Miami.

Western North Atlantic Central Florida Coastal Stock

The Western North Atlantic Central Florida Coastal stock of bottlenose dolphins is present in the coastal Atlantic waters shallower than 65.6 ft (20 m) in depth between latitude 29.4° North to the western end of Vaca Key (approximately 29.69° North to 81.11° West) where the stock boundary for the Florida Key stock begins, with an area of 3,007 mi² (7,789 km²). The outer entrance channel of the Port of Miami is approximately 15,500 ft long (4,724.4 m) by 500 ft wide, which is approximately 0.28 mi² (0.73 km²). The Port of Miami's channels consist of approximately 0.009% of the stocks boundaries.

The same calculations for assessing the potential impacts to bottlenose dolphins from the proposed blasting activities that were used for the Biscayne Bay stock were also applied to this stock. To determine the maximum area of the coastal Atlantic in which bottlenose dolphins may experience pressure levels greater than or equal to the 23 psi threshold for explosives less than 2,000 lb (907.2 kg), which has the potential to result in Level B harassment due to TTS and associated behavioral disruption, the ACOE may utilize a

maximum charge weight of 450 lb (204.1 kg) with a calculated danger zone of 1,995 ft (608.1 m). Using this radius, the total area of this zone is approximately 0.015% of coastal Atlantic where this stock is expected to occur.

For an open-water, unconfined blast, the pressure edge of the danger zone is expected to be 23 psi. For a fully confined blast, the pressure at the edge of the danger zone is expected to be 6 psi. Utilizing the pressure data collected the Miami Harbor Phase II project in 2005, for a maximum charge weight of 450 lbs in a fully confined blast, the pressure is expected to be 22 psi approximately 700 ft (213.4 m) from the blast, which is below the threshold for Level B harassment (*i.e.,* 23 psi criteria for explosives less than 2,000 lb). However to ensure the protection of marine mammals, and in case of an incident where a detonation is not fully confined, the ACOE assumes that any animal within the boundaries of the danger zone would be taken by Level B harassment.

Waring *et al.* (2010) estimates the minimum population for the Western North Atlantic Central Florida stock to be 5,094 animals, and estimates the best population to be 6,318 animals.

Table 5 (below) presents the estimated incidental take, by Level B harassment, for varying charge weight delays likely to be used during the proposed blasting activities and the estimated impacts based on the population estimates used in this analysis. In all cases, less than one bottlenose dolphin is expected to be taken incidental to each blasting event (0.102 minimum to 0.948 maximum). This assumes that the distribution of bottlenose dolphins is equal throughout all of the stock's range.

TABLE 5—THE ESTIMATED INCIDENTAL TAKE OF BOTTLENOSE DOLPHINS FROM THE WESTERN NORTH ATLANTIC CENTRAL FLORIDA COASTAL STOCK, PER EACH BLASTING EVENT, BASED ON THE MAXIMUM CHARGE WEIGHT/DELAY AND POPULATION DENSITY

Maximum (lbs/delay)	Danger zone (ft)	Estimated take based on minimum population estimate (5,094)	Estimated take based on best population estimate (6,318)
450	1,995	0.764	0.948
200	1,525	0.458042	0.569
119	1,280	0.360	0.379
50	960	0.153	0.190
17	670	0.102	0.126

Other than the aerial surveys conducted by NMFS used to develop the stock assessment report, the ACOE has not been able to locate any additional photo-ID or habitat usage analysis. As a result, the ACOE is unable to determine if animals are evenly distributed throughout the stock's range, particularly in the southernmost portion of the stock's range where the proposed action area is located.

To be conservative, the ACOE will use the same assumptions for the Western North Atlantic Central Florida Coastal stock as was used for the Biscayne Bay stock. Reviewing the data from the Miami Harbor Phase II project in 2005, the ACOE noted that for the 40 detonations, 28% of all animals sighted within the proposed action area (Fisherman's Channel) were bottlenose dolphins (the other animals sighted were manatees and sea turtles). Bottlenose dolphins were sighted inside the exclusion zone 12 times with a total of 30 individuals, with an average of 2.5 animals per sighting out of the total 58 bottlenose dolphins recorded during the project; therefore, groups of dolphins entered the exclusion zone multiple times. Also, dolphins entered the exclusion zone during 30% of the blasting events. Not all of the incidents where dolphins entered the exclusion zone resulted in a project delay, it is dependent upon when during the countdown the animals cross the line demarcating the exclusion zone, and how long they stay in the exclusion zone.

During the Miami Harbor Phase II project in 2005, bottlenose dolphins in the exclusion zone triggered delays on four occasions during the 13 blasting events (31%). If the maximum 313 planned detonations for the duration of the one year IHA have an equal percentage of delays as the 2005 project (assuming construction starts in June with blasting June, 2012 to June, 2013 timeframe, with no blasting on Sundays), 94 of the detonations would be delayed for some period of time due to the presence of protected species and 29 of those delays would specifically be for bottlenose dolphins.

As a worst case, using the area of the danger zone, and that the danger zone of any blasting event using equal to or less than 450 lbs/delay will be approximately 0.009% of the stock's range. The ACOE assumes that because animals are not evenly distributed throughout the stock's range, that they travel as single individuals or in groups (as documented in the monitoring data from the Miami Harbor Phase II project in 2005), and that without any monitoring and mitigation measures to minimize potential impacts, up to three bottlenose dolphins from the Western North Atlantic Central Florida Coastal stock may be taken, by Level B harassment, incidental to each blasting event.

Assuming that delays will be spread equally across the proposed action area and using the calculation of 29 delays and that three bottlenose dolphins would be inside the danger zone, 14 of the delayed blasting events would take place in Biscayne Bay since it compromises 48% of the proposed action area. Three bottlenose dolphins times 14 detonations is equal to 42 bottlenose dolphins may be exposed to underwater sound and pressure over a one year period for an IHA incidental to the proposed blasting activities at the Port of Miami.

Summary of Requested Estimated Take

Without the implementation of the proposed monitoring and mitigation measures, the ACOE has calculated up to 87 bottlenose dolphins (45 from the Biscayne Bay stock, 42 of the Western North Atlantic Central Florida stock) may be potentially taken, by Level B harassment, incidental to the proposed blasting operations over the course of the one year IHA. Due to the protective measures of confined blasts, the implementation of the proposed monitoring and mitigation measures (*i.e.,* danger, exclusion, safety, and watch zones, use of the confined blasting techniques, as well as PSOs),

the ACOE is requesting the take, by Level B harassment only, of a total of 22 bottlenose dolphins (12 bottlenose dolphins from the Biscayne Bay stock and 10 bottlenose dolphins from the Western North Atlantic Central Florida Coastal stock).

Encouraging and Coordination Research

The ACOE will coordinate monitoring with the appropriate Federal and state resource agencies, including NMFS Office of Protected Resources and NMFS Southeast Regional Office's (SERO) Protected Resources Division, and will provide copies of any monitoring reports prepared by the contractors.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS evaluated factors such as:

(1) The number of anticipated injuries, serious injuries, or mortalities;

(2) The number, nature, and intensity, and duration of Level B harassment (all relatively limited);

(3) The context in which the takes occur (*i.e.,* impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to the baseline data);

(4) The status of stock or species of marine mammals (*i.e.,* depleted, not depleted, decreasing, increasing, stable, and impact relative to the size of the population);

(5) Impacts on habitat affecting rates of recruitment or survival; and

(6) The effectiveness of monitoring and mitigation measures (*i.e.,* the manner and degree in which the measure is likely to reduce adverse impacts to marine mammals, the likely effectiveness of the measures, and the practicability of implementation).

Tables 1, 4, and 5 in this document discloses the habitat, regional abundance, conservation status, density, and the number of individuals potentially exposed to sounds and pressure levels considered the threshold for Level B harassment. Also, there are no known important reproductive or feeding areas in the proposed action area.

For reasons stated previously in this document, the specified activities associated with the ACOE's blasting operations are not likely to cause PTS, or other non-auditory injury, serious injury, or death to affected marine mammals. As a result, no take by injury, serious injury, or death is anticipated or authorized, and the potential for temporary or permanent hearing impairment is very low and will be minimized through the incorporation of the proposed monitoring and mitigation measures.

No injuries or mortalities are anticipated to occur as a result of the ACOE's blasting operations, and none are proposed to be authorized by NMFS. Approximately 22 Atlantic bottlenose dolphins (12 from the Biscayne Bay stock, 10 from the Western North Atlantic Central Florida Coastal stock) are anticipated to incur short-term, minor, hearing impairment (TTS) and associated behavioral disruption due to the instantaneous duration of the blasting events. While some other species of marine mammals may occur in the proposed project area, only Atlantic bottlenose dolphins are anticipated to be potentially impacted by the ACOE's proposed blasting operations.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). The ACOE's proposed action at Miami Harbor includes up to two planned blasting events per day, which are very short in duration, and may potentially result in momentary reactions by marine mammals in the proposed action area.

Atlantic bottlenose dolphins are the only species of marine mammals under NMFS jurisdiction that are likely to occur in the action area, they are not listed as threatened or endangered under the ESA, however both stocks are listed as depleted and considered strategic under the MMPA. To protect these marine mammals (and other protected species in the proposed action area), the ACOE must delay operations if animals enter designated zones. Due to the nature, degree, and context of the Level B harassment anticipated and described in this notice (see ''Potential Effects on Marine Mammals'' section above), the activity is not expected to impact rates of recruitment or survival for any affected species or stock.

As mentioned previously, NMFS estimates that one species of marine mammals under its jurisdiction could be potentially affected by Level B harassment over the course of the IHA. For each species, these numbers are estimated to be small (*i.e.,* 22 Atlantic bottlenose dolphins, 12 from the Biscayne Bay stock [17% of the estimated minimum population, 7.6% of the estimated best population, and 5.2% of the estimated maximum population], and 10 from the Western North Atlantic Central Florida Coastal stock [0.19% of the estimated minimum population and 0.15% of the estimated best population], less than 17 percent of any of the estimated population sizes based on data in this notice, and has been mitigated to the lowest level practicable through the incorporation of the monitoring and mitigation measures mentioned previously in this document.

NMFS had determined, provided that the aforementioned monitoring and mitigation measures are implemented, that the impact of conducting the proposed blasting activities in the Port of Miami from June, 2012 through May, 2012, may result, at worst in a temporary modification in behavior and/or low level physiological effects (Level B harassment) of small numbers of Atlantic bottlenose dolphins.

While behavioral modifications, including temporarily vacating the area immediately after blasting operations, may be made by these species to avoid the resultant underwater acoustic disturbance, the availability of alternate areas within these area and the instantaneous and sporadic duration of the blasting activities, have led NMFS to determine that this action will have a negligible impact on the specified geographic region.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS has preliminarily determined that the ACOE's planned blasting activities will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the blasting activities will have a negligible impact on the affected species or stocks of marine mammals; and the impacts to affected species or stocks of marine mammals have been mitigated to the lowest level practicable.

Impact on Availability of Affected Species for Taking for Subsistence Uses

Section 101(a)(5)(D) also requires NMFS to determine that the authorization will not have an unmitigable adverse effect on the availability of marine mammal species or stocks for subsistence use. There is no subsistence hunting for marine mammals in the action area (waters off of the coast of southeast Florida) that implicates MMPA section 101(a)(5)(D).

Endangered Species Act

Under section 7 of the ESA, the ACOE requested formal consultation with the NMFS SERO, on the proposed project to improve the Port of Miami on September 5, 2002, and reinitiated consultation on January 6, 2011. NMFS SERO determined that the proposed action is likely to adversely affect one ESA-listed species and prepared a Biological Opinion (BiOp) issued on September 8, 2011, that analyzes the project's effects on staghorn coral (*Acropora cervicornis*). It is NMFS's biological opinion that the action, as proposed, is likely to adversely affect staghorn coral, but is not likely to jeopardize its continued existence or adversely modify its designated critical habitat. Based upon NMFS SERO's updated analysis, NMFS no longer expects the proposed project is likely to adversely affect Johnson's seagrass (*Halophila johnsonii*) or its designated critical habitat. NMFS SERO has determined that the ESA-listed marine mammals (Blue, fin, sei, humpback, North Atlantic right, and sperm whales), smalltooth sawfish (*Pristis pectinata*), and leatherback sea turtles (*Dermochelys coriacea*) are not likely to be adversely affected by the proposed action. Previous NMFS biological opinions have determined that hopper dredges may affect hawksbill (*Eretmochelys imbricata*), Kemp's ridley (*Lepidochelys kempii*), green (*Chelonia mydas*), and loggerhead (*Caretta caretta*) sea turtles through entrainment by the draghead. Any incidental take of loggerhead, green, Kemp's ridley, or hawksbill sea turtles due to hopper dredging has been previously authorized in NMFS's 1997 South Atlantic Regional BiOp on hopper dredging along the South Atlantic coast. The ACOE is currently in re-initiation of consultation with NMFS on the South Atlantic Regional BiOp. When a new BiOp is issued by NMFS, the Terms and Conditions of that South Atlantic Regional BiOp will be incorporated into the proposed project.

National Environmental Policy Act (NEPA)

The ACOE has prepared a ''Final Environmental Impact Statement on the Navigation Study for Miami Harbor, Miami-Dade County, Florida,'' and a Record of Decision for the proposed project was signed on May 22, 2006; however, this document does not analyze NMFS's action, the issuance of the IHA for the ACOE's proposed activity. NMFS, after independently reviewing and evaluating the document for sufficiency and compliance with the CEQ regulations and NOAA Administrative Order (NAO) 216–6 § 5.09(d), has begun conducting a separate NEPA analysis, which analyzes the project's purpose and need, alternatives, affected environment, and environmental effects for the proposed action. NMFS will decide whether or not to sign a Finding of No Significant Impact (FONSI) prior to making a determination on the issuance of the IHA.

Proposed Authorization

NMFS proposes to issue an IHA to the ACOE for conducting blasting operations at the Port of Miami, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The duration of the IHA would not exceed one year from the date of its issuance.

Information Solicited

NMFS requests interested persons to submit comments and information concerning this proposed project and NMFS's preliminary determination of issuing an IHA (see **ADDRESSES**). Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 14, 2011.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–29886 Filed 11–17–11; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA800

Taking of Marine Mammals Incidental to Specified Activities; U.S. Marine Corps Training Exercises at Air Station Cherry Point

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received an application from the U.S. Marine Corps (USMC) requesting authorization to take marine mammals incidental to various training exercises at Marine Corps Air Station (MCAS) Cherry Point Range Complex, North Carolina. The USMC's activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act (NDAA) for Fiscal Year 2004. Pursuant to the MMPA, NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to the USMC to take bottlenose dolphins (*Tursiops truncatus*), by Level B harassment only, from specified activities.

DATES: Comments and information must be received no later than December 19, 2011.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *ITP.Laws@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and may be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application containing a list of the references used in this

document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* The following associated document is also available at the same Internet address: *Environmental Assessment MCAS Cherry Point Range Operations* (USMC 2009). Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as: ''An impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

The NDAA (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (Section 3(18)(B) of the MMPA):

(i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

On September 22, 2011, NMFS received an application from the USMC requesting an IHA for the harassment of Atlantic bottlenose dolphins (*Tursiops truncatus*) incidental to air-to-surface and surface-to-surface training exercises conducted around two bombing targets (BTs) within southern Pamlico Sound, North Carolina, at MCAS Cherry Point. NMFS first issued an IHA to the USMC for the same activities that was valid for a period of one year, beginning December 1, 2011 (75 FR 72807; November 26, 2010).

Weapon delivery training would occur at two BTs: Brant Island Target (BT–9) and Piney Island Bombing Range (BT–11). Training at BT–9 would involve air-to-surface (from aircraft to in-water targets) and surface-to-surface (from vessels to in-water targets) warfare training, including bombing, strafing, special (laser systems) weapons; surface fires using non-explosive and explosive ordnance; and mine laying exercises (inert). Training at BT–11 would involve air- to-surface exercises to provide training in the delivery of conventional (non-explosive) and special (laser systems) weapons. Surface-to-surface training by small military watercraft would also be executed here. The types of ordnances proposed for use at BT–9 and BT–11 include small arms, large arms, bombs, rockets, missiles, and pyrotechnics. All munitions used at BT–11 are inert, practice rounds. No live firing occurs at BT–11. Training for any activity may occur year-round. Active sonar is not a component of these specified training exercises; therefore, discussion of marine mammal harassment from active sonar operations is not included within this notice.

Description of the Specified Activity

The USMC is requesting authorization to harass bottlenose dolphins from ammunition firing conducted at two BTs within MCAS Cherry Point. The authorization would be valid for a period of one year from the date of issuance. The BTs are located at the convergence of the Neuse River and Pamlico Sound, North Carolina. BT–9 is a water-based target located approximately 52 km (28 nautical miles [nm]) northeast of MCAS Cherry Point. The BT–9 target area ranges in depth from 1.2 m to 6.1 m, with the shallow areas concentrated along the Brandt Island Shoal (which runs down the middle of the restricted area in a northwest to southeast orientation). The target itself consists of three ship hulls grounded on Brant Island Shoals, located approximately 4.8 km (3 miles [mi]) southeast of Goose Creek Island. Inert (non-explosive) ordnance up to 454 kilograms (kg) (1,000 lbs) and live (explosive) ordnance up to 45.4 kg (100 lbs) TNT equivalent, including ordnance released during strafing, are authorized for use at this target range. The target is defined by a 6 statute-mile (SM) diameter prohibited area designated by the U.S. Army Corps of Engineers, Wilmington District (33 CFR 334.420). Non-military vessels are not permitted within the prohibited area, which is delineated by large signs located on pilings surrounding the perimeter of the BT. BT–9 also provides a mining exercise area; however, all mine exercises are simulation only and do not involve detonations. BT–9 standard operating procedures limit live ordnance deliveries to a maximum explosive weight of 100 lbs TNT equivalent. The USMC estimates that it would conduct approximately 1,539 aircraft-based and 165 vessel-based sorties, annually, at BT–9. The standard sortie consists of two aircraft per bombing run or an average of two and maximum of six vessels.

BT–11 is a 50.6 square kilometers (sq km) (19.5 square miles [sq mi]) complex of land- and water-based targets on Piney Island. The BT–11 target area ranges in depth from 0.3 m along the shoreline to 3.1 m in the center of Rattan Bay (BA 2001). The in-water stationary targets of BT–11 consist of a barge and patrol (PT) boat located in roughly the center of Rattan Bay. The barge target is approximately 135 ft by 40 ft in dimension. The PT boat is approximately 110 ft by 35 ft in dimension. Water depths in the center of Rattan Bay are estimated as 2.4 to 3 m (8 to 10 ft) with bottom depths ranging from 0.3 to 1.5 m (1 to 5 ft) adjacent to the shoreline of Piney Island. A shallow ledge, with substrate expected to be hard-packed to hard bottom, surrounds Piney Island. No live firing occurs at BT–11; all munitions used are inert,

non-explosive practice rounds. Only 36 percent of all munitions fired at BT–11 occur over water; the remaining munitions are fired to land based targets on Piney Island. The USMC estimates that it would conduct approximately 6,727 aircraft-based and 51 vessel-based sorties, annually, at BT–11.

All inert and live-fire exercises at MCAS Cherry Point ranges are conducted so that all ammunition and other ordnances strike and/or fall on the land or water based target or within the existing danger zones or water restricted areas. A danger zone is a defined water area that is closed to the public on an intermittent or full-time basis for use by military forces for hazardous operations such as target practice and ordnance firing. A water restricted area is a defined water area where public access is prohibited or limited in order to provide security for Government property and/or to protect the public from the risks of injury or damage that could occur from the government's use of that area (33 CFR 334.2). Surface danger zones are designated areas of rocket firing, target practice, or other hazardous operations (33 CFR 334.420). The surface danger zone (prohibited area) for BT–9 is a 4.8 km radius centered on the south side of Brant Island Shoal. The surface danger zone for BT–11 is a 2.9 km radius centered on a barge target in Rattan Bay.

According to the application, the USMC is requesting take of marine mammals incidental to specified activities at MCAS Cherry Point Range Complex, located within Pamlico Sound, North Carolina. These activities include gunnery; mine laying; bombing; or rocket exercises and are classified into two categories here based on delivery method: (1) Surface-to-surface gunnery and (2) air-to-surface bombing. Exercises may occur year round, day or night (approximately 15 percent of training occurs at night).

Surface-to-Surface Gunnery Exercises

Surface-to-surface fires are fires from boats at sea to targets at sea. These can be direct (targets are within sight) or indirect (targets are not within sight). Gunnery exercise employing only direct fire is the only category of surface-to-surface activity currently conducted within the MCAS Cherry Point BTs. An average of two and maximum of six small boats (24–85 ft), or fleet of boats, typically operated by Special Boat Team personnel, use a machine gun to attack and disable or destroy a surface target that simulates another ship, boat, swimmer, floating mine or near shore land targets. Vessels travel between 0–20 kts with an average of two vessels actually conducting surface-to-surface firing activities. Typical munitions are 7.62 millimeter (mm) or .50 caliber (cal) machine guns; and/or 40 mm Grenade machine guns. This exercise is usually a live-fire exercise, but at times blanks may be used so that the boat crews can practice their ship handling skills. The goal of training is to hit the targets; however, some munitions may bounce off the targets and land in the water or miss the target entirely. Additionally, G911 Concussion hand grenades (inert and live) are used; however, these are not aimed at targets, as the goal is to learn how to throw them into the water.

The estimated amount of munitions expended at BT–9 and BT–11 during this training can be found in Table 1 below. Historically, boat sorties have been conducted at BT–9 and BT–11 year round with equal distribution of training effort throughout the seasons. Live fires constitute approximately 90 percent of all surface-to-surface gunnery events. The majority of sorties originated and practiced at BT–9 as no live fire is conducted at BT–11. The USMC has indicated a comparable number of sorties would occur throughout the IHA timeframe. There is no specific schedule associated with the use of ranges by the small boat teams. However, exercises tend to be scheduled for 5-day blocks with exercises at various times throughout that timeframe. There is no specific time of year or month training occurs as variables such as deployment status, range availability, and completion of crew specific training requirements influence schedules.

A number of different types of boats are used during surface-to-surface exercises depending on the unit using the boat and their mission and include versions of Small Unit River Craft, Combat Rubber Raiding Craft, Rigid Hull Inflatable Boats, Patrol Craft. They are inboard or outboard, diesel or gasoline engines with either propeller or water jet propulsion. Boat crews approach, at a maximum of 20 kts, and engage targets simulating other boats, swimmers, floating mines, or near shore land targets with 7.62 mm or .50 cal machine guns; 40 mm grenade machine guns; or M3A2 Concussion hand grenades (approximately 200, 800, 10, and 10 rounds respectively). Vessels typically travel in linear paths and do not operate erratically. Other vessels may be located within the BTs; however, these are support craft and do not participate in munitions expenditures. The purpose of the support craft is to remotely control High Speed Maneuvering Surface Targets (HSMSTs) or to conduct maintenance on electronic equipment located in the towers at BT–9. Support craft are typically anchored or tied to marker pilings during HSMST operations or tied to equipment towers. When underway, vessels do not typically travel faster than 12–18 kts or in an erratic manner.

TABLE 1—TYPE AND AMOUNT OF MUNITIONS EXPENDED AT BT–9 AND BT–11 DURING SURFACE-TO-SURFACE EXERCISES

Range	Annual number of sorties [1]	Munitions type	Munitions expended annually
BT–9	165	5.56 mm	1,468
		7.62 mm	218,500
		.50 cal	166,900
		40 mm Grenade—Inert	15,734
		40 mm Grenade—Live (HE)	9,472
		G911 Grenade	144
BT–11	51	7.62 mm	44,100
		.40 cal	4,600
		40 mm Grenade—Inert	1,517
		40 mm Illumination-Inert	9

[1] Sorties are from FY 2007 CURRS data.

Air-to-Surface

Air-to-surface training involves ordnance delivered from aircraft and aimed at targets on the water's surface or on land in the case of BT–11. A description of the types of targets used at MCAS Cherry Point is provided in the section on BTs above. There are four types of air-to-surface activities conducted within the MCAS Cherry Point BTs: Mine laying; bombing; gunnery or rocket exercises which are carried out via fixed wing or rotary wing aircraft.

Mine Laying Exercises

Mine Warfare (MIW) includes the strategic, operational, and tactical use of mines and mine countermine measures. MIW is divided into two basic subdivisions: (a) The laying of mines to degrade the enemy's capabilities to wage land, air, and maritime warfare, and (b) the countering of enemy-laid mines to permit friendly maneuver or use of selected land or sea areas (DoN, 2007). MCAS Cherry Point would only engage in mine laying exercises as described below. No detonations of any mine device are involved with this training.

During mine laying, a fixed-wing or maritime patrol aircraft (P–3 or P–8) typically drops a series of about four inert mine shapes in an offensive or defensive pattern, making multiple passes along a pre-determined flight azimuth, and dropping one or more shapes each time. Mine simulation shapes include MK76, MK80 series, and BDU practice bombs ranging from 25 to 2,000 pounds in weight, There is an attempt to fly undetected to the area where the mines are laid with either a low or high altitude tactic flight. The shapes are scored for accuracy as they enter the water and the aircrew is later debriefed on their performance. The training shapes are inert (no detonations occur) and expendable. Mine laying operations are regularly conducted in the water in the vicinity of BT–9.

Bombing Exercises

The purpose of bombing exercises is to train pilots in destroying or disabling enemy ships or boats. During training, fixed wing or rotary wing aircraft deliver bombs against surface maritime targets at BT–9 or BT–11, day or night, using either unguided or precision-guided munitions. Unguided munitions include MK–76 and BDU–45 inert training bombs, and MK–80 series of inert bombs (no cluster munitions authorized). Precision-guided munitions consist of laser-guided bombs (inert) and laser-guided training rounds (inert). Typically, two aircraft approach the target (principally BT–9) from an altitude of approximately 914 m (3,000 ft) up to 4,572 m (15,000 ft) and, when on an established range, the aircraft adhere to designated ingress and egress routes. Typical bomb release altitude is 914 m (3,000 ft) for unguided munitions or above 4,572 m (15,000 ft) and in excess of 1.8 km (1 nm) for precision-guided munitions. However, the lowest minimum altitude for ordnance delivery (inert bombs) would be 152 m (500 ft).

Onboard laser designators or laser designators from a support aircraft or ground support personnel are used to illuminate certified targets for use when using laser guided weapons. Due to target maintenance issues, live bombs have not been dropped at the BT–9 targets for the past few years although these munitions are authorized for use. For the effective IHA timeframe, no live bombs would be utilized. Live rockets and grenades; however, have been expended at BT–9.

Air-to-Surface bombing exercises have the potential to occur on a daily basis. The standard sortie consists of two aircraft per bombing run. The frequency of these exercises is dependent on squadron level training requirements, deployment status, and range availability; therefore, there is no set pattern or specific time of year or month when this training occurs. Normal operating hours for the range are 0800–2300, Monday through Friday; however, the range is available for use 365 days per year.

Rocket Exercises

Rocket exercises are carried out similar to bombing exercises. Fixed- and rotary-wing aircraft crews launch rockets at surface maritime targets, day and night, to train for destroying or disabling enemy ships or boats. These operations employ 2.75-inch and 5-inch rockets.

The average number of rockets delivered per sortie is approximately 14. As with the bombing exercise, there is no set level or pattern of amount of sorties conducted.

Gunnery Exercises

During gunnery training, fixed- and rotary-wing aircraft expend smaller munitions targeted at the BTs with the purpose of hitting them. However, some small arms may land in the water. Rotary wing exercises involve either CH–53, UH–1, CH–46, MV–22, or H–60 rotary-wing aircraft with mounted 7.62 mm or .50 cal machine guns. Each gunner expends approximately 800 rounds of 7.62 mm and 200 rounds of .50 cal ammunition in each exercise. These may be live or inert.

Fixed wing gunnery exercises involve the flight of two aircraft that begin to descend to the target from an altitude of approximately 914 meters (m) (3,000 feet [ft]) while still several miles away. Within a distance of 1,219 m (4,000 ft) from the target, each aircraft fires a burst of approximately 30 rounds before reaching an altitude of 305 m (1,000 ft), then breaks off and repositions for another strafing run until each aircraft expends its exercise ordnance allowance of approximately 250 rounds. In total, about 8–12 passes are made by each aircraft per exercise. Typically these fixed wing exercise events involve an F/A–18 and AH–1 with Vulcan M61A1/A2, 20 mm cannon; AV–8 with GAU–12, 25 mm cannon.

Munition Descriptions

A complete list of the ordnance authorized for use at BT–9 and BT–11 can be found in Tables 2 and 3, respectively. There are several varieties and net explosive weights (for live munition used at BT–9) can vary according to the variety. All practice bombs are inert and used to simulate the same ballistic properties of service type bombs. They are manufactured as either solid cast metal bodies or thin sheet metal containers. Since practice bombs contain no explosive filler, a practice bomb signal cartridge (smoke) is used for visual observation of weapon target impact. Practice bombs provide a low cost training device for pilot and ground handling crews. Due to the relatively small amount of explosive material in practice bombs (small signal charge), the availability of ranges for training is greatly increased.

When a high explosive detonates, it is converted almost instantly into a gas at very high pressure and temperature. Under the pressure of the gases thus generated, the weapon case expands and breaks into fragments. The air surrounding the casing is compressed and shock (blast) wave is transmitted into it. Typical initial values for a high-explosive weapon are 200 kilobars of pressure (1 bar = 1 atmosphere) and 5,000 degrees Celsius. There are five types of explosive sources used at BT–9: 2.75'' Rocket High Explosives, 5'' Rocket High Explosives, 30 mm High Explosives, 40 mm High Explosives, and G911 grenades. No live munitions are used at BT–11.

TABLE 2—DESCRIPTION OF MUNITIONS USED AT BT–9

Ordnance	Description	Net explosive weight
MK76 Practice Bomb (inert)	25-pound teardrop-shaped cast metal bomb, with a bore tube for installation of a signal cartridge.	(of signal cartridge) varies, maximum 0.083800 lbs.
BDU 33 Practice Bomb (inert)	Air Force MK 76 practice bomb	same as above.
BDU 48 Practice Bomb (inert)	10-pound metal cylindrical bomb body with a bore tube for installation of a signal cartridge.	same as above.
BDU 45 Practice Bomb (inert)	500-pound metal bomb either sand or water filled. Two signal cartridges.	(of signal cartridges, total 0.1676 lbs.
BDU 50 Practice Bomb (inert)	500-pound metal bomb either sand or water filled. Two signal cartridges.	same as above.
MK 81 Practice Bomb (inert)	250-pound bomb	0.
MK 82 Practice Bomb (inert)	500-pound bomb	0.
MK 83 Practice Bomb (inert)	1000-pound bomb configured like BDU 45	0.1676 lbs.
MK 84 Practice Bomb (inert) (special exception use only).	2000-pound bomb configured like BDU 45	0.1676 lbs.
2.75-inch (inert)	Unguided 2.75-inch diameter rocket	0.
5-inch Zuni (inert)	Unguided 5-inch diameter rocket	0.
5-inch Zuni (live)	Unguided 5-inch diameter rocket	15 lbs.
2.75wp (inert)	2.75-inch rocket containing white phosphorous	0.
2.75HE	High Explosive, 2.75-inch rocket	4.8 lbs.
0.50 cal (inert)	Machine gun rounds	0.
7.62 mm (inert)		
20 mm (inert)		
25mm (inert)		
30 mm (inert)		
40 mm (inert)		
25 mm HE (live)	High Explosive Incendiary, Live machine gun rounds	0.269 lbs.
Self Protection Flare	Aerial flare	0.
Chaff	18-pound chaff canister	0.
LUU–2	30-pound high intensity illumination flare	0.
Laser Guided Training Round (LGTR) (inert).	89-pound inert training bomblet	0.

TABLE 3—DESCRIPTION OF MUNITIONS USED AT BT–11

Ordnance	Description
MK76 Practice Bomb	25-pound teardrop-shaped cast metal bomb body, with a bore tube for installation of a signal cartridge.
BDU 33 Practice Bomb	Air Force designation for MK 76 practice bomb.
BDU 48 Practice Bomb	10-pound metal cylindrical bomb body with a bore tube for installation of a signal cartridge.
BDU45 Practice Bomb	500-pound metal bomb body either sand or water filled. Configured with either low drag conical tail fins or high drag tail fins for retarded weapons delivery. Two signal cartridges installed.
MK 81 Practice Bomb	250-pound inert bomb.
MK 82 Practice Bomb	500-pound inert bomb.
2.75-inch	Unguided 2.75 inch diameter rocket.
5-inch Zuni	5 inch diameter rocket.
WP-2.75-inch	White phosphorous 7-pound rocket.
0.50 cal	Inert machine gun rounds
7.62 mm	
5.56 mm	
20 mm	
30 mm	
40 mm	
TOW	Wire guided 56-pound anti-tank missile.
Self Protection Flare.	Aerial flare.
SMD SAMS	1.5-pound smoking flare.
LUU–2	30-pound high-intensity illumination flare.
Laser Guided Training Round (LGTR)	89-pound inert training bomblet.

The amounts of all ordnance to be expended at BT–9 and BT–11 (both surface-to-surface and air-to-surface) are 897,932 and 1,109,955 rounds, respectively (see Table 4 and 5 below).

TABLE 4—AMOUNT OF LIVE AND INERT MUNITIONS EXPENDED AT BT–9 PER YEAR

Proposed munitions [1]	Proposed total number of rounds	Proposed number of explosive rounds having an impact on the water	Net explosive weight (lb)
Small Arms Rounds Excluding .50 cal	525,610	N/A	N/A
.50 Cal	257,067	N/A	N/A
Large Arms Rounds—Live	12,592	30mm HE: 3,120	0.1019
		40mm HE: 9,472	0.1199
Large Arms Rounds—Inert	93,024	N/A	N/A
Rockets—Live	241	2.75″ Rocket: 184	4.8
		5″ Rocket: 57	15.0
Rockets—Inert	703	N/A	N/A
Bombs and Grenades—Live	144	G911 Grenade: 144	0.5
Bombs and Grenades—Inert	4,055	N/A	N/A
Pyrotechnics	4,496	N/A	N/A
Total	897,932	12,977	N/A

[1] Munitions may be expended from aircraft or small boats.

TABLE 5—AMOUNT OF INERT MUNITIONS EXPENDED AT BT–11

Proposed munitions [1]	Proposed total number of rounds [2]
Small Arms Rounds Excluding .50 Cal	507,812
.50 Cal	326,234
Large Arms Rounds	240,334
Rockets	4,549
Bombs and Grenades	22,114
Pyrotechnics	8,912
Total	1,109,955

[1] Munitions may be expended from aircraft or small boats.
[2] Munitions estimated using FY 2007 CURRS data on a per sortie-operation basis.

Description of Marine Mammals in the Area of the Specified Activity

Forty marine mammal species occur within the nearshore and offshore waters of North Carolina; however, the majority of these species are solely oceanic in distribution. Only one marine mammal species, the bottlenose dolphin, has been repeatedly sighted in Pamlico Sound, while an additional species, the endangered West Indian manatee (*Trichechus manatus*), has been sighted rarely (Lefebvre *et al.,* 2001; DoN 2003). The U.S. Fish and Wildlife Service oversees management of the manatee; therefore, authorization to harass manatees would not be included in any NMFS' authorization and will not be discussed further.

No sightings of the endangered North Atlantic right whale (*Eubalaena glacialis*) or other large whales have been observed within Pamlico Sound or in vicinity of the BTs (Kenney 2006). No suitable habitat exists for these species in the shallow Pamlico Sound or BT vicinity; therefore, whales would not be affected by the specified activities and will not be discussed further. Other dolphins, such as Atlantic spotted (*Stenella frontalis*) and common dolphins (*Delphinus delphis*), are oceanic in distribution and do not venture into the shallow, brackish waters of southern Pamlico Sound. Therefore, the specified activity has the potential to affect one marine mammal species under NMFS' jurisdiction: the bottlenose dolphin.

Coastal (or nearshore) and offshore stocks of bottlenose dolphins in the Western North Atlantic can be distinguished by genetics, diet, blood characteristics, and outward appearance (Duffield *et al.,* 1983; Hersh and Duffield, 1990; Mead and Potter, 1995; Curry and Smith, 1997). Initially, a single stock of coastal morphotype bottlenose dolphins was thought to migrate seasonally between New Jersey (summer months) and central Florida based on seasonal patterns in strandings during a large scale mortality event occurring during 1987–1988 (Scott *et al.,* 1988). However, re-analysis of stranding data (McLellan *et al.,* 2003) and extensive analysis of genetic, photo-identification, satellite telemetry, and stable isotope studies demonstrate a complex mosaic of coastal bottlenose dolphin stocks (NMFS 2001) which may be migratory or resident (they do not migrate and occur within an area year round). Four out of the seven designated coastal stocks may occur in North Carolina waters at some part of the year: The Northern Migratory stock (NM; winter); the Southern Migratory stock (SM; winter); the Northern North Carolina Estuarine stock (NNCE; resident, year round); and the more recently identified Southern North Carolina Estuarine stock (SNCE; resident, year round). Stable isotope depleted oxygen signature (hypoxic conditions routinely develops during summer in North Carolina waters) (Cortese, 2000), satellite telemetry, and photo-identification (NMFS, 2001) support stock structure analysis. Dolphins encountered at the BTs likely belong to the NNCE and SNCE stock; however, this may not always be the case. NMFS' 2010 stock assessment report provides further detail on stock delineation. All stocks discussed here are considered depleted (and thus strategic) under the MMPA (Waring *et al.,* 2010).

NMFS provides abundance estimates for the four aforementioned migratory and resident coastal stocks in its 2010 stock assessment report. The best available abundance estimate for the NNCE stock is the combined abundance from estuarine (Read *et al.,* 2003) and coastal (aerial survey data dating from 2002) waters. This combined estimate is 1,387 (Waring *et al.,* 2010). Similarly, the best available abundance estimate for the SNCE stock is the combined abundance from estuarine and coastal waters. This combined estimate is 2,595 (Waring *et al.,* 2010). The best abundance estimate for the NM stock, resulting from 2002 aerial surveys, is 9,604 (Waring *et al.,* 2010). Using the same information, the resulting best abundance estimate for the SM stock is 12,482 (Waring *et al.,* 2010).

From July 2004 through April 2006, the NMFS' SEFSC conducted 41 aerial surveys to document the seasonal distribution and estimated density of sea turtles and dolphins within Core Sound and portions of Pamlico Sound, and coastal waters extending one mile offshore (Goodman *et al.,* 2007). Pamlico Sound was divided into two survey areas: western (encompassing BT–9 and BT–11) and eastern (including Core Sound and the eastern portion of restricted air space R–5306). In total, 281 dolphins were sighted in the western range. To account for animals likely missed during sightings (*i.e.,* those below the surface), Goodman *et al.* (2007) estimate that, in reality, 415

dolphins were present. Densities for bottlenose dolphins in the western part of Pamlico Sound were calculated to be 0.0272/km² in winter; 0.2158/km² in autumn; 0.0371/km² in summer; and 0.0946/km² in summer (Goodman *et al.,* 2007). Dolphins were sighted throughout the entire range when mean sea surface temperature (SST) was 7.60 °C to 30.82 °C, with fewer dolphins sighted as water temperatures increased. Like in Mayer (2003), dolphins were found in higher numbers around BT–11, a range where no live firing occurs.

In 2000, Duke University Marine Lab (DUML), conducted a boat-based mark-recapture survey throughout the estuaries, bays and sounds of North Carolina (Read *et al.,* 2003). This summer survey yielded a dolphin density of 0.183/km² (0.071 mi²) based on an estimate of 919 dolphins for the northern inshore waters divided by an estimated 5,015 km² (1,936 mi²) survey area. Additionally, from July 2002–June 2003, the USMC supported DUML to conduct dolphin surveys specifically in and around BT–9 and BT–11. During these surveys, one sighting in the restricted area surrounding BT–9 and two sightings in proximity to BT–11 were observed, as well as seven sightings in waters adjacent to the BTs. In total, 276 bottlenose dolphins were sighted ranging in group size from two to 70 animals with mean dolphin density in BT–11 more than twice as large as the density of any of the other areas; however, the daily densities were not significantly different (Maher, 2003). Estimated dolphin density at BT–9 and BT–11 based on these surveys were calculated to be 0.11 dolphins/km², and 1.23 dolphins/km², respectively, based on boat surveys conducted from July 2002 through June 2003 (excluding April, May, Sept. and Jan.). However, the USMC choose to estimate take of dolphins based on the higher density reported from the summer 2000 surveys (0.183/km²). Although the aerial surveys were conducted year round and therefore provide for seasonal density estimates, the average year-round density from the aerial surveys is 0.0936, lower than the 0.183/km² density chosen to calculate take for purposes of this MMPA authorization. Additionally, Goodman *et al.* (2007) acknowledged that boat based density estimates may be more accurate than the uncorrected estimates derived from the aerial surveys.

In Pamlico Sound, bottlenose dolphins concentrate in shallow water habitats along shorelines, and few, if any, individuals are present in the central portions of the sounds (Gannon, 2003; Read *et al.,* 2003a, 2003b). The dolphins utilize shallow habitats, such as tributary creeks and the edges of the Neuse River, where the bottom depth is less than 3.5 m (Gannon, 2003). Fine-scale distribution of dolphins seems to relate to the presence of topography or vertical structure, such as the steeply-sloping bottom near the shore and oyster reefs, which may be used to facilitate prey capture (Gannon, 2003). Results of a passive acoustic monitoring effort conducted from 2006–2007 by Duke University researchers validated this information. Vocalizations of dolphins in the BT–11 vicinity were higher in August and September than vocalization detection at BT–9, an open water area (Read *et al.,* 2007). Additionally, detected vocalizations of dolphins were more frequent at night for the BT–9 area and during early morning hours at BT–11.

Unlike migrating whales which display strong temporal foraging and mating/birthing periods, many bottlenose dolphins in Pamlico Sound are residents and mate year round. However, dolphins in the southeast U.S. do display some reproductive seasonality. Based on neonate stranding records, sighting data, and births by known females, the populations of dolphins that frequent the North Carolina estuarine waters have calving peaks in spring but calving continues throughout the summer and is followed by a smaller number of fall births (Thayer *et al.,* 2003).

Bottlenose dolphins can typically hear within a broad frequency range of 0.04 to 160 kHz (Au, 1993; Turl, 1993). Electrophysiological experiments suggest that the bottlenose dolphin brain has a dual analysis system: one specialized for ultrasonic clicks and another for lower-frequency sounds, such as whistles (Ridgway, 2000). Scientists have reported a range of highest sensitivity between 25 and 70 kHz, with peaks in sensitivity at 25 and 50 kHz (Nachtigall *et al.,* 2000). Recent research on the same individuals indicates that auditory thresholds obtained by electrophysiological methods correlate well with those obtained in behavior studies, except at some lower (10 kHz) and higher (80 and 100 kHz) frequencies (Finneran and Houser, 2006).

Sounds emitted by bottlenose dolphins have been classified into two broad categories: pulsed sounds (including clicks and burst-pulses) and narrow-band continuous sounds (whistles), which usually are frequency modulated. Clicks have a dominant frequency range of 110 to 130 kiloHertz (kHz) and a source level of 218 to 228 dB re 1 μPa (peak-to-peak) (Au, 1993) and 3.4 to 14.5 kHz at 125 to 173 dB re 1 μPa (peak-to-peak) (Ketten, 1998). Whistles are primarily associated with communication and can serve to identify specific individuals (*i.e.,* signature whistles) (Caldwell and Caldwell, 1965; Janik *et al.,* 2006). Up to 52 percent of whistles produced by bottlenose dolphin groups with mother-calf pairs can be classified as signature whistles (Cook *et al.,* 2004). Sound production is also influenced by group type (single or multiple individuals), habitat, and behavior (Nowacek, 2005). Bray calls (low-frequency vocalizations; majority of energy below 4 kHz), for example, are used when capturing fish, specifically sea trout (Salmo trutta) and Atlantic salmon (Salmo salar), in some regions (*i.e.,* Moray Firth, Scotland) (Janik, 2000). Additionally, whistle production has been observed to increase while feeding (Acevedo-Gutiérrez and Stienessen, 2004; Cook *et al.,* 2004).

Potential Effects on Marine Mammals

As mentioned previously, with respect to military readiness activities, Section 3(18)(B) of the MMPA defines ''harassment'' as: (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

The USMC has concluded that harassment to marine mammals may occur incidental to munitions firing noise and pressure at the BTs. These military readiness activities would result in increased noise levels, explosions, and munition debris within bottlenose dolphin habitat. NMFS also considered the potential for harassment from vessel and aircraft operation. NMFS' analysis of potential impacts from these factors, including consideration of the USMC's analysis in its application, is outlined below.

Anthropogenic Sound

Marine mammals respond to various types of anthropogenic sounds introduced in the ocean environment. Responses are highly variable and depend on a suite of internal and external factors which in turn results in varying degrees of significance (NRC, 2003; Southall *et al.,* 2007). Internal factors include: (1) Individual hearing

sensitivity, activity pattern, and motivational and behavioral state (*e.g.,* feeding, traveling) at the time it receives the stimulus; (2) past exposure of the animal to the noise, which may lead to habituation or sensitization; (3) individual noise tolerance; and (4) demographic factors such as age, sex, and presence of dependent offspring. External factors include: (1) Non-acoustic characteristics of the sound source (*e.g.,* if it is moving or stationary); (2) environmental variables (*e.g.,* substrate) which influence sound transmission; and (3) habitat characteristics and location (*e.g.,* open ocean vs. confined area). To determine whether an animal perceives the sound, the received level, frequency, and duration of the sound are compared to ambient noise levels and the species' hearing sensitivity range. That is, if the frequency of an introduced sound is outside of the species' frequency hearing range, it cannot be heard. Similarly, if the frequency is on the upper or lower end of the species hearing range, the sound must be louder in order to be heard.

Marine mammal responses to anthropogenic noise are typically subtle and can include visible and acoustic reactions such as avoidance, altered dive patterns and cessation of pre-exposure activities and vocalization reactions such as increasing or decreasing call rates or shifting call frequency. Responses can also be unobservable, such as stress hormone production and auditory trauma or fatigue. It is not always known how these behavioral and physiological responses relate to significant effects (*e.g.,* long-term effects or individual/population consequences); however, individuals and populations can be monitored to provide some insight into the consequences of exposing marine mammals to noise. For example, Haviland-Howell *et al.* (2007) compared sighting rates of bottlenose dolphins within the Wilmington, NC stretch of the Atlantic Intracoastal Waterway (ICW) on weekends, when recreational vessel traffic was high, to weekdays, when vessel traffic was relatively minimal. The authors found that dolphins were less often sighted in the ICW during times of increased boat traffic (*i.e.,* on weekends) and theorized that because vessel noise falls within the frequencies of dolphin communication whistles and primary energy of most fish vocalizations, the continuous vessel traffic along that stretch of the ICW could result in social and foraging impacts. However, the extent to which these impacts affect individual health and population structure is unknown.

A full assessment of marine mammal responses and disturbances when exposed to anthropogenic sound can be found in NMFS' proposed rulemaking for the Navy Cherry Point Range Complex (74 FR 11057, March 16, 2009). That rulemaking was made final on June 15, 2009 (74 FR 28370). In summary, sound exposure may result in physiological impacts, stress responses, and behavioral responses which could affect proximate or ultimate life functions. Proximate life history functions are the functions that the animal is engaged in at the time of acoustic exposure. The ultimate life functions are those that enable an animal to contribute to the population (or stock, or species, *etc.*).

I. Physiology-Hearing Threshold Shift

In mammals, high-intensity sound may rupture the eardrum, damage the small bones in the middle ear, or over stimulate the electromechanical hair cells that convert the fluid motions caused by sound into neural impulses that are sent to the brain. Lower level exposures may cause a loss of hearing sensitivity, termed a threshold shift (TS) (Miller, 1974). Incidence of TS may be either permanent, referred to as permanent threshold shift (PTS), or temporary, referred to as temporary threshold shift (TTS). The amplitude, duration, frequency, and temporal pattern, and energy distribution of sound exposure all affect the amount of associated TS and the frequency range in which it occurs. As amplitude and duration of sound exposure increase, generally, so does the amount of TS and recovery time. Human non-impulsive noise exposure guidelines are based on exposures of equal energy (the same SEL) producing equal amounts of hearing impairment regardless of how the sound energy is distributed in time (NIOSH 1998). Until recently, previous marine mammal TTS studies have also generally supported this equal energy relationship (Southall *et al.,* 2007). Three newer studies, two by Mooney *et al.* (2009a, 2009b) on a single bottlenose dolphin either exposed to playbacks of Navy MFAS or octave-band noise (4–8 kHz) and one by Kastak *et al.* (2007) on a single California sea lion exposed to airborne octave-band noise (centered at 2.5 kHz), concluded that for all noise exposure situations the equal energy relationship may not be the best indicator to predict TTS onset levels. Generally, with sound exposures of equal energy, those that were quieter (lower sound pressure level [SPL]) with longer duration were found to induce TTS onset more than those of louder (higher SPL) and shorter duration (more similar to noise from AS Cherry Point exercises). For intermittent sounds, less TS will occur than from a continuous exposure with the same energy (some recovery will occur between exposures) (Kryter *et al.,* 1966; Ward, 1997). Additionally, though TTS is temporary, very prolonged exposure to sound strong enough to elicit TTS, or shorter-term exposure to sound levels well above the TTS threshold, can cause PTS, at least in terrestrial mammals (Kryter, 1985). However, these studies highlight the inherent complexity of predicting TTS onset in marine mammals, as well as the importance of considering exposure duration when assessing potential impacts.

PTS consists of non-recoverable physical damage to the sound receptors in the ear, which can include total or partial deafness, or an impaired ability to hear sounds in specific frequency ranges; PTS is considered Level A harassment. TTS is recoverable and is considered to result from temporary, non-injurious impacts to hearing-related tissues; TTS is considered Level B harassment.

Permanent Threshold Shift

Auditory trauma represents direct mechanical injury to hearing related structures, including tympanic membrane rupture, disarticulation of the middle ear ossicles, and trauma to the inner ear structures such as the organ of Corti and the associated hair cells. Auditory trauma is irreversible and considered to be an injury that could result in PTS. PTS results from exposure to intense sounds that cause a permanent loss of inner or outer cochlear hair cells or exceed the elastic limits of certain tissues and membranes in the middle and inner ears and result in changes in the chemical composition of the inner ear fluids. In some cases, there can be total or partial deafness across all frequencies, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges. There is no empirical data for onset of PTS in any marine mammal, and therefore, PTS- onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above the level eliciting TTS-onset. PTS is presumed to be likely if the hearing threshold is reduced by ≥ 40 dB (*i.e.,* 40 dB of TTS). Relationships between TTS and PTS thresholds have not been studied in marine mammals, but are assumed to be similar to those in humans and other terrestrial mammals.

Temporary Threshold Shift

TTS is the mildest form of hearing impairment that can occur during exposure to a loud sound (Kryter, 1985). Southall *et al.* (2007) indicate that although PTS is a tissue injury, TTS is not because the reduced hearing sensitivity following exposure to intense sound results primarily from fatigue, not loss, of cochlear hair cells and supporting structures and is reversible. Accordingly, NMFS classifies TTS as Level B Harassment, not Level A Harassment (injury); however, NMFS does not consider the onset of TTS to be the lowest level at which Level B Harassment may occur (see *III. Behavior* section below).

Southall *et al.* (2007) considers a 6 dB TTS (*i.e.,* baseline hearing thresholds are elevated by 6 dB) sufficient to be recognized as an unequivocal deviation and thus a sufficient definition of TTS onset. TTS in bottlenose dolphin hearing have been experimentally induced. For example, Finneran *et al.* (2002) exposed a trained captive bottlenose dolphin to a seismic watergun simulator with a single acoustic pulse. No TTS was observed in the dolphin at the highest exposure condition (peak: 207 kPa [30psi]; peak-to-peak: 228 dB re: 1 microPa; SEL: 188 dB re 1 microPa^2-s). Schludt *et al.* (2000) demonstrated temporary shifts in masked hearing thresholds in five bottlenose dolphins occurring generally between 192 and 201 dB rms (192 and 201 dB SEL) after exposure to intense, non-pulse, 1-s tones at, 3kHz, 10kHz, and 20 kHz. TTS onset occurred at mean sound exposure level of 195 dB rms (195 dB SEL). At 0.4 kHz, no subjects exhibited threshold shifts after SPL exposures of 193dB re: 1 microPa (192 dB re: 1 microPa^2-s). In the same study, at 75 kHz, one dolphin exhibited a TTS after exposure at 182 dB SPL re: 1 microPa but not at higher exposure levels. Another dolphin experienced no threshold shift after exposure to maximum SPL levels of 193 dB re: 1 microPa at the same frequency. Frequencies of explosives used at MCAS Cherry Point range from 1–25 kHz; the range where dolphin TTS onset occurred at 195 dB rms in the Schludt *et al.* (2000) study.

Preliminary research indicates that TTS and recovery after noise exposure are frequency dependent and that an inverse relationship exists between exposure time and sound pressure level associated with exposure (Mooney *et al.,* 2005; Mooney, 2006). For example, Nachtigall *et al.* (2003) measured TTS in a bottlenose dolphin and found an average 11 dB shift following a 30 minute net exposure to OBN at a 7.5 kHz center frequency (max SPL of 179 dB re: 1 microPa; SEL: 212–214 dB re: 1 microPa^2-s). No TTS was observed after exposure to the same duration and frequency noise with maximum SPLs of 165 and 171 dB re: 1 microPa. After 50 minutes of exposure to the same 7.5 kHz frequency OBN, Natchigall *et al.* (2004) measured a 4–8 dB shift (max SPL: 160dB re 1microPa; SEL: 193–195 dB re:1 microPa^2-s). Finneran *et al.* (2005) concluded that a sound exposure level of 195 dB re 1 μPa2-s is a reasonable threshold for the onset of TTS in bottlenose dolphins exposed to mid-frequency tones.

II. Stress Response

An acoustic source is considered a potential stressor if, by its action on the animal, via auditory or non-auditory means, it may produce a stress response in the animal. Here, the stress response will refer to an increase in energetic expenditure that results from exposure to the stressor and which is predominantly characterized by either the stimulation of the sympathetic nervous system (SNS) or the hypothalamic-pituitary-adrenal (HPA) axis (Reeder and Kramer, 2005). The SNS response to a stressor is immediate and acute and is characterized by the release of the catecholamine neurohormones norepinephrine and epinephrine (*i.e.,* adrenaline). These hormones produce elevations in the heart and respiration rate, increase awareness, and increase the availability of glucose and lipids for energy. The HPA response is ultimately defined by increases in the secretion of the glucocorticoid steroid hormones, predominantly cortisol in mammals. The presence and magnitude of a stress response in an animal depends on a number of factors. These include the animal's life history stage (*e.g.,* neonate, juvenile, adult), the environmental conditions, reproductive or developmental state, and experience with the stressor. Not only will these factors be subject to individual variation, but they will also vary within an individual over time. The stress response may or may not result in a behavioral change, depending on the characteristics of the exposed animal. However, provided a stress response occurs, we assume that some contribution is made to the animal's allostatic load. Any immediate effect of exposure that produces an injury is assumed to also produce a stress response and contribute to the allostatic load. Allostasis is the ability of an animal to maintain stability through change by adjusting its physiology in response to both predictable and unpredictable events (McEwen and Wingfield, 2003). If the acoustic source does not produce tissue effects, is not perceived by the animal, or does not produce a stress response by any other means, we assume that the exposure does not contribute to the allostatic load. Additionally, without a stress response or auditory masking, it is assumed that there can be no behavioral change.

III. Behavior

Changes in marine mammal behavior in response to anthropogenic noise may include altered travel directions, increased swimming speeds, changes in dive, surfacing, respiration and feeding patterns, and changes in vocalizations. As described above, lower level physiological stress responses could also co-occur with altered behavior; however, stress responses are more difficult to detect and fewer data exist relative to specific received levels of sound.

Acoustic Masking

Anthropogenic noise can interfere with, or mask, detection of acoustic signals such as communication calls, echolocation, and environmental sounds important to marine mammals. Southall *et al.* (2007) defines auditory masking as the partial or complete reduction in the audibility of signals due to the presence of interfering noise with the degree of masking depending on the spectral, temporal, and spatial relationships between signals and masking noise, as well as the respective received levels. Masking of sender communication space can be considered as the amount of change in a sender's communication space caused by the presence of other sounds, relative to a pre-industrial ambient noise condition (Clark *et al., in press*). Unlike auditory fatigue, which always results in a stress response because the sensory tissues are being stimulated beyond their normal physiological range, masking may or may not result in a stress response, depending on the degree and duration of the masking effect. Masking may also result in a unique circumstance where an animal's ability to detect other sounds is compromised without the animal's knowledge. This could conceivably result in sensory impairment and subsequent behavior change; in this case, the change in behavior is the lack of a response that would normally be made if sensory impairment did not occur. For this reason, masking also may lead directly to behavior change without first causing a stress response. Projecting noise into

the marine environment which causes acoustic masking is considered Level B harassment as it can disrupt natural behavioral patterns by interrupting or limiting the marine mammal's receipt or transmittal of important information or environmental cues. To compensate for masking, marine mammals, including bottlenose dolphins, are known to increase their levels of vocalization as a function of background noise by increasing call repetition and amplitude, shifting calls higher frequencies, and/or changing the structure of call content (Lesage *et al.,* 1999; Scheifele *et al.,* 2005; McIwem, 2006).

While it may occur temporarily, NMFS does not expect auditory masking to result in detrimental impacts to an individual's or population's survival, fitness, or reproductive success. Dolphins are not confined to the BT ranges; allowing for movement out of area to avoid masking impacts. The USMC would also conduct visual sweeps of the area before any training exercise and implement training delay mitigation measures if a dolphin is sighted within designated zones (see *Proposed Mitigation Measures* section below). As discussed previously, the USMC has been working with DUML to collect baseline information on dolphins in Pamlico Sound, specifically dolphin abundance and habitat use around the BTs. The USMC has also recently accepted a DUML proposal to investigate methods of dolphin acoustic detection around the BTs. NMFS would encourage the USMC to expand acoustic investigations to include the impacts of training exercises on vocalization properties (*e.g.,* call content, duration, frequency) and masking (*e.g.,* communication and foraging impairment) of the affected population of dolphins in Pamlico Sound.

Assessment of Marine Mammal Impacts From Explosive Ordnances

MCAS Cherry Point plans to use five types of explosive sources during its training exercises: 2.75″ Rocket High Explosives, 5″ Rocket High Explosives, 30 mm High Explosives, 40 mm High Explosives, and G911 grenades. The underwater explosions from these weapons would send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. The shock wave and blast noise are of most concern to marine animals. In general, potential impacts from explosive detonations can range from brief effects (such as short term behavioral disturbance), tactile perception, physical discomfort, slight injury of the internal organs and the auditory system, to death of the animal (Yelverton *et al.,* 1973; O'Keeffe and Young, 1984; DoN, 2001).

Explosives produce significant acoustic energy across several frequency decades of bandwidth (*i.e.,* broadband). Propagation loss is sufficiently sensitive to frequency as to require model estimates at several frequencies over such a wide band. The effects of an underwater explosion on a marine mammal depend on many factors, including the size, type, and depth of both the animal and the explosive charge; the depth of the water column; and the standoff distance between the charge and the animal, as well as the sound propagation properties of the environment. The net explosive weight (or NEW) of an explosive is the weight of TNT required to produce an equivalent explosive power. The detonation depth of an explosive is particularly important due to a propagation effect known as surface-image interference. For sources located near the sea surface, a distinct interference pattern arises from the coherent sum of the two paths that differ only by a single reflection from the pressure-release surface. As the source depth and/or the source frequency decreases, these two paths increasingly, destructively interfere with each other, reaching total cancellation at the surface (barring surface-reflection scattering loss). USMC conservatively estimates that all explosives would detonate at a 1.2 m (3.9 ft) water depth. This is the worst case scenario as the purpose of training is to hit the target, resulting in an in-air explosion.

The firing sequence for some of the munitions consists of a number of rapid bursts, often lasting a second or less. The maximum firing time is 10–15 second bursts. Due to the tight spacing in time, each burst can be treated as a single detonation. For the energy metrics, the impact area of a burst is computed using a source energy spectrum that is the source spectrum for a single detonation scaled by the number of rounds in a burst. For the pressure metrics, the impact area for a burst is the same as the impact area of a single round. For all metrics, the cumulative impact area of an event consisting of a certain number of bursts is merely the product of the impact area of a single burst and the number of bursts, as would be the case if the bursts are sufficiently spaced in time or location as to insure that each burst is affecting a different set of marine wildlife.

Physical damage of tissues resulting from a shock wave (from an explosive detonation) is classified as an injury. Blast effects are greatest at the gas-liquid interface (Landsberg, 2000) and gas containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible to damage (Goertner, 1982; Hill 1978; Yelverton *et al.,* 1973). Nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble (Reidenberg and Laitman, 2003). Severe damage (from the shock wave) to the ears can include tympanic membrane rupture, fracture of the ossicles, damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear.

Non-lethal injury includes slight injury to internal organs and the auditory system; however, delayed lethality can be a result of individual or cumulative sublethal injuries (DoN, 2001). Immediate lethal injury would be a result of massive combined trauma to internal organs as a direct result of proximity to the point of detonation (DoN, 2001). Exposure to distance explosions could result only in behavioral changes. Masked underwater hearing thresholds in two bottlenose dolphins and one beluga whale have been measured before and after exposure to impulsive underwater sounds with waveforms resembling distant signatures of underwater explosions (Finneran *et al.,* 2000). The authors found no temporary shifts in masked-hearing thresholds (MTTSs), defined as a 6-dB or larger increase in threshold over pre-exposure levels, had been observed at the highest impulse level generated (500 kg at 1.7 km, peak pressure 70 kPa); however, disruptions of the animals' trained behaviors began to occur at exposures corresponding to 5 kg at 9.3 km and 5 kg at 1.5 km for the dolphins and 500 kg at 1.9 km for the beluga whale.

Generally, the higher the level of impulse and pressure level exposure, the more severe the impact to an individual. While, in general, dolphins could sustain injury or mortality if within very close proximity to in-water explosion, monitoring and mitigation measures employed by the USMC before and during training exercises, as would be required under any ITA issued, are designed to avoid any firing if a marine mammal is sighted within designated BT zones (see Proposed Mitigation and Monitoring section below). No marine mammal injury or death has been attributed to the specified activities described in the application. As such, and due to implementation of the proposed mitigation and monitoring

measures, bottlenose dolphin injury or mortality is not anticipated nor would any be authorized.

Inert Ordnances

The potential risk to marine mammals from non-explosive ordnance entails two possible sources of impacts: Elevated sound levels or the ordnance physically hitting an animal. The latter is discussed below in the *Munition Presence* section below. The USMC provided information that the noise fields generated in water by the firing of non-explosive ordnance indicate that the energy radiated is about 1 to 2 percent of the total kinetic energy of the impact. This energy level (and likely peak pressure levels) is well below the TTS-energy threshold, even at 1-m from the impact and is not expected to be audible to marine mammals. As such, the noise generated by the in-water impact of non-explosive ordnance will not result in take of marine mammals.

Training Debris

In addition to behavioral and physiological impacts from live fire and ammunition testing, NMFS has preliminarily analyzed impacts from presence of munition debris in the water, as described in the USMC's application and 2009 EA. These impacts include falling debris, ingestion of expended ordnance, and entanglement in parachute debris.

Ingestion of marine debris by marine mammals can cause digestive tract blockages or damage the digestive system (Gorzelany, 1998; Stamper *et al.,* 2006). Debris could be either the expended ordnance or non-munition related products such as chaff and self protection flares. Expended ordnance would be small and sink to the bottom. Chaff is composed of either aluminum foil or aluminum-coated glass fibers designed to act as a visual smoke screen; hiding the aircraft from enemy radar. Chaff also serves as a decoy for radar detection, allowing aircraft to maneuver or egress from the area. The foil type currently used is no longer manufactured, although it remains in the inventory and is used primarily by B–52 bombers. Both types of chaff are cut into dipoles ranging in length from 0.3 to over 2.0 inches. The aluminum foil dipoles are 0.45 mils (0.00045 inches) thick and 6 to 8 mils wide. The glass fiber dipoles are generally 1 mil (25.4 microns) in diameter, including the aluminum coating. Chaff is packed into about 4-ounce bundles. The major components of chaff are silica, aluminum, and stearic acid; all naturally prevalent in the environment.

Based on the dispersion characteristics of chaff, concentrations around the BTs would be low. For example, Hullar *et al.* (1999) calculated that a 4.97-mile by 7.46-mile area (37.1 km^2) would be affected by deployment of a single cartridge containing 150 grams of chaff; however, concentration would only be about 5.4 grams per square nautical mile. This corresponds to fewer than 179,000 fibers per square nautical mile or fewer than 0.005 fibers per square foot.

Self-protection flares are deployed to mislead or confuse heat-sensitive or heat-seeking anti-aircraft systems. The flares are magnesium pellets that, when ignited, burn for a short period of time (less than 10 seconds) at 2,000 degrees Fahrenheit. Air-deployed LUU–2 high-intensity illumination flares are used to illuminate targets, enhancing a pilot's ability to see targets while using Night Vision Goggles. The LUU–2B Flare has a light output rating of 1.8 x 10(6) candlepower and at 1,000 feet altitude illuminates a circle on the ground of 500 meters. The LUU–2 is housed in a pod or canister and is deployed by ejection. The mechanism has a timer on it that deploys the parachute and ignites the flare candle. The flare candle burns magnesium at high temperature, emitting an intense bright white light. The LUU–2 has a burn time of approximately 5 minutes while suspended from a parachute. The pyrotechnic candle consumes the flare housing, reducing flare weight, which in turn slows the rate of fall during the last 2 minutes of burn time. At candle burnout an explosive bolt is fired, releasing one parachute support cable, which causes the parachute to collapse.

Ingestion of debris by dolphins is not likely, as dolphins typically eat fish and other moving prey items. NMFS solicited information on evidence of debris ingestion from two marine mammal veterinarians who have performed many necropsies on the protected species of North Carolina's waters. In their experience, no necropsies of bottlenose dolphins have revealed evidence of munition, parachute, or chaff ingestion (pers. comm., Drs. C. Harms and D. Rostein, November 14, 2009). However, it was noted evidence of chaff ingestion would be difficult to detect. In the chance that dolphins do ingest chaff, the filaments are so fine they would likely pass through the digestive system without complication. However, if the chaff is durable enough, it might act as a linear foreign body. In such case, the intestines bunch up on the line restricting movement of the line resulting in an obstruction. The peristalsis on an immovable thin line can cause intestinal lacerations and perforations (pers. comm., C. Harms, November 14, 2009. This is a well known complication in cats when they ingest thread and which occurs occasionally with sea turtles ingesting fishing line. The longevity of chaff filaments, based upon dispersion rates, is unclear. Chaff exposed to synthetic seawater and aqueous environments in the pH range of 4–10 exhibited varying levels of degradation suggesting a short lifespan for the outer aluminum coating (Farrell and Siciliano, 1998). The underlying filament is a flexible silica core and composed of primarily silica dioxide. While no studies have been conducted to evaluate the effects of chaff ingestion on marine mammals, the effects are expected to be negligible based upon chaff concentration in the environment, size of fibers, and available toxicity data on fiberglass and aluminum. Given that the size of chaff fibers are no more than 2 inches long, tidal flushing reduces concentration in the environment, and chaff degradation rate, the chance of chaff ingestions is unlikely; however, if swallowed, impacts would be negligible.

Given that there is no evidence that dolphins ingest military debris; dolphins in the Sound forage on moving prey suspended in the water column while expended munition would sink; the property and dispersion characteristics of chaff make potential for ingestion discountable; and that Pamlico Sound is a tidal body of water with continuing flushing, NMFS has preliminarily determined that the presence of training debris would not have an effect on dolphins in Pamlico Sound.

Although sometimes large, expended parachutes (*e.g.,* those from the flares) are flimsy and structurally simple and NMFS has determined that the probability of entanglement with a dolphin is low. There are no known reports of live or stranded dolphins entangled in parachute gear; fishing gear is usually the culprit of reported entanglements. The NMFS' Marine Mammal Stranding Network (Network) has established protocol for reporting marine mammals in peril. Should any injured, stranded or entangled marine mammal be observed by USMC personnel during training exercises, the sighting would be reported to the Network within 24 hours of the observation.

Vessel and Aircraft Presence

The marine mammals most vulnerable to vessel strikes are slow-moving and/or spend extended periods of time at the

surface in order to restore oxygen levels within their tissues after deep dives (*e.g.,* right whales, fin whales, sperm whales). Smaller marine mammals such as bottlenose dolphins (the only marine mammal that would be encountered at the BTs) are agile and move more quickly through the water, making them less susceptible to ship strikes. NMFS is not aware of any vessel strikes of bottlenose dolphins in Pamlico Sound. Therefore, NMFS does not anticipate that USMC vessels engaged in the specified activity would strike any marine mammals and no take from ship strike would be authorized in the proposed IHA.

Behaviorally, marine mammals may or may not respond to the operation of vessels and associated noise. Responses to vessels vary widely among marine mammals in general, but also among different species of small cetaceans. Responses may include attraction to the vessel (Richardson *et al.,* 1995); altering travel patterns to avoid vessels (Constantine, 2001; Nowacek *et al.,* 2001; Lusseau, 2003, 2006); relocating to other areas (Allen and Read, 2000); cessation of feeding, resting, and social interaction (Baker *et al.,* 1983; Bauer and Herman, 1986; Hall, 1982; Krieger and Wing, 1984; Lusseau, 2003; Constantine *et al.,* 2004); abandoning feeding, resting, and nursing areas (Jurasz and Jurasz 1979; Dean *et al.,* 1985; Glockner-Ferrari and Ferrari 1985, 1990; Lusseau, 2005; Norris *et al.,* 1985; Salden, 1988; Forest, 2001; Morton and Symonds, 2002; Courbis, 2004; Bejder, 2006); stress (Romano *et al.,* 2004); and changes in acoustic behavior (Van Parijs and Corkeron, 2001). However, in some studies marine mammals display no reaction to vessels (Watkins, 1986; Nowacek *et al.,* 2003) and many odontocetes show considerable tolerance to vessel traffic (Richardson *et al.,* 1995). Dolphins may actually reduce the energetic cost of traveling by riding the bow or stern waves of vessels (Williams *et al.,* 1992; Richardson *et al.,* 1995).

Dolphins within Pamlico Sound are continually exposed to recreational, commercial, and military vessels. Richardson *et al.* (1995) addresses in detail three responses that marine mammals may experience when exposed to anthropogenic activities: Tolerance; habituation; and sensitization. More recent publications provide variations on these themes rather than new data (NRC 2003). Marine mammals are often seen in regions with much human activity; thus, certain individuals or populations exhibit some tolerance of anthropogenic noise and other stimuli. Animals will tolerate a stimulus they might otherwise avoid if the benefits in terms of feeding, mating, migrating to traditional habitats, or other factors outweigh the negative aspects of the stimulus (NRC, 2003). In many cases, tolerance develops as a result of habituation. The NRC (2003) defines habituation as a gradual waning of behavioral responsiveness over time as animals learn that a repeated or ongoing stimulus lacks significant consequences for the animals. Contrarily, sensitization occurs when an animal links a stimulus with some degree of negative consequence and as a result increases responsiveness to that human activity over time (Richardson *et al.,* 1995). For example, seals and whales are known to avoid previously encountered vessels involved in subsistence hunts (Walker, 1949; Ash 1962; Terhune, 1985) and bottlenose dolphins that had previously been captured and released from a 7.3 m boat involved in health studies were documented to flee when that boat approached closer than 400 m, whereas dolphins that had not been involved in the capture did not display signs of avoidance of the vessel (Irvine *et al.,* 1981). Because dolphins in Pamlico Sound are continually exposed to vessel traffic that does not present immediate danger to them, it is likely animals are both tolerant and habituated to vessels.

The specified activities also involve aircraft, which marine mammals are known to react (Richardson *et al.,* 1995). Aircraft produce noise at frequencies that are well within the frequency range of cetacean hearing and also produce visual signals such as the aircraft itself and its shadow (Richardson *et al.,* 1995, Richardson & Würsig, 1997). A major difference between aircraft noise and noise caused by other anthropogenic sources is that the sound is generated in the air, transmitted through the water surface and then propagates underwater to the receiver, diminishing the received levels to significantly below what is heard above the water's surface. Sound transmission from air to water is greatest in a sound cone 26 degrees directly under the aircraft.

Reactions of odontocetes to aircraft have been reported less often than those of pinnipeds. Responses to aircraft include diving, slapping the water with pectoral fins or tail fluke, or swimming away from the track of the aircraft (Richardson *et al.,* 1995). The nature and degree of the response, or the lack thereof, are dependent upon nature of the flight (*e.g.,* type of aircraft, altitude, straight vs. circular flight pattern). Würsig *et al.* (1998) assessed the responses of cetaceans to aerial surveys in the northcentral and western Gulf of Mexico using a DeHavilland Twin Otter fixed-wing airplane. The plane flew at an altitude of 229 m at 204 km/hr. A minimum of 305 m straight line distance from the cetaceans was maintained. Water depth was 100–1000m. Bottlenose dolphins most commonly responded by diving (48 percent), while 14 percent responded by moving away. Other species (*e.g.,* beluga whale, sperm whale) show considerable variation in reactions to aircraft but diving or swimming away from the aircraft are the most common reactions to low flights (less than 500 m).

Anticipated Effects on Habitat

Detonations of live ordnance would result in temporary modification to water properties. As described above, an underwater explosion from these weapon would send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. However, these would be temporary and not expected to last more than a few seconds. Because dolphins are not expected to be in the area during live firing, due to monitoring and mitigation measure implementation, they would not be subject to any short term habitat alterations.

Similarly, no long term impacts with regard to hazardous constituents are expected to occur. MCAS Cherry Point has an active Range Environmental Vulnerability Assessment (REVA) program in place to monitor impacts to habitat from its activities. One goal of REVA is to determine the horizontal and vertical concentration profiles of heavy metals, explosives constituents, perchlorate nutrients, and dissolved salts in the sediment and seawater surrounding BT–9 and BT–11. The preliminary results of the sampling indicate that explosive constituents (*e.g.,* trinitrotoluene (TNT), cyclotrimethylenetrinitramine (RDX), and hexahydro-trinitro-triazine (HMX), as described in Hazardous Constituents [Subchapter 3.2.7.2] of the MCAS Cherry Point Range Operations EA, were not detected in any sediment or water sample surrounding the BTs. Metals were not present above toxicity screening values. Perchlorate was detected in a few sediment samples above the detection limit (0.21 ppm), but below the reporting limit (0.6 ppm). The ongoing REVA would continue to evaluate potential munitions constituent migration from operational range areas to off-range areas and MCAS Cherry Point.

Summary of Previous Monitoring

USMC complied with the mitigation and monitoring required under the previous authorization. In accordance with the 2010–11 IHA, USMC submitted a final monitoring report, which described the activities conducted and observations made. USMC did not record observations of any marine mammals during training exercises. The only recorded observations—which were of bottlenose dolphins—were on two occasions by maintenance vessels engaged in target maintenance. No marine mammals were observed during range sweeps, air to ground activities, surface to surface activities (small boats), or ad hoc via range cameras. Table 6 details the number of sorties conducted, by air and water, at each target. The number of sorties conducted does not relate to the total amount of munitions expended, as the training requirements for the specific military unit conducting the sortie determine the munitions loading for the air platform or watercraft during each sortie. In addition, munitions expenditures may be determined by the loading specifications of the specific aircraft and vessels used in the training exercise.

TABLE 6—SORTIES CONDUCTED AT BT–9 AND BT–11

Mission type	BT–9	BT–11
Air-to-surface	1,554	4,251
Surface-to-surface (water-to-water)	223	105
Total	1,777	4,356

The total amount of ordnance expended at BT–9 and BT–11 under the 2010–11 IHA was 878,625 and 693,612 respectively (Table 7). These amounts represent 98 and 62 percent of the estimated annual maximum ordnance expenditures. The amounts of ordnance expended at the BTs account for all use of the targets. There are five types of explosive sources used at BT–9: 2.75'' Rocket High Explosives, 5'' Rocket High Explosives, 30 mm High Explosives, 40 mm High Explosives, and G911 grenades. No explosive munitions are used at BT–11.

TABLE 7—ORDNANCE USAGE AT BT–9

Munitions expenditures	Total rounds		Percentage of maximum	
	BT–9	BT–11	BT–9	BT–11
Small arms, excluding .50 cal	355,718	363,899	68	72
.50 cal	410,815	246,255	160	75
Large arms (Live)	[1] 480	N/A	4	N/A
Large arms (Inert)	108,811	79,531	117	33
Rockets (Live)	[2] 48	N/A	20	N/A
Rockets (Inert)	185	2,018	26	44
Bombs/Grenades (Live)	0	N/A	0	N/A
Bombs/Grenades (Inert)	2,086	1,697	51	8
Pyrotechnics	482	212	11	2
Total	878,625	693,612	98	62

[1] (All 40 mm).
[2] (All 2.75 in).

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the ''permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.'' The NDAA of 2004 amended the MMPA as it relates to military-readiness activities and the ITA process such that ''least practicable adverse impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. The training activities described in the USMC's application are considered military readiness activities.

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; (3) the practicability of the measure for applicant implementation, including consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance while also considering personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The USMC, in collaboration with NMFS, has worked to identify potential practicable and effective mitigation measures, which include a careful balancing of the likely benefit of any particular measure to the marine mammals with the likely effect of that measure on personnel safety, practicality of implementation, and impact on the ''military-readiness activity''. These proposed mitigation measures are listed below.

(1) *Range Sweeps:* The VMR–1 squadron, stationed at MCAS Cherry Point, includes three specially equipped HH–46D helicopters. The primary mission of these aircraft, known as PEDRO, is to provide search and rescue for downed 2d Marine Air Wing aircrews. On-board are a pilot, co-pilot, crew chief, search and rescue swimmer, and a medical corpsman. Each crew

member has received extensive training in search and rescue techniques, and is therefore particularly capable at spotting objects floating in the water.

PEDRO crew would conduct a range sweep the morning of each exercise day prior to the commencement of range operations. The primary goal of the pre-exercise sweep is to ensure that the target area is clear of fisherman, other personnel, and protected species. The sweep is flown at 100–300 meters above the water surface, at airspeeds between 60–100 knots. The path of the sweep runs down the western side of BT–11, circles around BT–9 and then continues down the eastern side of BT–9 before leaving. The sweep typically takes 20–30 minutes to complete. The PEDRO crew is able to communicate directly with range personnel and can provide immediate notification to range operators. The PEDRO aircraft would remain in the area of a sighting until clear if possible or as mission requirements dictate.

If marine mammals are sighted during a range sweep, sighting data will be collected and entered into the US Marine Corps sighting database, web-interface, or report generator and this information would be relayed to the training Commander. Sighting data includes the following (collected to the best of the observer's ability): (1) Species identification; (2) group size; (3) the behavior of marine mammals (*e.g.,* milling, travel, social, foraging); (4) location and relative distance from the BT; (5) date, time and visual conditions (*e.g.,* Beaufort sea state, weather) associated with each observation; (6) direction of travel relative to the BT; and (7) duration of the observation.

(2) *Cold Passes:* All aircraft participating in an air-to-surface exercise would be required to perform a ''cold pass'' immediately prior to ordnance delivery at the BTs both day and night. That is, prior to granting a ''First Pass Hot'' (use of ordnance), pilots would be directed to perform a low, cold (no ordnance delivered) first pass which serves as a visual sweep of the targets prior to ordnance delivery to determine if unauthorized civilian vessels or personnel, or protected species, are present. The cold pass is conducted with the aircraft (helicopter or fixed-winged) flying straight and level at altitudes of 200–3000 feet over the target area. The viewing angle is approximately 15 degrees. A blind spot exists to the immediate rear of the aircraft. Based upon prevailing visibility, a pilot can see more than one mile forward upon approach. The aircrew and range personnel make every attempt to ensure clearance of the area via visual inspection and remotely operated camera operations (see Proposed Monitoring and Reporting section below). The Range Controller may deny or approve the First Pass Hot clearance as conditions warrant.

(3) *Delay of Exercises:* An active range would be considered ''fouled'' and not available for use if a marine mammal is present within 1000 yards (914 m) of the target area at BT–9 or anywhere within Rattan Bay (BT–11). Therefore, if a marine mammal is sighted within 1000 yards (914 m) of the target at BT–9 or anywhere within Rattan Bay at BT–11 during the cold pass or from range camera detection, training would be delayed until the marine mammal moves beyond and on a path away from 1000 yards (914 m) from the BT–9 target or out of Rattan Bay at BT–11. This mitigation applies to both air-to-surface and surface-to-surface exercises.

(4) *Range Camera Use:* To increase the safety of persons or property near the targets, Range Operation and Control personnel monitor the target area through tower mounted safety and surveillance cameras. The remotely operated range cameras are high resolution and, according to range personnel, allow a clear visual of a duck floating near the target. The cameras allow viewers to see animals at the surface and breaking the surface, but not underwater.

A new, enhanced camera system has been purchased and will be installed on BT–11 towers 3 and 7, and on both towers at BT–9. The new camera system has night vision capabilities with resolution levels near those during daytime. Lenses on the camera system have focal lengths of 40 mm to 2200 mm (56x), with view angles of 18°10′ and 13°41′, respectively. The field of view when zoomed in on the Rattan Bay targets will be 23′ wide by 17′ high, and on the mouth of Rattan Bay itself 87′ wide by 66′ high.

Again, in the event that a marine mammal is sighted within 1000 yards (914 m) of the BT–9 target, or anywhere within Rattan Bay, the target would be declared fouled. Operations may commence in the fouled area after the animal(s) have moved 1000 yards (914 m) from the BT–9 target and/or out of Rattan Bay.

(5) *Vessel Operation:* All vessels used during training operations would abide by the NMFS' Southeast Regional Viewing Guidelines designed to prevent harassment to marine mammals (*http://www.nmfs.noaa.gov/pr/education/southeast/*).

(6) *Stranding Network Coordination:* The USMC would coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during training activities or within 24 hours after completion of training.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for incidental take authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present. Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals: (a) An increase in our understanding of how many marine mammals are likely to be exposed to munition noise and explosions that we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS; (b) an increase in our understanding of how individual marine mammals respond (behaviorally or physiologically) to gunnery and bombing exercises (at specific received levels) expected to result in take; (c) an increase in our understanding of how anticipated takes of individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival); (d) an increased knowledge of the affected species; (e) an increase in our understanding of the effectiveness of certain mitigation and monitoring measures; (f) a better understanding and record of the manner in which the authorized entity complies with the incidental take authorization; (g) an increase in the probability of detecting marine mammals, both within the safety zone (thus allowing for more effective implementation of the mitigation) and in general to better achieve the above goals.

Proposed Monitoring

The suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals expected to be present within the action area are as follows:

(1) *Marine Mammal Observer Training:* Pilots, operators of small boats, and other personnel monitoring for marine mammals would be required to take the Marine Species Awareness Training (Version 2), maintained and promoted by the Department of the Navy. This training would make personnel knowledgeable of marine mammals, protected species, and visual cues related to the presence of marine mammals and protected species.

(2) *Weekly and Post-Exercise Monitoring:* Post-exercise monitoring would be conducted concomitant to the next regularly scheduled pre-exercise sweep. Weekly monitoring events would include a maximum of five pre-exercise and four post-exercise sweeps. The maximum number of days that would elapse between pre- and post-exercise monitoring events would be approximately 3 days, and would normally occur on weekends. If marine mammals are observed during this monitoring, sighting data identical to those collected by PEDRO crew would be recorded.

(3) *Long-Term Monitoring:* The USMC has awarded DUML duties to obtain abundance, group dynamics (*e.g.,* group size, age census), behavior, habitat use, and acoustic data on the bottlenose dolphins which inhabit Pamlico Sound, specifically those around BT–9 and BT–11. DUML began conducting boat-based surveys and passive acoustic monitoring of bottlenose dolphins in Pamlico Sound in 2000 (Read *et al.,* 2003) and specifically at BT–9 and BT–11 in 2003 (Mayer, 2003). To date, boat-based surveys indicate that bottlenose dolphins may be resident to Pamlico Sound and use BT restricted areas on a frequent basis. Passive acoustic monitoring (PAM) is providing more detailed insight into how dolphins use the two ranges, by monitoring for their vocalizations year-round, regardless of weather conditions or darkness. In addition to these surveys, DUML scientists are testing a real-time passive acoustic monitoring system at BT–9 that will allow automated detection of bottlenose dolphin whistles, providing yet another method of detecting dolphins prior to training operations. Although it is unlikely this PAM system would be active for purposes of implementing mitigation measures before an exercise prior to expiration of the proposed IHA, it would be operational for future MMPA incidental take authorizations.

(4) *Reporting:* The USMC would submit a report to NMFS within 90 days after expiration of the IHA or, if a subsequent incidental take authorization is requested, within 120 days prior to expiration of the IHA. The report would summarize the type and amount of training exercises conducted, all marine mammal observations made during monitoring, and if mitigation measures were implemented. The report would also address the effectiveness of the monitoring plan in detecting marine mammals.

Estimated Take by Incidental Harassment

The following provides the USMC's model for take of dolphins from explosives (without consideration of mitigation and the conservative assumption that all explosives would land in the water and not on the targets or land) and potential for direct hits and NMFS' analysis of potential harassment from small vessel and aircraft operations.

Acoustic Take Criteria

For the purposes of an MMPA incidental take authorization, three levels of take are identified: Level B harassment; Level A harassment; and mortality (or serious injury leading to mortality). The categories of marine mammal responses (physiological and behavioral) that fall into harassment categories were described previously in this notice. A method to estimate the number of individuals that will be taken, pursuant to the MMPA, based on the proposed action has been derived. To this end, NMFS uses acoustic criteria that estimate at what received level Level B harassment, Level A harassment, and mortality of marine mammals would occur. The acoustic criteria for underwater detonations are comprehensively explained in NMFS' proposed and final rulemakings for the U.S. Navy's Cherry Point Range Operations (74 FR 11057; 74 FR 28370) and are summarized here:

Criteria and thresholds for estimating the exposures from a single explosive activity on marine mammals were established for the Seawolf Submarine Shock Test Final Environmental Impact Statement (FEIS) (''Seawolf'') and subsequently used in the USS Winston S. Churchill (DDG 81) Ship Shock FEIS (''Churchill'') (DoN, 1998 and 2001). NMFS adopted these criteria and thresholds in its final rule on the unintentional taking of marine animals occurring incidental to the shock testing which involved large explosives (65 FR 77546; December 12, 2000). Because no large explosives (> 1000 lbs NEW) would be used at Cherry Point during the specified activities, a revised acoustic criterion for small underwater explosions (*i.e.,* 23 pounds per square inch [psi] instead of previous acoustic criteria of 12 psi for peak pressure over all exposures) has been established to predict onset of TTS.

I.1. Thresholds and Criteria for Injurious Physiological Impacts

I.1.a. Single Explosion

For injury, NMFS uses dual criteria, eardrum rupture (*i.e.,* tympanic-membrane injury) and onset of slight lung injury, to indicate the onset of injury. The threshold for tympanic-membrane (TM) rupture corresponds to a 50 percent rate of rupture (*i.e.,* 50 percent of animals exposed to the level are expected to suffer TM rupture). This value is stated in terms of an Energy Flux Density Level (EL) value of 1.17 inch pounds per square inch (in-lb/in2), approximately 205 dB re 1 microPa^2-sec.

The threshold for onset of slight lung injury is calculated for a small animal (a dolphin calf weighing 26.9 lbs), and is given in terms of the ''Goertner modified positive impulse,'' indexed to 13 psi-msec (DoN, 2001). This threshold is conservative since the positive impulse needed to cause injury is proportional to animal mass, and therefore, larger animals require a higher impulse to cause the onset of injury. This analysis assumed the marine species populations were 100 percent small animals. The criterion with the largest potential impact range (most conservative), either TM rupture (energy threshold) or onset of slight lung injury (peak pressure), will be used in the analysis to determine Level A exposures for single explosive events.

For mortality, NMFS uses the criterion corresponding to the onset of extensive lung injury. This is conservative in that it corresponds to a 1 percent chance of mortal injury, and yet any animal experiencing onset severe lung injury is counted as a lethal exposure. For small animals, the threshold is given in terms of the Goertner modified positive impulse, indexed to 30.5 psi-msec. Since the Goertner approach depends on propagation, source/animal depths, and animal mass in a complex way, the actual impulse value corresponding to the 30.5 psi-msec index is a complicated calculation. To be conservative, the analysis used the mass of a calf dolphin (at 26.9 lbs) for 100 percent of the populations.

I.1.b. Multiple Explosions

For multiple explosions, the Churchill approach had to be extended to cover multiple sound events at the same training site. For multiple exposures, accumulated energy over the entire

training time is the natural extension for energy thresholds since energy accumulates with each subsequent shot (detonation); this is consistent with the treatment of multiple arrivals in Churchill. For positive impulse, it is consistent with the Churchill final rule to use the maximum value over all impulses received.

I.2. Thresholds and Criteria for Non-Injurious Physiological Effects

To determine the onset of TTS (non-injurious harassment)—a slight, recoverable loss of hearing sensitivity, there are dual criteria: An energy threshold and a peak pressure threshold. The criterion with the largest potential impact range (most conservative), either the energy or peak pressure threshold, will be used in the analysis to determine Level B TTS exposures. The thresholds for each criterion are described below.

I.2.a. Single Explosion—TTS-Energy Threshold

The TTS energy threshold for explosives is derived from the Space and Naval Warfare Systems Center (SSC) pure-tone tests for TTS (Schlundt *et al.,* 2000; Finneran and Schlundt, 2004). The pure-tone threshold (192 dB as the lowest value) is modified for explosives by (a) interpreting it as an energy metric, (b) reducing it by 10 dB to account for the time constant of the mammal ear, and (c) measuring the energy in 1/3-octave bands, the natural filter band of the ear. The resulting threshold is 182 dB re 1 microPa^2-sec in any 1/3-octave band.

I.2.b. Single Explosion—TTS-Peak Pressure Threshold

The second threshold applies to all species and is stated in terms of peak pressure at 23 psi (about 225 dB re 1 microPa). This criterion was adopted for Precision Strike Weapons (PSW) Testing and Training by Eglin Air Force Base in the Gulf of Mexico (NMFS, 2005). It is important to note that for small shots near the surface (such as in this analysis), the 23-psi peak pressure threshold generally will produce longer impact ranges than the 182-dB energy metric. Furthermore, it is not unusual for the TTS impact range for the 23-psi pressure metric to actually exceed the without-TTS (behavioral change without onset of TTS) impact range for the 177-dB energy metric.

I.3. Thresholds and Criteria for Behavioral Effects

I.3.a. Single Explosion

For a single explosion, to be consistent with Churchill, TTS is the criterion for Level B harassment. In other words, because behavioral disturbance for a single explosion is likely to be limited to a short-lived startle reaction, use of the TTS criterion is considered sufficient protection and therefore behavioral effects (Level B behavioral harassment without onset of TTS) are not expected for single explosions.

I.3.b. Multiple Explosions—Without TTS

For multiple explosions, the Churchill approach had to be extended to cover multiple sound events at the same training site. For multiple exposures, accumulated energy over the entire uninterrupted firing time is the natural extension for energy thresholds since energy accumulates with each subsequent shot (detonation); this is consistent with the treatment of multiple arrivals in Churchill. Because multiple explosions could occur within a discrete time period, a new acoustic criterion-behavioral disturbance without TTS is used to account for behavioral effects significant enough to be judged as harassment, but occurring at lower noise levels than those that may cause TTS.

The threshold is based on test results published in Schlundt *et al.* (2000), with derivation following the approach of the Churchill FEIS for the energy-based TTS threshold. The original Schlundt *et al.* (2000) data and the report of Finneran and Schlundt (2004) are the basis for thresholds for behavioral disturbance without TTS. During this study, instances of altered behavior sometimes began at lower exposures than those causing TTS; however, there were many instances when subjects exhibited no altered behavior at levels above the onset-TTS levels. Regardless of reactions at higher or lower levels, all instances of altered behavior were included in the statistical summary. The behavioral disturbance without TTS threshold for tones is derived from the SSC tests, and is found to be 5 dB below the threshold for TTS, or 177 dB re 1 microPa^2-sec maximum energy flux density level in any 1/3-octave band at frequencies above 100 Hz for cetaceans.

II. Summary of Thresholds and Criteria for Impulsive Sounds

The effects, criteria, and thresholds used in the assessment for impulsive sounds are summarized in Table 8. The criteria for behavioral effects without physiological effects used in this analysis are based on use of multiple explosives from live, explosive firing at BT–9 only; no live firing occurs at BT–11.

TABLE 8—EFFECTS, CRITERIA, AND THRESHOLDS FOR IMPULSIVE SOUNDS

Effect	Criteria	Metric	Threshold	Effect
Mortality	Onset of Extensive Lung Injury	Goertner modified positive impulse.	indexed to 30.5 psi-msec (assumes 100 percent small animal at 26.9 lbs).	Mortality.
Injurious Physiological	50 percent Tympanic Membrane Rupture.	Energy flux density	1.17 in-lb/in^2 (about 205 dB re 1 microPa^2-sec).	Level A.
Injurious Physiological	Onset Slight Lung Injury	Goertner modified positive impulse.	indexed to 13 psi-msec (assumes 100 percent small animal at 26.9 lbs).	Level A.
Non-injurious Physiological.	TTS	Greatest energy flux density level in any 1/3-octave band (> 100 Hz for toothed whales and > 10 Hz for baleen whales)—for total energy over all exposures.	182 dB re 1 microPa^2-sec	Level B.
Non-injurious Physiological.	TTS	Peak pressure over all exposures.	23 psi	Level B.

TABLE 8—EFFECTS, CRITERIA, AND THRESHOLDS FOR IMPULSIVE SOUNDS—Continued

Effect	Criteria	Metric	Threshold	Effect
Non-injurious Behavioral.	Multiple Explosions Without TTS	Greatest energy flux density level in any 1/3-octave (> 100 Hz for toothed whales and > 10 Hz for baleen whales)—for total energy over all exposures (multiple explosions only).	177 dB re 1 microPa^2-sec	Level B.

Take From Explosives

The USMC conservatively modeled that all explosives would detonate at a 1.2 m (3.9 ft) water depth despite the training goal of hitting the target, resulting in an above water or on land explosion. For sources that are detonated at shallow depths, it is frequently the case that the explosion may breech the surface with some of the acoustic energy escaping the water column. The source levels presented in the table above have not been adjusted for possible venting nor does the subsequent analysis take this into account. Properties of explosive sources used at BT–9, including NEW, peak one-third-octave (OTO) source level, the approximate frequency at which the peak occurs, and rounds per burst are described in Table 9. Distances to NMFS harassment threshold levels from these sources are outlined in Table 10.

TABLE 9—SOURCE WEIGHTS AND PEAK SOURCE LEVELS

Source type	NEW	Peak OTO SL	Frequency of peak OTO SL	Rounds per burst
2.75″ Rocket	4.8 lbs	223.9 dB re: 1 μPa	~ 1500 Hertz (Hz)	1
5″ Rocket	15.0 lbs	228.9 dB re: 1 μPa	~ 1000 Hz	1
30 mm	0.1019 lbs	212.1 dB re: 1 μPa	~ 2500 Hz	30
40 mm	0.1199 lbs	227.8 dB re: 1 μPa	~ 1100 Hz	5
G911 Grenade	0.5	213.9 dB re: 1 μPa	~ 2500 Hz	1

TABLE 10—DISTANCES TO NMFS HARASSMENT THRESHOLDS FROM EXPLOSIVE ORDNANCES

	Behavioral disturbance (177 dB Energy)	TTS (23 psi)	Level A (13 psi-msec)	Mortality (31 psi-ms)
2.75″ Rocket HE	N/A	172 m (564 ft)	47 m (154 ft)	27 m (89 ft).
5″ Rocket HE	N/A	255 m (837 ft)	61 m (200 ft)	39 m (128 ft).
30 mm HE	209 m (686 ft)	N/A	10 m (33 ft)	5 m (16 ft).
40 mm HE	144 m (472 ft)	N/A	10 m (33 ft)	5 m (16 ft).
G911 Grenade	N/A	83 m (272 ft)	21 m (33 ft)	10 m (33 ft).

To calculate take, the distances to which animals may be harassed were considered along with dolphin density. The density estimate from Read *et al.* (2003) was used to calculate take from munition firing. As described in the *Description of Marine Mammals in the Area of the Specified Activity* section above, this density, 0.183/km^2, was derived from boat based surveys in 2000 which covered all inland North Carolina waters. Note that estimated density of dolphins at BT–9 and BT–11, specifically, were calculated to be 0.11 dolphins/km^2, and 1.23 dolphins/km^2 respectively (Maher 2003), based on boat surveys conducted from July 2002 through June 2003 (excluding April, May, Sept. and Jan.). However, the USMC chose to estimate take of dolphins based on the higher density reported from the summer 2000 surveys (0.183/km^2). Additionally, take calculations for munition firing are based on 100 percent water detonation, although the goal of training is to hit the targets, and no pre-exercise monitoring or mitigation. Therefore, take estimates can be considered conservative.

Based on dolphin density and amount of munitions expended, there is very low potential for Level A harassment and mortality and monitoring and mitigation measures are anticipated to further negate this potential. Accordingly, NMFS is not proposing to issue these levels of take. As portrayed in Table 9, the largest harassment zone (Level B) is within 209 m of a detonation in water; however, the USMC has implemented a 1000 m ''foul'' zone for BT–9 and anywhere within Rattan Bay for BT–11. In total, from firing of explosive ordnances, the USMC is requesting, and NMFS is proposing to issue, the incidental take of 25 bottlenose dolphins from Level B harassment (Table 11).

TABLE 11—NUMBER OF DOLPHINS POTENTIALLY TAKEN FROM EXPOSURE TO EXPLOSIVES BASED ON THRESHOLD CRITERIA

Ordnance type	Level B—Behavioral (177dB re 1 microPa²-s)	Level B—TTS (23 psi)	Level A—Injurious (205 dB re 1 microPa²-s or 13 psi)	Mortality (30.5 psi)
2.75″ Rocket HE	N/A	4.97	0.17	0.06
5″ Rocket HE	N/A	3.39	0.09	0.03
30 mm HE	2.55	N/A	0.05	0.00
40 mm HE	12.60	N/A	0.16	0.01
G911 Grenade	N/A	0.87	0.03	0.01
Total	15.15	9.23	0.5	0.11

Take From Direct Hit

The potential risk of a direct hit to an animal in the target area is estimated to be so low it is discountable. A Range Air Installation Compatible Use Zone (RAICUZ) study generated the surface area or footprints of weapon impact areas associated with air-to-ground ordnance delivery (USMC 2001). Statistically, a weapon safety footprint describes the area needed to contain 99.99 percent of initial and ricochet impacts at the 95-percent confidence interval for each type of aircraft and ordnance utilized on the BTs. At both BT–9 and BT–11 the probability of deployed ordnance landing in the impact footprint is essentially 1.0, since the footprints were designed to contain 99.99 percent of impacts, including ricochets. However, only 36 percent of the weapon footprint for BT–11 is over water in Rattan Bay, so the likelihood of a weapon striking an animal at the BT in Rattan Bay is 64 percent less. Water depths in Rattan Bay range from 3 m (10 ft) in the deepest part of the bay to 0.5 m (1.6 m) close to shore, so that nearly the entire habitat in Rattan Bay is suitable for marine mammal use (or 36 percent of the weapon footprint).

The estimated potential risk of a direct hit to an animal in the target area is extremely low. The probability of hitting a bottlenose dolphin at the BTs can be derived as follows: Probability = dolphin's dorsal surface area * density of dolphins. The estimated dorsal surface area of a bottlenose dolphin is 1.425 m² (or the average length of 2.85 m times the average body width of 0.5 m). Thus, using Read *et al.* (2003)'s density estimate of 0.183 dolphins/km², without consideration of mitigation and monitoring implementation, the probability of a dolphin being hit in the waters of BT–9 is 2.61×10^{-7} and of BT–11 is 9.4×10^{-8}. Using the proposed levels of ordnance expenditures at each in-water BT (Tables 4 and 5) and taking into account that only 36 percent of the ordnance deployed at BT–11 is over water, as described in the application, the estimated potential number of ordnance strikes on a marine mammal per year is 0.263 at BT–9 and 0.034 at BT–11. It would take approximately three years of ordnance deployment at the BTs before it would be likely or probable that one bottlenose dolphin would be struck by deployed inert ordnance. Again, these estimates are without consideration to proposed monitoring and mitigation measures.

Take From Vessel and Aircraft Presence

Vessel movement is associated with surface-to-surface exercises, as described in the *Specified Activities* section above, which primarily occurs within BT–11. The USMC is not requesting takes specific to the act of maneuvering small boats within the BTs; however, NMFS has analyzed the potential for take from this activity.

The potential impacts from exposure to vessels are described in the *Vessel and Aircraft Presence* section above. Interactions with vessels are not a new experience for bottlenose dolphins in Pamlico Sound. Pamlico Sound is heavily used by recreational, commercial (fishing, daily ferry service, tugs, *etc.*), and military (including the Navy, Air Force, and Coast Guard) vessels year-round. The NMFS' Southeast Regional Office has developed marine mammal viewing guidelines to educate the public on how to responsibly view marine mammals in the wild and avoid causing a take (*http://www.nmfs.noaa.gov/pr/education/southeast*). The guidelines recommend that vessels should remain a minimum of 50 yards from a dolphin, operate vessels in a predictable manner, avoid excessive speed or sudden changes in speed or direction in the vicinity of animals, and not to pursue, chase, or separate a group of animals. The USMC would abide by these guidelines to the fullest extent practicable. The USMC would not engage in high speed exercises should a marine mammal be detected within the immediate area of the BTs prior to training commencement and would never closely approach, chase, or pursue dolphins. Detection of marine mammals would be facilitated by personnel monitoring on the vessels and those marking success rate of target hits and monitoring of remote camera on the BTs (see Proposed Monitoring and Reporting section).

Based on the description of the action, the other activities regularly occurring in the area, the species that may be exposed to the activity and their observed behaviors in the presence of vessel traffic, and the implementation of measures to avoid vessel strikes, NMFS believes it is unlikely that the operation of vessels during surface-to-surface maneuvers will result in the take of any marine mammals, in the form of either behavioral harassment or injury.

Aircraft would move swiftly through the area and would typically fly approximately 914 m from the water's surface before dropping unguided munitions and above 4,572 m for precision-guided munition bombing. While the aircraft may approach as low as 152 m (500 ft) to drop a bomb this is not the norm and would never been done around marine mammals. Regional whale watching guidelines advise aircraft to maintain a minimum altitude of 300 m (1,000 ft) above all marine mammals, including small odontocetes, and to not circle or hover over the animals to avoid harassment. NMFS' approach regulations limit aircraft from flying below 300 m (1,000 ft) over a humpback whale (*Megaptera novaeangliae*) in Hawaii, a known calving ground, and limit aircraft from flying over North Atlantic right whales closer than 460 m (1509 ft). Given USMC aircraft would not fly below 300 m on the approach, would not engage in hovering or circling the animals, and would not drop to the minimal altitude of 152 m if a marine mammal is in the

area, NMFS believes it is unlikely that the operation of aircraft, as described above, will result in take of bottlenose dolphins in Pamlico Sound.

Negligible Impact Analysis and Preliminary Determination

Pursuant to NMFS' regulations implementing the MMPA, an applicant is required to estimate the number of animals that will be ''taken'' by the specified activities (*i.e.,* takes by harassment only, or takes by harassment, injury, and/or death). This estimate informs the analysis that NMFS must perform to determine whether the activity will have a ''negligible impact'' on the species or stock. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as: ''An impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number and manner of takes, alone, is not enough information on which to base a negligible impact determination. NMFS must also consider other factors, such as the likely nature of any responses (their intensity, duration, *etc.*), the context of any responses (critical reproductive time or location, migration, *etc.*), or any of the other variables mentioned in the first paragraph (if known), as well as the number and nature of estimated Level A takes, the number of estimated mortalities, and effects on habitat.

The USMC has been conducting gunnery and bombing training exercises at BT–9 and BT–11 for years and, to date, no dolphin injury or mortality has been attributed these military training exercises. The USMC has a history of notifying the NMFS stranding network when any injured or stranded animal comes ashore or is spotted by personnel on the water. Therefore, stranded animals have been examined by stranding responders, further confirming that it is unlikely training contributes to marine mammal injuries or deaths. Due to the implementation of the aforementioned mitigation measures, no take by Level A harassment or serious injury or mortality is anticipated nor would any be authorized in the IHA. NMFS is proposing; however, to authorize 25 Level B harassment takes associated with training exercises.

The USMC has proposed a 1000 yard (914 m) safety zone around BT–9 despite the fact that the distance to NMFS explosive Level B harassment threshold is 228 yards (209 m). They also would consider an area fouled if any dolphins are spotted within Raritan Bay (where BT–11 is located). The Level B harassment takes allowed for in the IHA would be of very low intensity and would likely result in dolphins being temporarily behaviorally affected by bombing or gunnery exercises. In addition, takes may be attributed to animals not using the area when exercises are occurring; however, this is difficult to calculate. Instead, NMFS looks to if the specified activities occur during and within habitat important to vital life functions to better inform its negligible impact determination.

Read *et al.* (2003) concluded that dolphins rarely occur in open waters in the middle of North Carolina sounds and large estuaries, but instead are concentrated in shallow water habitats along shorelines. However, no specific areas have been identified as vital reproduction or foraging habitat. Scientific boat based surveys conducted throughout Pamlico Sound conclude that dolphins use the areas around the BTs more frequently than other portions of Pamlico Sound (Maher, 2003) despite the USMC actively training in a manner identical to the specified activities described here for years.

As described in the *Affected Species* section of this notice, bottlenose dolphin stock segregation is complex with stocks overlapping throughout the coastal and estuarine waters of North Carolina. It is not possible for the USMC to determine to which stock any individual dolphin taken during training activities belong as this can only be accomplished through genetic testing. However, it is likely that many of the dolphins encountered would belong to the NNCE or SNCE stock. These stocks have a population estimate of 1,387 and 2,595, respectively. NMFS is proposing to authorize 25 takes of bottlenose dolphins in total; therefore, this number represents 1.8 and 1.0 percent, respectively, of those populations.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that the specified USMC AS Cherry Point BT–9 and BT–11 training activities will result in the incidental take of marine mammals, by Level B harassment only, and that the total taking from will have a negligible impact on the affected species or stocks.

Subsistence Harvest of Marine Mammals

Marine mammals are not taken for subsistence use within Pamlico Sound; therefore, issuance of an IHA to the USMC for MCAS Cherry Point training exercises would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence use.

Endangered Species Act (ESA)

No ESA-listed marine mammals are known to occur within the action area. Therefore, there is no requirement for NMFS to consult under Section 7 of the ESA on the issuance of an IHA under section 101(a)(5)(D) of the MMPA. However, ESA-listed sea turtles may be present within the action area.

On September 27, 2002, NMFS issued a Biological Opinion (BiOp) on *Ongoing Ordnance Delivery at Bombing Target 9 (BT–9) and Bombing Target 11 (BT–11) at Marine Corps Air Station, Cherry Point, North Carolina.* The BiOp, which is still in effect, concluded that the USMC's proposed action will not result in adverse impacts to any ESA-listed marine mammals and is not likely to jeopardize the continued existence of the endangered green turtle (*Chelonia mydas*), leatherback turtle (*Dermochelys coriacea*), Kemp's ridley turtle (*Lepidochelys kempii*), or threatened loggerhead turtle (*Caretta caretta*). No critical habitat has been designated for these species in the action area; therefore, none will be affected.

National Environmental Policy Act (NEPA)

On February 11, 2009, the USMC issued a Finding of No Significant Impact for its Environmental Assessment (EA) on MCAS Cherry Point Range Operations. Based on the analysis of the EA, the USMC determined that the proposed action will not have a significant impact on the human environment. NMFS adopted USMC's EA and signed a FONSI on August 31, 2010. NMFS has reviewed the proposed application and preliminarily determined that there are no substantial changes to the proposed action or new environmental impacts or concerns. Therefore, NMFS has determined that a new or supplemental EA or Environmental Impact Statement is likely unnecessary. Before making a final determination in this regard, NMFS will review public comments and information submitted by the public and others in response to this notice. The EA referenced above is available for review at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

Dated: November 14, 2011.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–29851 Filed 11–17–11; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to the Procurement List.

SUMMARY: The Committee is proposing to add products to the Procurement List that will be furnished by the nonprofit agency employing persons who are blind or have other severe disabilities.

DATES: *Comments Must Be Received On or Before:* 12/19/2011.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Patricia Briscoe, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov*.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products listed below from the nonprofit agency employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organization that will furnish the products to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products are proposed for addition to the Procurement List for production by the nonprofit agency listed:

Products

NSN: 8920–00–NSH–0130—Sweet Roll Mix, 6—5 lb bags.
NSN: 8920–00–NSH–0131—Sweet Roll Mix, 6—4 lb cans.
NSN: 8920–00–NSH–0132—Hot Roll Mix, 6—5 lb bags.
NSN: 8920–00–NSH–0133—Hot Roll Mix, 6—4 lb cans.
NPA: Transylvania Vocational Services, Inc., Brevard, NC.
Contracting Activity: Defense Logistics Agency Troop Support, Philadelphia, PA.
Coverage: C-List for 100% of the requirement of the Department of Defense, as aggregated by the Defense Logistics Agency Troop Support, Philadelphia, PA.

Patricia Briscoe,

Deputy Director, Business Operations, (Pricing and Information Management).

[FR Doc. 2011–29827 Filed 11–17–11; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Civil Penalties; Notice of Adjusted Maximum Amounts

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of adjusted maximum civil penalty amounts.

SUMMARY: In 1990, Congress enacted statutory amendments that provided for periodic adjustments to the maximum civil penalty amounts authorized under the Consumer Product Safety Act, the Federal Hazardous Substances Act, and the Flammable Fabrics Act. On August 14, 2009, the Consumer Product Safety Improvement Act of 2008 (CPSIA) increased the maximum civil penalty amounts to $100,000 for each violation and $15,000,000 for any related series of violations. The CPSIA also revised the starting date, from December 1, 1994 to December 1, 2011, on which the Commission must prescribe and publish in the **Federal Register** the schedule of maximum authorized penalties. As calculated in accordance with the amendments, the new amounts are $100,000 for each violation, and $15,150,000 for any related series of violations.

DATES: The new amounts will become effective on January 1, 2012.

FOR FURTHER INFORMATION CONTACT: Amy S. Colvin, Attorney, Office of the General Counsel, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7639; email *acolvin@cpsc.gov.*

SUPPLEMENTARY INFORMATION: The Consumer Product Safety Improvement Act of 1990 (Improvement Act), Public Law 101–608, 104 Stat. 3110 (November 16, 1990), and the Consumer Product Safety Improvement Act of 2008 (CPSIA), Public Law 110–314, 122 Stat. 3016 (August 14, 2008), amended the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), and the Flammable Fabrics Act (FFA). The Improvement Act added civil penalty authority to the FHSA and FFA, which previously contained only criminal penalties. 15 U.S.C. 1264(c) and 1194(e). The Improvement Act also increased the maximum civil penalty amounts applicable to civil penalties under the CPSA and set the same maximum amounts for the newly created FHSA and FFA civil penalties. 15 U.S.C. 2069(a)(1), 1264(c)(1), and 1194(e)(1).

The Improvement Act directed the Commission to adjust the maximum civil penalty amounts periodically for inflation:

(A) The maximum penalty amounts authorized in paragraph (1) shall be adjusted for inflation as provided in this paragraph.

(B) Not later than December 1, 1994, and December 1 of each fifth calendar year thereafter, the Commission shall prescribe and publish in the **Federal Register** a schedule of maximum authorized penalties that shall apply for violations that occur after January 1 of the year immediately following such publication.

(C) The schedule of maximum authorized penalties shall be prescribed by increasing each of the amounts referred to in paragraph (1) by the cost-of-living adjustment for the preceding 5 years. Any increase determined under the preceding sentence shall be rounded to—

(i) In the case of penalties greater than $1,000 but less than or equal to $10,000, the nearest multiple of $1,000;

(ii) In the case of penalties greater than $10,000 but less than or equal to $100,000, the nearest multiple of $5,000;

(iii) In the case of penalties greater than $100,000 but less than or equal to $200,000, the nearest multiple of $10,000; and

(iv) In the case of penalties greater than $200,000, the nearest multiple of $25,000.

(D) For purposes of this subsection:

(i) The term ''Consumer Price Index'' means the Consumer Price Index for all-urban consumers published by the Department of Labor.

(ii) The term ''cost-of-living adjustment for the preceding five years'' means the percentage by which–

(I) The Consumer Price Index for the month of June of the calendar year preceding the adjustment; exceeds

(II) The Consumer Price Index for the month of June preceding the date on which the maximum authorized penalty was last adjusted. 15 U.S.C. 2069(a)(3), 1264(c)(6), and 1194(e)(5).

The CPSIA amended the CPSA, FHSA, and FFA to increase the maximum civil penalty amounts to $100,000 for each violation, and $15,000,000 for any related series of violations. 15 U.S.C. 2069(a)(1), 1264(c)(1), and 1194(e)(1). The CPSIA also revised the starting date from December 1, 1994, and every fifth year thereafter, to no later than December 1, 2011, on which ''the Commission shall prescribe and publish in the **Federal Register** a schedule of maximum authorized penalties that shall apply for violations that occur after January 1 of the year immediately following such publication.''

The Commission's Directorate for Economics has calculated that the cost-of-living adjustment increases the maximum civil penalty amounts to $101,053 for each violation, and to $15,157,981 for any related series of violations. Rounding off these numbers in accordance with the statutory directions, the adjusted maximum amounts are $100,000 for each violation, and $15,150,000 for any related series of violations. These new amounts will apply to violations that occur after January 1, 2012.

Dated: November 15, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–29817 Filed 11–17–11; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0128]

Proposed Collection; Comment Request

AGENCY: Department of Defense, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, Office of the Deputy Under Secretary of Defense for Installations and Environment, Office of Economic Adjustment (OEA).

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, OEA announces a new proposed collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, through the use of automated collection techniques and other forms of information technology.

DATES: Consideration will be given to all comments received by January 17, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request further information on this proposed collection, or to obtain a copy of the associated program announcement, please write to the Office of Economic Adjustment, ATTN: Mr. David F. Witschi, OEA Associate Director, 400 Army Navy Drive, Suite 200, Arlington, VA 22202–2884, or call Mr. David Witschi at (703) 604–6020.

Title, Associated Form, and OMB Number: Application Information—Public Schools on Military Installations; OMB Control Number 0790–TBD.

Needs and Uses: This is a request for information to qualify for non-competitive funds. OEA is authorized to provide up to $250 million ''to make grants, conclude cooperative agreements, or supplement other Federal funds to construct, renovate, repair, or expand elementary and secondary public schools on military installations in order to address capacity or facility condition deficiencies at such schools.'' Local Education Agencies (LEAs) representing the schools with the most serious capacity and facility condition deficiencies will be invited to submit a request for funding. Only LEAs that operate a public school on a military installation, and receive a written invitation from OEA, may request funds under this program. LEAs that are invited to apply will be asked by OEA to submit a project proposal within 90 days using the Application for Federal Assistance Standard Form 424 (OMB Number: 4040–0004). Proposal information listed in the September 9, 2011 **Federal Register** notice (76 FR 55883–55886) will supplement the application and assist OEA in determining compliance with legal and programmatic requirements. Grant awards will be made to successful applicants until the available funds are exhausted.

Affected Public: Local Education Agencies.

Annual Burden Hours: 330.

Number of Annual Respondents: 15.

Annual Responses to Respondent: 1.

Average Burden per Response: 22 hours.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

The Secretary of Defense is authorized by Section 8109 of Public Law 112–10, the Department of Defense and Full-Year Continuing Appropriations Act, 2011, and is choosing to act through OEA, to provide up to $250 million ''to make grants, conclude cooperative agreements, or supplement other Federal funds to construct, renovate, repair, or expand elementary and secondary public schools on military installations in order to address capacity or facility condition deficiencies at such schools: Provided further, that in making such funds available, OEA shall give priority consideration to those military installations with schools

having the most serious capacity or facility condition deficiencies as determined by the Secretary of Defense.'' OEA is establishing a one-time non-competitive program, as described in the September 9, 2011 **Federal Register** notice (76 FR 55883–55886), to administer this appropriation. In the event subsequent funding is made available, the program will be extended and additional applicants will be invited to participate.

Dated: November 15, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–29816 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Wage Committee; Notice of Closed Meetings

AGENCY: Department of Defense (DoD).

ACTION: Notice of closed meetings.

SUMMARY: Pursuant to the provisions of section 10 of Public Law 92–463, the Federal Advisory Committee Act, notice is hereby given that closed meeting of the Department of Defense Wage Committee will be held.

DATES: Tuesday, December 20, 2011, at 10 a.m.

ADDRESSES: 1400 Key Boulevard, Level A, Room A101, Rosslyn, Virginia 22209.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the meetings may be obtained by writing to the Chairman, Department of Defense Wage Committee, 4000 Defense Pentagon, Washington, DC 20301–4000.

SUPPLEMENTARY INFORMATION: Under the provisions of section 10(d) of Public Law 92–463, the Department of Defense has determined that the meetings meet the criteria to close meetings to the public because the matters to be considered are related to internal rules and practices of the Department of Defense and the detailed wage data to be considered were obtained from officials of private establishments with a guarantee that the data will be held in confidence.

However, members of the public who may wish to do so are invited to submit material in writing to the chairman concerning matters believed to be deserving of the Committee's attention.

Dated: November 14, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–29773 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Missile Defense Advisory Committee; Notice of Closed Meeting

AGENCY: Missile Defense Agency (MDA), Department of Defense.

ACTION: Notice of closed meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended) and the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended) and 41 CFR 102–3.150, the Department of Defense announces that the following Federal advisory committee meeting of the Missile Defense Advisory Committee will take place.

DATES: Tuesday, December 13, 2011 through Wednesday, December 14, 2011, from 7:30 a.m. to 6 p.m. each day. Security clearance and visit requests are required for access.

ADDRESSES: 5700 18th Street, Building 245, Fort Belvoir, Virginia 22060–5573.

FOR FURTHER INFORMATION CONTACT: Mr. David Bagnati, Designated Federal Officer at MDAC@mda.mil, phone/voice mail (571) 231–8113, or mail at 5700 18th Street, Building 245, Fort Belvoir, Virginia 22060–5573.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: At this meeting, the Committee will receive classified information on the Missile Defense Agency's Budget and Future Requirements.

Agenda: Topics tentatively scheduled for classified discussion include, but are not limited to briefings on Updates and Program Changes to the Missile Defense Agency's Program Objective Memorandum 2013 to 2017; Ballistic Missile Defense Strategic Issues and Future Capabilities; Status of Department of Defense Efficiencies; Missile Defense Advisory Committee Executive Session; and Missile Defense Advisory Committee preliminary outbrief to the Director, Missile Defense Agency.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155 the Missile Defense Agency has determined that the meeting shall be closed to the public. The Director, Missile Defense Agency, in consultation with the Missile Defense Agency Office of General Counsel, has determined in writing that the public interest requires that all sessions of the committee's meeting will be closed to the public because they will be concerned with classified information and matters covered by section 5 U.S.C. 552b(c)(1).

Committee's Designated Federal Officer: Mr. David Bagnati, *MDAC@mda.mil*, phone/voice mail (571) 231–8113, or mail at 5700 18th Street, Building 245, Fort Belvoir, Virginia 22060–5573. Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the membership of the Missile Defense Advisory Committee about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of a planned meeting of the Missile Defense Advisory Committee.

All written statements shall be submitted to the Designated Federal Officer for the Missile Defense Advisory Committee, in the following formats: one hard copy with original signature and one electronic copy via email (acceptable file formats: Adobe Acrobat PDF, MS Word or MS PowerPoint), and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Designated Federal Officer is as stated in **FOR FURTHER INFORMATION CONTACT** and can also be obtained from the GSA's Federal Advisory Committee Act Database—*https://www.fido.gov/facadatabase/public.asp.*

Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the Missile Defense Advisory Committee until its next meeting. The Designated Federal Officer will review all timely submissions with the Missile Defense Advisory Committee Chairperson and ensure they are provided to all members of the Missile Defense Advisory Committee before the meeting that is the subject of this notice.

Dated: November 14, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–29807 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Wage Committee; Notice of Closed Meetings

AGENCY: Department of Defense (DoD).

ACTION: Notice of closed meetings.

SUMMARY: Pursuant to the provisions of section 10 of Public Law 92–463, the Federal Advisory Committee Act, notice is hereby given that a closed meeting of the Department of Defense Wage Committee will be held.

DATES: Tuesday, January 10, 2012, at 10 a.m.

ADDRESSES: 1400 Key Boulevard, Level A, Room A101, Rosslyn, Virginia 22209.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the meetings may be obtained by writing to the Chairman, Department of Defense Wage Committee, 4000 Defense Pentagon, Washington, DC 20301–4000.

SUPPLEMENTARY INFORMATION: Under the provisions of section 10(d) of Public Law 92–463, the Department of Defense has determined that the meetings meet the criteria to close meetings to the public because the matters to be considered are related to internal rules and practices of the Department of Defense and the detailed wage data to be considered were obtained from officials of private establishments with a guarantee that the data will be held in confidence.

However, members of the public who may wish to do so are invited to submit material in writing to the chairman concerning matters believed to be deserving of the Committee's attention.

Dated: November 15, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–29834 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket No. DARS–2011–0070–0002]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Defense Acquisition Regulations System has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Consideration will be given to all comments received by December 19, 2011.

Title, Associated Forms and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 217, Special Contracting Methods, and related provision and clauses at DFARS 252.217–7012, Liability and Insurance; DFARS 252.217–7026, Identification of Sources of Supply; and 252.217–7028, Over and Above Work; OMB Control Number 0704–0214.

Type of Request: Extension.

Number of Respondents: 51,839.

Responses per Respondent: Approximately 1.7.

Annual Responses: 88,091.

Average Burden per Response: Approximately 9.8 hours.

Annual Burden Hours: 861,942.

Needs and Uses: DFARS Part 217 prescribes policies and procedures for acquiring supplies and services by special contracting methods. Contracting officers use the required information as follows:

The clause at DFARS 252.217–7012 is used in master agreements for repair and alteration of vessels. Contracting officers use the information required by paragraph (d) of the clause to determine that the contractor is adequately insured. This requirement supports prudent business practice, because it limits the Government's liability as a related party to the work the contractor performs. Contracting officers use the information required by paragraphs (f) and (g) of the clause at DFARS 252.217–7012 to keep informed of lost or damaged property for which the Government is liable, and to determine the appropriate course of action for replacement or repair of the property.

Contracting officers use the information required by the provision at DFARS 252.217–7026 to identify the apparently successful offeror's sources of supply so that competition can be enhanced in future acquisitions. This collection complies with 10 U.S.C. 2384, entitled ''Supplies: Identification of supplier and sources,'' which requires the contractor to identify the actual manufacturer or all sources of supply for supplies furnished under contract to DoD.

Contracting officers use the information required by the clause at DFARS 252.217–7028 to determine the extent of ''over and above'' work before the work commences. This requirement allows the Government to review the need for pending work before the contractor begins performance.

Contracting officers use the information required by DFARS 217.7004(a) where offerors shall state prices for the new items being acquired both with and without any exchange (trade-in allowance).

Contracting officers use the information from DFARS 217.7404–3(b), to evaluate a contractor's ''qualifying proposal'' in accordance with the definitization schedule. This requirement will require receipt of a qualifying proposal containing sufficient information for the DoD to do complete a meaningful analyses and audit of the information in the proposal, and any other information that the contracting officer has determined DoD needs to review in connection with the contract.

Contracting officers use the information from 217.7505(d), where the offeror supply's with its proposal, price, and quantity data on any Government orders for the replenishment part issued within the most recent 12 months.

Affected Public: Businesses or other for-profit and not-for- profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or maintain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number, and title for the **Federal Register** document. The general policy for comments and other public submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information provided. To confirm receipt of your comment(s), please check *http://www.regulations.gov* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, 2nd Floor, East

Tower, Suite 02G09, Alexandria, VA 22350–3100.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2011–29902 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket No. DARS 2011–0069–0002]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Requests for Equitable Adjustment (OMB Control Number 0704–0397)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for comments.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection for use through November 30, 2012. DoD proposes that OMB extend its approval for use for three additional years.

DATES: DoD will consider all comments received by January 17, 2012.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0397, using any of the following methods:

○ *Regulations.gov: http://www.regulations.gov.* Follow the instructions for submitting comments.

○ *Email: dfars@osd.mil.* Include OMB Control Number 0704–0397 in the subject line of the message.

○ *Fax:* (703) 602–0350.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment, please check *http://www.regulations.gov* approximately two to three days after submission to verify posting, except allow 30 days for posting of comments submitted by mail.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, (703) 602–1302. The information collection requirements addressed in this notice are available on the World Wide Web at: *http://www.acq.osd.mil/dpap/dars/dfars.html.*

Paper copies are available from Ms. Meredith Murphy, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) part 243, Contract Modifications, and the related clause at DFARS 252.243–7002; OMB Control Number 0704–0397.

Needs and Uses: The information collection required by the clause at DFARS 252.243–7002, Requests for Equitable Adjustment, implements 10 U.S.C. 2410(a). DoD contracting officers and auditors use this information to evaluate contractor requests for equitable adjustment to contract terms.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Annual Burden Hours: 2,120.

Number of Respondents: 440.

Responses per Respondent: 1.

Annual Responses: 440.

Average Burden per Response: 4.8 hours.

Frequency: On occasion.

Summary of Information Collection

The clause at DFARS 252.243–7002, Requests for Equitable Adjustment, requires contractors to certify that requests for equitable adjustment that exceed the simplified acquisition threshold are made in good faith and that the supporting data are accurate and complete. The clause also requires contractors to fully disclose all facts relevant to the requests for adjustment.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2011–29893 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DELAWARE RIVER BASIN COMMISSION

Notice of Commission Meeting and Public Hearing

Notice is hereby given that the Delaware River Basin Commission will hold an informal conference followed by a public hearing on Thursday, December 8, 2011. The hearing will be part of the Commission's regularly scheduled business meeting. The conference session and business meeting both are open to the public and will be held at the West Trenton Volunteer Fire Company, located at 40 West Upper Ferry Road, West Trenton, New Jersey.

The morning conference session will begin at 10:30 a.m. and will consist of presentations: (a) By A. Scott Andres, P.G. of the Delaware Geological Survey on the Groundwater Availability Report undertaken by the Delaware Water Supply Coordinating Council; (b) by Dr. Thomas J. Fikslin of the DRBC on an overview of DRBC's monitoring programs; and (c) by David Sayers of the DRBC staff on implementation of the Commission's Water Loss Accountability rule, which will go into effect in calendar year 2012.

Items for Public Hearing. The subjects of the public hearing to be held during the 1:30 p.m. business meeting on December 8, 2011 include draft dockets for which the names and brief descriptions will be posted on the Commission's Web site at *drbc.net* at least 10 days prior to the meeting date. Draft dockets also will be posted on the Web site ten days prior to the meeting date. Additional public records relating to the dockets may be examined at the Commission's offices. Please contact William Muszynski at (609) 883–9500, extension 221, with any docket-related questions.

In addition to the hearings on draft dockets, public hearings also will be held during the 1:30 p.m. business meeting on: (a) A proposed resolution authorizing the Executive Director to issue a request for proposal and enter into an agreement with the winning firm (or firms) to conduct surface water sampling at natural gas well pad sites; (b) a proposed resolution to adopt the Delaware River Basin Commission fiscal year 2013 operating budget; and (c) a show cause hearing concerning notices of violation, provided that settlements with the alleged violators are not reached prior to the December meeting date.

Other Agenda Items. Other agenda items will consist of the standard business meeting items: Adoption of the

Minutes of the Commission's September 21, 2011 business meeting, announcements of upcoming meetings and events, a report on hydrologic conditions, reports by the Executive Director and the Commission's General Counsel, public hearings and a public dialogue session.

Opportunities to Comment. Individuals who wish to comment for the record on a hearing item or to address the Commissioners informally during the public dialogue portion of the meeting are asked to sign up in advance by contacting Ms. Paula Schmitt of the Commission staff, at *paula.schmitt@drbc.state.nj.us* or by phoning Ms. Schmitt at (609) 883–9500 ext. 224. Written comment on items scheduled for hearing may be submitted in advance of the meeting date to: Commission Secretary, P.O. Box 7360, 25 State Police Drive, West Trenton, NJ 08628; by fax to Commission Secretary, DRBC at (609) 883–9522 or by email to *paula.schmitt@drbc.state.nj.us.* Written comment on dockets should also be furnished directly to the Project Review Section at the above address or fax number or by email to *william.muszynski@drbc.state.nj.us.*

Individuals in need of an accommodation as provided for in the Americans with Disabilities Act who wish to attend the informational meeting, conference session or hearings should contact the Commission Secretary directly at (609) 883–9500 ext. 203 or through the Telecommunications Relay Services (TRS) at 711, to discuss how we can accommodate your needs.

Agenda Updates. Note that conference items are subject to change and items scheduled for hearing are occasionally postponed to allow more time for the Commission to consider them. Please check the Commission's Web site, *drbc.net,* closer to the meeting date for changes that may be made after the deadline for filing this notice.

Dated: November 14, 2011.

Pamela M. Bush,

Commission Secretary.

[FR Doc. 2011–29819 Filed 11–17–11; 8:45 am]

BILLING CODE 6360–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9494–6]

Acid Rain Program: Notice of Annual Adjustment Factors for Excess Emissions Penalty

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of annual adjustment factors for excess emissions penalty.

SUMMARY: The Acid Rain Program under title IV of the Clean Air Act provides for automatic excess emissions penalties in dollars per ton of excess emissions for sources that do not meet their annual Acid Rain emissions limitations. This notice states the dollars per ton excess emissions penalty amounts, which must be adjusted for each compliance year commensurate with changes in the Consumer Price Index (CPI), for compliance years 2011 and 2012.

FOR FURTHER INFORMATION CONTACT: Robert L. Miller, Clean Air Markets Division (6204J), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW. Washington, DC 20460 at (202) 343–9077 or *miller.robertl@epa.gov.*

SUPPLEMENTARY INFORMATION: The Acid Rain Program under title IV of the Clean Air Act limits annual sulfur dioxide and nitrogen oxide emissions of fossil fuel-fired utility units. Under the Acid Rain Program, affected sources must hold enough allowances to cover their sulfur dioxide emissions, and certain coal-fired sources must meet an emission limit for nitrogen oxides. Under 40 CFR 77.6, sources that do not meet these requirements must pay a penalty without demand to the Administrator based on the number of excess tons emitted times $2,000 as adjusted by an annual adjustment factor, which must be published in the **Federal Register**.

The annual adjustment factor for adjusting the penalty for excess emissions of sulfur dioxide and nitrogen oxides under 40 CFR part 77.6(b) for compliance year 2011 is 1.7521. This value is derived using the CPI for 1990 and 2010 (defined respectively at 40 CFR 72.2 as the CPI for August of the year before the specified year for all urban consumers) and results in an automatic penalty of $3,504 per excess ton of sulfur dioxide or nitrogen oxides emitted for 2011.

The annual adjustment factor for adjusting the penalty for such excess emissions under 40 CFR 77.6(b) for compliance year 2012 is 1.8182. This value is derived using the CPI for 1990 and 2011 and results in an automatic penalty of $3,636 per excess ton of sulfur dioxide or nitrogen oxides emitted for 2012.

Dated: October 31, 2011.

Sam Napolitano,

Director, Clean Air Markets Division, Office of Atmospheric Programs, Office of Air and Radiation.

[FR Doc. 2011–29911 Filed 11–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9000–1]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 11/07/2011 Through 11/11/2011

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EIS are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

EIS No. 20110383, Final EIS, USFS, OR, Marks Creek Allotment Management Plans, Proposes to Reauthorize Cattle Term Grazing Permits, Construct Range Improvements, and Restore Riparian Vegetation on three Allotments, Lookout Mountain Ranger District, Ochoco National Forest, Crook County, OR, Review Period Ends: 12/19/2011, Contact: Marcy Anderson (541) 416–6463.

EIS No. 20110384, Draft Supplement, FHWA, MN, Trunk Highway 60 between St. James to Windom to Implement Transportation System Improvement, Funding, Cottonwood and Watonwan Counties, MN, Comment Period Ends: 01/04/2012, Contact: Philip Forst (651) 291–6110.

EIS No. 20110385, Final EIS, FHWA, UT, Bangerter 600 West Project, Proposed Improvements to Address Projected Transportation Demand and Safety, Salt Lake County, UT, Review Period Ends: 12/19/2011, Contact: Bryan Dillon (801) 955–3517.

EIS No. 20110386, Draft Supplement, USFS, ID, Upper Lochsa Land Exchange Project, Updated Information on New Alternative F, Proposes to Exchange National Forest System Land for approximately 39,371 Acres of western Pacific Timber Land, Federal Land Exchange, Clearwater, Nez Perce and Idaho Panhandle National Forests, Clearwater, Latah, Idaho, Benewah, Kootenai and Bonner Counties, ID, Comment Period Ends: 01/17/2012, Contact: Teresa Trulock (208) 935–4256.

EIS No. 20110387, Draft EIS, USA, AK, Point Thomson Project, Authorization to Construct Industrial Infrastructure

and Produce Liquid Hydrocarbon Resources, Implementation, AK, Comment Period Ends: 01/03/2012, Contact: Harry Batj 1–800–478–2712.

EIS No. 20110388, Final EIS, TVA, AL, Muscle Shoals Reservation Redevelopment, Disposal and Potential Redevelopment Approximately 1,400 Acres of its Muscle Shoals Reservation, Muscle Shoals, Colbert County, AL, Review Period Ends: 12/19/2011, Contact: Stanford E. Davis (865) 632–2915.

EIS No. 20110389, Draft EIS, BR, WA, PROGRAMMATIC—Yakima River Basin Integrated Water Resource Management Plan, To Meet the Water Supply and Ecosystem Restoration Needs, Benton, Kittitas, Klickitat and Yakim Counties, WA, Comment Period Ends: 01/03/2012, Contact: Jim Taylor (208) 378–5081.

EIS No. 20110390, Draft EIS, NPS, HI, Hawaii Volcanoes National Park Project, Protecting and Restoring Native Ecosystems by Managing Non-Native Ungulates, Hawaii County, HI, Comment Period Ends: 01/17/2012, Contact: Rhonda Loh (808) 985–6098.

EIS No. 20110391, Draft EIS, BOP, KS, Leavenworth Federal Correctional Institution and Federal Prison Camp, Construction and Operation, KS, Comment Period Ends: 01/03/2012, Contact: Richard A. Cohn (202) 514–6470.

EIS No. 20110392, Final EIS, USFS, UT, Black Fork Salvage Project, Proposal to Treat Timer Harvest, Prescribe Fire, and Mechanical Thinning, Uinta-Wasatch-Cache National Forest, Summit County, UT, Review Period Ends: 12/19/2011, Contact: Pam Jarnecke (801) 236–3441.

Amended Notices

EIS No. 20110369, Draft EIS, USACE, 00, City of Denison Land Conveyance, Lake Texoma, To Develop Recreational and Economic Needs, Grayson and Cooke Counties, TX and Portion of Bryan, Marshall, Johnston and Love Counties, OK, Comment Period Ends: 12/21/2011, Contact: Stephen L. Nolen. (918) 669–7660 Revision of FR Notice Published 11/04/2011: Correction to EIS Title—City of Denison.

EIS No. 20110380, Second Draft Supplement, NRC, TN, Related to the Operation of Watts Bar Nuclear Plant Units 2, New and Updated Information, Operating License, Rhea County, TN, Comment Period Ends: 12/27/2011, Contact: Justin Poole (301) 415–2048 Revision to FR Notice Published 11/10/2011: Correction to Comment Period from 01/24/2012 to 12/27/2011.

Dated: November 15, 2011.

Cliff Rader,

Acting Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2011–29879 Filed 11–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9494–3]

Notice of a Public Meeting on Long Term 2 Enhanced Surface Water Treatment Rule: Initiate Regulatory Review—Cryptosporidium Analytical Method Improvements and Update on Source Water Monitoring

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: The Environmental Protection Agency (EPA) is hosting a public meeting on December 7, 2011, to discuss the analytical methods for *Cryptosporidium* and the source water monitoring data from the Long Term 2 Enhanced Surface Water Treatment Rule (LT2 rule). This is the first of at least two meetings on the LT2 rule that EPA will host. At the December meeting, EPA will present its evaluation of the LT2 rule *Cryptosporidium* source water monitoring data, new information on the performance of Method 1623, as well as the latest information on Method 1623 improvements. A public meeting on the LT2 rule uncovered finished water reservoir requirement will occur in Spring 2012. Matters related to the uncovered finished water reservoir requirement will not be discussed at the December 7, 2011, meeting. The information discussed in these meetings is part of the review of the LT2 rule under the Six Year Review process announced as part of EPA's Retrospective Review Plan under Executive Order (E.O.) 13563 in August 2011. The LT2 rule requires a second round of *Cryptosporidium* monitoring, which is scheduled to start in 2015. The Stage 2 Microbial and Disinfection Byproducts (M/DBP) Federal Advisory Committee (FAC) recommended that EPA hold a public meeting on these issues prior to the second round of monitoring.

Date and Location: The public meeting will be held on Wednesday, December 7, 2011, (8:30 a.m. to 5 p.m., Eastern Time), at the EPA East Building, Room 1153, 1201 Constitution Avenue NW., Washington, DC 20460. A separate **Federal Register** notice will be published to provide information on the date and location of the 2012 public meeting focused on the LT2 uncovered finished water reservoir requirement.

FOR FURTHER INFORMATION CONTACT: For technical inquiries, contact, César Cordero, Standards and Risk Management Division, Office of Ground Water and Drinking Water (MC 4607M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460 at (202) 564–3716 or *cordero.cesar@epa.gov.* For more information about the LT2 rule or the Six Year Review Process, visit: *http://water.epa.gov/lawsregs/rulesregs/sdwa/lt2/* or *http://water.epa.gov/lawsregs/rulesregs/regulatingcontaminants/sixyearreview/index.cfm.*

SUPPLEMENTARY INFORMATION: EPA published the final LT2 rule in January 2006. The purpose of the LT2 rule is to reduce disease incidence associated with *Cryptosporidium* and other disease-causing microorganisms in drinking water.

The 1996 Amendments to the Safe Drinking Water Act (SDWA) require EPA to review its existing drinking water regulations every six years. SDWA specifies that any revision to a national primary drinking water regulation must maintain or provide for greater protection of the health of persons.

EPA announced in the Agency's August 2011 *Improving Our Regulations: Final Plan for Periodic Review Retrospective Reviews of Existing Regulations* document in response to E.O. 13563 that a review of the LT2 rule will start in 2011. The Agency plans to complete its review of the LT2 rule no later than 2016. As part of the review, EPA will assess and analyze new information regarding occurrence, treatment, analytical methods, health effects, and risk from all relevant waterborne pathogens to evaluate whether there are new or additional ways to manage risk while assuring equivalent or improved protection.

Registration: Individuals planning on participating in the public meeting must register for the meeting by contacting Junie Percy of Intellitech by email at *junie.percy@itsysteminc.com* no later than December 2, 2011. Teleconferencing will be available for individuals unable to attend the meeting in person.

Special Accommodations: For information on access or accommodations for individuals with disabilities, please contact Jini Mohanty at (202) 564–5269 or by email at *mohanty.jini@epa.gov.* Please allow at least five business days prior to the meeting to give EPA time to process your request.

Dated: November 10, 2011.

Cynthia C. Dougherty,

Director, Office of Ground Water and Drinking Water.

[FR Doc. 2011–29776 Filed 11–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9491–6]

Request for Nominations of Candidates to the EPA's Science Advisory Board (SAB) Chemical Assessment Advisory Committee

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA) invites public nominations of scientific experts to be considered for appointment to the EPA's Science Advisory Board (SAB) Chemical Assessment Advisory Committee to provide advice through the chartered SAB regarding Toxicological Reviews of environmental chemicals available on EPA's Integrated Risk Information System (IRIS).

DATES: Nominations should be submitted in time to arrive no later than January 6, 2012.

FOR FURTHER INFORMATION CONTACT: Nominators unable to submit nominations electronically as described below may submit a paper copy to the Designated Federal Officer for the committee, Dr. Suhair Shallal, DFO by email at *shallal.suhair@epa.gov* or contact her by telephone at (202) 564–2057.

Background: The chartered SAB (the Board) was established in 1978 by the Environmental Research, Development and Demonstration Act (42 U.S.C. 4365) to provide independent advice to the Administrator on general scientific and technical matters underlying the Agency' policies and actions. Members of the SAB and its subcommittees constitute a distinguished body of non-EPA scientists, engineers, economists, and social scientists that are nationally and internationally-recognized experts in their respective fields from academia, industry, state, and Tribal governments, research institutes, and non-governmental organizations. Members are appointed by the EPA Administrator for a period of three years. The SAB conducts business in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and related regulations. Generally, SAB meetings are announced in the **Federal Register**, conducted in public view, and provide opportunities for public input during deliberations. All the work of the SAB subcommittees is performed under the direction of the Board. The chartered Board provides strategic advice to the EPA Administrator on a variety of EPA science and research programs and reviews and approves all SAB subcommittee and panel reports. Additional information about the SAB Federal Advisory Committees may be found at *http://www.epa.gov/sab.*

EPA's Integrated Risk Information System (IRIS) is a publicly available database which contains hazard and dose-response information on hundreds of chemical substances and their potential health effects. EPA's IRIS program develops human health risk assessments (*i.e.,* Toxicological Reviews) used to inform the Agency's decisions on protecting public health. EPA is seeking SAB advice on a continuous basis as part of an effort to strengthen and streamline the process for IRIS Toxicological Review development. In response, the SAB is establishing a new subcommittee, the Chemical Assessment Advisory Committee, which will provide advice through the chartered SAB regarding the IRIS program and the development of IRIS Toxicological Reviews.

Expertise Sought: The SAB Staff Office is seeking nominations of experts to serve on the SAB Chemical Assessment Advisory Committee with knowledge in human health risk assessment and expertise in a range of disciplines including, but not limited to: *public health; epidemiology; toxicology; modeling; biostatistics; and risk assessment.* For further information, please contact Dr. Suhair Shallal, DFO, by telephone at (202) 564–2057 or by email at *shallal.suhair@epa.gov.*

Selection Criteria Include

—Demonstrated scientific credentials and disciplinary expertise in their own fields;

—Willingness to commit time to the committee and demonstrated ability to work constructively and effectively on committees;

—Absence of financial conflicts of interest;

—Absence of an appearance of a lack of impartiality;

—Background and experiences that would contribute to the diversity of perspectives on the committee, *e.g.,* geographic, economic, social, cultural, educational backgrounds, and professional affiliations; and

—For the committee as a whole, consideration of the collective breadth and depth of scientific expertise; and a balance of scientific perspectives.

How to Submit Nominations: Any interested person or organization may nominate qualified persons to be considered for appointment to this advisory committee. Individuals may self-nominate. Nominations should be submitted in electronic format (preferred) following the instructions for ''Nominating Experts to the Chemical Assessment Advisory Committee'' provided on the SAB Web site. The form can be accessed through the ''Nomination of Experts'' link on the blue navigational bar on the SAB Web site at *http://www.epa.gov/sab.* To be considered, all nominations should include the information requested. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

Nominators are asked to identify the specific committee for which nominees are to be considered. The following information should be provided on the nomination form: Contact information about the person making the nomination; contact information about the nominee; the disciplinary and specific areas of expertise of the nominee; the nominee's curriculum vita; and a biographical sketch of the nominee indicating current position, educational background; research activities; and recent service on other national advisory committees or national professional organizations. Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB Web site, should contact the Designated Federal Officer for the committee, as identified above. Non-electronic submissions must follow the same format and contain the same information as the electronic form. The SAB Staff Office will acknowledge receipt of nominations.

Candidates invited to serve will be asked to submit the ''Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency'' (EPA Form 3110–48). This confidential form allows EPA to determine whether there is a statutory conflict between that person's public responsibilities as a Special Government Employee and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded through the ''Ethics Requirements for Advisors'' link on the blue navigational

bar on the SAB Web site at *http://www.epa.gov/sab.*

Dated: November 14, 2011.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2011–29916 Filed 11–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0038: FRL–9326–9]

Emergint Technologies, Inc.; Transfer of Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces that pesticide related information submitted to EPA's Office of Pesticide Programs (OPP) pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), including information that may have been claimed as Confidential Business Information (CBI) by the submitter, will be transferred to Emergint Technologies, Inc. in accordance with 40 CFR 2.307(h)(3) and 2.308(i)(2). Emergint Technologies, Inc. has been awarded a contract to perform work for OPP, and access to this information will enable Emergint Technologies, Inc. to fulfill the obligations of the contract.

DATES: Emergint Technologies, Inc. will be given access to this information on or before November 23, 2011.

FOR FURTHER INFORMATION CONTACT: Mario Steadman, Information Technology and Resources Management Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; *telephone number:* (703) 305–8338, *email address: steadman.mario@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action applies to the public in general. As such, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2011–0038. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

II. Contractor Requirements

Under contract number ER–W–11–025, the contractor will perform the following: The contractor will be assisting in information and records management activities to support antimicrobial reregistration activities governed by the Federal Insecticide Fungicide, and Rodenticide Act (FIFRA) as amended by the Food Quality Act (FQPA) of August 3, 1996 and the Federal Food Drug and Cosmetic Act (FFDCA).

This contract involves no subcontractors.

OPP has determined that the contracts described in this document involve work that is being conducted in connection with FIFRA, in that pesticide chemicals will be the subject of certain evaluations to be made under this contract. These evaluations may be used in subsequent regulatory decisions under FIFRA.

Some of this information may be entitled to confidential treatment. The information has been submitted to EPA under sections 3, 4, 6, and 7 of FIFRA and under sections 408 and 409 of FFDCA.

In accordance with the requirements of 40 CFR 2.307(h)(3), the contracts with Emergint Technologies, Inc. prohibits use of the information for any purpose not specified in these contracts; prohibits disclosure of the information to a third party without prior written approval from the Agency; and requires that each official and employee of the contractor sign an agreement to protect the information from unauthorized release and to handle it in accordance with the FIFRA Information Security Manual. In addition, Emergint Technologies, Inc. is required to submit for EPA approval a security plan under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided to Emergint Technologies, Inc. until the requirements in this document have been fully satisfied. Records of information provided to Emergint Technologies, Inc. will be maintained by EPA Project Officers for these contracts. All information supplied to Emergint Technologies, Inc. by EPA for use in connection with these contracts will be returned to EPA when Emergint Technologies, Inc. has completed its work.

List of Subjects

Environmental protection, Business and industry, Government contracts, Government property, Security measures.

Dated: November 9, 2011.

Oscar Morales,

Director, Information Technology and Resources Management Division, Office of Pesticide Programs.

[FR Doc. 2011–29785 Filed 11–17–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of

Governors not later than December 15, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Community Bancshares Employee Stock Ownership Plan, Neosho,* Missouri; to acquire up to 60 percent of the voting shares of Community Bancshares, Inc., and thereby indirectly acquire voting shares of Community Bank & Trust, both in Neosho, Missouri.

Board of Governors of the Federal Reserve System, November 15, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–29818 Filed 11–17–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Notice.

SUMMARY: The FTC intends to ask the Office of Management and Budget (''OMB'') to extend through November 30, 2014, the current Paperwork Reduction Act (''PRA'') clearance for the information collection requirements in Use of Prenotification Negative Option Plans (''Negative Option Rule'' or ''Rule''). That clearance expires on November 30, 2011.

DATES: Comments must be submitted by December 19, 2011.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Negative Option Rule: FTC File No. P064202'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/NegOptionPRA2* by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex J), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Edwin Rodriguez, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., M–8102B, Washington, DC 20580, (202) 326–3147.

SUPPLEMENTARY INFORMATION:

Title: Negative Option Rule, 16 CFR Part 425.

OMB Control Number: 3084–0104.

Type of Review: Extension of currently approved collection.

Abstract: The Negative Option Rule governs the operation of prenotification subscription plans. Under these plans, sellers notify subscribers that they will automatically ship merchandise, such as books, compact discs, or tapes, and bill subscribers for the merchandise if the subscribers do not expressly reject the merchandise beforehand within a prescribed time. The Rule protects consumers by: (a) Requiring that promotional materials disclose the terms of membership clearly and conspicuously; and (b) establishing procedures for the administration of such ''negative option'' plans.

On August 4, 2011, the Commission sought comment on the information collection requirements associated with the Negative Option Rule. 76 FR 47186. No comments were received. Pursuant to the OMB regulations, 5 CFR Part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.,* the FTC is providing a second opportunity for the public to comment while seeking OMB approval to renew the pre-existing clearance for the Rule.

Estimated Annual Burden: 3,875 hours.

Estimated Number of Respondents, Estimated Average Burden per Year per Respondent:

(a) 45 existing clubs each require annually about 75 hours to comply with the Rule's disclosure requirements, for a total of 3,375 hours (45 clubs × 75 hours);

(b) 5 new clubs come into being each year, requiring approximately 100 hours to comply with the Rule, including start up-time, for a total of 500 hours (5 clubs × 100 hours).

Estimated Annual Labor Cost: $167,125.[1]

Estimated Capital or Other Non-Labor Cost: Minimal.[2]

Request for Comment

You can file a comment online or on paper. For the FTC to consider your comment, we must receive it on or before December 19, 2011. Write ''Negative Option Rule: FTC File No. P064202'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential * * *,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[3] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your

[1] The calculations underlying this estimate were detailed in the August 4, 2011, related **Federal Register** Notice. See 76 FR at 47187. An error in the recap, however, showed the total as $171,825; the ensuing calculations in that notice, however, correctly showed the total as $167,125.

[2] Because the Rule has been in effect since 1974, the vast majority of the negative option clubs have no current start-up costs. For the few new clubs that enter the market each year, the costs associated with the Rule's disclosure requirements, beyond the additional labor costs discussed above, are minimal. Negative option clubs already have access to the ordinary office equipment necessary to achieve compliance with the Rule. Similarly, the Rule imposes few, if any, printing and distribution costs. The required disclosures generally constitute only a small addition to the advertising for negative option plans. Because printing and distribution expenditures are incurred to market the product regardless of the Rule, adding the required disclosures results in marginal incremental expense.

[3] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).

comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/NegOptionPRA2* by following the instructions on the Web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Negative Option Rule: FTC File No. P064202'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex J), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before December 19, 2011. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Comments on the information collection requirements subject to review under the PRA should additionally be submitted to OMB. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, *Attention:* Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments instead should be sent by facsimile to (202) 395–5167.

David C. Shonka,

Acting General Counsel.

[FR Doc. 2011–29833 Filed 11–17–11; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

[File No. 102 3185]

ScanScout, Inc.; Analysis of Proposed Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before December 8, 2011.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''ScanScout, File No. 102 3185'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/scanscoutconsent,* by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Kandi Parsons ((202) 326–2369), FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for November 8, 2011), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before December 8, 2011. Write ''ScanScout, File No. 102 3185'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/scanscoutconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''ScanScout, File No. 102 3185'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before December 8, 2011. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from ScanScout, Inc. (''ScanScout'').

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

ScanScout is a video advertising network that engages in online behavioral advertising, the practice of collecting and storing information about consumers' online activities across Web sites in order to deliver advertising targeted to their interests as inferred from their online activities. ScanScout acts as an intermediary between Web site publishers and advertisers that wish to have their video advertisements placed on Web sites. As a general matter, when a consumer visits a Web site within an online behavioral advertiser's network of Web site publishers, the online advertising network sets an HTTP cookie, which is a small text file, into the consumer's browser or automatically receives a cookie it has previously set in the consumer's browser. The cookie contains a unique identifier that allows the network to recognize the consumer's computer and correlate the computer to online activity across Web sites. The advertising network uses the cookie to collect and store information about the consumer's online activities, including content or advertisements viewed and the pages visited within a particular Web site.

By contrast, from at least April 2007 to September 2009, ScanScout used Flash cookies, also known as Flash local shared objects, instead of HTTP cookies to conduct online behavioral advertising. ScanScout's privacy policy stated that by changing their browser settings, consumers could opt out of receiving cookies; however, at that time, users could not use their browser settings to block the placement of Flash cookies. Accordingly, the complaint alleges that ScanScout deceived consumers and violated Section 5 of the FTC Act by stating that consumers could prevent the company from collecting data about their online activities by changing their browser settings to prevent the receipt of cookies. The Commission alleges that representations ScanScout made in its privacy policy regarding consumers' ability to opt out of receiving cookies were false or misleading.

Part I of the proposed order prohibits ScanScout[2] from misrepresenting (1) the extent to which data about users or their online activities is collected, used, disclosed, or shared and (2) the extent to which users may exercise control over the collection, use, disclosure, or sharing of data collected from or about them, their computers or devices or their online activities. Part II of the proposed order requires the company to take a number of steps to improve the transparency of, and users' ability to control, its collection of user data for online behavioral advertising. First, within thirty (30) days after service of the proposed order, ScanScout must place a clear and prominent notice with a hyperlink on the homepage of its Web site that states: ''We collect information about your activities on certain Web sites to send you targeted ads. To opt out of our targeted advertisements, click *here.*'' The notice must direct users to a mechanism that allows them to prevent the company from (1) collecting information that can be associated with them or contains a unique identifier, (2) redirecting their browsers to third parties that collect data, absent an affirmative action, and (3) associating any previously collected data with them. Such choice must remain in effect for a minimum of five (5) years. ScanScout may, however, collect data that can be associated with a particular user or that contains a unique identifier for certain permissible uses specified in the order—for example, to effectuate the consumer's opt out choice or to limit the number of times an advertisement is displayed.

Second, within close proximity to the mechanism, the company must disclose: (1) That it collects information about users' activities on certain Web sites to deliver targeted ads; (2) that by opting out, the company will not collect this information to deliver such ads; (3) users' current choice status (*i.e.,* whether opted out or not opted out); and (4) any circumstances that, if initiated by the user, would disable the mechanism or require the user to implement the mechanism again to maintain his or her choice (*i.e.,* if they switch browsers or devices, or if they delete cookies, they will have to opt out again).

Third, within or immediately adjacent to any behaviorally targeted display advertisement that the company serves, it must include a hyperlink that takes users directly to the required choice mechanism. The hyperlink text must disclose to consumers that selecting the hyperlink will give them choices about receiving targeted ads.

Fourth, due to technical limitations ScanScout cannot currently incorporate a hyperlink to the choice mechanism into all its video advertisements; therefore the order requires the company to undertake reasonable efforts to develop and implement a hyperlink for video advertisements that directs users to the choice mechanism, and the company must report regularly to the Commission regarding those efforts.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires ScanScout to retain documents relating to its compliance with the order. Part IV requires dissemination of the order to all current and future principals, officers, directors, managers, employees, agents, and representatives having

[2] In November 2010, ScanScout merged with Tremor Media, Inc., now known as Tremor Video, Inc. Tremor Video, Inc. is included in the definition of respondent in the order. In addition, the order includes a representation by ScanScout that any parents, subsidiaries, and successors necessary to effectuate the relief contemplated by the order are bound to the order as if they had signed the agreement and were made parties to the proceeding.

supervisory responsibilities relating to the subject matter of the order. Part V ensures notification to the FTC of changes in corporate status. Part VI mandates that ScanScout submit reports to the Commission detailing its compliance with the order. Part VII provides that the order expires after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2011–29792 Filed 11–17–11; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Solicitation of Nominations for Membership on the National Vaccine Advisory Committee

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health.

ACTION: Notice.

AUTHORITY: 42 U.S.C. 300aa–5, Section 2105 of the Public Health Service (PHS) Act, as amended. The Committee is governed by the provisions of Public Law 92–463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

SUMMARY: The National Vaccine Program Office (NVPO), a program office within the Office of the Assistant Secretary for Health, Department of Health and Human Services (HHS), is soliciting nominations of qualified candidates to be considered for appointment as members to the National Vaccine Advisory Committee (NVAC). The activities of this Committee are governed by the Federal Advisory Committee Act (FACA). Management support for the activities of this Committee is the responsibility of the NVPO.

Consistent with the National Vaccine Plan, the Committee advises and makes recommendations to the Assistant Secretary for Health in his capacity as the Director of the National Vaccine Program, on matters related to the Program's responsibilities. Specifically, the Committee studies and recommends ways to encourage the availability of an adequate supply of safe and effective vaccination products in the United States; recommends research priorities and other measures to enhance the safety and efficacy of vaccines. The Committee also advises the Assistant Secretary for Health in the implementation of Sections 2102 and 2103 of the PHS Act; and identifies annually the most important areas of government and non-government cooperation that should be considered in implementing Sections 2102 and 2103 of the PHS Act.

DATES: All nominations for membership on the Committee must be received no later than 5 p.m. EDT on December 23, 2011, at the address listed below.

ADDRESSES: All nominations should be mailed or delivered to: Bruce Gellin, M.D., M.P.H., Executive Secretary, NVAC, Office of the Assistant Secretary for Health, Department of Health and Human Services, 200 Independence Avenue SW., Room 715–H, Hubert H. Humphrey Building, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Mr. Guillermo Avilés-Mendoza, J.D., LL.M., Public Health Advisor, National Vaccine Program Office, Department of Health and Human Services, 200 Independence Avenue SW., Room 739G.4, Hubert H. Humphrey Building, Washington, DC 20201; (202) 205–2982; or send an email to *nvpo@hhs.gov.*

A copy of the Committee charter which includes the Committee's structure and functions as well as a list of the current membership can be obtained by contacting Mr. Avilés-Mendoza or by accessing the NVAC Web site at: *www.hhs.gov/nvpo/nvac.*

SUPPLEMENTARY INFORMATION: *Committee Function, Qualifications, and Information Required:* As part of an ongoing effort to enhance deliberations and discussions with the public on vaccine and immunization policy, nominations are being sought for interested individuals to serve on the Committee. Individuals selected for appointment to the Committee will serve as voting members. The NVAC consists of 17 voting members. The Committee is composed of 15 public members, including the Chair, and two representative members. Public members shall be selected from individuals who are engaged in vaccine research or the manufacture of vaccines, or who are physicians, members of parent organizations concerned with immunizations, representatives of state or local health agencies or public health organizations. Representative members shall be selected from the vaccine manufacturing industry who are engaged in vaccine research or the manufacture of vaccines. Individuals selected for appointment to the Committee can be invited to serve terms of up to four years.

All NVAC members are authorized to receive the prescribed per diem allowance and reimbursement for travel expenses that are incurred to attend meetings and conduct authorized Committee-related business, in accordance with Standard Government Travel Regulations. Individuals who are appointed to serve as public members are authorized also to receive honorarium for attending Committee meetings and to carry out other authorized Committee-related business. Individuals who are appointed to serve as representative members for a particular interest group or industry are not authorized to receive honorarium for the performance of these duties.

This announcement is to solicit nominations of qualified candidates to fill positions on the NVAC that are scheduled to be vacated in the public member category. The positions are scheduled to be vacated during the calendar year 2012.

Nominations

In accordance with the charter, persons nominated for appointment as members of the NVAC should be among authorities knowledgeable in areas related to vaccine safety, vaccine effectiveness, and vaccine supply. Nominations should be typewritten. The following information should be included in the package of material submitted for each individual being nominated for consideration: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.,* specific attributes which qualify the nominee for service in this capacity); and a statement that the nominee is willing to serve as a member of the Committee; (2) the nominator's name, address and daytime telephone number, home and/or work address, telephone number, and email address; and (3) a current copy of the nominee's curriculum vitae.

Individuals can nominate themselves for consideration of appointment to the Committee. All nominations must include the required information. Incomplete nominations will not be processed for consideration. The letter from the nominator and certification of the nominated individual must bear original signatures; reproduced copies of these signatures are not acceptable. Applications cannot be submitted by facsimile. The names of Federal employees should not be nominated for consideration of appointment to this Committee. The Department makes

every effort to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made that a broad representation of geographic areas, gender, ethnic and minority groups, and the disabled are given consideration for membership on HHS Federal advisory committees. Appointment to this committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status.

The Standards of Ethical Conduct for Employees of the Executive Branch are applicable to individuals who are appointed as public members of Federal advisory committees. Individuals appointed to serve as public members of Federal advisory committees are classified as special Government employees (SGEs). SGEs are Government employees for purposes of the conflict of interest laws. Therefore, individuals appointed to serve as public members of NVAC are subject to an ethics review. The ethics review is conducted to determine if the individual has any interests and/or activities in the private sector that may conflict with performance of their official duties as a member of the Committee. Individuals appointed to serve as public members of the Committee will be required to disclose information regarding financial holdings, consultancies, and research grants and/or contracts.

Bruce Gellin,

Deputy Assistant Secretary for Health, Director, National Vaccine Program Office, Executive Secretary, National Vaccine Advisory Committee.

[FR Doc. 2011–29771 Filed 11–17–11; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Board on Radiation and Worker Health (ABRWH or Advisory Board), National Institute for Occupational Safety and Health (NIOSH)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), and pursuant to the requirements of 42 CFR 83.15(a), the Centers for Disease Control and Prevention (CDC) announces the following meeting of the aforementioned committee:

Board Public Meeting Times and Dates: (All times are Eastern Time):

8:15 a.m.–5 p.m., December 7, 2011.

8:15 a.m.–4 p.m., December 8, 2011.

Public Comment Times and Dates (All times are Eastern Time):

5 p.m.–6:30 p.m.,* December 7, 2011.

* Please note that the public comment periods may end before the times indicated, following the last call for comments. Members of the public who wish to provide public comments should plan to attend public comment sessions at the start times listed.

Place: Tampa Marriott Westshore, 1001 N. Westshore Blvd., Tampa, Florida 33607; *Phone:* (800) 564–3489; *Fax:* (813) 289–5464. Audio Conference Call via FTS Conferencing. The USA toll-free, dial-in number is 1–(866) 659–0537 with a pass code of 9933701.

Status: Open to the public, limited only by the space available. The meeting space accommodates approximately 150 people.

Background: The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines which have been promulgated by the Department of Health and Human Services (HHS) as a final rule, advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule, advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program, and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to the CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, and will expire on August 3, 2013.

Purpose: This Advisory Board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advising the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

Matters To Be Discussed: The agenda for the Advisory Board meeting includes: NIOSH Program Update; Department of Labor (DOL) Program Update; Department of Energy (DOE) Program Update; Mound Plant Work Group Update; Pinellas Plant Site Profile Update; SEC petitions for: Weldon Spring, Hooker Electrochemical, Linde Ceramics Plant, Feed Materials Production Center (Fernald, Ohio), General Steel Industries; and Savannah River Site; SEC Petition Status Updates; Subcommittee and Work Group Reports; and Board Work Sessions.

The agenda is subject to change as priorities dictate.

In the event an individual cannot attend, written comments may be submitted in accordance with the redaction policy provided below. Any written comments received will be provided at the meeting and should be submitted to the contact person below well in advance of the meeting.

Policy on Redaction of Board Meeting Transcripts (Public Comment): (1) If a person making a comment gives his or her name, no attempt will be made to redact that name. (2) NIOSH will take reasonable steps to ensure that individuals making public comment are aware of the fact that their comments (including their name, if provided) will appear in a transcript of the meeting posted on a public Web site. Such reasonable steps include: (a) A statement read at the start of each public comment period stating that transcripts will be posted and names of speakers will not be redacted; (b) A printed copy of the statement mentioned in (a) above will be displayed on the table where individuals sign up to make public comments; (c) A statement such as outlined in (a) above will also appear with the agenda for a Board Meeting when it is posted on the NIOSH Web site; (d) A statement such as in (a) above will appear in the **Federal Register** Notice that announces Board and Subcommittee meetings. (3) If an individual in making a statement reveals personal information (e.g., medical information) about themselves that information will not usually be redacted. The NIOSH FOIA coordinator will, however, review such revelations in accordance with the Freedom of

Information Act and the Federal Advisory Committee Act and if deemed appropriate, will redact such information. (4) All disclosures of information concerning third parties will be redacted. (5) If it comes to the attention of the DFO that an individual wishes to share information with the Board but objects to doing so in a public forum, the DFO will work with that individual, in accordance with the Federal Advisory Committee Act, to find a way that the Board can hear such comments.

CONTACT PERSON FOR MORE INFORMATION: Theodore Katz, M.P.A., Executive Secretary, NIOSH, CDC, 1600 Clifton Road, MS E–20, Atlanta, GA 30333, *telephone:* (513) 533–6800, *toll free:* 1–(800) CDC–INFO, *email: dcas@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: November 9, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office Centers for Disease Control and Prevention.

[FR Doc. 2011–29866 Filed 11–17–11; 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 National HIV Behavioral Surveillance For Young Men Who Have Sex With Men, Funding Opportunity Announcement (FOA), PS11–0010201SUPP12, 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

1 p.m.–5 p.m., January 12, 2012 (Closed).

Place: Teleconference.

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 ''National HIV Behavioral Surveillance For Young Men Who Have Sex With Men, FOA PS11–0010201SUPP12.''

Contact Person for More Information: Amy Yang, Ph.D., Scientific Review Officer, CDC, 1600 Clifton Road, NE., Mailstop E60, Atlanta, Georgia 30333, *Telephone:* (404) 718–8836.

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: November 8, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–29880 Filed 11–17–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10366]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* New collection (request for new OMB control number); *Title of Information Collection:* Nursing Home Quality Improvement Questionnaire; *Use:* The information obtained via the Nursing Home Quality Improvement Questionnaire will be utilized by CMS staff in the Survey & Certification Group, Division of Nursing Homes, to identify areas for quality assurance and performance improvement (QAPI) technical assistance (TA) that will be useful to nursing facilities as they prepare to meet the new QAPI regulation that was mandated as part of the Affordable Care Act. Specifically, the information collected through the use of the questionnaire will be used to establish a baseline of QAPI practices in nursing homes, gather information on the challenges and barriers to implementing effective QAPI programs, assess the development of QAPI systems, determine what types of TA to make available to nursing homes, and assess the potential impact of TA in advancing QAPI in nursing homes; *Form Number:* CMS–10366 (OCN 0938–New); *Frequency:* Once; *Affected Public:* Private sector (business or other for-profits and not-for-profit institutions) and State, Local or Tribal Governments; *Number of Respondents:* 4,200; *Total Annual Responses:* 4,200; *Total Annual Hours:* 1,386. (For policy questions regarding this collection contact Debra Lyons at (410) 786–6780. For all other issues call (410) 786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *January 17, 2012:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs,

Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: November 15, 2011.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2011–29840 Filed 11–17–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–10373]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medical Loss Ratio (MLR) Quarterly Reporting for Mini-Med Plans and Expatriate Plans; *Use:* Under Section 2718 of the Affordable Care Act and implementing regulations at 45 CFR part 158 (75 FR 74865, December 1, 2010) as modified by technical corrections on December 30, 2010 (75 FR 82277), a health insurance issuer (issuer) offering group or individual health insurance coverage must submit a report to the Secretary concerning the amount the issuer spends each year on claims, quality improvement expenses, non-claims costs, Federal and State taxes and licensing or regulatory fees, and the amount of earned premium. An issuer must provide an annual rebate to enrollees if the amount it spends on certain costs compared to its premium revenue (excluding Federal and States taxes and licensing or regulatory fees) does not meet a certain ratio, referred to as the medical loss ratio (MLR). An interim final rule (IFR) implementing the MLR was published on December 1, 2010 (75 FR 74865) and modified by technical corrections on December 30, 2010 (75 FR 82277), which added part 158 to Title 45 of the Code of Federal Regulations. The IFR is effective January 1, 2011. Issuers are required to submit annual MLR reporting data for each large group market, small group market, and individual market within each State in which the issuer conducts business. For policies that have a total annual limit of $250,000 or less (sometimes referred to as ''mini-med plans'') and for group policies that primarily cover employees working outside the United States (referred to as ''expatriate plans''), the IFR applies a special circumstance adjustment to the MLR data for the 2011 MLR reporting year. In order to evaluate the appropriateness of this special circumstance adjustment for years 2012 and beyond, issuers that provide such policies are required to submit quarterly MLR data to the Secretary for the 2011 MLR reporting year. We received two comment letters in response to the 60-day comment period that was associated with CMS–10373. We have taken into consideration all of the proposed suggestions, and as result, have not made any changes to the quarterly reporting form or to the estimated burden that correlates with the form. *Form Number:* CMS–10373 (OCN: 0938–1132); *Frequency:* Quarterly; *Affected Public:* Private Sector—Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 75; *Total Annual Responses:* 825; *Total Annual Hours:* 3,700. (For policy questions regarding this collection contact Carol Jimenez at (301) 492–4109. For all other issues call (410) 786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *December 19, 2011.*

OMB, Office of Information and Regulatory Affairs, *Attention:* CMS Desk Officer, *Fax Number:* (202) 395–6974, *Email: OIRA_submission@omb.eop.gov*.

Dated: November 15, 2011.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2011–29838 Filed 11–17–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3253–N]

Medicare Program; Meeting of the Medicare Evidence Development and Coverage Advisory Committee—January 25, 2012

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of meeting.

SUMMARY: This notice announces that a public meeting of the Medicare Evidence Development & Coverage Advisory Committee (MEDCAC) (''Committee'') will be held on Wednesday, January 25, 2012. The Committee generally provides advice and recommendations concerning the adequacy of scientific evidence needed to determine whether certain medical items and services can be covered under the Medicare statute. This meeting will focus on the currently available evidence regarding the management of carotid atherosclerosis. This meeting is open to the public in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2, section 10(a)).

DATES: *Meeting Date:* The public meeting will be held on Wednesday, January 25, 2012 from 7:30 a.m. until 4:30 p.m., Eastern Standard Time (EST).

Deadline for Submission of Written Comments: Written comments must be received at the address specified in the **ADDRESSES** section of this notice by 5 p.m. EST, Monday, December 19, 2011. Once submitted, all comments are final.

Deadlines for Speaker Registration and Presentation Materials: The

deadline to register to be a speaker and to submit PowerPoint presentation materials and writings that will be used in support of an oral presentation is 5 p.m., EST on Monday, December 19, 2011. Speakers may register by phone or via email by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Presentation materials must be received at the address specified in the **ADDRESSES** section of this notice.

Deadline for All Other Attendees Registration: Individuals may register online at *http://www.cms.gov/apps/events/upcomingevents.asp?strOrderBy=1&type=3* or by phone by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice by 5 p.m. EST, Friday, January 20, 2012.

We will be broadcasting the meeting live via Webcast at *http://www.cms.gov/live/.*

Deadline for Submitting a Request for Special Accommodations: Persons attending the meeting who are hearing or visually impaired, or have a condition that requires special assistance or accommodations, are asked to contact the Executive Secretary as specified in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than 5 p.m., EST Friday, January 6, 2012.

ADDRESSES: *Meeting Location:* The meeting will be held in the main auditorium of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244.

Submission of Presentations and Comments: Presentation materials and written comments that will be presented at the meeting must be submitted via email to *MedCACpresentations@cms.hhs.gov* or by regular mail to the contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice by the date specified in the **DATES** section of this notice.

FOR FURTHER INFORMATION CONTACT: Maria Ellis, Executive Secretary for MEDCAC, Centers for Medicare & Medicaid Services, Office of Clinical Standards and Quality, Coverage and Analysis Group, S3–02–01, 7500 Security Boulevard, Baltimore, MD 21244 or contact Ms. Ellis by phone (410) 786–0309 or via email at *Maria.Ellis@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

MEDCAC, formerly known as the Medicare Coverage Advisory Committee (MCAC), provides advice and recommendations to CMS regarding clinical issues. (For more information on MCAC, see the December 14, 1998 **Federal Register** (63 FR 68780). This notice announces the Wednesday, January 25, 2012, public meeting of the Committee. During this meeting, the Committee will discuss the currently available evidence regarding the management of carotid atherosclerosis.

Background information about this topic, including panel materials, is available at *http://www.cms.gov/medicare-coverage-database/indexes/medcac-meetings-index.aspx?bc=BAAAAAAAAAAA&.* CMS will no longer be providing paper copies of the handouts for the meeting. Electronic copies of all the meeting materials will be on the CMS Web site no later than 2 business days before the meeting. We encourage the participation of appropriate organizations with expertise in the management of carotid atherosclerosis.

II. Meeting Format

This meeting is open to the public. The Committee will hear oral presentations from the public for approximately 45 minutes. 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, CMS 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 December 22, 2011. Your comments should focus on issues specific to the list of topics that we have proposed to the Committee. The list of research topics to be discussed at the meeting will be available on the following web site prior to the meeting: *http://www.cms.gov/medicare-coverage-database/indexes/medcac-meetings-index.aspx?bc=BAAAAAAAAAAA&.* We require that you declare at the meeting whether you have any financial involvement with manufacturers (or their competitors) of any items or services being discussed.

The Committee will deliberate openly on the topics under consideration. Interested persons may observe the deliberations, but the Committee will not hear further comments during this time except at the request of the chairperson. The Committee will also allow a 15-minute unscheduled open public session for any attendee to address issues specific to the topics under consideration. At the conclusion of the day, the members will vote and the Committee will make its recommendation(s) to CMS.

III. Registration Instructions

CMS' Coverage and Analysis Group is coordinating meeting registration. While there is no registration fee, individuals must register to attend. You may register online at *http://www.cms.gov/apps/events/upcomingevents.asp?strOrderBy=1&type=3* or by phone by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice by the deadline listed in the **DATES** section of this notice. Please provide your full name (as it appears on your state-issued driver's license), address, organization, telephone, fax number(s), and email address. You will receive a registration confirmation with instructions for your arrival at the CMS complex or you will be notified that the seating capacity has been reached.

IV. Security, Building, and Parking Guidelines

This meeting will be held in a Federal government building; therefore, Federal security measures are applicable. We recommend that confirmed registrants arrive reasonably early, but no earlier than 45 minutes prior to the start of the meeting, to allow additional time to clear security. Security measures include the following:

- Presentation of government-issued photographic identification to the Federal Protective Service or Guard Service personnel.
- Inspection of vehicle's interior and exterior (this includes engine and trunk inspection) at the entrance to the grounds. Parking permits and instructions will be issued after the vehicle inspection.
- Inspection, via metal detector or other applicable means of all persons brought entering the building. We note that all items brought into CMS, whether personal or for the purpose of presentation or to support a presentation, are subject to inspection. We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set-up, safety, or timely arrival of any personal belongings or items used for presentation or to support a presentation.

Note: Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the meeting. The public may not enter the building earlier than 45 minutes prior to the convening of the meeting. All visitors must be escorted in areas other than the lower and first floor levels in the Central Building.

Authority: 5 U.S.C. App. 2, section 10(a).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774,

Medicare—Supplementary Medical Insurance Program)

Dated: October 18, 2011.

Patrick Conway,

CMS Chief Medical Officer and Director, Office of Clinical Standards and Quality, Centers for Medicare & Medicaid Services.

[FR Doc. 2011–29782 Filed 11–17–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1431–N]

Medicare Program; Town Hall Meeting on FY 2013 Applications for New Medical Services and Technology Add-On Payments Under the Hospital Inpatient Prospective Payment System

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of meeting.

SUMMARY: This notice announces a town hall meeting in accordance with to discuss fiscal year (FY) 2013 applications for add-on payments for new medical services and technologies under the hospital inpatient prospective payment system (IPPS). Interested parties are invited to this meeting to present their comments, recommendations, and data regarding whether the FY 2013 new medical services and technologies applications meet the substantial clinical improvement criterion.

DATES: *Meeting Date:* The town hall Meeting will be held on Tuesday, February 14, 2012. The town hall meeting will begin at 9 a.m. eastern standard time (e.s.t.) and check-in will begin at 8:30 a.m. e.s.t.

Deadline for Registration of Presenters of the Town Hall Meeting: All presenters for the town hall meeting, whether attending in person or by phone, must register and submit their agenda item(s) by Monday, January 23, 2012.

Deadline for Registration of All Other Participants for the Town Hall Meeting and Submitting Requests for Special Accommodations: All other participants must register by Tuesday, January 24, 2012. Requests for special accommodations must be received no later than 5 p.m., e.s.t. on Tuesday, January 31, 2012.

Deadline for Submission of Agenda Item(s) or Written Comments for the Town Hall Meeting: Written comments and agenda items for discussion at the town hall meeting must be received by January 23, 2012. In addition to materials submitted for discussion at the town hall meeting, individuals may submit other written comments, as specified in the **ADDRESSES** section of this notice, on whether the service or technology represents a substantial clinical improvement. These comments must be received by March 6, 2012, for consideration before publication of the FY 2013 IPPS proposed rule.

ADDRESSES: *Meeting Location:* The town hall meeting will be held in the main Auditorium in the central building of the Centers for Medicare and Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Registration and Special Accommodations: Individuals wishing to participate in the meeting must register by following the on-line registration instructions located in section III. of this notice or by contacting staff listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Individuals who need special accommodations should contact staff listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Registration information and special accommodation requests may also be mailed to the address listed in the **ADDRESSES** section of this notice.

Submission of Agenda Item(s) or Written Comments for the Town Hall Meeting: Each presenter must submit an agenda item(s) regarding whether a FY 2013 application meets the substantial clinical improvement criterion. Agenda items, written comments, questions or other statements must not exceed three single-spaced typed pages and may be sent via email to *newtech@cms.hhs.gov* or sent via regular mail to: Division of Acute Care, New Technology Team, Mailstop C4–08–06, Centers for Medicare and Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244–1850, *Attention:* Michael Treitel or Celeste Beauregard.

FOR FURTHER INFORMATION CONTACT: Michael Treitel, (410) 786–4552, *michael.treitel@cms.hhs.gov*, or Celeste Beauregard, (410) 786–8102, *celeste.beauregard@cms.hhs.gov*.

Alternatively, you may forward your requests via email to *newtech@cms.hhs.gov* or regular mail as specified in the **ADDRESSES** section of this notice.

SUPPLEMENTARY INFORMATION:

I. Background on the Add-On Payments for New Medical Services and Technologies Under the Hospital Inpatient Prospective Payment System (IPPS)

Sections 1886(d)(5)(K) and (L) of the Social Security Act (the Act) require the Secretary to establish a process of identifying and ensuring adequate payments to acute care hospitals for new medical services and technologies under Medicare. Effective for discharges beginning on or after October 1, 2001, section 1886(d)(5)(K)(i) of the Act requires the Secretary to establish (after notice and opportunity for public comment) a mechanism to recognize the costs of new services and technologies under the inpatient hospital prospective payment system (IPPS). In addition, section 1886(d)(5)(K)(vi) of the Act specifies that a medical service or technology will be considered ''new'' if it meets criteria established by the Secretary (after notice and opportunity for public comment). (See the FY 2002 proposed rule (66 FR 22693), May 4, 2001) and final rule (66 FR 46912), September 7, 2001) for a more detailed discussion.)

In the FY 2002 IPPS final rule (66 FR 46914), we noted that we evaluate a request for special payment for a new medical service or technology against the following criteria in order to determine if the new technology meets the substantial clinical improvement requirement:

- The device offers a treatment option for a patient population unresponsive to, or ineligible for, currently available treatments.
- The device offers the ability to diagnose a medical condition in a patient population where that medical condition is currently undetectable or offers the ability to diagnose a medical condition earlier in a patient population than allowed by currently available methods. There must also be evidence that use of the device to make a diagnosis affects the management of the patient.
- Use of the device significantly improves clinical outcomes for a patient population as compared to currently available treatments. Some examples of outcomes that are frequently evaluated in studies of medical devices are the following:

++ Reduced mortality rate with use of the device.

++ Reduced rate of device-related complications.

++ Decreased rate of subsequent diagnostic or therapeutic interventions (for example, due to reduced rate of recurrence of the disease process).

++ Decreased number of future hospitalizations or physician visits.

++ More rapid beneficial resolution of the disease process treatment because of the use of the device.

++ Decreased pain, bleeding, or other quantifiable symptoms.

++ Reduced recovery time.

In addition, we indicated that the requester is required to submit evidence that the technology meets one or more of these criteria.

Section 503 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) amended section 1886(d)(5)(K)(viii) of the Act to revise the process for evaluating new medical services and technology applications by requiring the Secretary to do the following:

- Provide for public input regarding whether a new service or technology represents an advance in medical technology that substantially improves the diagnosis or treatment of Medicare beneficiaries before publication of a proposed rule.
- Make public and periodically update a list of all the services and technologies for which an application is pending.
- Accept comments, recommendations, and data from the public regarding whether the service or technology represents a substantial improvement.
- Provide for a meeting at which organizations representing hospitals, physicians, manufacturers and any other interested party may present comments, recommendations, and data to the clinical staff of CMS as to whether the service or technology represents a substantial improvement before publication of a proposed rule.

The opinions and alternatives provided during this meeting will assist us as we evaluate the new medical services and technology applications for FY 2013. In addition, they will help us to evaluate our policy on the IPPS new technology add-on payment process before the publication of the FY 2013 IPPS proposed rule.

II. Town Hall Meeting Format and Conference Calling Information

A. Format of the Town Hall Meeting

As noted in section I. of this notice, we are required to provide for a meeting at which organizations representing hospitals, physicians, manufacturers and any other interested party may present comments, recommendations, and data to the clinical staff of CMS concerning whether the service or technology represents a substantial clinical improvement. This meeting will allow for a discussion of the substantial clinical improvement criteria on each of the FY 2013 new medical services and technology add-on payment applications. Information regarding the applications can be found on our Web site at *http://www.cms.hhs.gov/AcuteInpatientPPS/08_newtech.asp#TopOfPage.*

The majority of the meeting will be reserved for presentations of comments, recommendations, and data from registered presenters. The time for each presenter's comments will be approximately 10 to 15 minutes and will be based on the number of registered presenters. Individuals who would like to present must register and submit their agenda item(s) to the address specified in the **ADDRESSES** section of this notice by the date specified in the **DATES** section of this notice. Comments from participants will be heard after scheduled statements if time permits. Once the agenda is completed, it will be posted on the CMS IPPS Web site at *http://www.cms.hhs.gov/AcuteInpatientPPS/08_newtech.asp#TopOfPage.*

In addition, written comments will also be accepted and presented at the meeting if they are received at the address specified in the **ADDRESSES** section of this notice by the date specified in the **DATES** section of this notice. Written comments may also be submitted after the meeting for our consideration. If the comments are to be considered before the publication of the proposed rule, the comments must be received at the address specified in the **ADDRESSES** section of this notice by the date specified in the **DATES** section of this notice.

B. Conference Call Information

For participants who cannot come to CMS for the Town Hall Meeting, an open toll-free phone line, (877) 267–1577, has been made available. The conference code is ''0638.''

III. Registration Instructions

The Division of Acute Care of CMS is coordinating the meeting registration for the Town Hall Meeting. While there is no registration fee, individuals must register to attend the Town Hall Meeting on substantial clinical improvement.

Registration may be completed on-line at the following web address: *http://www.cms.hhs.gov/AcuteInpatientPPS/08_newtech.asp#TopOfPage.* Select the link at the bottom of the page ''Register to Attend the New Technology Town Hall Meeting''. After completing the registration, on-line registrants should print the confirmation page(s) and bring it with them to the meeting(s).

If you are unable to register on-line, you may register by sending an email to the contacts listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Please include your name, address, telephone number, email address, and fax number. If seating capacity has been reached, you will be notified that the meeting has reached capacity.

IV. Security, Building, and Parking Guidelines

Because these meetings will be located on Federal property, for security reasons, any persons wishing to attend these meetings must register by close of business by the date listed in the **DATES** section of this notice. Please allow sufficient time to go through the security checkpoints. It is suggested that you arrive at CMS complex no later than 8:30 a.m. e.s.t. if you are attending the Town Hall Meeting so that you will be able to arrive promptly for the meeting.

Security measures include the following:

- Presentation of government-issued photographic identification to the Federal Protective Service or Guard Service personnel.
- Interior and exterior inspection of vehicles (this includes engine and trunk inspection) at the entrance to the grounds. Parking permits and instructions will be issued after the vehicle inspection.
- Passing through a metal detector and inspection of items brought into the building. We note that all items brought to CMS, whether personal or for the purpose of demonstration or to support a demonstration, are subject to inspection. We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set-up, safety, or timely arrival of any personal belongings or items used for demonstration or to support a demonstration.

Note: Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the meetings. The public may not enter the building earlier than 45 minutes prior to the convening of the meeting(s).

All visitors must be escorted in areas other than the lower and first floor levels in the Central Building. Seating capacity is limited to the first 250 registrants.

Authority: Section 503 of Pub. L. 108–173.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: November 3, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2011–29832 Filed 11–17–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3254–N]

Medicare Program; Request for Nominations for Members for the Medicare Evidence Development & Coverage Advisory Committee

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: This notice announces the request for nominations for membership on the Medicare Evidence Development & Coverage Advisory Committee (MEDCAC). Among other duties, the MEDCAC provides advice and guidance to the Secretary of the Department of Health and Human Services (the Secretary) and the Administrator of the Centers for Medicare & Medicaid Services (CMS) concerning the adequacy of scientific evidence available to CMS for ''reasonable and necessary'' determinations under Medicare.

We are requesting nominations for both voting and nonvoting members to serve on the MEDCAC. Nominees are selected based upon their individual qualifications and not as representatives of professional associations or societies. We wish to ensure adequate representation of the interests of both women and men, members of all ethnic groups and physically challenged individuals. Therefore we encourage nominations of qualified candidates who can represent these interests.

The MEDCAC reviews and evaluates medical literature, technology assessments, and hears public testimony on the evidence available to address the impact of medical items and services on health outcomes of Medicare beneficiaries.

DATES: Nominations will be considered if postmarked by Monday, January 30, 2012 and mailed to the address specified in the **ADDRESSES** section of this notice.

ADDRESSES: You may mail nominations for membership to the following address: Centers for Medicare & Medicaid Services, Office of Clinical Standards and Quality, *Attention:* Maria Ellis, 7500 Security Boulevard, Mail Stop: South Building 3–02–01, Baltimore, MD 21244.

FOR FURTHER INFORMATION CONTACT: Maria Ellis, Executive Secretary for the MEDCAC, Centers for Medicare & Medicaid Services, Office of Clinical Standards and Quality, Coverage and Analysis Group, S3–02–01, 7500 Security Boulevard, Baltimore, MD 21244 or contact Ms. Ellis by phone (410) 786–0309) or via email at *Maria.Ellis@cms.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary signed the initial charter for the Medicare Coverage Advisory Committee (MCAC) on November 24, 1998. A notice in the **Federal Register** (63 FR 68780) announcing establishment of the MCAC was published on December 14, 1998. The MCAC name was updated to more accurately reflect the purpose of the committee and on January 26, 2007, the Secretary published a notice in the **Federal Register** (72 FR 3853), announcing that the Committee's name changed to the Medicare Evidence Development & Coverage Advisory Committee (MEDCAC). The charter for the committee was renewed by the Secretary on November 24, 2010. The current charter is effective for 2 years.

The MEDCAC is governed by provisions of the Federal Advisory Committee Act, Pub. L. 92–463, as amended (5 U.S.C. App. 2), which sets forth standards for the formulation and use of advisory committees, and is authorized by section 222 of the Public Health Service Act as amended (42 U.S.C. 217A).

The MEDCAC consists of a pool of 100 appointed members including: 94 voting members of whom 6 are designated patient advocates, and 6 nonvoting representatives of industry interests. Members generally are recognized authorities in clinical medicine including subspecialties, administrative medicine, public health, biological and physical sciences, epidemiology and biostatistics, clinical trial design, health care data management and analysis, patient advocacy, health care economics, medical ethics, or other relevant professions.

The MEDCAC works from an agenda provided by the Designated Federal Official. The MEDCAC reviews and evaluates medical literature, technology assessments, and hears public testimony on the evidence available to address the impact of medical items and services on health outcomes of Medicare beneficiaries. The MEDCAC may also advise CMS as part of Medicare's ''coverage with evidence development'' initiative.

II. Provisions of the Notice

As of June 2012, there will be 30 membership terms expiring. Of the 30 memberships expiring, 1 is a nonvoting industry representative, 4 are voting patient advocates and the remaining 25 membership openings are for the general MEDCAC voting membership.

Accordingly, we are requesting nominations for both voting and nonvoting members to serve on the MEDCAC. Nominees are selected based upon their individual qualifications and not as representatives of professional associations or societies. We wish to ensure adequate representation of the interests of both women and men, members of all ethnic groups and physically challenged individuals. Therefore, we encourage nominations of qualified candidates from these groups.

All nominations must be accompanied by curricula vitae. Nomination packages must be sent to Maria Ellis at the address listed in the **ADDRESSES** section of this notice. Nominees for voting membership must also have expertise and experience in one or more of the following fields:

- Clinical medicine including subspecialties
- Administrative medicine
- Public health
- Biological and physical sciences
- Epidemiology and biostatistics
- Clinical trial design
- Health care data management and analysis
- Patient advocacy
- Health care economics
- Medical ethics
- Other relevant professions

We are looking for experts in a number of fields. Our most critical needs are for experts in hematology; genomics; Bayesian statistics; clinical epidemiology; clinical trial methodology; knee, hip, and other joint replacement surgery; ophthalmology; psychopharmacology; rheumatology; screening and diagnostic testing analysis; and vascular surgery. We also need experts in biostatistics in clinical settings, cardiovascular epidemiology, dementia, endocrinology, geriatrics, gynecology, minority health, observational research design, stroke epidemiology, and women's health.

The nomination letter must include a statement that the nominee is willing to serve as a member of the MEDCAC and appears to have no conflict of interest that would preclude membership. We are requesting that all curricula vitae include the following:

- Date of birth
- Place of birth
- Social Security number
- Title and current position
- Professional affiliation
- Home and business address
- Telephone and fax numbers

- Email address
- List of areas of expertise

In the nomination letter, we are requesting that the nominee specify whether they are applying for a voting patient advocate position, for another voting position, or as a nonvoting industry representative. Potential candidates will be asked to provide detailed information concerning such matters as financial holdings, consultancies, and research grants or contracts in order to permit evaluation of possible sources of conflict of interest.

Members are invited to serve for overlapping 2-year terms. A member may serve after the expiration of the member's term until a successor is named. Any interested person may nominate one or more qualified persons. Self-nominations are also accepted.

The current Secretary's Charter for the MEDCAC is available on the CMS Web site at: *http://www.cms.hhs.gov/FACA/Downloads/medcaccharter.pdf,* or you may obtain a copy of the charter by submitting a request to the contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Authority: 5 U.S.C. App. 2, section 10(a)(1) and (a)(2).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program.)

Dated: October 18, 2011.

Patrick Conway,

CMS Chief Medical Officer and Director, Office of Clinical Standards and Quality, Centers for Medicare & Medicaid Services.

[FR Doc. 2011–29784 Filed 11–17–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Regional Partnership Grant (RPG) Program Data Collection.

OMB No.: 0970–0353.

Description

On September 30, 2007, the Administration for Children and Families (ACF), Children's Bureau awarded multi-year grants to 53 regional partnerships grantees (RPGs) to improve the safety, permanency and well-being of children affected by methamphetamine or other substance abuse who have been removed or are at risk of removal from their home. The Child and Family Services Improvement Act of 2006, the authorizing legislation for the RPG program, required that a set of performance indicators be established to periodically assess the grantees' outcomes. The legislation mandated that these performance indicators be developed through a consultative process involving ACF, the Substance Abuse and Mental Health Services Administration (SAMHSA), and representatives of the State or Tribal agencies who are members of the regional partnerships. The legislation also requires the Secretary of the Department of Health and Human services to submit annually to Congress a report that includes the performance indicators established under this grant program.

The final set of RPG performance indicators was approved by ACF and disseminated to the funded grantees in January 2008. It includes a total of 23 indicators across four outcome domains: Child/youth (9 indicators), adult (7 indicators), family/relationship (5 indicators), and regional partnership/service capacity (2 indicators). It also includes a core set of child and adult demographic elements that will provide important context needed to properly analyze, explain and understand the outcomes. No other national data collection measures these critical child, adult, family, and RPG outcomes specifically for these children and families. The data also will have significant implications for policy and program development for child well-being programs nationwide.

The purpose of this request is to obtain OMB approval for an extension of the original three year request which was approved on March 31, 2009. Forty-three of the original 53 grantees were awarded for a five-year grant period, thus necessitating an extension of the original request in order to continue data collection for the remainder of the grant period. The first submission of RPG grantee data to the RPG data collection system occurred in December, 2008, and every six months thereafter. Data collection will be conducted for the fifth year of the grant period, ending September 30, 2012, with data submission by January 2013. Data collection may be extended for one year until January 2014 should grantees request and be granted no-cost extensions.

To minimize grantee data collection and reporting burden, many of the data elements are already being collected by counties and States in order to report Federally-mandated data to the Adoption and Foster Care Analysis and Reporting System (AFCARS), the Treatment Episode Data Set (TEDS) and the National Outcome Measures (NOMs); in addition, all States voluntarily submit data for the Federal National Child Abuse and Neglect Data System (NCANDS). Therefore, most child welfare data elements included in the RPG performance measures can be found in a State's automated case management system, which is often a Federally-funded Statewide Automated Child Welfare Information System (SACWIS). TEDS admission and discharge data are collected by State substance abuse agencies according to their own information systems for monitoring substance abuse treatment admissions and transmitted monthly or quarterly to the SAMHSA contractor. As a result of prior Federal government reporting requirements, States are already collecting several data elements needed by the RPGs. The RPGs lead agency or their state or local partners are able to download information from these existing State child welfare and substance abuse treatment data systems to obtain data to monitor their RPG program outcomes, thereby reducing the amount of primary data collection needed.

Respondents

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Private Sector	17	2	175.5	5,967
State, Local, or Tribal Government	26	2	175.5	9,126

Estimated Total Annual Burden Hours: 15,093.

Additional Information

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. *Email address: infocollection@acf.hhs.gov.*

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register.** Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project. *Fax:* (202) 395–7285. *Email: OIRA_SUBMISSION@OMB.EOP.GOV. Attn:* Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–29811 Filed 11–17–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: State Plan for Grants to States for Refugee Resettlement.

OMB No.: 0970–0351.

Description: A State Plan is required by 8 U.S.C. 1522 of the Immigration and Nationality Act (the Act) [Title IV, Sec. 412 of the Act] for each State agency requesting Federal funding for refugee resettlement under 8 U.S.C. 524 [Title IV, Sec. 414 of the Act], including Refugee Cash and Medical Assistance, Refugee Social Services, and Targeted Assistance program funding. The State Plan is a comprehensive narrative description of the nature and scope of a States programs and provides assurances that the programs will be administered in conformity with the specific requirements stipulated in 45 CFR 400.4–400.9. The State Plan must include all applicable State procedures, designations, and certifications for each requirement as well as supporting documentation. A State may use a pre-print format prepared by the Office of Refugee Resettlement (ORR) of the Administration for Children and Families (ACF) or a different format, on the condition that the format used meets all of the State plan requirements under Title IV of the Act and ORR regulations at 45 CFR part 400.

There is no schedule for submission of this State Plan, as all States are currently operating under an approved plan and are in compliance with regulations at 45 CFR 400.4–400.9. Per 45 CFR 400.4(b), States need only certify that the approved plan is current and continues in effect, no later than 30 days after the beginning of the Federal fiscal year. Consistent with regulations, if States wish to revise or amend the plan, a revised plan or plan amendment must be submitted to ORR as described at 45 CFR 400.7 400.9.

Respondents: State Agencies, Replacement Designees under 45 CFR 400.301(c), and Wilson-Fish Grantees (State 2 Agencies) administering or supervising the administration of programs under Title IV of the Act.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Title IV State Plan	50	1	15	750

Estimated Total Annual Burden Hours: 750.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. *Email address: infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, *Fax:* (202) 395–7285, *Email: OIRA_SUBMISSION@OMB.EOP.GOV, Attn:* Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–29820 Filed 11–17–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0492]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Class II Special Controls Guidance Document: Labeling for Natural Rubber Latex Condoms

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 December 19, 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 emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0633. Also include the FDA 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: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Class II Special Controls Guidance Document: Labeling for Natural Rubber Latex Condoms Classified Under 21 CFR 884.5300—(OMB Control Number 0910–0633)—Extension

Under the Medical Device Amendments of 1976 (Pub. L. 94–295), class II devices were defined as those devices for which there was insufficient information to show that general controls themselves would provide a reasonable assurance of safety and effectiveness, but for which there was sufficient information to establish performance standards to provide such assurance.

Condoms without spermicidal lubricant containing nonoxynol-9 are classified in class II. They were originally classified before the enactment of provisions of the Safe Medical Devices Act of 1990 (Pub. L. 101–629) that broadened the definition of class II devices and now permit FDA to establish special controls beyond performance standards, including guidance documents, to help provide reasonable assurance of the safety and effectiveness of such devices.

In December 2000, Congress enacted Public Law 106–554, which among other provisions, directed FDA to ''reexamine existing condom labels'' and ''determine whether the labels are medically accurate regarding the overall effectiveness or lack of effectiveness in preventing sexually transmitted diseases * * *.'' In response, FDA recommended labeling intended to provide important information for condom users, including the extent of protection provided by condoms against various types of sexually transmitted diseases.

Respondents to this collection of information are manufacturers and repackagers of male condoms made of natural rubber latex without spermicidal lubricant. FDA expects approximately three new manufacturers or repackagers to enter the market yearly and collectively have a third-party disclosure burden of 1,224 hours. The number of respondents and prospective new manufacturers cited in table 1 of this document are based on FDA's database of premarket submissions. The remaining figures were derived from a study performed for FDA by Eastern Research Group, Inc., an economic consulting firm, to estimate the impact of the 1999 over-the-counter (OTC) human drug labeling requirements final rule (64 FR 13254, March 17, 1999). Because the packaging requirements for condoms are similar to those of many OTC drugs, we believe the burden to design the labeling for OTC drugs is an appropriate proxy for the estimated burden to design condom labeling.

The special controls guidance document also refers to currently approved collections of information found in FDA regulations. The collections of information under 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120; the collections of information under 21 CFR part 820 have been approved under OMB control number 0910–0073; and the collections of information in part 801 (21 CFR part 801) have been approved under OMB control number 0910–0485.

The collection of information under § 801.437 does not constitute a ''collection of information'' under the PRA. Rather, it is a ''public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public'' (5 CFR 1320.3(c)(2)).

In the **Federal Register** of July 8, 2011 (76 FR 40377), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
884.5300	3	34	102	12	1,224

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: November 14, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–29839 Filed 11–17–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0410]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Premarket Notification for a New Dietary Ingredient

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Premarket Notification for a New Dietary Ingredient'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–

400B, Rockville, MD 20850, (301) 796–3793.

SUPPLEMENTARY INFORMATION: On August 25, 2011, the Agency submitted a proposed collection of information entitled ''Premarket Notification for a New Dietary Ingredient'' to OMB for review and clearance under 44 U.S.C. 3507. 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 now approved the information collection and has assigned OMB control number 0910–0330. The approval expires on November 30, 2013. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: November 14, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–29837 Filed 11–17–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0099]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Followup Study for Infant Feeding Practices Study II

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Followup Study for Infant Feeding Practices Study II'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Denver Presley, II, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, (301) 796–3793.

SUPPLEMENTARY INFORMATION: On August 2, 2011, the Agency submitted a proposed collection of information entitled ''Followup Study for Infant Feeding Practices Study II'' to OMB for review and clearance under 44 U.S.C. 3507. 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 now approved the information collection and has assigned OMB control number 0910–0696. The approval expires on November 30, 2014. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: November 14, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–29836 Filed 11–17–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0074]

Guidance for Industry on Medication Guide Distribution Requirements and Inclusion of Medication Guides in Risk Evaluation and Mitigation Strategies; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Medication Guides—Distribution Requirements and Inclusion in Risk Evaluation and Mitigation Strategies (REMS).'' This guidance addresses two topics pertaining to Medication Guides for drug and biological products. First, the guidance addresses when FDA intends to exercise enforcement discretion regarding when a Medication Guide must be provided with a drug or biological product that is dispensed to a health care professional for administration to a patient instead of being dispensed directly to the patient for self-administration or to the patient's caregiver for administration to the patient. Second, the guidance addresses when a Medication Guide will be required as part of a REMS. The guidance is intended to answer questions that have arisen concerning these topics.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002; or the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. The guidance may also be obtained by mail by calling CBER at 1–(800) 835–4709 or (301) 827–1800. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance 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:

Kristen E. Miller, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6226, Silver Spring, MD 20993–0002, (301) 796–5400;

or

Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, (301) 827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Medication Guides—Distribution Requirements and Inclusion in Risk Evaluation and Mitigation Strategies (REMS).'' This guidance provides information for industry, health care providers, and authorized dispensers of prescription drug products. The guidance addresses two topics pertaining to Medication Guides for drug and biological products.

Medication Guides are primarily for prescription drug and biological products used on an outpatient basis without direct supervision by a health care professional. Questions have arisen concerning when a Medication Guide must be provided with a drug or biological product that is dispensed to a health care professional for administration to a patient in certain situations, for example, in an inpatient setting or an outpatient setting such as a clinic or infusion center. This guidance is intended to articulate the circumstances under which FDA intends to exercise enforcement discretion regarding Medication Guide distribution.

The second topic addressed by the guidance is when a Medication Guide

will be required as part of a REMS. Under section 505–1(e) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355–1(e)), FDA may require that a REMS for a drug include one or more of the elements described in section 505–1(e), including the requirement for an applicant to develop a Medication Guide for distribution to each patient when the drug is dispensed (when the criteria in part 208 (21 CFR part 208) are met). Since the enactment of the Food and Drug Administration Amendments Act of 2007, FDA has, as a matter of policy, considered any new Medication Guide (or safety-related changes to an existing Medication Guide) to be part of a REMS. However, the Agency has the authority to determine, based on the risks of a drug and public health concern, how a Medication Guide should be required when the standard in part 208 is met. Based on the risks and public health concern, the Agency may require: (1) A Medication Guide in accordance with part 208 that is not an element of a REMS or (2) A Medication Guide in accordance with part 208 and section 505–1 of the FD&C Act that is an element of a REMS, which may include other elements of a REMS (such as elements to assure safe use).

In the **Federal Register** of February 28, 2011 (76 FR 10908), FDA announced the availability of a draft guidance for industry entitled ''Medication Guides—Distribution Requirements and Inclusion in Risk Evaluation and Mitigation Strategies (REMS).'' The notice gave interested parties the opportunity to comment by May 31, 2011. The Agency considered all of the comments received and made minor editorial and clarifying changes to the guidance.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on when FDA intends to exercise enforcement discretion regarding Medication Guide distribution and inclusion of Medication Guides in REMS. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. 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.

III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 314.70 and 601.12 have been approved under OMB control numbers 0910–0001 and 0910–0338, respectively; the collections of information in part 208 have been approved under OMB control number 0910–0393.

IV. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm, http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm,* or *http://www.regulations.gov.*

Dated: November 14, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–29877 Filed 11–17–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). To obtain a copy of the clearance requests submitted to OMB for review, email *paperwork@hrsa.gov* or call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

Proposed Project: National Survey of Organ Donation Attitudes and Practices (OMB No. 0915–xxxx)—[New]

The Division of Transplantation (DoT), Healthcare Systems Bureau, Health Resources and Services Administration (HRSA), is planning to conduct a telephone survey of public knowledge, perceptions, opinion, and behaviors related to organ donation. Two key missions of the DoT are (1) to provide oversight for the Organ Procurement and Transplantation Network and policy development related to organ donation and transplantation and (2) to implement efforts to increase public knowledge about the need for increased organ donation.

With a constantly growing deficit between the number of Americans needing donor organs (currently approximately 112,000) and the annual number of donors (14,505 in 2010), raising the American public's willingness to donate becomes increasingly critical. Effective education and outreach campaigns need to be based on knowledge of the public's attitudes and perceptions about, and perceived impediments to, organ donation. Two national surveys using nearly identical survey instruments to identify public views and behaviors related to organ donation were conducted in 1993 and 2005.

The proposed study will identify current organ donation views and practices of the American public and various population subgroups using a survey instrument similar to the two earlier studies in order to track changes over time. It will measure issues such as public knowledge about and attitudes toward organ donation, public commitment to or willingness to donate, impediments to public willingness to donate, and attitudes toward living donation, donation practices, policy issues, allocation policy, presumed consent, and financial incentives for donation. Demographic information also will be collected. The randomly drawn sample will consist of 3,250 adults (age 18 and over), including an oversample of Asians, Hispanics, African Americans, and Native Americans, and will be geographically representative of the United States. The survey instrument will be administered in both English and Spanish through computer-assisted telephone interviews.

In addition to being useful to the DoT (especially in its donation outreach initiatives), results of this survey also will be of assistance to the donation and transplant community, DoT grantees and other research efforts, and to the

Secretary's Advisory Committee on Organ Transplantation (ACOT) as it fulfills its charge to advise the Secretary of Health and Human Services on the numerous and often controversial issues related to donation and transplantation. In its first meeting, the ACOT suggested such a survey to gather information to inform both public education efforts and policy decisions on the issue of organ donation.

The annual estimate of burden is as follows:

Instrument	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Telephone survey	3,250	1	3,250	0.3	975
Total	3,250	1	3,250	0.3	975

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to the desk officer for HRSA, either by email to *OIRA_submission@omb.eop.gov* or by fax to (202) 395–6974. Please direct all correspondence to the ''attention of the desk officer for HRSA.''

A similar request for public comments was published in the **Federal Register** on September 20, 2011 (76 FR 58282).

Dated: November 14, 2011.

Reva Harris,

Acting Director, Division of Policy and Information Coordination.

[FR Doc. 2011–29830 Filed 11–17–11; 8:45 am]

BILLING CODE 4165–15–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, RFA Panel: Interventions for SIDS and Other Sleep Related Infant Deaths.

Date: December 7–8, 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: Kevin Walton, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, (301) 435–1785, *kevin.walton@nih.hhs.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Program Project: Cell Biology.

Date: December 13–14, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Homewood Suites Hotel, 2 Farm Glen Boulevard, Farmington, CT 06032.

Contact Person: David Balasundaram, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5189, MSC 7840, Bethesda, MD 20892, (301) 435–1022, *balasundaramd@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 9, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29891 Filed 11–17–11; 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: Integrative Neurosensory Studies.

Date: December 7–8, 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: Wei-Qin Zhao, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181 MSC 7846, Bethesda, MD 20892–7846, (301) 435–1236, *zhaow@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Integrative Neuroscience.

Date: December 15, 2011.

Time: 5 p.m. to 8 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: Kirk Thompson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844, Bethesda, MD 20892, (301) 435–1242, *kgt@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 14, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29887 Filed 11–17–11; 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, Reducing the Impact of Hypertension in Low and Middle Income Countries.

Date: December 6, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Crystal City, 2799 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: William J Johnson, Ph.D., 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.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Dissemination, Implementation, & Education Research (R18 and R25).

Date: December 9, 2011.

Time: 9:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Keith A. Mintzer, Ph.D., 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.*

(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: November 14, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29885 Filed 11–17–11; 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 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: Heart, Lung, and Blood Initial Review Group, NHLBI Institutional Training Mechanism Review Committee.

Date: December 9, 2011.

Time: 10 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Charles Joyce, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892–7924, (301) 435–0288, *cjoyce@nhlbi.nih.gov.*

(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: November 14, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29884 Filed 11–17–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Recombinant DNA Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Recombinant DNA Advisory Committee.

Date: December 13–14, 2011.

Time: December 13, 2011, 2 p.m. to 5:30 p.m.

Agenda: The NIH Recombinant DNA Advisory Committee (RAC) will review and discuss selected human gene transfer protocols and related datamanagement activities. Please check the meeting agenda at *http://oba.od.nih.gov/rdna_rac/rac_meetings.html* for more information.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Time: December 14, 2011, 8:15 a.m. to 5 p.m.

Agenda: The NIH Recombinant DNA Advisory Committee (RAC) will review and discuss selected human gene transfer protocols, new clinical results from trials using T cell based immunotherapy for cancer, and related data management activities. Please check the meeting agenda at *http://oba.od.nih.gov/rdna_rac/rac_meetings.html* for more information.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Chezelle George, Office of Biotechnology Activities, Office of Science Policy/OD, National Institutes of Health, 6705 Rockledge Drive, Room 750, Bethesda, MD 20892, (301) 496–9838, *georgec@od.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://oba.od.nih.gov/rdna.html,* where an agenda and any additional information for the meeting will be posted when available.

OMB's ''Mandatory Information Requirements for Federal Assistance Program Announcements'' (45 FR 39592, June 11, 1980) requires a statement concerning the official government programs contained in the Catalog of Federal Domestic Assistance. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers virtually every NIH and Federal research program in which DNA recombinant molecule techniques could be used, it has been determined not to be cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information

address above about whether individual programs listed in the Catalog of Federal Domestic Assistance are affected.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: November 10, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29883 Filed 11–17–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Human Genome Research Institute Special Emphasis Panel, November 22, 2011, 12 p.m. to November 22, 2011, 1 p.m., NHGRI Fishers Lane Office, 5635 Fishers Lane, 4076, Rockville, MD 20852 which was published in the **Federal Register** on October 27, 2011, 76FRN66731.

The meeting notice was amended to change the meeting date and time from November 22, 2011 to December 1, 2011 from 12 p.m. to 3 p.m. The meeting is closed to the public.

Dated: November 14, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29882 Filed 11–17–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2011–0843]

Collection of Information Under Review by Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding Information Collection Requests (ICRs), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval of a revision to the following collections of information: 1625–0037, Certificates of Compliance, Boiler/Pressure Vessel Repairs, Cargo Gear Records, and Shipping Papers, 1625–0041, Various International Agreement Pollution Prevention Certificates and Documents, and Equivalency Certificates, 1625–0042, Requirements for Lightering of Oil and Hazardous Material Cargoes, and 1625–0044, Outer Continental Shelf Activities—Title 33 CFR Subchapter N. Our ICRs describe the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Comments must reach the Coast Guard and OIRA on or before December 19, 2011.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2011–0843] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT) and/or to OIRA. To avoid duplicate submissions, please use only one of the following means:

(1) *Online:* (a) To Coast Guard docket at *http://www.regulations.gov.* (b) To OIRA by email via: *OIRA-submission@omb.eop.gov*.

(2) *Mail:* (a) DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. (b) To OIRA, 725 17th Street NW., Washington, DC 20503, attention Desk Officer for the Coast Guard.

(3) *Hand Delivery:* To DMF address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

(4) *Fax:* (a) To DMF, (202) 493–2251. (b) To OIRA at (202) 395–6566. To ensure your comments are received in a timely manner, mark the fax, attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–611), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2100 2nd St. SW., STOP 7101, Washington, DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Ms. Kenlinishia Tyler, Office of Information Management, telephone (202) 475–3652 or fax (202) 475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, (202) 366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collections. There is one ICR for each Collection.

The Coast Guard invites comments on whether these ICRs should be granted based on the Collections being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collections; (2) the accuracy of the estimated burden of the Collections; (3) ways to enhance the quality, utility, and clarity of information subject to the Collections; and (4) ways to minimize the burden of the Collections on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICRs referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG 2011–0843], and must be received by December 19, 2011. We will post all comments received, without change, to *http://*

www.regulations.gov. They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number [USCG–2011–0843], indicate the specific section of the document to which each comment applies, providing a reason for each comment. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an email address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**, but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type ''USCG–2011–0843'' in the ''Keyword'' box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½; by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this Notice as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–0843'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

OIRA posts its decisions on ICRs online at *http://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Numbers: 1625–0037, 1625–0041, 1625–0042 and 1625–0044.

Privacy Act

Anyone can search the electronic form of comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act statement regarding Coast Guard public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (76 FR 56208, September 12, 2011) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments.

Information Collection Request

1. *Title:* Certificates of Compliance, Boiler/Pressure Vessel Repairs, Cargo Gear Records, and Shipping Papers.
OMB Control Number: 1625–0037.
Type of Request: Revision of a currently approved collection.
Respondents: Owners and operators of vessels.
Abstract: This information is needed to enable the Coast Guard to fulfill its responsibilities for maritime safety under Title 46, U.S. Code. It is solely for this purpose. The affected public includes some owners or operators of large merchant vessels and all foreign-flag tankers calling at U.S. ports.
Forms: CG–3585.
Burden Estimate: The estimated burden has decreased from 17,294 hours to 14,725 hours a year.

2. *Title:* Various International Agreement Pollution Prevention Certificates and Documents, and Equivalency Certificates.
OMB Control Number: 1625–0041.
Type of Request: Revision of a currently approved collection.
Respondents: Owners, operators, or masters of vessels.
Abstract: Required by the adoption of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) and other international treaties, these certificates and documents are evidence of compliance for U.S. vessels on international voyages. Without the proper certificates or documents, a U.S. vessel could be detained in a foreign port.
Forms: CG–5352, CG–5352A, CG–5352B, CG–6047, CG–6047A, CG–6056, CG–6056A, CG–6056B, CG–6056C and CG–6057.
Burden Estimate: The estimated burden has increased from 2,067 hours to 2,738 hours a year.

3. *Title:* Requirements for Lightering of Oil and Hazardous Material Cargoes.
OMB Control Number: 1625–0042.
Type of Request: Revision of a currently approved collection.
Respondents: Owners, masters and agents of lightering vessels.
Abstract: The information for this report allows the U.S. Coast Guard to provide timely response to an emergency and minimize the environmental damage from an oil or hazardous material spill. The information also allows the Coast Guard to control the location and procedures for lightering activities.
Forms: None.
Burden Estimate: The estimated burden has increased from 215 hours to 217 hours a year.

4. *Title:* Outer Continental Shelf Activities—Title 33 CFR Subchapter N.
OMB Control Number: 1625–0044.
Type of Request: Revision of a currently approved collection.
Respondents: Operators of facilities and vessels engaged in activities on the OCS.
Abstract: The Outer Continental Shelf Lands Act, as amended, authorizes the Coast Guard to promulgate and enforce regulations promoting the safety of life and property on OCS facilities. These regulations are located in 33 CFR chapter I subchapter N.
Forms: CG–5432.
Burden Estimate: The estimated burden has increased from 6,234 hours to 6,304 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: November 10, 2011.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2011–29810 Filed 11–17–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Form I–129S, Extension of an Existing Information Collection; Comment Request.

ACTION: 30-Day Notice of Information Collection Under Review; Form I–129S, Nonimmigrant Petition Based on Blanket L Petition; OMB Control No. 1615–0010.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on September 6, 2011, at 76 FR 55081, allowing for a 60-day public comment period. USCIS did not receive any comments.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 19, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Avenue NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to (202) 272–8352 or via email at *uscisfrcomment@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at (202) 395–5806 or via email at *oira_submission@omb.eop.gov*.

When submitting comments by email, please make sure to add OMB Control No. 1615–0010 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 agencies 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 submission of responses.

Overview of this Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Nonimmigrant Petition Based on Blanket L Petition.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–129S; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or others for profit. This form is used by an employer to classify employees as L–1 nonimmigrant intracompany transferees under a blanket L petition approval. USCIS will use the data on this form to determine eligibility for the requested immigration benefit.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 42,000 responses at .583 hours (35 minutes) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 24,486 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov/.*

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020, Telephone number (202) 272–8377.

Dated: November 15, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–29914 Filed 11–17–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Availability of Finding of No Significant Impact for Field Release of Insects for Biological Control of Carrizo Cane

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Notice of availability.

SUMMARY: U.S. Customs and Border Protection (CBP) is advising the public of the availability of a Finding of No Significant Impact (FONSI) for its support of U.S. Department of Agriculture (USDA) research and field release of two insects, the Arundo scale and the Arundo wasp as biological control agents for the non-native and invasive Carrizo cane in the continental United States. To reach this FONSI, CBP examined two Environmental Assessments (EAs) prepared by USDA's Animal and Plant Health Inspection Service (APHIS), performed independent analyses of those EAs, and reached its own findings. The two EAs (APHIS 2009 and 2010) are also being made available through CBP.

DATES: The FONSI is available beginning on November 18, 2011.

ADDRESSES: Copies of the FONSI may be obtained by accessing either of the following Web sites: *http://cbp.gov/xp/cgov/border_security/ti/ti_docs/carrizo_fonsi.xml,* or *http://www.dhs.gov/xabout/laws/editorial_0850.shtm* under Environmental Assessments; or by sending a request to Christopher Colacicco of CBP by telephone: (202) 344–1085; by fax: (202) 344–1250; by email: *Christopher.j.colacicco@cbp.dhs.gov;* or by writing to: CBP, Attn: Christopher Colacicco, 1300 Pennsylvania Avenue NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Christopher Colacicco, CBP, Border Patrol Facilities and Tactical Information Program Management Office, telephone (202) 344–1085, email *Christopher.j.colacicco@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background Information

The non-native invasive weed species, Carrizo cane, *Arundo donax* (Poaceae), is prevalent along the southern border of the United States and is an impediment to border security. Among other things, it obscures Border Patrol agents' lines of sight and provides cover to individuals who are attempting to enter the United States illegally. Accordingly, effective control of Carrizo cane is critical in preventing terrorists and terrorist weapons, drugs, and other contraband from entering the United States and in providing a safer work environment for Border Patrol agents. CBP has evaluated various methods of controlling Carrizo cane, including the application of herbicides and mechanical removal; however, CBP remains interested in evaluating other methods of controlling Carrizo cane.

ARS Biological Control Research

The USDA Agricultural Research Service (ARS) is conducting research

into the use of two insects as biological control agents for Carrizo cane: The Arundo wasp, *Tetramesa romana* Walker (Hymenoptera: Eurytomidae), and Arundo scale *Rhizaspidiotus donacis* (Hemiptera: Diaspididae). CBP has recognized the potential utility of biological control agents to help control Carrizo cane. Under the authority of 7 U.S.C. 3318(b), CBP and USDA entered into a non-assistive cooperative agreement in support of research into biological controls for Carrizo cane. In accordance with this agreement, CBP plans to provide funding and other support to ARS through fiscal years 2012 and 2013 for research regarding the release of the Arundo wasp and Arundo scale in the United States and to coordinate deployment of these biological control agents for Carrizo cane. Additional funding or support may be provided after 2013 if funds are available and the biological controls appear effective. The coordination will take the form of agreements regarding the locations where ARS will release the Arundo wasp and Arundo scale and the provision of access to CBP-controlled property for ARS studies. The goal of the program is to determine if biological control is an effective option for reducing Carrizo cane density. Reducing Carrizo cane density is likely to increase visibility along the border, thereby meeting CBP's operational needs.

USDA Environmental Assessments

USDA's Animal and Plant Health Inspection Service (APHIS) completed two Environmental Assessments (EAs) that evaluated the potential environmental impacts related to the release of these two insects as biological control agents for the control of Carrizo cane.

On March 6, 2009, APHIS issued an EA that evaluated a range of alternatives and strategies to ensure protection of the environment associated with the release of the Arundo wasp in the continental United States. The Arundo wasp is a non-stinging wasp that feeds and resides only on Carrizo cane and is known to pose no threat to humans or other animals. A 30 day public comment period was provided, and 10 comments were received. After consideration of the comments, APHIS issued a final EA and a FONSI for the release of the Arundo wasp on April 10, 2009. *See* 74 FR 21311.

On November 12, 2010, APHIS issued an EA that evaluated a range of alternatives and strategies to ensure protection of the environment associated with the release of Arundo scale in the continental United States. A 30 day public comment period was provided, and 11 comments were received. After consideration of the comments, APHIS issued a final EA and a FONSI for the release of Arundo scale on December 15, 2010. *See* 76 FR 8708.

These documents are posted on the APHIS Web site at: *http://www.aphis.usda.gov/plant_health/ea/downloads/Tetramesa-romana-ea.pdf* and *http://www.aphis.usda.gov/plant_health/ea/downloads/RhizaspidiotusdonacisEA-Fonsi.pdf.* Links to these documents may also be found on the CBP Web site: *http://cbp.gov/xp/cgov/border_security/ti/ti_docs/carrizo_fonsi.xml.*

Adoption of the APHIS EAs and CBP's Issuance of a FONSI

Following independent analysis and review of the APHIS EAs, CBP has adopted the APHIS EAs regarding the Arundo wasp and Arundo scale. Based on this analysis and review, CBP has determined that the release of the Arundo wasp and Arundo scale in CBP-controlled areas will not have a significant effect on the environment, and thus has issued a FONSI. Copies of the FONSI may be obtained as described in the **ADDRESSES** section of this document.

NEPA

This environmental analysis was conducted in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.,* the Council on Environmental Quality Regulations for Implementing the NEPA (40 CFR parts 1500–1508), and Department of Homeland Security Directive 023–01 (renumbered from 5100.1), *Environmental Planning Program* (April 19, 2006).

Dated: November 3, 2011.

Karl H. Calvo,

Executive Director, Facilities Management and Engineering, Office of Administration.

[FR Doc. 2011–29766 Filed 11–17–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Revocation of Customs Broker Licenses

AGENCY: U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: Customs broker license revocations for the failure to file the triennial status report and applicable fee.

SUMMARY: Notice is hereby given that pursuant to section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), and Title 19 of the Code of Federal Regulations at § 111.30(d), the following Customs broker licenses are revoked by operation of law without prejudice.

Last/company name	*First name*	*License*	*Port name*
Lequire	Cynthia A	20655	Anchorage
Ransom	Brian Charles	13863	Anchorage
Runfola	Thomas Michael	12540	Atlanta
Grizzard Customs Brokers, Inc		21184	Atlanta
Grizzard	Michael R	13265	Atlanta
McDonald-McGlone	Kay	09543	Atlanta
Simpson	Sherry Elaine	13412	Atlanta
McTiernan	Timothy	15722	Atlanta
O'Conner	William L	16182	Atlanta
Rivers	Myra B	16155	Atlanta
Peek	Brenda K	13392	Atlanta
Smolen	Lee Ellis	09190	Atlanta
Sheffield	Beverly J	16856	Atlanta
Pierce	Scott M	15327	Atlanta
Maltbie	Jean L	20058	Atlanta
Siebern	Marilyn C	23594	Atlanta
Bruno	Ann T	10526	Baltimore
Gontrum, Jr	Ralph W	04695	Baltimore
Johnson, Jr	William H	05405	Baltimore
Goodman	Richard J	04226	Baltimore

Last/company name	First name	License	Port name
Fawcett	Rae Dematteis	10953	Baltimore
Hall	Melissa L	22209	Baltimore
Keenan	Helene	17308	Baltimore
Veit, Jr	Arthur B	12464	Baltimore
Schnobrich, III	Norman Thomas	20113	Baltimore
D Lee Kraus & Company, Ltd		11766	Baltimore
DAO Forwarding & Customs Brokerage, Inc		17406	Baltimore
DeBord	Barbara L	16589	Baltimore
Engers	Patricia D	09267	Baltimore
Coakley	Judy A	20910	Baltimore
Brennan	Frank R	10364	Baltimore
Olimpex International, Inc		11452	Baltimore
Smith	Margaret Desdamona	12546	Baltimore
Shaw	Kimberly G	16387	Baltimore
Kraus	Diane Eileen	12465	Baltimore
Mid-Atlantic Trade Services, Inc		15081	Baltimore
Miskiel	Alexander Robert	12874	Baltimore
Maraghy	Helene M	17153	Boston
Vitale	Kimberly B	13600	Boston
Hub Forwarding Company, Inc		16274	Boston
McFadyen	Joseph M	21183	Boston
Lewis	Clark G	17068	Boston
MacDonald	John C	17488	Boston
Wiley	Clintona Belle	17391	Boston
Anderson	Jeffrey D	20369	Boston
LaPorte, Jr	Wayne D	21460	Boston
Brendle	Thomas M	16487	Boston
Curley	Richard Francis	04536	Boston
Haughton	John Joseph	10514	Boston
Vanderlugt	Victor	20505	Boston
Curley	David George	07094	Boston
Massa	Anne L	22295	Boston
Pelliciotti	Robert B	15998	Boston
Mailly	Louise	09119	Boston
Medema	Nancy S	14580	Buffalo
Monin	Maureen E	09152	Buffalo
Koprowski	Joseph	10941	Buffalo
Sheldon	Stuart B	04593	Buffalo
Borowiecki	Anthony B	07516	Buffalo
Nocera	Annette	11104	Buffalo
Frederick	Jean M	05947	Buffalo
Lawhon	Joseph J	12150	Buffalo
Kudela	Kathleen L	12613	Buffalo
Buscaglia	Vincent P	05921	Buffalo
Bielmeier	Edward R	06651	Buffalo
Rosati	Frank J	12552	Buffalo
Deane	Richard T	04754	Buffalo
Delgado-White	Daniel	20994	Buffalo
Balling	Sandra C	13477	Buffalo
Hansen	David J	21453	Champlain
Zweeres	Katherine T	11081	Champlain
DiPrinzio	Charles	04337	Champlain
Tate	Brent	21257	Charlotte
Shelton	Patricia P	20202	Charlotte
Hallenbeck	Cheryl L	15239	Charlotte
Orr	Gwendolyn K	17463	Charlotte
West	Phyllis K	14127	Charlotte
Harrison	Albert K	13529	Charlotte
Goad	Jennifer Anne	22294	Charlotte
Al Smith Customs Brokers, Inc		12534	Charlotte
Collins	Debra G	12176	Chicago
Emmel	Margaret A	09030	Chicago
Osowski	Kenneth G	07307	Chicago
Reaves	Jacqueline	15878	Chicago
Hoglund	Steven S	04429	Chicago
Hoglund	Janet M	05348	Chicago
Wait	Gordon R	13196	Chicago
Lange	Patricia S	14913	Chicago
Wait	Merri M	11599	Chicago
Milton	Antoinette M	13100	Chicago
Branch	Bobby D	14006	Chicago
Stewart	Timothy S	11597	Chicago
Griffin	Michael A	17160	Chicago
Collignon	Connie L	14566	Chicago

Last/company name	First name	License	Port name
Scala	Nora	21789	Chicago
Penz	James P	23437	Chicago
Hays	Dennis G	05756	Cleveland
Matthaes	Debora J	21892	Cleveland
Stamm	Michael F	16377	Cleveland
Bradford	William E	12376	Cleveland
Sugaski	Andrea	22659	Cleveland
Howard	Carol A	20227	Cleveland
Blount	Richard E	12375	Cleveland
Premec	Richard J	15276	Cleveland
Shafer	Brenda Sue	12207	Cleveland
Conde	Alicia C	22534	Cleveland
Kirsch	Elizabeth	20223	Cleveland
Westrick	Janet K	20231	Cleveland
Frost	Jessica L	23669	Cleveland
Holdredge	Jed D	21516	Dallas/Fort Worth
Weinbaum	Sandra Sue	07388	Dallas/Fort Worth
Webb	Lenora E	21717	Dallas/Fort Worth
Steinbach	Thomas J	07045	Dallas/Fort Worth
Hornsby	Michael David	22473	Dallas/Fort Worth
Weinbaum	Ralph Michael	04645	Dallas/Fort Worth
Martin	Tammie Sue	21154	Dallas/Fort Worth
Larson	Sharon Lee	13773	Detroit
Jeffries	Pamela Lynn	21845	Detroit
Klutz	Charlene	10226	Detroit
Majewski	Donald	10228	Detroit
Burtka	Sigmund A	07879	Detroit
Wallace	Julie Anne	11271	Detroit
Cobbs	Emily	22058	Detroit
McMahan	Diana Lynn	22039	Detroit
Raffin	Anthony J	24103	Detroit
White	James F	15695	Detroit
Brunner	Thomas A	17240	Detroit
Mertens	Ann F	17238	Detroit
Frank	Matthew S	20295	Detroit
Hall	Jennifer	20456	Detroit
Coe	Warren Emerson	14976	Detroit
LeBlanc, Jr	Albert Frederick	16982	Detroit
Bahan	Larry M	14259	Detroit
Karras	Spiros	21349	Detroit
Curran	Dennis John	05999	Detroit
Mahalak	Michael Louis	14773	Detroit
Farr	Steven James	14303	Detroit
Alcantar	Jose R	02814	El Paso
Camarillo	Jaime G	16569	El Paso
Burdett	Malcolm E	17264	El Paso
Lauser	Charles F	15815	El Paso
J & J Brokerage		12742	El Paso
Slack	Richard C	02239	El Paso
Mainwaring	Mark B	13136	El Paso
Weakley	Robert Dale	11757	Great Falls
Corrigan	Kathleen M	15080	Great Falls
Befort	Norman	15057	Great Falls
Holje	Shirley J	03833	Great Falls
Gemini Consultants		16163	Great Falls
SJ Lam, Inc		14551	Honolulu
Stowe	John Cleophas	04202	Honolulu
S DeFreest & Company, Inc		07924	Honolulu
Lam	Sun Kien	03750	Honolulu
Lam	Ernest S.S	05100	Honolulu
Khudabuksh	Walji	09296	Houston
Batra	Suraj P	14047	Houston
Villarreal	Jesse	05074	Houston
Holt	Terry R	12386	Houston
Hovel, Jr	William G	03672	Laredo
Mireles, Jr	Eugenio	07043	Laredo
Gorena	Fidela	14814	Laredo
Garcia	Armando	19651	Laredo
Esquivel	Gloria Y	20978	Laredo
Hopson	Margaret Jones	22162	Laredo
Martinez	Miguel Antonio	14271	Laredo
Borderlogic, Inc		21095	Laredo
Bustamante, Jr	Dionicio	16983	Laredo
Shipley	Michael P	20155	Laredo

Last/company name	First name	License	Port name
Gutierrez	Jorge	13588	Laredo
Guevara Jr	Geronimo	21901	Laredo
Bridgeport Custom Brokers, Inc		14368	Laredo
Inter-Continental US CHB, Inc		20140	Laredo
Cienfuegos, Inc		15211	Laredo
Roser	Maria Estella P	02301	Laredo
Molina	Mase	18007	Laredo
Hord	James C	21515	Laredo
Gomez	Luis Jaime	14386	Laredo
CTC Distributing Ltd	Alberto Diaz	22433	Laredo
Brittain International, Inc		07873	Laredo
Hernandez	Ernesto	12083	Laredo
Resendez	Aquiles	06977	Laredo
Galindo	Sergio	12335	Laredo
Bruce	John M	13161	Laredo
Aguilar	Aida	22084	Laredo
Mireles	Thomas E	17370	Laredo
Ambrose, Jr	John H	22099	Laredo
Rollin	Michael William	14902	Laredo
Martinez	Bertha A	15543	Laredo
Aguiluz, IV	Amable	06978	Los Angeles
Waldner	Martha Jane	07312	Los Angeles
McCloskey	Jimmie E	07672	Los Angeles
Hopper	Michael D	07017	Los Angeles
Harris	Michael F	09483	Los Angeles
Powell	Barry Elliot	13317	Los Angeles
Chang	Ee-Shin	13463	Los Angeles
Lee	Whei-Jen	13751	Los Angeles
Kim	Augustine Young Dae	12622	Los Angeles
Lonon	Karen L	12326	Los Angeles
Ngo	Catherine C	24181	Los Angeles
Rollings	Patricia Diane	17281	Los Angeles
Tsui	Wing-Sze	22192	Los Angeles
Albornoz	Sandra G	15810	Los Angeles
Pardi	David	22156	Los Angeles
Pagett	Thomas Wendell	17368	Los Angeles
Clare Freight, Los Angeles, Inc		21915	Los Angeles
Mowery	Richard V	21841	Los Angeles
Trinity Customs Brokers, Inc	Frank A. Pubins III	22248	Los Angeles
Lee	T. Ted	07185	Los Angeles
Rios	Carlos Alberto	12251	Los Angeles
MacDonald	Glenn D	22578	Los Angeles
Anderson	Barbara Gail	17221	Los Angeles
Malonzo	Avelyne Elli	21407	Los Angeles
Michel	Glen Alan	14397	Los Angeles
Ferris	Karen A	11519	Los Angeles
Bae	Klaudia Kyung	15809	Los Angeles
Bowler	David Robert	05219	Los Angeles
Neyra, Jr	Aldo Lasaro	17367	Los Angeles
Nalls	Denise Lavonne	13310	Los Angeles
Fricke	Neil A	10916	Los Angeles
Weinberg	Milton	04333	Los Angeles
Archia	Robin Lou	10915	Los Angeles
DSL Integrated Logistics, Inc		16544	Los Angeles
Newland	Garry Eugene	04072	Los Angeles
Lee	Ilsun David	20197	Los Angeles
Kenehan	John William	05809	Los Angeles
Buffon	Paolo	22474	Los Angeles
Smith	Gary Wayne	04545	Los Angeles
Cuza	Fermin	10966	Los Angeles
Erchul	Elizabeth Jane	10490	Los Angeles
KMD Customhouse Broker		11913	Los Angeles
Ziobro	Eugene W	17429	Miami
Hernandez	Marta C	20214	Miami
Torres	Luis E	16599	Miami
Impex International Brokerage, Inc		04512	Miami
Santiago	Jesus	05655	Miami
Oropeza	Hugo V	16324	Miami
Simonitsch	William J	15518	Miami
Martin	Michael Ralph	06803	Miami
Trend	Barbara L.C	12812	Miami
Sexton	Terri	20868	Miami
Wilson	Michelle Marie	15412	Miami
Neary	Raymond G	21307	Miami

Last/company name	First name	License	Port name
Hasselbring	Mark Alan	10043	Miami
Jimenez	Hugo	15547	Miami
Suarez	Amalia	21224	Miami
Santos	Magaret	15786	Miami
Ruvalcaba	Karla	23511	Miami
Nylen	Patricia Ann	14360	Milwaukee
Sacia	Paul J	15102	Minneapolis
Oakins	June W	06241	Minneapolis
Grigor	Margaret A	13349	Minneapolis
Ingham	Arthur Draper	03844	Minneapolis
Pope	Calvin Pruner	06814	Minneapolis
Thompson	Mark A	20724	Minneapolis
Storms	Amy M	17489	Minneapolis
St John Brothers, Inc		06722	New Orleans
World International Freight Forwarders, Inc	Catherine A. Finn	04187	New Orleans
Tate, Jr	James W	11667	New Orleans
Piazza, III	Anthony Robert	04922	New Orleans
Pollackov	Linda J	09309	New York
Kotcher	Daniel L	09515	New York
Lopez	Gustavo V	09678	New York
Douglas	Teresa	09681	New York
Vesque	Carole	10027	New York
Safian	Stanley	10430	New York
Duffel	Paula	10434	New York
Goodwin	Lucia Lanzaro	11958	New York
Feldman	Alyssa	11180	New York
Marchini	James Louis	11581	New York
Levine	Mark J	11618	New York
ISA Import Clearance, Inc		11785	New York
Ciaccio	Christa A	09229	New York
Penson	Thomas A	03950	New York
Borodyansky	Boris	11163	New York
Mazzarise	Joseph Gerard	05135	New York
Dowling	Ann Marie	12154	New York
Kelly-Paturalski	Helen M	07967	New York
PH Petry Company		00055A	New York
Trombetta	James C	02899	New York
Rosten	Marvin	03084	New York
Cramer	Bernard M	04972	New York
Kron	Harry	05043	New York
Fabricant	Gregory P	07506	New York
Cuomo	Carmine	05545	New York
Intercorp Forwarders, Ltd		05777	New York
Hummel	Gordon R	05838	New York
Kennell	Thomas M	05912	New York
Bartone	Paul J	06830	New York
Rossi	Roland	06922	New York
Plunkett	James J	04810	New York
Friedkin	Don S	06545	New York
Huston	Craig	07528	New York
Thornton	Kathleen T	09510	New York
Freight Wings, Inc		09617	New York
Sessa	Ralph J	09984	New York
Rios	Geraldine T	11186	New York
Worms	Scarlett	10984	New York
Bacigalupo	Arnold J	10480	New York
Antonisen	Christopher R	06280	New York
Chechakos	Lori Hasson	10035	New York
Hoffman	Marcia R	06469	New York
Bloom	Philip	05144	New York
Duffield	John Gilson	05829	New York
Marsh	Michele	20575	New York
Silvey	Cheryl D	07756	New York
Montanez	Dominga	12620	New York
Weinstein	Harold	11363	New York
Wechsler	Lara	21634	New York
Kim	Eric Sehoon	23577	New York
Russell	Michael E	22702	New York
Orzel	John George	22328	New York
Aufiero	Gabriel	22213	New York
Artesian Consulting LLC	Howard Bender	22815	New York
Tierney	Mark	22093	New York
Albert	Richard P	09674	New York
Atta	Kamil	21739	New York

Last/company name	First name	License	Port name
Antonisen	Barbara	09288	New York
Freeman	Maxine A	21375	New York
Smith	Mary Josephine	21162	New York
Hayes	Eugene F	03693	New York
Oceano Shipping Company, Inc		00611	New York
Dalipi	Ismet	20908	New York
Anthem Worldwide Lines, Inc		20922	New York
Campisi	Peter John	21855	New York
Cooper	Harriet S	04928	New York
Emposimato	Anthony	04930	New York
Sirinek	Douglas W	04663	New York
Aloyd Forwarding Company, Inc		05922	New York
Couret	Jose	05039	New York
McAdam	Michael P	05087	New York
Antonelli	Joseph	04804	New York
Rosenberg	Edward	02869	New York
Kim	Haingduck	16243	New York
Solomon	Julius	02703	New York
Woo	Samantha C. M	17389	New York
Cunningham	Brian P	17376	New York
Koczan	David M	17293	New York
Borriello	Lisa A	14990	New York
Huff	Robin A	13928	New York
Truzzolino	Angela	12636	New York
Kelly	Martin J	03696	New York
Molina	Christian M	17132	New York
Oh	Gloria S	15790	New York
JM Customs Brokers, Inc		13767	New York
Paik	Chong Min	13792	New York
Chang	Young Chan	13909	New York
Kneipher	Charles A	14472	New York
Corsello	Christine	14504	New York
Trovato	Vincent S	12597	New York
Bonvissuto	Michael J	04973	New York
Dib	Jeanne Ohan	16540	New York
Antoniello	Rosario	03602	New York
Johnson	Scott D	17090	New York
Digena	Stephanie	16624	New York
Four Corners, Inc		16691	New York
Juliussen	Ellen	15497	New York
Trachman	Daniel M	18013	New York
Loewenstein	Irwin	03102	New York
Carlstedt	Kenneth David	13049	New York
Moylan	Steven G	15407	Nogales
Fernandez	Clementina	15165	Nogales
Ahumada	Marco	11735	Nogales
Gross	Julia L	10886	Norfolk
Global Trade Resources, Inc	Julia L. Gross	22588	Norfolk
Rhodes	Marvin D	04418	Norfolk
Jones	Darlene Dutton	10884	Norfolk
White	Gordon M	06683	Norfolk
Suslaev	Alexey A	21236	Norfolk
Blankenship	Candice K	10503	Norfolk
Clark	Erin L	22403	Otay Mesa
Cubilla	Phillip A	05884	Otay Mesa
McNally	John V	07900	Otay Mesa
Horacek	Kathleen	15996	Otay Mesa
Le	Tomy	21328	Otay Mesa
Arth	David T	04602	Philadelphia
Dracha	David	20769	Philadelphia
Fritzinger	Amy	22108	Philadelphia
Frederick	Ted D	10654	Philadelphia
Semel	Dana L	15735	Philadelphia
Borgerding	Madonna M	13219	Philadelphia
Myers	Ronald W	15479	Philadelphia
Martinez	Ignatius R	10101	Philadelphia
Trinidad	Lamberto B	07785	Philadelphia
Murphy	Patrick J	08089	Philadelphia
Brown	Kenneth W	10270	Philadelphia
Klingbeil	Susan	10847	Philadelphia
Cook	Edgar G	03771	Portland, ME
Guerra	Ralph M	12372	Portland, ME
Albert	Liane E	17243	Portland, ME
Howland	Edwina K	15243	Portland, ME

Last/company name	First name	License	Port name
Hice	Thomas J	15253	Portland, OR
McCathern	Nora Magdalene	15096	Portland, OR
Bouray	Dale A	05295	Portland, OR
Black	Francis Robert	03547	Providence
McNamara	Diane M	06396	Providence
Carr	Kevin James	20124	San Diego
Bowen	Ted B	15374	San Diego
Romero and McNally Co., Inc		09620	San Diego
Quinby	James C	22706	San Francisco
Miller	Lindy Lois	05238	San Francisco
Daniels	Thomas David	13147	San Francisco
Bradley	Evelyn Marlene	13564	San Francisco
Boyle	Nancy A	05873	San Francisco
McBride	Beth Cheri	08038	San Francisco
Rasheed	Samuel Safwat	06032	San Francisco
Webster	James A	04342	San Francisco
Connolly	Timothy M	22714	San Francisco
McGee	Sally J	06834	San Francisco
Lind	Mary Barbara	07040	San Francisco
Griffin	Gerald W	05536	San Francisco
Kelly	Timothy Edward	13011	San Francisco
Cummins	Sherri Lynn	17474	San Francisco
Elliott	Tracey Susan	10363	San Francisco
Carino	Nina Cynthia	20350	San Francisco
DelaTorre	Frank S	05623	San Francisco
Anderson	Scott Erik	16354	San Francisco
Severino	Olga J	16760	San Francisco
Katson	Denise Simone	11826	San Francisco
Martin	George W	10854	San Francisco
Jung	Peter	20680	San Francisco
Rhode	Stephen A	12346	San Francisco
Abdou	Toni	21047	San Francisco
Mundie	Robert J	10855	San Francisco
Kerti	Janice	09271	San Francisco
Knowles	Gayla J	08091	Savannah
Sutton	Patricia A	10156	Savannah
Sandt	Raymond E	13118	Savannah
Brandsborg Oros	Amy	15069	Savannah
Hurt	Kathy P. (Chance)	09191	Savannah
Bredeman	Kevin	21320	Seattle
Colton	Anna-Marie	21049	Seattle
Brown-Ramby	Holly S	15029	Seattle
Roleter	George R	10238	Seattle
Blue	Michele	22500	Seattle
Thibault	Dennis J	09141	Seattle
Balk	Barbara J	05340	Seattle
Williams	Sam	12026	Seattle
Roznowski	Baerbel K	15178	Seattle
Duerst	Tricia J	15359	Seattle
Tylen	George E	03827	Seattle
Tiffin	Phyllis L	10110	Seattle
Holliday	Wendy C	17561	Seattle
Erwin, II	Robert Charles	13473	Seattle
Johnson	Barbara E	12293	Seattle
Norton	Henry L	02704	Seattle
Noble	Joshua	16198	St. Albans
Rocheleau	Paul A	05990	St. Albans
Demers	Clifton Paul	12611	St. Albans
Midyett	Cheryl Ann	17011	St. Louis
Caudill	Jeramy Eugene	23068	St. Louis
Meester	Jason Wayne	20466	St. Louis
Toye	Bernita Ann	14380	Tampa
Action International Logistics, Inc	John Lebold	22924	Tampa
Reba	Maria	22241	Tampa
ATEC Customs Brokerage, Inc		22923	Tampa
Auditrade, Inc		16550	Tampa
Copeland Company, Inc		04372	Tampa
Duty Recovery Services, Inc		20948	Tampa
Brouillet	Barry F	07930	Tampa
Carson	Lloyd Christopher	17056	Tampa
Fette	Mary M	14871	Tampa
H Conrad & Associates, Inc		12858	Tampa
Cassise	Christopher J	20143	Washington, DC
Jung	Holly D	16706	Washington, DC

Last/company name	First name	License	Port name
Gwilliam	Josette	05781	Washington, DC
Ferguson	Anthony R	10934	Washington, DC
Soyka	David	22351	Washington, DC
Moritsugu	Erika L	23065	Washington, DC
St. John	Julia E	12205	Washington, DC
Barr	Richard P	23924	Washington, DC

Dated: November 10, 2011.

Allen Gina,

Assistant Commissioner, Office of International Trade.

[FR Doc. 2011–29868 Filed 11–17–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Notice of Revocation of Customs Broker Licenses

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: Customs broker license revocations for the failure to file the 2006 triennial status report and applicable fee.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 U.S.C. 1641) and Title 19 of the Code of Federal Regulations at section 111.30(d), the following Customs broker licenses are revoked without prejudice.

Dallas	Denise Corriveau	13248
Dallas	Barbara Fredrick	15115
Dallas	Earl Hartley	5618
Dallas	Margaret L. Kelcey	12832
Dallas	Bryan McCarty	20621
Dallas	Darko Najsul	21778
Dallas	Pamela J. Santiago	16150
Dallas	Dale Syth	22026
Dallas	Shelly L. Wares	16225
Seattle	Karen Anderson	16174
Seattle	Dennis Boatman	04433
Seattle	Steven Brimmer	05605
Seattle	Alan Canzano	14701
Seattle	Gordon Dickson	02794
Seattle	Pauline Donohue	15466
Seattle	Barbara Frazier	16892
Seattle	Mary Freeman	09980
Seattle	Jack Gillam	03890
Seattle	Scott Kauffman	17560
Seattle	De Illa Lamb	11978
Seattle	Karen Lovely	10411
Seattle	Lori Murvin	20341
Seattle	Douglas Shaver	06888
Seattle	Robert Shreve	05477
Seattle	Billie Ulricksen	05794
Seattle	Brenda Young	16783

For the Triennial Report filing period of 2006, Customs and Border Protection notified the above-identified brokers via certified mail, return receipt at their last known address that the Triennial Report was due. At the time of publication of the Notice of Cancellation of Customs Broker License the above-identified brokers were inadvertently omitted. *See* Notice of Cancellation of Customs Broker License, dated July 25, 2006 (71 FR 42105). The current Notice of Revocation of Customs Broker Licenses will correct this administrative oversight.

Dated: November 10, 2011.

Allen Gina,

Assistant Commissioner, Office of International Trade.

[FR Doc. 2011–29876 Filed 11–17–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5484–N–35]

Notice of Proposed Information Collection: Comment Request; Single Family Premium Collection Subsystem—Periodic (SFPCS–P)

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date: January 17, 2012.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–(800) 877–8339).

FOR FURTHER INFORMATION CONTACT: Pauline Devore, Acting Branch Chief, Single Family Insurance Operations Branch, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 402–8311 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Single Family Premium Collection Subsystem—Periodic (SFPCS–P).

OMB Control Number, if applicable: 2502–0536.

Description of the need for the information and proposed use: The Single Family Premium Collection Subsystem—Periodic (SFPCS–P) allows the lenders to remit the Periodic Mortgage Insurance Premiums using funds obtained from the mortgagor during the collection of the monthly mortgage payment. The SFPCS–P strengthens HUD's ability to manage and process periodic single-family mortgage insurance premium collections and corrections to submitted data. It also improves data integrity for the Single Family Mortgage Insurance Program. Therefore, the FHA approved lenders use Automated Clearing House (ACH) application for all transmissions with SFPCS–P. The authority for this collection of information is specified in

24 CFR 203.264 and 24 CFR 203.269. In general, the lenders use the ACH application to remit the periodic premium payments through SFPCS–P for the required FHA insured cases and to comply with the Credit Reform Act.

Agency form numbers, if applicable: None.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The public reporting burden for this collection of information is estimated as the number of hours needed to prepare the information collection is 2,765 annually, the estimated number of respondents is 1,536 annually, the frequency of response is monthly generating 18,432 responses annually, and the estimated time per response is approximately 15 minutes. Since remittances are made through the ACH applications the periodic remittance is submitted electronically and there is no paperwork to complete and mail in.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., chapter 35, as amended.

Dated: November 10, 2011.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing .

[FR Doc. 2011–29919 Filed 11–17–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–114]

Notice of Submission of Proposed Information Collection to OMB; Moving to Work Demonstration

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

All PHAs are required to submit annual plans, however, PHAs with Moving to Work demonstration agreements (29 at the time of submission of this request) the annual MTW plan and annual MTW report are submitted in lieu of the standard annual and 5 year PHA plans. Revisions are being made to this 50900 form to streamline the process of Agencies submitting required Annual Plan and Report Data to HUD so that the Department is able to better respond to Congressional and other inquiries regarding outcome measures obtained and promising practices learned throughout the duration of the demonstration.

DATES: *Comments Due Date: December 19, 2011.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–0216) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; *fax:* (202) 395–5806. *Email: 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; email Colette Pollard at *Colette.Pollard@hud.gov.* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice Also Lists the Following Information

Title of Proposal: Moving to Work Demonstration.

OMB Approval Number: 2577–0216.

Form Numbers: HUD–50900.

Description of the Need for the Information and its Proposed Use:

All PHAs are required to submit annual plans, however, PHAs with Moving to Work demonstration agreements (29 at the time of submission of this request) the annual MTW plan and annual MTW report are submitted in lieu of the standard annual and 5 year PHA plans. Revisions are being made to this 50900 form to streamline the process of Agencies submitting required Annual Plan and Report Data to HUD so that the Department is able to better respond to Congressional and other inquiries regarding outcome measures obtained and promising practices learned throughout the duration of the demonstration.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	33	13.090		10		4,320

Total Estimated Burden Hours: 4,320.

Status: Revision of a currently previously approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: November 10, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–29917 Filed 11–17–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5374–N–35]

Buy American Exceptions Under the American Recovery and Reinvestment Act of 2009

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: In accordance with the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–05, approved February 17, 2009) (Recovery Act), and implementing guidance of the Office of Management and Budget (OMB), this notice advises that certain exceptions to the Buy American requirement of the Recovery Act have been determined applicable for work using Capital Fund Recovery Formula and Competition (CFRFC) grant funds. Specifically, exceptions were granted to the Philadelphia Housing Authority for the purchase and installation of a single zone, ductless split Heating, Ventilation and Air Conditioning (HVAC) system for the Plymouth Hall Apartments project, and to the Chattanooga Housing Authority for the purchase and installation of linoleum flooring for its Fairmount Avenue Townhomes project.

FOR FURTHER INFORMATION CONTACT: Donald J. LaVoy, Deputy Assistant Secretary for Office of Field Operations, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4112, Washington, DC 20410–4000, telephone number (202) 402–8500 (this is not a toll-free number); or Dominique G. Blom, Deputy Assistant Secretary for Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4130, Washington DC, 20410–4000, telephone number (202) 402–8500 (this is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Section 1605(a) of the Recovery Act provides that none of the funds appropriated or made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. Section 1605(b) provides that the Buy American requirement shall not apply in any case or category in which the head of a Federal department or agency finds that: (1) Applying the Buy American requirement would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality, or (3) inclusion of iron, steel, and manufactured goods will increase the cost of the overall project by more than 25 percent. Section 1605(c) provides that if the head of a Federal department or agency makes a determination pursuant to section 1605(b), the head of the department or agency shall publish a detailed written justification in the **Federal Register**.

In accordance with section 1605(c) of the Recovery Act and OMB's implementing guidance published on April 23, 2009 (74 FR 18449), this notice advises the public that, on October 20, 2011, the following exceptions were granted:

1. *Philadelphia Housing Authority.* Upon request of the Philadelphia Housing Authority, HUD granted an exception to applicability of the Buy American requirements with respect to work, using CFRFC grant funds, in connection with the Plymouth Hall Apartments project. The exception was granted by HUD on the basis that the relevant manufactured goods (split HVAC systems) are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality.

2. *Chattanooga Housing Authority.* Upon request of the Chattanooga Housing Authority, HUD granted an exception to applicability of the Buy American requirements with respect to work, using CFRFC grant funds, in connection with its Fairmount Avenue Townhomes project. The exception was granted by HUD on the basis that the relevant manufactured goods (linoleum flooring) are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality.

Dated: November 8, 2011.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2011–29908 Filed 11–17–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5477–N–46]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at (800) 927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: November 10, 2011.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. 2011–29631 Filed 11–17–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5587–N–01]

Notice of HUD-Held Multifamily and Healthcare Loan Sale (MHLS 2012–1)

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of sale of mortgage loans.

SUMMARY: This notice announces HUD's intention to sell certain unsubsidized multifamily and healthcare mortgage loans, without Federal Housing Administration (FHA) insurance, in a competitive, sealed bid sale (MHLS 2012–1). This notice also describes generally the bidding process for the sale and certain persons who are ineligible to bid.

DATES: The Bidder's Information Package (BIP) will be made available to qualified bidders on November 16, 2011. Bids for the loans must be submitted on the bid date, which is currently scheduled for December 14, 2011. HUD anticipates that awards will be made on or before December 15, 2011. Closings are expected to take place between December 21, 2011 and January 6, 2012.

ADDRESSES: To become a qualified bidder and receive the BIP, prospective bidders must complete, execute, and submit a Confidentiality Agreement and a Qualification Statement acceptable to HUD. Both documents will be available on the HUD Web site at *http://www.hud.gov/fhaloansales.* Please mail and fax executed documents to KDX Ventures: KDX Ventures, c/o The Debt Exchange, 133 Federal Street 10th Floor, Boston, MA 02111, *Attention:* MLS 2012–1 Sale Coordinator, *Fax:* 1–(617) 531–3499.

FOR FURTHER INFORMATION CONTACT: John Lucey, Deputy Director, Asset Sales Office, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Room 3136, Washington, DC 20410–8000; *telephone* (202) 708–2625, extension 3927. Hearing- or speech-impaired individuals may call (202) 708–4594 (TTY). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: HUD announces its intention to sell in MHLS 2012–1 certain unsubsidized mortgage loans (Mortgage Loans) secured by multifamily and healthcare properties located throughout the United States. The Mortgage Loans are comprised of non-performing mortgage loans. A final listing of the Mortgage Loans will be included in the BIP. The Mortgage Loans will be sold without FHA insurance and with servicing released. HUD will offer qualified bidders an opportunity to bid competitively on the Mortgage Loans.

The Mortgage Loans may be stratified for bidding purposes into several mortgage loan pools. Each pool may contain Mortgage Loans that generally have similar performance, property type, geographic location, lien position and other characteristics. Qualified bidders may submit bids on one or more pools of Mortgage Loans or may bid on individual loans. A mortgagor who is a qualified bidder may submit an individual bid on its own Mortgage Loan. Interested Mortgagors should review the Qualification Statement to determine whether they may also be eligible to qualify to submit bids on one or more pools of Mortgage Loans or on individual loans in MHLS 2012–1.

The Bidding Process

The BIP will describe in detail the procedure for bidding in MHLS 2012–1. The BIP will also include a standardized non-negotiable loan sale agreement (Loan Sale Agreement).

As part of its bid, each bidder must submit a deposit equal to the greater of $100,000 or 10% of the bid price. In the event the bidder's aggregate bid is less than $100,000, the minimum deposit shall be not less than fifty percent (50%) of the bidder's aggregate bid. HUD will evaluate the bids submitted and determine the successful bids in its sole and absolute discretion. If a bidder is successful, the bidder's deposit will be non-refundable and will be applied toward the purchase price. Deposits will be returned to unsuccessful bidders. Closings are scheduled to occur between December 21, 2011 and January 6, 2012.

These are the essential terms of sale. The Loan Sale Agreement, which will be included in the BIP, will contain additional terms and details. To ensure a competitive bidding process, the terms of the bidding process and the Loan Sale Agreement are not subject to negotiation.

Due Diligence Review

The BIP will describe the due diligence process for reviewing loan files in MHLS 2012–1. Qualified bidders will be able to access loan information remotely via a high-speed Internet connection. Further information on performing due diligence review of the Mortgage Loans will be provided in the BIP.

Mortgage Loan Sale Policy

HUD reserves the right to add Mortgage Loans to or delete Mortgage Loans from MHLS 2012–1 at any time prior to the Award Date. HUD also reserves the right to reject any and all bids, in whole or in part, without prejudice to HUD's right to include any Mortgage Loans in a later sale. Mortgage Loans will not be withdrawn after the Award Date except as is specifically provided in the Loan Sale Agreement.

This is a sale of unsubsidized mortgage loans, pursuant to Section 204(a) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, 12 U.S.C. 1715z–11a(a).

Mortgage Loan Sale Procedure

HUD selected a competitive sale as the method to sell the Mortgage Loans. This method of sale optimizes HUD's return on the sale of these Mortgage Loans, affords the greatest opportunity for all qualified bidders to bid on the Mortgage Loans, and provides the quickest and most efficient vehicle for HUD to dispose of the Mortgage Loans.

Bidder Eligibility

In order to bid in the sale, a prospective bidder must complete, execute and submit both a Confidentiality Agreement and a Qualification Statement acceptable to HUD. The following individuals and entities are ineligible to bid on any of the Mortgage Loans included in MHLS 2012–1:

1. Any employee of HUD, a member of such employee's household, or an entity owned or controlled by any such employee or member of such an employee's household;

2. Any individual or entity that is debarred, suspended, or excluded from doing business with HUD pursuant to Title 24 of the Code of Federal Regulations, Part 24, and Title 2 of the Code of Federal Regulations, Part 2424;

3. Any contractor, subcontractor and/or consultant or advisor (including any agent, employee, partner, director, principal or affiliate of any of the foregoing) who performed services for, or on behalf of, HUD in connection with MHLS 2012–1;

4. Any individual who was a principal, partner, director, agent or employee of any entity or individual described in subparagraph 3 above, at any time during which the entity or individual performed services for or on behalf of HUD in connection with MHLS 2012–1;

5. Any individual or entity that uses the services, directly or indirectly, of any person or entity ineligible under subparagraphs 1 through 4 above to assist in preparing any of its bids on the Mortgage Loans;

6. Any individual or entity which employs or uses the services of an employee of HUD (other than in such employee's official capacity) who is involved in MHLS 2012–1;

7. Any affiliate, principal or employee of any person or entity that, within the two-year period prior to December 1, 2011, serviced any of the Mortgage Loans or performed other services for or on behalf of HUD;

8. Any contractor or subcontractor to HUD that otherwise had access to information concerning the Mortgage Loans on behalf of HUD or provided services to any person or entity which, within the two-year period prior to December 1, 2011, had access to information with respect to the Mortgage Loans on behalf of HUD;

9. Any employee, officer, director or any other person that provides or will provide services to the potential bidder with respect to such Mortgage Loans during any warranty period established for the Loan Sale, that (x) serviced any of the Mortgage Loans or performed other services for or on behalf of HUD or (y) within the two-year period prior to December 1, 2011, provided services to any person or entity which serviced, performed services or otherwise had access to information with respect to the Mortgage Loans for or on behalf of HUD;

10. Any mortgagor or operator that failed to submit to HUD on or before November 30, 2011, audited financial statements for fiscal years 2007 through 2010 (for such time as the project has been in operation or the prospective bidder served as operator, if less than three (3) years) for a project securing a Mortgage Loan;

11. Any individual or entity and any Related Party (as such term is defined in the Qualification Statement) of such individual or entity that is a mortgagor in any of HUD's multifamily and/or healthcare housing programs and that is in default under such mortgage loan or is in violation of any regulatory or business agreements with HUD, unless such default or violation is cured on or before November 30, 2011;

Prospective bidders should carefully review the Qualification Statement to determine whether they are eligible to submit bids on the Mortgage Loans in MHLS 2012–1.

Freedom of Information Act Requests

HUD reserves the right, in its sole and absolute discretion, to disclose information regarding MHLS 2012–1, including, but not limited to, the identity of any successful bidder and its bid price or bid percentage for any pool of loans or individual loan, upon the closing of the sale of all the Mortgage Loans. Even if HUD elects not to publicly disclose any information relating to MHLS 2012–1, HUD will have the right to disclose any information that HUD is obligated to disclose pursuant to the Freedom of Information Act and all regulations promulgated thereunder.

Scope of Notice

This notice applies to MHLS 2012–1 and does not establish HUD's policy for the sale of other mortgage loans.

Dated: November 14, 2011.

Carol J. Galante,

Acting Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2011–29920 Filed 11–17–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

Outer Continental Shelf (OCS), Eastern Gulf of Mexico, Oil and Gas Lease Sales for Years 2012–2017

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Call for Information and Nominations/Notice of Intent (Call/NOI) to Prepare an Environmental Impact Statement (EIS).

SUMMARY: This Call for Information and Nominations (hereinafter referred to as ''Call'') is the initial step in a multi-sale process covering all lease sales in the Eastern Planning Area (EPA) in the Gulf of Mexico (GOM) to be included in the OCS Oil and Gas Leasing Program for 2012–2017. Two EPA lease sales are specifically covered by this Call. Simultaneously with this Call, BOEM is preparing a multi-sale EIS covering the same sales in the EPA. Comments received in response to the NOI will assist BOEM in developing the scope of the EIS.

DATES: Information and Nominations submitted in response to the Call must be received no later than December 19, 2011. Comments on the NOI must be received no later than January 3, 2012 at the addresses specified below.

FOR FURTHER INFORMATION CONTACT: For information on the Call, please contact Mr. Carrol Williams, Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard (MS 5422), New Orleans, Louisiana 70123–2394, *telephone* (504) 736–2803. For information on the NOI, you may contact Mr. Gary Goeke, Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard (MS 5412), New Orleans, Louisiana 70123–2394, *telephone* (504) 736–3233.

SUPPLEMENTARY INFORMATION: On November 8, 2011, the Department of the Interior released a Proposed OCS Oil and Gas Leasing Program for 2012–2017. The OCS Oil and Gas Leasing Program 2012–2017 Draft PEIS, prepared by BOEM to support the Proposed Program, is available for comment through January 9, 2012. This multi-sale Call covers only the lease sales in the EPA that are proposed for inclusion in the OCS Oil and Gas Leasing Program for 2012–2017.

Gulf of Mexico OCS Oil and Gas Lease Sale 224 was held on March 19, 2008. The EIS which will be prepared subsequent to this Call/NOI will analyze a larger area in the EPA than was addressed in the Gulf of Mexico OCS Oil and Gas Lease Sale 224, Final Supplemental EIS (OCS EIS/EA BOEMRE 2007–060); this EIS will address the lease Sale 224 area plus the 109,977-acre triangular area located immediately south of the Lease Sale 224 area.

Call for Information and Nominations

1. Authority

This Call is published pursuant to the Outer Continental Shelf Lands Act (OCSLA) as amended (43 U.S.C. 1331 *et seq.*), and the implementing regulations (30 CFR part 556).

2. Purpose of Call

The purpose of the Call is to gather information for the following tentatively scheduled OCS lease sales:

OCS planning area sale	Tentative lease sale year
EPA Sale 225	2014
EPA Sale 226	2016

BOEM seeks information and nominations on oil and gas leasing, exploration, development, and production within this portion of the EPA from all interested parties. This early planning and consultation step ensures that all interests and concerns are communicated to the Department of the Interior for its future decisions in the leasing process pursuant to section 18 of OCSLA (43 U.S.C. 1344) and implementing regulations (30 CFR part 556).

Pursuant to section 18 of OCSLA (43 U.S.C. 1344), the Secretary of the Interior is separately developing the 5-year Program for 2012–2017; this Call should not be construed as a prejudgment by the Secretary concerning any area to be made available for leasing under the 2012–2017 5-year Program.

This Call does not indicate a preliminary decision to lease in the area described below. Leasing within this area will be in compliance with applicable laws including all requirements of the National

Environmental Policy Act, Coastal Zone Management Act and OCSLA and established departmental procedures.

3. Description of Area

The general area of this Call covers approximately 657,905 acres in the EPA in the GOM, which includes the Sale 224 Area and a triangular area south of the Sale 224 area. The entire Sale 225 area is bordered on the north by a 200-mile buffer drawn south of the Florida coastline, on the west by the Central Planning Area boundary, and on the east by the Military Mission Line (86° 41′ W). The area is south of eastern Alabama and western Florida; the nearest point of land is 125 miles northwest in Louisiana. A standard Call for Information Map depicting this portion of the EPA is available without charge from the Bureau of Ocean Energy Management, Public Information Office (MS 5034), 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, or by telephone at 1–(800)–200–GULF. The map is also available via the BOEM Web site at *http://www.boem.gov.*

4. Instructions on the Call

Indications of interest and comments must be received no later than 30 days following publication of this document in the **Federal Register** in envelopes labeled ''Comments on the Call for Information for EPA Lease Sales for the years 2012–2017 in the GOM,'' submitted to the Gulf of Mexico OCS Region's Leasing and Financial Responsibility Section (Attention: Mr. Carrol Williams) at the previously noted address.

The standard Call for Information Map delineates the Call area, all of which has been identified by BOEM as having potential for the discovery of accumulations of oil and gas.

Comments are sought from all interested parties about particular geological, environmental (including natural disasters), biological, archaeological, and socioeconomic conditions or conflicts, or other information that might bear upon the potential leasing and development of this area. Comments are also sought on potential conflicts between future OCS oil and gas activities that may result from the proposed lease sale and State Coastal Management Programs (CMPs). If possible, these comments should identify specific CMP policies of concern, the nature of the conflict foreseen, and steps that BOEM could take to avoid or mitigate the potential conflict. Comments may be in terms of broad areas or restricted to particular blocks of concern. Those submitting comments are requested to list block numbers or outline the subject area on the standard Call for Information Map.

5. Use of Information From Call

Information submitted in response to this Call will be used for several purposes. First, comments on possible environmental effects and potential use conflicts will be used in the analysis of environmental conditions in and near the Call area. Comments on environmental and other use conflicts will be used to make a preliminary determination of the potential advantages and disadvantages of oil and gas exploration and development to the region and the Nation. A second purpose for this Call is to use the comments collected in the scoping process to develop proposed actions and alternatives. Third, comments may be used in developing lease terms and conditions to ensure environmentally safe offshore operations. Finally, comments may be used to assess potential conflicts between offshore gas and oil activities and State CMPs.

Individual indications of interest in areas for mineral leasing are considered to be privileged and proprietary information. The names of persons or entities submitting comments or indicating interest will be treated by BOEM as information that may be released to the public. Comments will likewise be released, except that actual individual indications of interest in areas for mineral leasing, trade secrets, commercial or financial information will be treated as confidential and proprietary information that is privileged and will not be released to the public.

6. Existing Information

BOEM routinely assesses the status of information acquisition efforts and the quality of the information base for potential decisions on tentatively scheduled lease sales. An extensive environmental studies program has been underway in the GOM since 1973. The emphasis, including continuing studies, has been on ''environmental analysis'' of biologically sensitive habitats, physical oceanography, ocean-circulation modeling, ecological and socio-economic effects of oil and gas activities, and the effects of hurricanes on coastal communities and environments.

You may obtain a complete listing of available study reports and information for ordering copies from the Public Information Office referenced above. You may also order the reports for a fee by contacting the U.S. Department of Commerce at: U.S. Department of Commerce, National Technical Information Service, 5301 Shawnee Road, Springfield, Virginia 22312, or by *telephone:* (703) 605–6000 or (800) 553–6847. In addition, you may obtain a program status report for continuing studies in this area by contacting BOEM at: Chief, Environmental Sciences Section (MS 5430), Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, by *telephone:* (504) 736–2752, or via the BOEM Web site at *http://www.boem.gov/Environmental-Stewardship/Environmental-Studies/Gulf-of-Mexico-Region/GOMR-Studies.aspx.*

7. Tentative Schedule for the First EPA Sale

NOI to Prepare an EIS	November 2011.
Call for Information and Nominations	November 2011.
Comments Received on Call	December 2011.
Comments Received on NOI	January 2012.
Scoping Meetings	January 2012.
Area Identification Decision	February 2012.
Draft EIS Published	July–August 2012.
Public Hearings on Draft EIS	September 2012.
Final EIS Published	April 2013.
Proposed Notice of Sale and Coastal Zone Management Consistency Determination	September–October 2014.
Final Notice of Sale	February 2014.
Tentative Lease Sale Date	March 2014.

Notice of Intent To Prepare an Environmental Impact Statement

1. Authority

The NOI is published pursuant to the regulations (40 CFR 1501.7) implementing the provisions of the NEPA of 1969, as amended (42 U.S.C. 4321 *et seq.* (1988)).

2. Purpose of the Notice of Intent

Pursuant to the regulations implementing the procedural provisions of NEPA, BOEM is announcing its intent to prepare an EIS on oil and gas lease sales tentatively scheduled in 2012–2017 in the EPA offshore the States of Alabama and Florida. The NOI serves to announce the scoping process for this EIS. Throughout the scoping process, Federal, state, and local government agencies and other interested parties have the opportunity to aid BOEM in determining the significant issues and alternatives for analysis in the EIS. BOEM will use and coordinate the NEPA commenting process to satisfy the public involvement process for Section 106 of the National Historic Preservation Act (16 U.S.C. 470f), as provided for in 36 CFR 800.2(d)(3).

The EIS analysis will focus on the potential environmental and socioeconomic effects of oil and natural gas leasing, exploration, development, and production in the area identified through the Area Identification process as the proposed lease sale areas. In addition to the no action alternative (*i.e.,* hold no sale), other alternatives may be considered for each sale such as deferring certain areas from the proposed lease sales.

3. Supplemental Information

On July 18, 2008, the President announced the lifting of the Presidential Withdrawal for all areas of the OCS except for marine sanctuaries. The lifting of this withdrawal made available some acreage in the Gulf of Mexico that is not under the Gulf of Mexico Energy Security Act moratoria. One of these areas in the EPA is a triangle approximately 39 miles long and approximately 8 miles wide at its widest point with blocks and portions of blocks in the Lloyd Ridge and Henderson areas; it is immediately south of the Sale 224 Area.

For more information on the EIS, you may contact Mr. Gary Goeke at the Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard (MS 5412), New Orleans, Louisiana 70123–2394.

4. Cooperating Agency

BOEM invites other Federal agencies and state, Tribal, and local governments to consider becoming cooperating agencies in the preparation of the EIS. We invite qualified government entities to inquire about cooperating agency status for the EIS. Following the guidelines from the Council on Environmental Quality (CEQ), qualified agencies and governments are those with ''jurisdiction by law or special expertise.'' Potential cooperating agencies should consider their authority and capacity to assume the responsibilities of a cooperating agency and note that an agency's role in the environmental analysis neither enlarges nor diminishes the final decisionmaking authority of any other agency involved in the NEPA process. Upon request, BOEM will provide potential cooperating agencies with a written summary of ground rules for cooperating agencies, including time schedules and critical action dates, milestones, responsibilities, scope and detail of cooperating agencies' contributions, and the availability of pre-decisional information. BOEM anticipates this summary will form the basis for a Memorandum of Understanding between BOEM and each cooperating agency. Agencies should also consider the ''Factors for Determining Cooperating Agency Status'' in Attachment 1 to CEQ's January 30, 2002, *Memorandum for the Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act.* A copy of this document is available at *http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html* and *http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagencymemofactors.html.*

BOEM, as the lead agency, will not provide financial assistance to cooperating agencies. Yet, even if an organization is not a cooperating agency, opportunities exist to provide information and comments to BOEM during the normal public input phases of the NEPA/EIS process. If further information about cooperating agencies is needed, please contact Mr. Gary Goeke at (504) 736–3233.

5. Comments

Federal, state, and local government agencies and other interested parties are requested to send their written comments on the scope of the EIS, significant issues that should be addressed, alternatives that should be considered, and scenario development in either of the following ways:

a. In written form enclosed in an envelope labeled ''Comments on the EIS'' and mailed (or hand carried) to the Regional Supervisor, Environment (MS 5400), Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394.

b. Electronically to the BOEM email address: *Gary.Goeke@boem.gov.*

Comments should be submitted no later than 45 days from the publication of this NOI.

Notice of Public Scoping Meetings on the Environmental Impact Statement

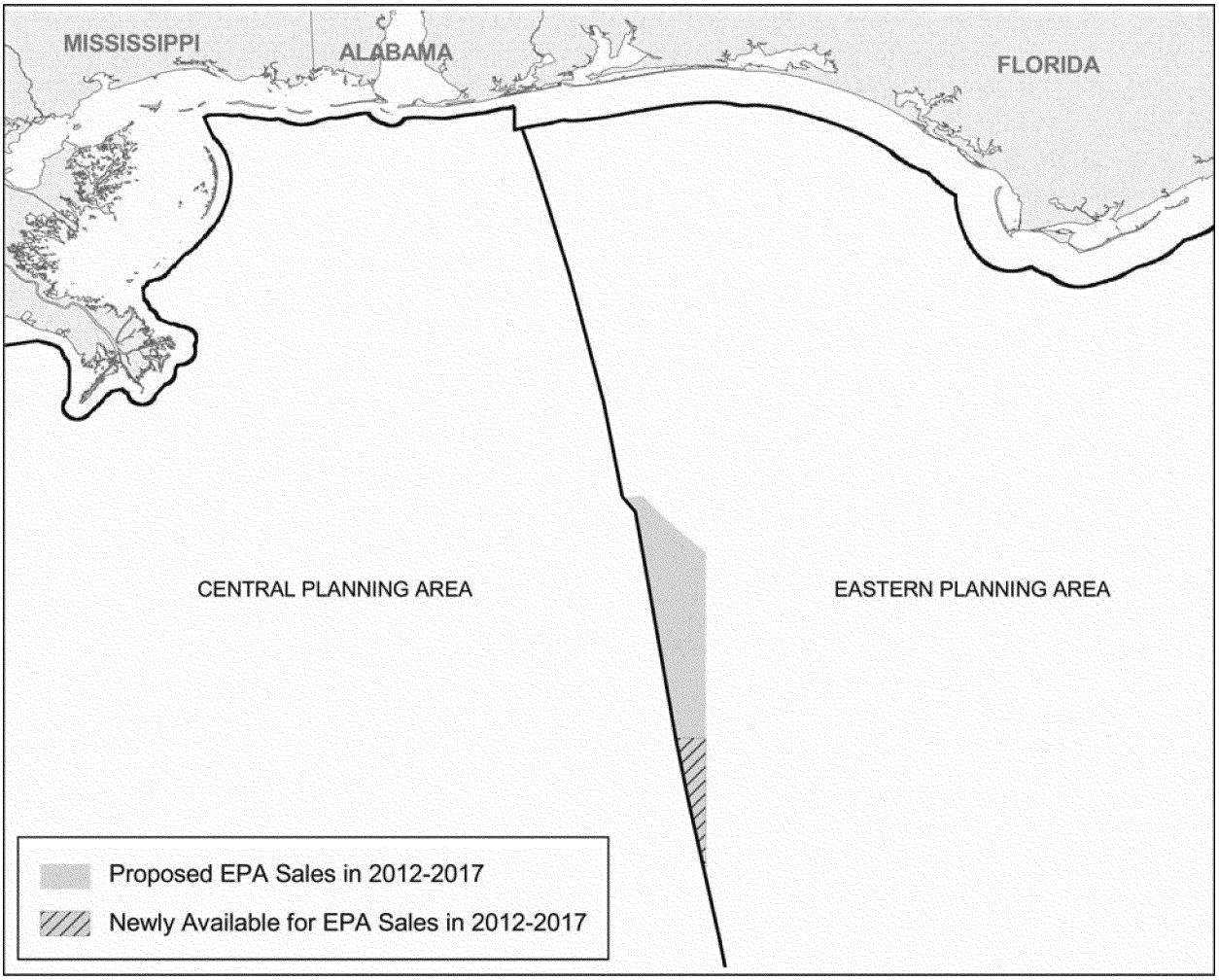
Pursuant to the regulations implementing the procedural provisions of NEPA (42 U.S.C. 4321 *et seq.*), BOEM will hold public scoping meetings in Louisiana, Alabama, and Florida on the EIS for the tentatively scheduled 2012–2017 oil and gas leasing proposal in the EPA. The purpose of these meetings will be to solicit comments on the scope of the EIS. The public scoping meetings will be scheduled at a later date and a FR notice will be published announcing the date, time and location of the meetings.

For further information about the scoping meetings, contact Mr. Gary Goeke at the Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard (MS 5412), New Orleans, Louisiana 70123–2394, or by telephone (504) 736–3233.

Dated: November 7, 2011.

Tommy P. Beaudreau,

Director, Bureau of Ocean Energy Management.



[FR Doc. 2011–29854 Filed 11–17–11; 8:45 am]
BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2010–N248; 1265–0000–10137–S3]

Pearl Harbor National Wildlife Refuge, Honolulu 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 (Service), announce the availability of the final comprehensive conservation plan (CCP) and a finding of no significant impact (FONSI) for the CCP for Pearl Harbor National Wildlife Refuge (Refuge). The CCP describes how we will manage the Refuge for the next 15 years.

DATES: The FONSI was signed on September 30, 2010. The CCP and FONSI are available now. Implementation of the CCP can begin immediately.

ADDRESSES: You may view or obtain copies of the Final CCP and FONSI/EA by any of the following methods. You may request a hard copy or CD–ROM.

Agency Web site: Download a copy of the document(s) at *http://www.fws.gov/pacific/planning/main/docs/HI-PI/docsjcpearl.htm.*

Email: Laura_Beauregard@fws.gov. Include ''Pearl Harbor final CCP'' in the subject.

Mail: O'ahu National Wildlife Refuge Complex, 66–590 Kamehameha Highway, Room 2C, Hale'iwa, HI 96712.

FOR FURTHER INFORMATION CONTACT: David Ellis, Project Leader, (808) 637–6330.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for the Refuge. We started this process through a notice in the **Federal Register** (73 FR 72826; December 1, 2008). We released the Draft CCP/EA to the public, announcing and requesting comments in a notice of availability in the **Federal Register** (75 FR 56130; September 15, 2010).

Pearl Harbor Refuge is located on the southern coast of the island of O'ahu and is comprised of three units, the Honouliuli Unit, Waiawa Unit, and Kalaeloa Unit. The Honouliuli and Waiawa units are wetland units located on the shores of Pearl Harbor. The 37-acre Honouliuli Unit and 25-acre Waiawa Unit were established in 1972 to protect and enhance habitat for endangered Hawaiian waterbirds. Habitats found on these units include open water, freshwater marsh, mudflat, grassland, and shrubland. The units provide important breeding, feeding, and resting areas for endangered waterbirds, a variety of migratory waterfowl, shorebirds, and other wetland birds. Neither unit is open to the general public; however, a grade school wetland education program is administered under a special use permit at the Honouliuli Unit.

The 38-acre Kalaeloa Unit is a coastal unit on O'ahu's southwestern point, and was once part of the Barbers Point Naval Air Station (NAS) within the arid 'Ewa Plains. When the NAS closed in 2001, the unit was established to protect and enhance habitat for the endangered 'Ewa hinahina plant. The unit contains the largest remnant stand of 'Ewa hinahina and a repatriated population of 'akoko, another endangered plant. We manage the unit's plant populations by planting native plant species and controlling invasive plants. The unit also contains exposed ancient coral shelf, rocky shoreline, and unique anchialine pool microhabitats. These small brackish/saltwater pools are found in the raised limestone coral reef, and are connected to the ocean via tiny subterranean cracks and crevices within the coralline substrate. Anchialine pools support unique insects, plants, and animals, including two imperiled species of native shrimp. The Refuge's volunteer program includes college-level education programs and habitat restoration activities on the unit. The Kalaeloa Unit is closed to the general public.

We announce our decision and the availability of the FONSI for the final CCP for the 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, and the Alaska National Interest Lands Conservation Act of 1980 (94 Stat. 2371; ANILCA) require us to develop a CCP for every 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 Administration Act and ANILCA.

CCP Alternatives, Including Selected Alternative

We identified several issues in our Draft CCP/EA. To address the issues, we developed and evaluated two alternatives, a brief summary of each one follows.

Alternative A is the no-action alternative. Under Alternative A, we would continue current management activities. On the wetlands of the Honouliuli and Waiawa units, we would continue to control predators and manage and protect habitat for endangered Hawaiian waterbirds, as part of the Statewide effort to implement the Hawaiian Waterbird Recovery Plan. Control of invasive plant species would be modest, and intensive predator control would continue. On the Kalaeloa Unit, we would continue to restore and manage endangered plants and control invasive plants at the current level. Protection would continue for 14 existing anchialine pools on the Kalaeloa Unit, but no additional pools would be protected. We would continue to cooperate with the Bishop Museum to catalog avian and other fossil remains from the pools.

Under both alternatives entry into the fenced portions of the Refuge units would continue by special use permit. The Betty Bliss Memorial Overlook would be constructed outside of the Honouliuli Unit's fence, to provide new year-round interpretation, wildlife viewing, and photography opportunities. The coastal foot trail outside of the Kalaeloa Unit's fence would remain open to the public for shoreline fishing. Both alternatives would protect threatened and endangered species and cultural resources.

Under Alternative B, the selected alternative, we would focus management efforts at the Kalaeloa Unit on increasing the restoration of native and rare coralline plain habitat. We would increase the existing 25-acre restoration area to 37 acres. Controlling and reducing invasive plants, and establishing native plants would be emphasized. We would protect 14 existing anchialine pools, identify additional pool sites for potential restoration, and continue with translocation of endangered Hawaiian damselflies (pinapinao) to suitable habitat in the anchialine pools. We would develop a foot trail system for guided tours. We would expand volunteer, research, and environmental education opportunities, including working with partners such as the Bishop Museum and the Smithsonian Institution to pursue an in-depth paleontological study of the entire unit.

On the Honouliuli and Waiawa units, under Alternative B, we would increase wetland management to improve the units' overall capacity to support endangered waterbirds. Water level and vegetation management and invasive species control, including predator control, would be improved as part of the Statewide effort to implement the Hawaiian Waterbird Recovery Plan. On the Honouliuli Unit we would remove exotic mangrove on 5 acres to improve and maintain intertidal mudflat habitat. We would also determine the feasibility of installing a predator-proof fence. At the Waiawa Unit we would work with partners and neighbors to determine the feasibility of developing an additional overlook.

Comments

We solicited comments on the Draft CCP/EA from August 16, 2010, to September 15, 2010. We received 2 comment letters on the Draft CCP/EA during the review period. We incorporated these comments into the CCP when possible, and we responded to the comments in an appendix to the CCP.

Selected Alternative

After considering the comments we received, we selected Alternative B for implementation. Under the selected alternative we will:

- Increase rare coralline plain habitat restoration at the Kalaeloa Unit.
- Control and reduce invasive plants and establish native plants.
- Develop a foot trail system for guided tours.
- Protect 14 existing anchialine pools, identify additional pool sites for potential restoration, and continue translocating endangered Hawaiian damselflies (pinapinao) to suitable habitat in the anchialine pools.
- Expand volunteer, research, and environmental education opportunities, including working with partners.
- Increase our level of wetland management on the Honouliuli and Waiawa units to improve the units' overall capacity to support endangered waterbirds.
- Improve water level and vegetation management, and invasive species control, including predator control, as part of the Statewide effort to implement the Hawaiian Waterbird Recovery Plan.
- Remove exotic mangrove on 5 acres of the Honouliuli Unit to improve and maintain intertidal mudflat habitat.
- Determine the feasibility of installing a predator-proof fence.

• Work with partners and neighbors on the Waiawa Unit to determine the feasibility of developing an additional overlook.

Public Availability of Documents

In addition to the methods in **ADDRESSES**, you can view or obtain documents on our Web site at *http://www.fws.gov/pearlharbor/planning.html,* and at the following libraries during regular library hours: Hawai'i State Library, 478 S. King St., Honolulu, HI 96813, telephone number (808) 586–3500; and Pearl City Public Library, 1138 Waimano Home Road, Pearl City, HI 96782, telephone number (808) 453–6566.

Dated: November 4, 2011.

Robyn Thorson,

Regional Director, Region 1, Portland, Oregon.

[FR Doc. 2011–29795 Filed 11–17–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Renewal of Agency Information Collection for Class III Tribal-State Gaming Compact Process; Request for Comments

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of submission to OMB.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Bureau of Indian Affairs (BIA) is submitting to the Office of Management and Budget (OMB) a request for renewal for the collection of information for the Class III Tribal State Gaming Compact Process. The information collection is currently authorized by OMB Control Number 1076–0172, which expires November 30, 2011.

DATES: Interested persons are invited to submit comments on or before December 19, 2011.

ADDRESSES: You may submit comments on the information collection to the Desk Officer for the Department of the Interior at the Office of Management and Budget, by facsimile to (202) 395–5806 or you may send an email to: *OIRA_DOCKET@omb.eop.gov*. Please send a copy of your comments to Paula L. Hart, Director, Office of Indian Gaming, 1849 C Street NW., MS 3657, Washington, DC 20240, Fax No. (202) 273–3153.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart at (202) 219–4066.

SUPPLEMENTARY INFORMATION:

I. Abstract

The BIA is seeking renewal of the approval for the information collection conducted under 25 CFR 293, Class III Tribal State Gaming Compact Process and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2710(d)(8)(A), (B) and (C), which authorizes the Secretary to approve, disapprove or ''consider approved'' (*i.e.,* deem approved) a tribal state gaming compact or compact amendment and publish notice of that approval or considered approval in the **Federal Register**.

II. Request for Comments

BIA requests that you send your comments on this collection to the location listed in the **ADDRESSES** section. Your comments should address: (a) The necessity of the information collection for the proper performance of the agencies, including whether the information will have practical utility; (b) the accuracy of our estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or conduct, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number.

It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section during the hours of 9 a.m.–5 p.m., Eastern Time, Monday through Friday except for legal holidays. Before including your address, phone number, email address or other personally identifiable information, be advised that your entire comment—including your personally identifiable information—may be made public at any time. While you may request that we withhold your personally identifiable information, we cannot guarantee that we will be able to do so.

III. Data

OMB Control Number: 1076–0172.

Title: Class III Tribal State Gaming Compact Process, 25 CFR part 293.

Brief Description of Collection: The information collected includes tribal state compacts or compact amendments entered into by Indian tribes and State governments. The Secretary of the Interior reviews this information and may approve, disapprove or considered the compact approved.

Type: Extension without change of a currently approved collection.

Respondents: Indian tribes and State governments.

Number of Respondents: 32 per year, on average.

Frequency of Response: Once.

Estimated Time per Response: 360 hours.

Estimated Total Annual Burden: 11,520 hours.

Dated: November 10, 2011.

Alvin Foster,

Assistant Director for Information Resources.

[FR Doc. 2011–29875 Filed 11–17–11; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Renewal of Agency Information Collection for Reindeer in Alaska; Request for Comments

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Bureau of Indian Affairs (BIA) is seeking comments on renewal of Office of Management and Budget (OMB) approval for the collection of information for Reindeer in Alaska. The information collection is currently authorized by OMB Control Number 1076–0047, which expires March 30, 2012.

DATES: Interested persons are invited to submit comments on or before January 17, 2012.

ADDRESSES: You may submit comments on the information collection to Keith Kahklen, Natural Resources Manager, Bureau of Indian Affairs, P.O. Box 25520 [3rd Floor Federal Building], Juneau, Alaska 99802–5520; *Email Keith.Kahklen@bia.gov*; *Telephone* (907) 586–7618 and *Facsimile* (907) 586–7120.

FOR FURTHER INFORMATION CONTACT: Keith Kahklen, (907) 586–7618.

SUPPLEMENTARY INFORMATION:

I. Abstract

The BIA is seeking renewal of the approval for the information collection conducted under 25 CFR part 243, Reindeer in Alaska, which is used to monitor and regulate the possession and use of Alaskan reindeer by non-Natives in Alaska. The information to be provided includes an applicant's name

and address, and where an applicant will keep reindeer. The applicant must fill out an application for a permit to get a reindeer for any purpose, and is required to report on the status of reindeer annually or when a change occurs, including changes prior to the date of the annual report.

II. Request for Comments

The BIA requests that you send your comments on this collection to the location listed in the **ADDRESSES** section. Your comments should address: (a) The necessity of the information collection for the proper performance of the agency's duties, including whether the information will have practical utility; (b) the accuracy of our estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or conduct, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number. This information collection expires March 30, 2012.

It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section during the hours of 9 a.m.–5 p.m., Eastern Time, Monday through Friday except for legal holidays. Before including your address, phone number, email address or other personally identifiable information, be advised that your entire comment—including your personally identifiable information—may be made public at any time. While you may request that we withhold your personally identifiable information, we cannot guarantee that we will be able to do so.

III. Data

OMB Control Number: 1076–0047.

Title: Reindeer in Alaska.

Brief Description of Collection: The two forms associated with this information collection, Sale Permit for Alaska Reindeer, and Special Use Permit, require information to be provided to obtain or retain a benefit, namely, a permit to obtain a reindeer, but without such information no permit shall be issued.

Type: Extension without change of a currently approved collection.

Respondents: Non-Natives who wish to possess Alaskan reindeer.

Number of Respondents: 10 per year, on average.

Frequency of Response: Once a year.

Estimated Time per Response: 10 minutes, on average.

Estimated Total Annual Burden: 2 hours.

Dated: November 10, 2011.

Alvin Foster,

Assistant Director for Information Resources.

[FR Doc. 2011–29867 Filed 11–17–11; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

National Park Service

[7700–1104–SZS]

Record of Decision, Long Walk National Historic Trail Feasibility Study/Abbreviated Final Environmental Impact Statement, National Trails Intermountain Region, NM

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability of a Record of Decision on the Abbreviated Final Environmental Impact Statement for the Long Walk National Historic Trail Feasibility Study.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service announces the availability of the Record of Decision for the Abbreviated Final Environmental Impact Statement for the Long Walk National Historic Trail Feasibility Study, prepared by National Trails Intermountain Region, Santa Fe, New Mexico. On August 3, 2011, the Regional Director, Intermountain Region approved the Record of Decision for the project. Four alternatives and their respective environmental consequences were presented in the study. The Record of Decision identifies the preferred alternative as alternative A, no-action. Under the no-action alternative, a national historic trail would not be designated. Interpretation and protection of Long Walk-related events and resources would not be coordinated by a single, overarching federal agency. State, county, and tribal laws for historic preservation would continue to apply; no new federal actions would be taken to protect other significant resources.

In the feasibility study, the National Park Service found that the Long Walk routes fully meet the criteria for national historic trails. The overall nature of public comments during the review period supported designation of a national historic trail. The National Park Service decision to support the no action alternative as the selected action is based on the lack of support for designation by the Navajo Nation Tribal Council and the Mescalero Apache Tribe.

The Record of Decision includes a statement of the decision made, synopses of other alternatives considered, the basis for the decision, a description of the environmentally preferable alternative, and an overview of public involvement in the decision-making process. Impairment and measures to minimize environmental harm are not addressed in the Record of Decision because the study involved no park resources.

FOR FURTHER INFORMATION CONTACT: Sharon A. Brown, National Trails Intermountain Region, National Park Service, P.O. Box 728, 1100 Old Santa Fe Trail, Santa Fe, New Mexico 87504–0728; (505) 988–6717.

SUPPLEMENTARY INFORMATION: Copies of the Record of Decision may be obtained online at *http://parkplanning.nps.gov/ntir* or from the contact listed above.

Dated: October 17, 2011.

Laura Joss,

Deputy Regional Director, Intermountain Region, National Park Service.

[FR Doc. 2011–29354 Filed 11–17–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0003]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection.

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 January 17, 2012. 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 Gary Taylor, *FIPB@atf.gov* Firearms Industry Programs Branch, Room 6N–672, 99 New York Ave. NE., Washington, DC 20226.

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.

Summary of Information Collection

(1) *Type of Information Collection:* Revision.

(2) *Title of the Form/Collection:* Report of Multiple Sale or Other Disposition of Pistols and Revolvers.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 3310.4. 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: Business or other for-profit. Other: Federal Government, State, Local, or Tribal Government.

Need for Collection

The information documents certain sales or other dispositions of handguns for law enforcement purposes and determines if the buyer is involved in an unlawful activity, or is a person prohibited by law from obtaining firearms.

(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 67,833 respondents will complete a 15 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 49,606 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–29842 Filed 11–17–11; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Telemanagement Forum

Notice is hereby given that, on August 22, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), TeleManagement Forum (''The Forum''), has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 7P Solutions & Consulting AG, Koeln, GERMANY; A&K Telecoms Consulting Services (UK) Limited, Slough, UNITED KINGDOM; ACG Research, Gilbert, AZ; Advenis, Linden, BELGIUM; Alekstra Oy, Helsinki, FINLAND; Altech ISIS, a Division of Altech Information Technologies (Pty) Limited, Cape Town, SOUTH AFRICA; Altion Technologies Ltd, Dublin, IRELAND; AmberNet Technologies, Inc., Adison, TX; Antillean Technology & Consulting Hollywood, FL; Arab Digital Factory, Amman, JORDAN; Areeba Guinea SA (Conakry), Almamyah, Conakry, GUINEA; ASPIDER Solutions US Inc, Salem, MA; Auxia Partners, New York, NY; Avigato Consulting GmbH, Bad Homburg, GERMANY; Azur Telecom RCA, Bangui, CENTRAL AFRICAN REPUBLIC; BaseN,Helsinki, FINLAND; Bintel Ltd, Dubai, UNITED ARAB EMIRATES; Blue Buffalo Group, Lafayette, CO; Bwired, Sandton, SOUTH AFRICA; CABLEUROPA S.A.U. (ONO), Madrid, SPAIN; Calltrix Ltd, London, UNITED KINGDOM; Canoe Ventures, Centennial, CO; Centillion Consulting, Karachi, PAKISTAN; Cloud Strategy Partners LLC, Scotts Valley, CA; Consultingiss LLC, Oceanside, CA; Corporacion Nacional de Telecomunicaciones CNT EP, Quito, Pichincha, ECUADOR; Credit Suisse, New York, NY; Curtin University, Perth, Western Australia, AUSTRALIA; DCENR Ireland, Dublin, IRELAND; Dell Inc, Round Rock, TX; Electricity Networks Corporation trading as Western Power, Perth, WA, AUSTRALIA; Equateir Telecom Congo SA, RCCM Brazzaville, CONGO; Ergon Informatik AG, Zurich, SWITZERLAND; ETI Software Solutions, Norcross, GA; Expresso Telecom Group, Dubai, UNITED ARAB EMIRATES; Fusion Communications Corporation, Chiyoda-ku, Tokyo, JAPAN; Futuro Exito Sp. z.o.o., Lubin, POLAND; Gevenue Technologies (AKA Beesion Technologies), Fort Lauderdale, FL; GRASP TECHNOLOGY PTY LIMITTED, Newport, Victoria, AUSTRALIA; Humbug Telecom Labs Ltd, Ramat Hasharon, ISRAEL; Ideasoft Uruguay S.R.L., Montevideo CP, URUGUAY; IP TOTAL SOFTWARE S.A., Cali, COLOMBIA; Ixonos Business Solutions, Helsinki, FINLAND; Kopint-Datorg zRt, Budapest, HUNGARY; KPMG International, Amstelveen, NETHERLANDS; Marco Giaccaglini & C. S.a.a, Milano, ITALY; Maxis Berhad, Kuala Lumpur, Kuala Lumpur, MALAYSIA; Mentum SA, Velizy Villacoublay, Velizy, FRANCE; Mosaic Business Advisory Services, Inc., Atlanta, GA; MY SOFT SRL, Bucharest, ROMANIA; Nephologic Ltd, Dublin, IRELAND; Net Servicos, Chacara Santo Antonio, Sao Paulo—SP, BRAZIL; Netadmin Systems, Linkoping, SWEDEN; NETCON LTDA., Recife, PE, BRAZIL; NetTraffic, Frisco, TX; Neuralitic, Montreal, Quebec, CANADA; NII Holdings, Inc, Reston, VA; Nimbula, Mountain View, CA; Nordiska Servercentralen AB, Bromma, SWEDEN; O2 Slovakia, Bratislava, SLOVAK REPUBLIC; Olinda Solutions, Denver, CO; Orbus Software UK, London, UNITED KINGDOM; Packetware India Pvt. Ltd., Hyderabad, Andhra Pradesh, INDIA; Paltel Group, Nablus, PALENTINIAN TERRITORY, OCCUPIED; Pantha Corp Pty Ltd, Manly, NSW, AUSTRALIA; PreClarity, Victor, NY; ProCom Consulting, Alpharetta, GA; Protiviti Member Firm Kuwait, KUWAIT; Proventa AG, Frankfurt am Main, Hessen, GERMANY; RainStor Inc, San Francisco, CA; Ramp-Rate, Santa Monica, CA; Revenue Risk Management Solutions, Bracknell, Berkshire, UNITED KINGDOM; Robi

Axiata Limited, Gulshan-1, Dhaka, BANGLADESH; RubieM Technologies, Johannesburg, SOUTH AFRICA; Saugatuck Technology, Westport, CT; Scancom Ltd, Ridge-Accra, GHANA; SETAR, Oranjestad, ARUBA; Sistema Shyam TeleServices Ltd., Gurgaon, Haryana, INDIA; Sivnet, Inc., Montreal, Quebec, CANADA; SK Regional Services Pte Ltd, Kuala Lumpur, MALAYSIA; SL Software Consult Hungary Ltd, Pecs, HUNGARY; SML Technologies, Jakarta, Selatan, INDONESIA; Sofrecom-Groupe OrangeFT, Vincennes, FRANCE; Softera Oy, Espoo, FINLAND; Sparx Systems Pty Ltd, Creswick, Victoria, AUSTRALIA; Split, NY; StarHub, Singapore, SINGAPORE; State Street Corporation, N Quincy, MA; SWIFT, La Hulpe, BELGIUM; SWISSFOX Telecommunications Holding AG, Zug, SWITZERLAND; Telefonica Global Technology SA, Caba, ARGENTINA; The Now Factory, Sandyford, Dublin, IRELAND; Thinxtream Technologies, Singapore, SINGAPORE; ThomsonReuters, New York, NY; TIE Kinetix,Utrecht, NETHERLANDS; TOA Technologies, Inc., Beachwood, CA; Tom Sawyer Software, Oakland, CA; tw telecom, Littleton, CO; Ultimate Software, Weston, FL; Univa, Lisle, IL; USAN Gabon (AZUR), Libreville, GABON; VanceInfo Technologies Australia Pty. Ltd., Melbourne, Victoria, AUSTRALIA; Vesta Corporation, Portland, OR; West Avenue Capital Markets Partners, Darien, CT; Wind Telecomunicaziono SpA, Roma, ITALY; wwite p/l, Eaglemont, Victoria, AUSTRALIA; Zenith System Solutions, Inc., Mississauga, Ontario, CANADA; and Zenoss, Annapolis, MD, have been added as parties to this venture.

The following existing members have changed their names: Ambernet Technologies to AmberNet Technologies, Inc., Adison, TX; Aran Technologies Ltd to ARANTECH, Blackrock, Co. Dublin, IRELAND; MTN Guinea Conakry to Areeba Guinea SA (Conakry), Almamyah, Conakry, GUINEA; BaseN North America Inc to BaseN, Helsinki, FINLAND; BATMANN Consulting to BATMANN Analytics, Centennial, CO; CA to CA Technologies, Inc., Portsmouth, NH; CGI Group Inc. to CGI Info Systems Management Consulting Inc., Toronto, Ontario, CANADA; Clarity International Ltd to Clarity, Sydney, NSW, AUSTRALIA; Consultingiss to Consultingiss LLC, Oceanside, CA; DCENR to DCENR Ireland, Dublin, IRELAND; Eircom to Ericom Ltd, Dublin, IRELAND; ETI Software to ETI Software Solutions, Norcross, GA; Gevenue Technologies to Gevenue Technologies (AKA Beesion Technologies), Fort Lauderdale, FL; SITRONICS TS, CZ to JSC Sitronics, Prague CZECH REPUBLIC; KPMG LLP to KPMG International, Amstelveen, NETHERLANDS; Laboratory For Telecomm-Faculty of Elect. Eng. to Laboratory for Telecomm-Faculty of Elect. Eng. University of Ljubljana, Ljubljana, SLOVENIA; SkyTerra Communications to LightSquared, Reston, VA; GMS Consulting to Maksen Consulting, S.A., Lisbon, PORTUGAL; Maxis Communications Bhd to Maxis Broadband Sdn Bhd, Kuala Lumpur, Kuala Lumpur, MALAYSIA; Martin Dawes Systems to MDS, Fearnhead, Warrington, UNITED KINGDOM; Mentum to Mentum SA, Velizy Villacoublay, Velizy, FRANCE; MITRE Corporation to MITRE, Bedford, NY; NetAge Solutions GmbH to netage solutions, Muenchen, GERMANY; Nextel International Holdings Inc. to NII Holdings, Inc., Reston, VA; MegaFon JSC to OJSC ''Megafon'', Moscow, RUSSIA; Open Cloud to OpenCloud, Cambridge, UNITED KINGDOM; Protiviti Global Middle East to Protiviti Member Firm Kuwait, Kuwait, KUWAIT; Telkom R&D Center to PT Telkomunikasi Indonesia, Bandung, INDONESIA; QATAR TELECOM (Qtel) to QATAR TELECOM (Qtel International), Doha, QATAR; RainStor to RainStor Inc, San Francisco, CA; Axiata Bangladesh Limited to Robi Axiata Limited, Gulshan-1, Dhaka, BANGLADESH; Telecominications to RubieM Technologies, Johannesburg, SOUTH AFRICA; Sivnet to Sivnet, Inc., Montreal, Quebec, CANADA; Quindell Enterprise Solutions to SMI Telecoms LLC, London, UNITED KINGDOM; IDS Scheer AG to Software AG, Saarbrucken, GERMANY; Tech Mahindra Ltd to Tech Mahindra Limited, Andheri East, Mumbai, INDIA; O2 Ireland to Telefonica Ireland, Dublin IRELAND; TTI Telecom to TEOCO Corporation, Fairfax, VA; it vision GmbH to The Quality Group it vision GmbH, Hamburg, GERMANY; TIE MamboFive b.v. to TIE Kinetix, Utrecht, NETHERLANDS; TOA Technologies to TOA Technologies, Inc., Beachwood, CA; TW Telecom Inc. to tw telecom, Littleton, CO; EPM Telecomunicaciones S.A.E.S.P to UNE EPM Telecomunicaciones S.A.,oma Los Balsos, Medellin, Antioquia, COLOMBIA; VanceInfo Technologies Australia to VanceInfo Technologies Australia Pty. Ltd., Melbourne, Victoria, AUSTRALIA; AIST ISP to ZAO 'AIST', Togliatti, RUSSIA; Zenith System Solutions to Zenith System Solutions, Inc., Mississauga, Ontario, CANADA.

The following members have withdrawn from this venture: Agilent Technologies, Folsom, CA; Aljeel aljadeed for Technology, Tripoli, LIBYA; Almadar Aljadid, Tripoli, LIBYA; Alphion Corporation, Princeton Junction, NJ; Altor Networks, Redwood Shores, CA; Aspivia Ltd, Bournemouth, UNITED KINGDOM; Aviat Networks, Melbourne, FL; Billskill AB, Stockholm, SWEDEN; Bull Telecom & Media, Les-Clayes-Sous-Bois, FRANCE; Calix, Inc., Petaluma, CA; celsius technologies, Charleroi, BELGIUM; Center of Excellence, Abu Dhabi, UNITED ARAB EMIRATES; Compunet Services, Inc., Stockbridge, GA; Cordys, Putten, NETHERLANDS; Cybercom Sweden South, Stockholm, SWEDEN; Dataduct Technologies Ltd, Dunlaoghaire, Dublin, IRELAND; Datanomic Limited, Cambridge, UNITED KINGDOM; Dorado Software, Folsom, CA; EHF Consultoria, Santa Rita do Sapucai, MG, BRAZIL; Elsag Datamat spa, Genova, ITALY; Etihad Atheeb Telecom Co., Riyadh, SAUDI ARABIA; Etisalat Nigeria, Banana Island, Ikoyi, Lagos, Nigeria; Eutelsat S.A., Paris, FRANCE; Exploit Technologies LLC, Lone Tree, CO; Fluke Networks, Duluth, GA; GDI Systems Inc., Zagreb, CROATIA; Georg-August Universitat, Gottingen, Gottingen, GERMANY; Guavus, Inc., Sunnyvale, CA; Hansen Corporation Europe, Teddington, Middlesex, UNITED KINGDOM; iLink Systems, Redmond, WA; InteliPower, Johannesburg, Gauteng, SOUTH AFRICA; Intelligent Communication Software Entwicklungs GmbH, Muenchen, Bayern, GERMANY; Interfacing Technologies Corp., Montreal, Quebec, CANADA; InterSoft, Melbourne, Victoria, AUSTRALIA; isilogica Sarl, Arzier, Vaud, SWITZERLAND; IST Holdings (Pty) Ltd, Pretoria, Gauteing, SOUTH AFRICA; iToolsOnline Ltd., Mt Albert, Auckland, NEW ZEALAND; KARA DANISMANLIK YAZILIM Ve BILISIM TICARET LTD. STI, Istanbul, TURKEY; LHS Telekommunikation GmbH & Co. KG, Frankfurt, GERMANY; Libyan International telecommunication Company, Tripoli, LIBYA; Libyan Post, Telecommunication and Information Technology co, Tripoli, LIBYA; Marand d.o.o., Ljublijana, SLOVENIA; McShane Consulting, Rollong Meadows, IL; MHM & Partner AG, Rotkreuz, SWITZERLAND; mobily, Riyadh, SAUDI ARABIA; Moov Benin SA, Porto-Novo, REPUBLIC OF BENIN; MOOV Central African Republic, Bangui, CENTRAL AFRICAN REPUBLIC; Moov Gabon, Liberville, GABON; Moov Togo, Lome, TOGO; Motorola, Arlington Heights, IL; MTC Touch, Beirut,

LEBANON; NAB, Washington,DC; National Lab. of Software Development Environment, Beijing, PEOPLE'S REPUBLIC OF CHINA; Nixu Software Oy Ltd., Espoo, FINLAND; Northwestel Inc., Whitehorse, YT, CANADA; NuaTel, Cork, IRELAND; PacketFront Systems AB, Kista, SWEDEN; Pakistan Telecommunication Company Limited PTCL, Islamabad, PAKISTAN; Perceval, Brussels, BELGIUM; Perot Systems TSI (India) Ltd., North Sydney, NSW, AUSTRALIA; PSI Transcom GmbH, Dusseldorf, GERMANY; Reach Global Services Limited, Wanchai, HONG KONG–CHINA; Savvis, Town & Country, MO; Scuola Superiore Sant'Anna, Pisa, ITALY; Selatra Limited, Cork, IRELAND; Smartlabs, Moscow, RUSSIA; Strategic Consulting Alliance, Amersfoort, NETHERLANDS; Striata (Australia) Pty Ltd, Sydney, NSW, AUSTRALIA; Sygnity, Warsaw, Mazowieckie, POLAND; Sykora Data Center, Ostrava, CZECH REPUBLIC; TDC, Kobenhavn C (Copenhagen), DENMARK; Telcel Niger (Etisalat), Niamey, REPUBLIC OF NIGERIA; The CNIA Group, Westfield, NJ; Torokina Networks, Artarmon, NSW, AUSTRALIA; uFONE, Islamabad, PAKISTAN; University of Maryland, College Park, MD; VISITEK, Jakarta Selatan, Jakarta, Indonesia; WiTech, Cascina, Pisa, ITALY; Yyield Group BV, Bennebroek, NETHERLANDS; Zain, Safat, KUWAIT.

In addition, the following have changed their addresses: Aircom International Ltd. to Leatherhead, Surrey, UNITED KINGDOM; AT&T to Florham Park, NJ; CHR Solutions to Houston, TX; HIKESIYA Co., Ltd. to Yokohama-city, Kanagawa, JAPAN; Infosys Technologies Ltd. to Bangalore, Karnataka, INDIA; Mobile TeleSystems OJSC to Moscow, RUSSIA; netage solutions to Muenchen, GERMANY; Neural Technologies to Petersfield, Hampshire, UNITED KINGDOM; OJSC ''Megafon'' to Moscow, RUSSIA; OpenCloud to Cambridge, UNITED KINGDOM; and TelcoSI to St Leonards, New South Wales, AUSTRALIA.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and The Forum intends to file additional written notifications disclosing all changes in membership.

On October 21, 1988, The Forum filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 8, 1988 (53 FR 49615).

The last notification was filed with the Department on February 15, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 8, 2011 (76 FR 19788).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–29809 Filed 11–17–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–53]

Kamal Tiwari, M.D.; Pain Management and Surgery Center of Southern Indiana; Decision and Order

On April 23, 2010, I, the Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to Kamal Tiwari, M.D. (Respondent Tiwari), holder of DEA Certificate of Registration BT2936411, and his principal place of business, the Pain Management and Surgery Center (Respondent PMSC), holder of DEA Certificate of Registration BP4917413, both of Bloomington, Indiana. The Show Cause Order proposed the revocation of each Respondent's registration, on the ground that Respondent Tiwari had committed acts which render the continued registration of each Respondent ''inconsistent with the public interest.'' Show Cause Order, at 1 (citing 21 U.S.C. 823(f) and 824(a)(4)).

The Show Cause Order specifically alleged that between March 2003 and August 2008, Respondent Tiwari issued ''numerous'' prescriptions for controlled substances to three patients, who were addicts, and ''who did not exhibit any verifiable medical indications warranting the prescribing of controlled substances.'' *Id.* at 2. The Order thus alleged that Respondent lacked a legitimate medical purpose and acted outside the usual course of professional practice in issuing the prescriptions and violated federal and state laws. *Id.* (citing 21 U.S.C. 841(a)(1); 21 CFR 1306.04(a); Ind. Code § 25–1–9–4(a)(9)). With respect to these patients, the Show Cause Order further alleged that Respondent prescribed controlled substances to them ''in exchange for their agreements to undergo medical procedures * * * for profit,'' and that ''[t]his prescribing pattern indicates'' that he issued the ''prescriptions without a legitimate medical purpose and outside the scope of professional practice.'' *Id.* at 2–3.

The Show Cause Order also alleged that a medical expert concluded that Respondent's prescribing to these three patients lacked ''a legitimate medical purpose and [was] outside the scope of professional practice.'' *Id.* at 3. The Order further alleged that the expert concluded with respect to these three patients, as well as nine other patients, that Respondent's ''actions encouraged the abuse of controlled substances and allowed their misuse,'' that his prescribing of controlled substances contributed to the deaths of six patients, and that there was no justification for his ''long-term prescribing of controlled substances * * * or the administration of procedures using controlled substances'' to these patients. *Id.*

Next, the Show Cause Order alleged that a second medical expert concluded that Respondent Tiwari had prescribed controlled substances to, and/or performed medical procedures using controlled substances without medical justification on, several other patients. *Id.* Finally, the Show Cause Order alleged that ''at least nine of'' Respondent's patients had died over a six-year period, the most recent being in February 2009, and that Respondent had ''continue[d] to prescribe controlled substances to patients at per-patient rates that [we]re similar to the prescribing rates in 2008, when two of [his] patients died of conditions related to drug abuse.'' *Id.*

Based on the above, I concluded that Respondents' continued registration during the pendency of the proceeding ''constitutes an imminent danger to the public health and safety.'' *Id.* at 4. I therefore ordered that each Respondent's registration be immediately suspended. *Id.*

On May 24, 2010, Respondents filed a request for a hearing and the matter was assigned to an Administrative Law Judge (ALJ), who proceeded to conduct pre-hearing procedures. However, on May 27, 2010, the Government moved for Summary Disposition and filed a Motion to Stay the Filing of Prehearing Statements. Mot. Summ. Disp., at 2–3.

The basis of the Government's motion was that each Respondent currently lacks authority to handle controlled substances in the State of Indiana, the jurisdiction where the Respondents are licensed to practice medicine and hold their DEA registrations. Mot. Summ. Disp., at 1–2 (citing 21 U.S.C. 801(21), 823(f), 824(a)(3)). In support of its motion, the Government attached a letter from the Medical Licensing Board of Indiana (MLB) to Respondent Kamal Tiwari, dated May 26, 2010, stating that

his Indiana controlled substance registration (CSR) Number 01034945B, had been suspended pursuant to Indiana Code § 35–48–3–5(e).[1] *Id.* at Ex. 3. The Government also attached a printout from the Indiana Online Licensing Web site which shows that Indiana CSR Number 61100223B, held by Respondent PMSC, has also been suspended. *Id.* at Ex. 4.

Thereafter, the ALJ issued an Order for Respondents' Response to Government's Motion for Summary Disposition and to Stay the Filing of Prehearing Statements; she also stayed the filing of the Prehearing statements. ALJ's Recommended Ruling (also ALJ), at 4.

On June 16, 2010, Respondents filed their Response. Therein, Respondents argued that granting summary disposition based on their lack of state authority to handle controlled substances would be circular and violate their right to Due Process, because the State's suspension of their state CSRs was based on the DEA Order to Show Cause and Immediate Suspension of Registration. Resps. Response at 1, 3–6. Respondents also argued that in suspending their state registrations, the MLB cited ''no basis for the State suspension other than the federal suspension.'' *Id.* at 2. Respondents further maintain that the MLB ''has no authority concerning controlled substances registrations, which are instead under the jurisdiction of the Indiana State Board of Pharmacy.'' *Id.* at 2–3 (citations omitted).

Respondents also argued that in none of the cases cited by the Government did it ''attempt to rely * * * on a derivative state action triggered by the Government's suspension,'' and that ''[n]ot a single one of the Government's cases revoke[d] a registration under 21 U.S.C. 843(a)(3) without some independent determination'' by the respective state authority. *Id.* at 4. Respondents thus maintained that ''[d]epriving a practitioner of the right to review of a DEA action based solely on a State suspension that was in turn based solely on the original DEA action would violate Due Process.'' *Id.* at 5. Finally, Respondents also contended that ''[p]ractitioners may not be able to obtain review of *either* suspension, if the State takes the same position that the [DEA] does here.'' *Id.*

On June 17, the Government filed its Reply to Opposition to Government's Motion for Summary Disposition and to Stay the Filing of Pre-hearing Statements (Reply). The Government argued that ''Indiana law specifically provides a basis for substantive review of any state suspension which is triggered by a DEA suspension.'' Reply at 1 (citing Ind. Code § 35–48–3–5(f)).[2] The Government further argues that under DEA precedent, ''when a state suspends a respondent's controlled substance privileges, Federal revocation is warranted as long as the respondent has some mechanism to challenge the state action.'' *Id.* at 2 (citing *Odette Louise Campbell, M.D.,* No. 09–62, Order Remanding for Further Proceedings).[3]

On June 18, 2010, Respondents filed a Surreply in Opposition to Government's Motion for Summary Disposition (Surreply), in which they assert that the Government ''fundamentally misunderstands the Indiana statutory scheme.'' Surreply, at 1. Therein, the Respondents again argued that the ''Government's Motion for Summary Disposition should be denied because it relies on a potential, nonbinding state hearing, a theoretical possibility that cannot be triggered until the Indiana Board that actually has authority to suspend the Respondents' controlled substances registrations issues an order to show cause, which it has not.'' *Id.* Respondents further maintained that ''the Indiana Advisory Committee could avoid the hearing provision on which the Government relies solely by not issuing the show cause notice.'' *Id.* at 2.

On June 21, 2010, the ALJ issued an Order for Government's Response to Surreply in Opposition to Government's Motion for Summary Disposition. On July 2, 2010, the Government filed its Response to Surreply. The Government reiterated that the Respondents' Indiana CSRs have been suspended and that while the issuance of the DEA Immediate Suspension Orders ''may have been the *cause* of the state suspension, [they] do not govern whether those state suspensions remain in effect.'' Response to Surreply, at 1.

The Government again argued that under Indiana law, the Board of Pharmacy '' 'may reinstate a [CSR] that has been suspended under subsection (e), after a hearing, if the board is satisfied that the applicant is able to * * * dispense controlled substances with reasonable skill and safety to the public.' '' *Id.* (quoting Ind. Code § 35–48–3–5(f)). The Government also noted that Respondents had filed a Petition for Review of the state suspensions, albeit with the Medical Licensing Board and not the Board of Pharmacy. *Id.* The Government argued that this nonetheless demonstrated that Respondents knew of, and were pursuing, their right to seek administrative review of the State's suspensions, pursuant to section 35–48–3–5(f).

Next, the Government argued that Respondents' contention that Indiana must issue an Order to Show Cause prior to suspending their CSRs is without merit, and that in any case, the issue is a matter of state law, and not a matter for a DEA ALJ to decide. Response to Surreply, at 2. Finally, the Government argued that the Respondents' interpretation of the Indiana statutes would render them inconsistent and meaningless. *Id.* at 2–3.

On July 7, 2010, the ALJ issued her recommended decision (hereinafter ALJ). Therein, the ALJ specifically found that the Indiana Board of Pharmacy had automatically suspended the Indiana CSRs held by the Respondents. ALJ at 5. Noting the settled Agency rule that ''possessing authority under state law to handle controlled substances is an essential condition for holding a DEA registration,'' *id.* at 6 (quoting *Joseph Baumstarck, M. D.,* 74 FR 17525, 17527 (2009)), and rejecting Respondents' contention that granting summary disposition would deny them their right to Due Process, the ALJ granted the Government's Motion for Summary Disposition. ALJ at 5–7, 9. The ALJ thus recommended that I revoke the Respondents' DEA Certificates of Registration and deny any pending applications to renew their registrations. *Id.* at 9.

Neither party filed exceptions to the ALJ's decision. Thereafter, the record was forwarded to me for final agency action.

[1] This provision states: ''If the Drug Enforcement Administration terminates, denies, suspends or revokes a federal registration for the manufacture, distribution, or dispensing of controlled substances, a registration issued by the board under this chapter is automatically suspended.'' Ind. Code § 35–48–3–5(e).

[2] ''The board may reinstate a registration that has been suspended under subsection (e), after a hearing, if the board is satisfied that the applicant is able to manufacture, distribute, or dispense controlled substances with reasonable skill and safety to the public.'' Ind. Code § 35–48–3–5(f).

[3] The Government also argued that ''to the extent that Respondents argue that the Medical Licensing Board of Indiana * * * has no authority concerning controlled substance registrations, that jurisdictional argument must be made to the Board of Pharmacy,'' and that in ''its letter to [Respondent] Tiwari, the Medical Licensing Board * * * merely informed Respondent that his CSR was suspended pursuant to the appropriate statute.'' Reply at 3. Finally, the Government attached a May 27, 2010 letter from the Indiana Board of Pharmacy to Respondents which stated that Indiana CSR Number 61100223B, which is held by Respondent PMSC, had been suspended pursuant to Ind. Code § 35–48–3–5(e). Reply at 3, Ex. 3–A.

Having considered the record as a whole including the parties' pleadings, I adopt the ALJ's findings of fact and recommended sanction. I will therefore revoke Respondents' respective DEA Certificates of Registration and deny any pending applications to renew their registrations. I make the following findings.

Findings

Respondent Tiwari is the holder of Certificate of Registration BT2936411, which authorizes him to dispense controlled substances in schedules II through V, as a practitioner. While this registration was due to expire on November 30, 2009, on October 2, 2009, Respondent Tiwari submitted a timely renewal application. Respondent Tiwari's registration thus remains active, albeit in suspended status, pending the issuance of the Final Order in this matter. 5 U.S.C. 558(c).

Respondent PMSC is the holder of Certificate of Registration BP4917413, which authorizes it to dispense controlled substances in schedules II through V, as a hospital/clinic. This registration is due to expire on March 31, 2011. According to the registration records of this Agency, Respondent Tiwari has also submitted an application to renew Respondent PMSC's registration.

On or about May 27, 2010, the Indiana Board of Pharmacy placed Respondent PMSC's Indiana CSR in suspended status. *See* Reply to Opp. to Gov. Mot. for Summ. Disp., at Ex. 3–A. Moreover, according to a letter from the MLB to Respondent Tiwari, on or about May 26, 2010, his Indiana CSR was placed in suspended status. *Id.* at Ex. 3. According to the Indiana Online Licensing Web site, of which I take official notice, each Respondent's CSR remains suspended as of the date of this Decision and Final Order.[4]

Discussion

Under the Controlled Substances Act (CSA), a practitioner must be currently authorized to handle controlled substances in ''the jurisdiction in which he practices'' in order to maintain a DEA registration. *See* 21 U.S.C. 802(21) (''[t]he term 'practitioner' means a physician * * * pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice''). *See also id.* § 823(f) (''The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.''). As these provisions make plain, possessing authority under state law to handle controlled substances is an essential condition for obtaining and maintaining a practitioner's registration.

Accordingly, DEA has held that revocation of a practitioner's registration is warranted whenever his (or its) state authority to dispense controlled substances has been suspended or revoked. *David W. Wang,* 72 FR 54297, 54298 (2007); *Sheran Arden Yeates,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci,* 58 FR 51104, 51105 (1993); *Bobby Watts,* 53 FR 11919, 11920 (1988). *See also* 21 U.S.C. 824(a)(3) (authorizing revocation of a registration ''upon a finding that the registrant * * * has had his State license or registration suspended [or] revoked * * * and is no longer authorized by State law to engage in the * * * distribution [or] dispensing of controlled substances'').

DEA has further held that revocation is warranted even where a practitioner's state authority has been summarily suspended and the State has yet to provide the practitioner with a hearing to challenge the State's action and at which he (or it) may ultimately prevail. *See Robert Wayne Mosier,* 75 FR 49950 (2010) (''revocation is warranted * * * even in those instances where a practitioner's state license has only been suspended, and there is the possibility of reinstatement''); *accord Bourne Pharmacy,* 72 FR 18273, 18274 (2007); *Anne Lazar Thorn,* 62 FR 12847 (1997).

Here, it is undisputed that the State has suspended the state controlled substance registration of each Respondent. DEA has long held that the order of a state agency suspending or revoking a practitioner's state authority cannot be collaterally attacked in a proceeding under the CSA. *See Hicham K. Riba,* 73 FR 75773, 75774 (2008) (rejecting claim that state proceeding was fundamentally unfair based on alleged improper *ex parte* influence of director of state board as ''not addressable in'' DEA proceeding); *Sunil Bhasin,* 72 FR at 5082, 5083 (2007) (rejecting claim that settlement agreement in which Respondent surrendered state license was produced by fraud and was unconscionable; ''a DEA Show Cause Proceeding is not the proper forum to litigate the issue''); *see also Shahid Musud Siddiqui,* 61 FR 14818 (1996); *Robert A. Leslie,* 60 FR 14004 (1995).

The underlying premise of these cases is that the States exercise sovereign powers in regulating the medical profession and that challenges to the validity of state board orders should be raised and litigated in state forums. *See, e.g., Riba,* 73 FR at 75774 (claim that ''state proceeding was fundamentally unfair * * * is not addressable in'' DEA proceeding). These cases likewise implicitly recognize that state boards and state courts are fully cognizant of their obligation under the Due Process Clause to provide a full and fair opportunity to litigate the issues. *Cf. University of Tennessee* v. *Elliott,* 478 U.S. 788, 797–98 (1986) (''When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata*[.]'') (int. quotations and citations omitted).

It is true that in *Odette Louise Campbell, M.D.,* No. 09–62, I denied the Government's request for a final order based on the registrant's loss of her controlled substance prescribing authority under Texas law where the State had suspended that authority based on DEA's issuance of an immediate suspension order and remanded the matter for further proceedings. *Campbell,* Order Remanding for Further Proceedings, at 10–11. However, I noted that specific provisions of Texas law and regulations suggested that the registrant was not entitled to a hearing to challenge the merits of the state suspension because it was based on the DEA immediate suspension. *Id.* at 9 (citing Texas Health & Safety Code §§ 481.063(e)(3), 481.063(h), 481.066(g), and Tex. Admin. Code § 13.272(h)). Moreover, I ordered the ALJ to first determine whether the State had provided, or would provide, the registrant with a hearing; I further ordered that if the State had provided or would provide a hearing, the Government could renew its motion for summary disposition. *Id.* at 10.

By contrast, while the Indiana Board(s) suspended Respondents' state registrations based on the state law provision that ''[i]f the Drug Enforcement Administration * * * suspends * * * a federal registration for the * * * dispensing of controlled substances, a registration issued by the board under this chapter is automatically suspended,'' Ind. Code

[4] Under the Administrative Procedure Act (APA), an agency ''may take official notice of facts at any stage in a proceeding-even in the final decision.'' U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulations, Respondent is ''entitled on timely request, to an opportunity to show to the contrary.'' 5 U.S.C. 556(e); *see also* 21 CFR 1316.59(e). Respondent can dispute the facts of which I take official notice by filing a properly supported motion for reconsideration within twenty days of service of this Order, which shall begin on the date it is mailed.

§ 35–48–3–5(e), state law further provides that ''[t]he board may reinstate a registration that has been suspended under subsection(e) *after a hearing,* if the board is satisfied that the applicant is able to manufacture, distribute or dispense controlled substances with reasonable skill and safety to the public.'' *Id.* § 35–48–3–5(f). (emphasis added). Thus, it appears that Respondents are entitled to a hearing to challenge the underlying allegations before the State board.

Respondents contend that their right to a hearing under section 35–48–3–5(f) ''is not triggered until the Indiana Controlled Substances Advisory Committee serves upon the * * * registrant an order to show cause why registration should not be denied, revoked or suspended,'' and that ''absent such a step, the purported suspension issued by the board * * * is a nullity, and cannot form the basis for a federal suspension.'' Surreply at 2 (citing Ind. Code § 35–48–3–6(a)).[5] Respondents further argue that ''[i]f it could, then the Indiana Advisory Committee could avoid the hearing provision on which the Government relies solely by not issuing the show cause notice.'' *Id.*

Beyond the fact that Respondents' argument appears to be based on the speculative premise that the Indiana authorities will attempt to prevent them from obtaining a hearing, the Indiana statute makes clear that Respondents are entitled to a hearing. Presumably, the Indiana courts are open and can provide an appropriate remedy in the event the state board refuses to provide Respondents with a hearing. *See* Ind. Code § 34–27–3–1 (''An action for mandate may be prosecuted against any inferior tribunal * * * public * * * officer, or person to compel the performance of any * * * act that the law specifically requires[.]'').

Moreover, the question of whether the Indiana suspensions are a nullity because the State did not serve Respondents with a Show Cause Order is an issue of state law and for the Indiana courts to decide. As such, it is outside the scope of this proceeding. *See George S. Heath, M.D.,* 51 FR 26610 (1986) (''DEA accepts as valid and lawful the action of a state regulatory board unless that action is overturned by a state court or otherwise pursuant to state law. * * * The [DEA] will not consider a challenge to the lawfulness of a Georgia Board Order. Such a challenge must be made in another forum.''); *see also* Shahid *Musud Siddiqui, M.D.,* 61 FR 14818, 14818–19 (DEA 1996) (A ''DEA administrative proceeding is not an appropriate forum for wholesale review of state criminal and administrative actions taken by the State of New York arising out of the laws of the State of New York. To allow it to be so would be to permit a wide collateral attack upon such convictions.'') (int. quotations and citation omitted).

Finally, Respondents argue that the suspensions of their state CSRs are invalid because they were suspended by the MLB and only the Pharmacy Board has authority under state law to suspend their registrations. However, the Pharmacy Board's May 27, 2010 letter makes clear that it (and not the MLB) was suspending Respondent PMSC's registration, and even if Respondent Tiwari's controlled substance registration was suspended by the MLB, the validity of this action is also a question of state law and for the Indiana courts to decide. *Riba,* 73 FR at 75774; *Heath,* 51 FR at 26610.

Because there is no dispute over the material fact that each Respondent's Indiana controlled substance registration has been suspended, each is without authority to hold a DEA registration.[6] *See* 21 U.S.C. 802(21). Accordingly, Respondents' registrations will be revoked and any pending applications will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I order that DEA Certificate of Registration, BT2936411, issued to Respondent Kamal Tiwari, M.D., and DEA Certificate of Registration, BP4917413, issued to Respondent Pain Management and Surgery Center of Southern Indiana, be, and they hereby are, revoked. I further order that any pending applications of Kamal Tiwari, M.D. and Pain Management and Surgery Center of Southern Indiana, to renew or modify such registrations, be, and they hereby are, denied. This Order is effective immediately.[7]

Dated: November 8, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–29708 Filed 11–17–11; 8:45 am]

BILLING CODE 4410–09–P

[5] This provision states:

Before recommending a denial, suspension, or revocation of a registration, or before refusing a renewal of registration, the board shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended * * *. The order to show cause shall contain a statement of the basis therefor [sic] and shall call upon the applicant or registrant to appear before the board at a time and place not less than thirty (30) days after the date of service of the order * * *.

[6] Where, as here, no material fact is in dispute, there is no need for an evidentiary hearing and summary disposition is appropriate. *See Michael G. Dolin, M.D.,* 65 FR 5661 (2000); see also *Philip E. Kirk, M.D.,* 48 FR 32887 (1983), *aff'd sub nom Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984).

[7] For the same reason that I ordered that the Respondents' registration be immediately suspended, I conclude that the public interest necessitates that this Order be effective immediately. *See* 21 CFR 1316.67.

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–0008]

Agency Information Collection Activities: Proposed Collection, Comments Requested; Extension of a Currently Approved Collection; Monthly Return of Arson Offenses Known to Law Enforcement

ACTION: 30-day Notice of Information Collection Under Review.

The Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division (CJIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with established review procedures of 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** on September 15, 2011, Volume 76, Number 179, Page 57081, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 19, 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 Mr. Gregory E. Scarbro, Unit Chief, Federal Bureau of Investigation, CJIS Division, Module E–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306; facsimile (304) 625–3566.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(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 of other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of information collection:* Extension of a currently approved collection.

(2) *The title of the form/collection:* Monthly Return of Arson Offenses Known to Law Enforcement.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Form Number 1–725; Sponsor: Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: City, county, state, federal and tribal law enforcement agencies. Brief Abstract: This form collects information on arson incidents committed throughout the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 18,108 law enforcement agency respondents that submit monthly for a total of 217,296 responses with an estimated response time of 9 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 32,594 hours, annual burden, associated with this information collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2011–29841 Filed 11–17–11; 8:45 am]

BILLING CODE 4410–02–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–018 and 52–019; NRC–2008–0170; Docket Nos. 52–022 and 52–023; NRC–2008–0231; Docket Nos. 52–029 and 52–030; NRC–2008–0558; Docket Nos. 52–040 and 52–041; NRC–2009–0337]

Notice of Availability of Combined License Applications

ACTION: Combined license applications; receipt.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is giving notice once each week for four consecutive weeks of combined license (COL) applications from Progress Energy Florida, Inc., Duke Energy Carolinas, LLC, Progress Energy Carolinas, Inc., and Florida Power & Light Company.

ADDRESSES: You can access publicly available documents related to this action using the following methods:

• *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–(800) 397–4209, (301) 415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession numbers for the initial application cover letters are as follows: ML073510494 for William States Lee III Nuclear Station Units 1 and 2, ML080580078 for Shearon Harris Nuclear Power Plant Units 2 and 3; ML082260277 for Levy Nuclear Plant Units 1 and 2; and ML091830589 for Turkey Point Units 6 and 7.

• *Federal Rulemaking Web site:* Public comments and supporting materials related to this action can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2008–0170 (William States Lee III Nuclear Station Units 1 and 2), NRC–2008–0231 (Shearon Harris Nuclear Power Plant Units 2 and 3), NRC–2008–0558 (Levy Nuclear Plant Units 1 and 2), and NRC–2009–0337 (Turkey Point Units 6 and 7). Address questions about NRC dockets to Carol Gallagher, *telephone:* (301) 492–3668; *email: Carol.Gallagher@nrc.gov.*

The applications are also available at *http://www.nrc.gov/reactors/new-reactors/col.html.*

FOR FURTHER INFORMATION CONTACT: Donald Habib, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *telephone:* (301) 415–1035, *email: Donald.Habib@nrc.gov.*

SUPPLEMENTARY INFORMATION: The following parties have filed applications for COLs with the NRC, pursuant to Section 103 of the Atomic Energy Act of 1954, as amended, and Title 10 of the *Code of Federal Regulations* (10 CFR) part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants:''

1. On December 12, 2007, Duke Energy Carolinas, LLC, submitted an application for COLs for two AP1000 advanced passive pressurized water reactors designated as William States Lee III Nuclear Station Units 1 and 2 in Cherokee County, South Carolina.

2. On February 18, 2008, Progress Energy Carolinas, Inc., submitted an application for COLs for two AP1000 advanced passive pressurized water reactors designated as Shearon Harris Nuclear Power Plant Units 2 and 3 in Wake County, North Carolina.

3. On July 28, 2008, Progress Energy Florida, Inc., submitted an application for COLs for two AP1000 advanced passive pressurized water reactors designated as Levy Nuclear Plant Units 1 and 2 in Levy County, Florida.

4. On June 30, 2009, Florida Power & Light Company submitted an application for COLs for two AP1000 advanced passive pressurized water reactors designated as Turkey Point Units 6 and 7 in Miami-Dade County, Florida.

These four applications are currently under review by the NRC staff.

An applicant may seek a COL in accordance with Subpart C of 10 CFR Part 52. The information submitted by the applicant includes certain administrative information, such as financial qualifications submitted pursuant to 10 CFR 52.77, as well as technical information submitted pursuant to 10 CFR 52.79. These notices are being provided in accordance with the requirements in 10 CFR 50.43(a)(3).

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 14th day of November 2011.

Jeffrey Cruz,

Chief, AP1000 Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2011–29828 Filed 11–17–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS), Meeting of the ACRS Subcommittee on Plant Operations and Fire Protection; Notice of Meeting

The ACRS Subcommittee on Plant Operations and Fire Protection will hold a meeting on December 15, 2011, Room T–2B3, 11545 Rockville Pike, Rockville, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Thursday, December 15, 2011—8:30 a.m. until 5 p.m.

The Subcommittee will review the supplemental Safety Evaluation Reports (SERs) associated with the staff's review of the Watts Bar Unit 2 Operating License application. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Girija Shukla (*Telephone* (301) 415–6855 or *Email: Girija.Shukla@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64127–64128).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (*Telephone* (240) 888–9835) to be escorted to the meeting room.

Dated: November 8, 2011.

Cayetano Santos,

Chief, Reactor Safety Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011–29823 Filed 11–17–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS), Meeting of the ACRS Subcommittee on Reliability and Probabilistic Risk Assessment; Notice of Meeting

The ACRS Subcommittee on Reliability and Probabilistic Risk Assessment (PRA) will hold a meeting on December 14, 2011, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, December 14, 2011—8:30 a.m. until 12:30 p.m.

The Subcommittee will review the progress on Human Reliability Analysis (HRA) methods. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), John Lai (*Telephone* (301) 415–5197 or *Email: John.Lai@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64127–64128).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site *http://www.nrc.gov/public-involve/public-meetings/meeting-schedule.html* or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (*Telephone:* (240) 888–9835) to be escorted to the meeting room.

Dated: November 8, 2011.

Cayetano Santos,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011–29824 Filed 11–17–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on Power Uprates; Notice of Meeting

The ACRS Subcommittee on Power Uprates will hold a meeting on December 14, 2011, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance with the exception for portions that may be closed to protect proprietary information pursuant to 5 U.S.C. 552b(c)(4).

The agenda for the subject meeting shall be as follows:

Wednesday, December 14, 2011—8:30 a.m. until 5 p.m.

The Subcommittee will review the Safety Evaluation Report (SER) associated with the staff's review of the Turkey Point Units 3 and 4 extended power uprate application. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, the licensee (Florida Power & Light Company), and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Weidong Wang (Telephone (301) 415–6279 or Email: *Weidong.Wang@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64127–64128).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown ((240) 888–9835) to be escorted to the meeting room.

Dated: November 14, 2011.

Cayetano Santos,

Chief Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011–29825 Filed 11–17–11; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. MT2012–1; Order No. 959]

Market Test of First-Class Tracer

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-field Postal Service proposal to conduct a market test of a market dominant product, First-Class Tracer. This document describes the proposed test, addresses procedural aspects of the filing, and invites public comment.

DATES: *Comment deadline:* November 28, 2011.

ADDRESSES: Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at (202) 789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Background
III. Notice of Filing
IV. Ordering Paragraphs

I. Introduction

On November 7, 2011, the Postal Service filed a notice, pursuant to 39 U.S.C. 3641(c)(1), announcing its intent to initiate a market test beginning on or about December 7, 2011, of an experimental market dominant product, First-Class Tracer.[1] The market research test will consist of providing customers a means to track the transportation and processing of single-piece First-Class Mail. *Id.* at 1.

II. Background

The Postal Service states that consumers have continuously looked for ways to track single-piece First-Class Mail through the postal system. *Id.* at 1–2. It proposes the instant market test of the First-Class Tracer as a convenient and highly visible means of providing commercial mailers and individual consumers a tool through which to gain information on the transportation and processing of their First-Class Mail letters. *Id.* The Postal Service sees the market test as a way to leverage product design, development, and distribution of resources with minimal competitive impact. *Id.* at 2.

The Postal Service explains that the proposed market test will consist of retail distribution sales of the First-Class Tracer to consumers in specific test locations. *Id.* at 1. Sales will be revenue generating, and the Postal Service will test different prices in different test locations. *Id.* Expenses incurred will be considered research and development costs incurred in connection with new product development. *Id.*

Statutory authority. The Postal Service indicates that its proposal satisfies the criteria of section 3641, which imposes certain conditions on experimental products. 39 U.S.C. 3641. For example, the Postal Service asserts that the First-Class Tracer is significantly different from all products offered by the Postal Service within the meaning of section 3641(b)(1). *Id.* at 4. In addition, it contends that the product will only be available at retail, apply solely to a market dominant product, and will not create an unfair or inappropriate competitive advantage for the Postal Service or any mailer. *Id.* at 5; *see also* section 3641(b)(2). The Postal Service states that the First-Class Tracer

[1] Notice of the United States Postal Service of Market Test of Experimental Product First-Class Tracer, November 7, 2011 (Notice).

is correctly classified as a market dominant product. *Id.; see also* section 3641(b)(3). The Postal Service does not anticipate that the annual revenues from the market test will exceed $10,000,000, as adjusted for inflation in any fiscal year, pursuant to 39 U.S.C. 3641(e), (g). *Id.* at 4, 6.

Product description and nature of market test. Pursuant to section 3641(c)(1)(B), the Postal Service provides a description of the nature and scope of the market test. The product will be offered at 50 retail locations around the Washington, DC metropolitan area in two packaged quantities, a five-label pack and ten-label pack. *Id.* at 3. Test prices will vary according to the test location. *Id.* Depending on early test results, the Postal Service may offer alternative packaging quantities and change sale channels. *Id.* The Postal Service states that the duration of the market test will not exceed 24 months unless the Postal Service requests an extension from the Commission. *Id.* at 6.

A First-Class Tracer, which consists of a barcoded label, tracing number, and QR Code, will allow customers to obtain information on the processing and transportation of their First-Class letters. *Id.* at 2–3. First-Class Tracer service does not receive a delivery scan. *Id.* at 2. The Postal Service provides an illustrative figure of the First-Class Tracer in its filing notice. *Id.* at 3.

III. Notice of Filing

The Commission establishes Docket No. MT2012–1 for consideration of matters raised by the Notice. Interested persons may submit comments on whether the Postal Service's filing in the captioned docket is consistent with the policies of 39 U.S.C. 3641. Comments are due no later than November 28, 2011. The filing can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Kenneth R. Richardson to serve as Public Representative in this docket.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. MT2012–1 for consideration of the matters raised by the Notice.

2. Pursuant to 39 U.S.C. 505, Kenneth R. Richardson is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments by interested persons are due no later than November 28, 2011.

4. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–29808 Filed 11–17–11; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Board of Governors; Sunshine Act Meeting; Board Votes to Close November 4, 2011, Meeting

By telephone vote on November 4, 2011, a majority of the members of the Board of Governors of the United States Postal Service met and voted unanimously to close to public observation its meeting held in Washington, DC, via teleconference. The Board determined that no earlier public notice was possible.

Items Considered

1. Strategic Issues.
2. Financial Matters.
3. Pricing.
4. Personnel Matters and Compensation Issues.

General Counsel Certification

The General Counsel of the United States Postal Service has certified that the meeting was properly closed under the Government in the Sunshine Act.

Contact Person for More Information

Requests for information about the meeting should be addressed to the Secretary of the Board, Julie S. Moore, at (202) 268–4800.

Julie S. Moore,

Secretary.

[FR Doc. 2011–29912 Filed 11–16–11; 11:15 am]

BILLING CODE 7710–12–P

PRESIDIO TRUST

Notice of Establishment of the Fort Winfield Scott Advisory Committee

AGENCY: The Presidio Trust.

ACTION: Notice of establishment of the Fort Winfield Scott Advisory Committee.

SUMMARY: Pursuant to the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), the Executive Director of the Presidio Trust announces the intent to establish the Fort Winfield Scott Advisory Committee (''Committee''). The Committee will advise the Executive Director of the Presidio Trust on matters pertaining to the rehabilitation and reuse of Fort Winfield Scott as a new national center focused on service and leadership development.

DATES: Nominations for members must be received on or before December 16, 2011.

ADDRESSES: All nominations should be submitted to Joshua Steinberger, Senior Advisor to the Executive Director, at 34 Graham Street, P.O. Box 29052, San Francisco, CA 94129–0052. The Committee's charter and membership balance plan are web accessible at *http://www.fido.gov/facadatabase/.*

FOR FURTHER INFORMATION CONTACT: Joshua Steinberger, Presidio Trust, 34 Graham Street, P.O. Box 29052, San Francisco, CA 94129–0052. *phone* (415) 561–5367 or *email jsteinberger@presidiotrust.gov.*

SUPPLEMENTARY INFORMATION:

Background and Authority: Pursuant to the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), the Executive Director of the Presidio Trust announces the intent to establish the Fort Winfield Scott Advisory Committee. The Executive Director of the Presidio Trust, in consultation with the Chair of the Board of Directors, has determined that the Committee is in the public interest and supports the Presidio Trust in performing its duties and responsibilities under the Presidio Trust Act, 16 U.S.C. 460bb appendix.

The Committee will advise on the establishment of a new national center (''Center'') focused on service and leadership development, with specific emphasis on: (a) Assessing the role and key opportunities of a national center dedicated to service and leadership at Fort Scott in the Presidio of San Francisco; (b) providing recommendations related to the Center's programmatic goals, target audiences, content, implementation, and evaluation; (c) providing guidance on a phased development approach that leverages a combination of funding sources including philanthropy; and (d) making recommendations on how to structure the Center's business model to best achieve the Center's mission and ensure long-term financial self-sufficiency.

Structure: The Committee shall consist of up to 15 members with a demonstrated interest in advancing service to community and country and/or expertise in building the capacity of organizations to tackle society's most pressing challenges through innovative approaches, including cross-sector collaboration. Members will be selected

with regard to the Committee's collective representation of public, for-profit, non-profit, and academic perspectives.

Committee members will be selected in accordance with the candidate identification process detailed in the Committee's Membership Balance Plan (accessible at *http://fido.gov/facadatabase/*). Members will serve for a term of two years without compensation, but may receive transportation expenses, including per diem in lieu of subsistence, to the extent permissible by law and subject to the availability of resources. Meetings will occur at an estimated frequency of once every three months.

Nominations: The Presidio Trust will consider nominations of all qualified individuals to ensure that the Committee includes the areas of subject matter expertise noted above (see ''Structure''). Potential candidates may be asked to provide detailed information as necessary regarding financial interests, employment, and professional affiliations to evaluate possible sources of conflicts of interest.

Each nomination should include: (1) The nominee's name, affiliation, and contact information; (2) a cover letter describing the nominee's qualifications or interest in serving on the Committee; and (3) a copy of the nominee's biography and/or curriculum vitae. The Presidio Trust encourages applications from diverse nominees with respect to backgrounds, professions, ethnicities, gender, and geography. Self-nominations are acceptable.

Dated: November 14, 2011.

Karen A. Cook,

General Counsel.

[FR Doc. 2011–29878 Filed 11–17–11; 8:45 am]

BILLING CODE 4310–4R–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Tuesday, November 15, 2011 at 2:30 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), (9)(ii) and (10) permit consideration of the scheduled matter at the Closed Meeting.

Commissioner Aguilar, as duty officer, voted to consider the item listed for the Closed Meeting in a closed session, and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting scheduled for Tuesday, November 15, 2011 will be:

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting item.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: November 15, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–29969 Filed 11–16–11; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65663; File No. SR–FINRA–2011–035]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, etc.

November 1, 2011.

Correction

In notice document 2011–28716 appearing on pages 68800–68803 in the issue of November 7, 2011, make the following correction:

On page 68802, in the third column, in the second full paragraph, in the eleventh line, ''[insert date 45 days from publication in the **Federal Register**]'', should read ''December 22, 2011''.

[FR Doc. C1–2011–28716 Filed 11–17–11; 8:45 am]

BILLING CODE 1505–01–D

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65662; File No. SR–CBOE–2011–102]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt a Market-Maker Trade Prevention Order on CBOE Stock Exchange

November 1, 2011.

Correction

In notice document 2011–28694 appearing on pages 68798–68800 in the issue of November 7, 2011, make the following correction:

On page 68798, in the first column, the Release No. and the File No., which were inadvertently omitted from the document heading, are added to read as set forth above.

[FR Doc. C1–2011–28694 Filed 11–17–11; 8:45 am]

BILLING CODE 1505–01–D

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65722; File No. SR–FINRA–2011–065]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update Rule Cross-References Within Certain FINRA Rules

November 10, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 2, 2011, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to update cross-references within certain FINRA rules to reflect changes adopted in the consolidated FINRA rulebook.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA is in the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook'').[4] That process involves FINRA submitting to the Commission for approval a series of proposed rule changes over time to adopt rules in the Consolidated FINRA Rulebook. The phased adoption and implementation of those rules necessitates periodic amendments to update rule cross-references and other non-substantive technical changes in the Consolidated FINRA Rulebook.

The proposed rule change would update rule cross-references to reflect changes adopted in the Consolidated FINRA Rulebook. In this regard, the proposed rule change would update references in FINRA Rules 0150 (Application of Rules to Exempted Securities Except Municipal Securities),[5] 2114 (Recommendations to Customers in OTC Equity Securities), 2124 (Net Transactions with Customers), 2130 (Approval Procedures for Day-Trading Accounts), 2264 (Margin Disclosure Statement), 2270 (Day-Trading Risk Disclosure Statement), 2330 (Members' Responsibilities Regarding Deferred Variable Annuities), 2360 (Options), 2370 (Security Futures), 5122 (Private Placements of Securities Issued by Members), 5320 (Prohibition Against Trading Ahead of Customer Orders), 6630 (Applicability of FINRA Rules to Securities Previously Designated as PORTAL Securities),[6] 7230A (Trade Report Input), 7330 (Trade Report Input), 9217 (Violations Appropriate for Disposition Under Plan Pursuant to SEA Rule 19d–1(c)(2)), 9559 (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series), and 9610 (Application) that are needed as the result of Commission approval of three recent FINRA proposed rule changes.[7] Also, the proposed rule change will delete the general recordkeeping provisions of NYSE Rule 440 (Books and Records).[8] In addition, the proposed rule change would update reference to former MSRB Rule G–36 (Delivery of Official Statements, Advance Refunding Documents and Forms G–36(OS) and G–36(ARD) to Board or its Designee) in FINRA Rule 9217 to reflect changes made in a MSRB Rule filing.[9]

As noted in Item 2 of this filing, FINRA has filed the proposed rule change for immediate effectiveness. The implementation date for the proposed change to FINRA Rule 9559 will be December 2, 2011.[10] The implementation date for certain proposed rule changes to FINRA Rules 0150 and 6630, and proposed rule changes to FINRA Rules 2114, 2124, 2130, 2264, 2270, 2330, 2360, 2370, 5122, 5320, 7230A, 7330 and 9217 will be December 5, 2011. The implementation date for the proposed rule changes to update certain references in FINRA Rules 0150, 6630(c)(2) and 9610(a) that would delete the reference to NASD Rule 3020 and add the reference to FINRA Rule 4360 will be January 1, 2012.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[11] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposed rule change will provide greater clarity to members and the public regarding FINRA's rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section

[4] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[5] The proposed rule change would update FINRA Rule 0150 to reflect (1) the adoption of Rules 2268, 4510 Series, and 5340 and the deletion of NASD Rule 3110 and NASD IM–3110, effective December 5, 2011, and (2) the deletion of NASD Rule 3020 to add Rule 4360, effective January 1, 2012. *See Regulatory Notice* 11–19 (April 2011) (regarding File No. SR–FINRA–2010–052) and *Regulatory Notice* 11–21 (May 2011) (regarding File No. SR–FINRA–2010–059).

[6] The proposed rule change would update FINRA Rule 6630 to reflect (1) the adoption of Rules 4510 Series and the deletion of NASD Rule 3110, effective December 5, 2011, and (2) the deletion of NASD Rule 3020 to add Rule 4360, effective January 1, 2012. *See Regulatory Notice* 11–19 (April 2011) (regarding File No. SR–FINRA–2010–052) and *Regulatory Notice* 11–21 (May 2011) (regarding File No. SR–FINRA–2010–059).

[7] *See* Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving File No. SR–FINRA–2010–052); Securities Exchange Act Release No. 63961 (February 24, 2011), 76 FR 11542 (March 2, 2011) (Order Approving File No. SR–FINRA–2010–059); and Securities Exchange Act Release No. 65281 (September 7, 2011), 76 FR 56848 (September 14, 2011) (Order Approving File No. SR–FINRA–2011–031).

[8] *See* Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving File No. SR–FINRA–2010–052). *See also* Securities Exchange Act Release No. 63999 (March 1, 2011), 76 FR 12380 (March 7, 2011) (Order Approving File No. SR–FINRA–2010–061).

[9] *See* Securities Exchange Act Release No. 59966 (May 21, 2009), 74 FR 25790 (May 29, 2009) (Order Approving File No. SR–MSRB–2009–02).

[10] *See Regulatory Notice* 11–50 (November 2011) (regarding File No. SR–FINRA–2011–031).

[11] 15 U.S.C. 78*o*–3(b)(6).

19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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 email to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2011–065 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2011–065. This file number should be included on the subject line if email 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 FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–FINRA–2011–065 and should be submitted on or before December 9, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–29786 Filed 11–17–11; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65732; File No. SR–CBOE–2011–106]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide a Limited Extension to the Compliance Deadline for Registration and Qualification Pursuant to Rule 3.6A

November 10, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] notice is hereby given that on November 4, 2011, the Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by CBOE. The Exchange has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule pursuant to Section 19(b)(3)(A)(i) of the Act[2] and Rule 19b–4(f)(1) thereunder,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[4] the Exchange proposes to provide a limited extension to the November 5, 2011 deadline to comply with its rules regarding registration and qualification of individual Trading Permit Holders and individual associated persons for those individual Trading Permit Holders and/or individual associated persons that have failed the required qualification examination(s) associated with their required categories of registration. CBOE is not proposing any textual changes to the Rules of CBOE. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

Pursuant to Rule 15b7–1,[5] promulgated under the Exchange Act,[6] ''No registered broker or dealer shall effect any transaction in * * * any security unless any natural person associated with such broker or dealer who effects or is involved in effecting such transaction is registered or approved in accordance with the standards of training, experience, competence, and other qualification standards * * * established by the rules of any national securities exchange * * *'' CBOE Rule 3.6A sets forth requirements for registration and qualification of individual Trading Permit Holders and individual associated persons. In response to a

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(i).

[3] 17 CFR 240.19b–4(f)(1).

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.15b7–1.

[6] 15 U.S.C. 78a *et seq.*

request by the Division of Trading and Markets at the Securities and Exchange Commission (the ''Commission'' or ''SEC''), CBOE recently amended its rules to expand its registration and qualification requirements set forth in CBOE Rule 3.6A to include individual Trading Permit Holders and individual associated persons that are engaged or to be engaged in the securities business of a Trading Permit Holder or TPH organization.[7] CBOE Rule 3.6A provides that these individuals must be registered with the Exchange in the category of registration appropriate to the function to be performed as prescribed by the Exchange. Further, Rule 3.6A requires, among other things, that an individual Trading Permit Holder or individual associated person submit an application for registration and pass the appropriate qualification examination before the registration can become effective. The revised requirements apply to both CBOE and CBOE Stock Exchange (''CBSX'') Trading Permit Holders and their associated persons.

In conjunction with the registration requirements established by SR–CBOE–2010–084, three new qualification examinations became available on June 20, 2011 in the Central Registration Depository system (''WebCRD''), which is operated by the Financial Industry Regulatory Authority, Incorporated (''FINRA''). These registration categories include the following (the required qualification examinations and prerequisites, as applicable, associated with each registration category are in parentheses): PT—Proprietary Trader (Series 56), CT—Proprietary Trader Compliance Officer (Series 14, Series 56 prerequisite) and TP—Proprietary Trader Principal (Series 24, Series 56 prerequisite). In the Approval Order for SR–CBOE–2010–084, the SEC established a deadline of August 12, 2011 for CBOE and CBSX individual Trading Permit Holders and individual associated persons of CBOE and CBSX Trading Permit Holders to register for and pass the applicable qualification examination(s). CBOE recently submitted a rule filing extending the deadline until November 5, 2011.[8]

CBOE respectfully requests a limited extension to the November 5, 2011 deadline for those individuals that have attempted to take the required qualification examination(s) prior to November 5, 2011 but have failed the examination (or prerequisite examination if multiple examinations are required). If an individual fails a required examination, the individual is prevented from rescheduling an examination for at least thirty days following the initial failure of an exam.[9] Therefore, CBOE is proposing to provide thirty days following the date that WebCRD permits an individual to reschedule the appropriate qualification examination (following the failure of an examination taken prior to November 5, 2011). CBOE believes this proposal provides a reasonable amount of time for individuals that have failed an examination to come into compliance with the rule while limiting the disruption to a Trading Permit Holder's business operation that may result from an exam failure.

In order to qualify for the limited extension, the individual (or associated Trading Permit Holder) must demonstrate that (i) the individual failed the required qualification examination prior to November 5, 2011; and (ii) that the individual attempted to take the qualification examination again within thirty days following the date that WebCRD permits the individual to reschedule the examination after the initial failure. For example, if an individual failed the Series 56 on October 14, 2011, the individual must retake the examination no later than December 13, 2011.

Similarly, if an individual fails an examination that is the prerequisite for a second exam and is compliant with the terms of the limited extension referenced above, CBOE is also proposing to provide an additional thirty (30) days following successful completion of the prerequisite examination to pass the second examination. For example, for an individual that is required to take the Series 56 and the Series 24, if an individual fails the Series 56 on October 14, 2011, and the individual successfully takes the Series 56 on November 16, 2011, the individual must take the Series 24 no later than December 16, 2011.

(2) Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] which requires, among other things, that the Exchange's rules be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. Specifically, CBOE believes this proposal provides Trading Permit Holders (and associated persons) that attempted to comply with the registration and qualification requirements by the deadline a reasonable amount of additional time to comply with these requirements, particularly as the individuals that are impacted by this rule are subject to a system requirement that prevents the individual from complying with these requirements within the designated timeframe. Further, CBOE believes that this proposal will limit the disruption to a Trading Permit Holder's business operation and/or the marketplace, in the event an individual or firm withdraws from the marketplace following an exam failure. The Exchange also believes the proposed rule change furthers the objectives of Section 6(c)(3)[12] of the Act, which authorizes CBOE to prescribe standards of training, experience and competence for persons associated with CBOE members, in that this filing is proposing to extend the deadline for compliance with the standards of training, experience and competence established by the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission

The foregoing proposed rule change will take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)(i) of the Act[13] and Rule 19b–4(f)(1) thereunder,[14] because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

[7] *See* Securities Exchange Act Release No. 63314 (November 12, 2010), 75 FR 70957 (November 19, 2010) (SR–CBOE–2010–084).

[8] *See* SR–CBOE–2011–104.

[9] WebCRD also imposes a thirty-day delay for the failure of a qualification examination for the second time. In addition, an individual is prevented from re-registering for an examination for an additional one hundred eighty days upon the third failure of a qualification examination.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78f(c)(3).

[13] 15 U.S.C. 78s(b)(3)(A)(i).

[14] 17 CFR 240.19b–4(f)(1).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–106 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2011–106. This file number should be included on the subject line if email 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 this filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–CBOE–2011–106 and should be submitted on or before December 9, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–29746 Filed 11–17–11; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 7691]

Culturally Significant Objects Imported for Exhibition Determinations: ''The Steins Collect: Matisse, Picasso, and the Parisian Avant-Garde'' Exhibition

ACTION: Notice, correction.

SUMMARY: On April 1, 2011, notice was published on page 18292 of the **Federal Register** (volume 76, number 63) of the determinations made by the Department of State pertaining to the exhibition ''The Steins Collect: Matisse, Picasso, and the Parisian Avant-Garde.'' The referenced notice is corrected as to the number of objects on temporary display at The Metropolitan Museum of Art, which is nine rather than six. Therefore, I determine that the exhibition or display of all of the exhibit objects at the San Francisco Museum of Modern Art, San Francisco, CA, from on or about May 21, 2011, until on or about September 6, 2011, and the temporary display of nine of the objects at The Metropolitan Museum of Art, New York, NY, from on or about February 21, 2012, until on or about June 3, 2012, is in the national interest. Also, the temporary display of the objects at possible additional exhibitions or venues yet to be determined is in the national interest. I have ordered that Public Notice of the correction of the number of the objects to be on temporary display at The Metropolitan Museum of Art be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: (202) 632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: November 9, 2011.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–29862 Filed 11–17–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7690]

Advisory Committee on Historical Diplomatic Documentation; Notice of Meeting

SUMMARY: The Advisory Committee on Historical Diplomatic Documentation will meet on December 12 and December 13 at the Department of State, 2201 ''C'' Street NW., Washington, DC. Prior notification and a valid government-issued photo ID (such as driver's license, passport, U.S. government or military ID) are required for entrance into the building. Members of the public planning to attend must notify Colby Prevost, Office of the Historian ((202) 663–3529) no later than December 8, 2011 to provide date of birth, valid government-issued photo identification number and type (such as driver's license number/state, passport number/country, or U.S. government ID number/agency or military ID number/branch), and relevant telephone numbers. If you cannot provide one of the specified forms of ID, please consult with Colby Prevost for acceptable alternative forms of picture identification. In addition, any requests for reasonable accommodation should be made no later than December 6, 2011. Requests for reasonable accommodation received after that time will be considered, but might be impossible to fulfill.

The Committee will meet in open session from 11 a.m. until 12 Noon on Monday, December 12, 2011, in the Department of State, 2201 ''C'' Street NW., Washington, DC, in Conference Room 1205, to discuss declassification and transfer of Department of State records to the National Archives and Records Administration and the status of the *Foreign Relations* series. The remainder of the Committee's sessions in the afternoon on Monday, December 12, 2011 and in the morning on Tuesday, December 13, 2011, will be closed in accordance with Section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463). The agenda calls for discussions of agency declassification decisions concerning the *Foreign Relations* series and other declassification issues. These are matters properly classified and not subject to public disclosure under 5

U.S.C. 552b(c)(1) and the public interest requires that such activities be withheld from disclosure. Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Privacy Impact Assessment for VACS–D at *http://www.state.gov/documents/organization/100305.pdf,* for additional information.

Questions concerning the meeting should be directed to Ambassador Edward Brynn, Executive Secretary, Advisory Committee on Historical Diplomatic Documentation, Department of State, Office of the Historian, Washington, DC 20520, *telephone* (202) 663–1123 (*email history@state.gov*).

Dated: November 7, 2011.

Edward Brynn,

Executive Secretary, Advisory Committee on Historical Diplomatic Documentation, Department of State.

[FR Doc. 2011–29863 Filed 11–17–11; 8:45 am]

BILLING CODE 4710–11–P

DEPARTMENT OF STATE

[Public Notice 7654]

Advisory Committee on International Economic Policy; Notice of Open Meeting

The Advisory Committee on International Economic Policy (ACIEP) will meet from 2 p.m. to 4 p.m. on Thursday, December, 8, 2011, in room 1107 of the Harry S. Truman Building at the U.S. Department of State, 2201 C Street NW., Washington, DC. The meeting will be hosted by the Assistant Secretary of State for Economic, Energy, and Business Affairs Jose W. Fernandez and Committee Chair Ted Kassinger. The ACIEP serves the U.S. Government in a solely advisory capacity, and provides advice concerning issues and challenges in international economic policy. The meeting will examine A New Focus on Investment: Attracting Inbound Foreign Direct Investment to the U.S. and highlight the U.S.-Turkey Economic Partnership Commission. Subcommittee reports will be led by the Investment Subcommittee, the Sanctions Subcommittee, and the Subcommittee on Women in International Economic Policy.

This meeting is open to public participation, though seating is limited. Entry to the building is controlled; to obtain pre-clearance for entry, members of the public planning to attend should provide, by Monday, December 5 their name, professional affiliation, valid government-issued ID number (*i.e.,* U.S. Government ID [agency], U.S. military ID [branch], passport [country], or drivers license [state]), date of birth, and citizenship to Ronelle Jackson by *fax* (202) 647–5936, *email* (*JacksonRS@state.gov*), or *telephone* (202) 647–9204. One of the following forms of valid photo identification will be required for admission to the State Department building: U.S. driver's license, U.S. Government identification card, or any valid passport. Enter the Department of State from the entrance on 23rd Street. In view of escorting requirements, non-Government attendees should plan to arrive 15 minutes before the meeting begins. Requests for reasonable accommodation should be made to Ronelle Jackson prior to Thursday, December 1st. Requests made after that date will be considered, but might not be possible to fulfill.

Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Privacy Impact Assessment for VACS–D at *http://www.state.gov/documents/organization/100305.pdf* for additional information.

For additional information, contact Deputy Outreach Coordinator Tiffany Enoch, Office of Economic Policy Analysis and Public Diplomacy, Bureau of Economic, Energy and Business Affairs, at (202) 647–2231 or *EnochT@state.gov*.

Dated: November 14, 2011.

Ruth Hall,

Acting Director, Office of Economic Policy Analysis and Public Diplomacy, U.S. Department of State.

[FR Doc. 2011–29864 Filed 11–17–11; 8:45 am]

BILLING CODE 4710–07–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Comments Concerning Compliance With Telecommunications Trade Agreements

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of request for public comment and reply comment.

SUMMARY: Pursuant to section 1377 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 3106) ('Section 1377'), the Office of the United States Trade Representative (''USTR'') is reviewing and requests comments on the operation, effectiveness, and implementation of and compliance with the following agreements regarding telecommunications products and services of the United States: The World Trade Organization (''WTO'') General Agreement on Trade in Services; The North American Free Trade Agreement (''NAFTA''); U.S. free trade agreements (''FTAs'') with Australia, Bahrain, Chile, Morocco, Oman, Peru, and Singapore; and the Dominican Republic–Central America–United States Free Trade Agreement (''CAFTA–DR''), and any other telecommunications trade agreements, such as Mutual Recognition Agreements (MRAs) for Conformity Assessment of Telecommunications Equipment. The USTR will conclude the review by March 31, 2012.

DATES: Comments are due on December 16, 2011 and reply comments on January 13, 2012.

ADDRESSES: Donald W. Eiss, Trade Policy Staff Committee, or Jonathan McHale, DAUSTR, Telecom Trade Policy, ATTN: Section 1377 Comments, Office of the United States Trade Representative, 1724 F Street, NW., Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: Jonathan McHale, Office of Services and Investment (202) 395–9533; or Maria Pagan, Office of the General Counsel (202) 395–9626.

SUPPLEMENTARY INFORMATION: Section 1377 requires the USTR to review annually the operation and effectiveness of all U.S. trade agreements regarding telecommunications products and services that are in force with respect to the United States. The purpose of the review is to determine whether any act, policy, or practice of a country that has entered into an FTA or other telecommunications trade agreement with the United States is inconsistent with the terms of such agreement or otherwise denies U.S. firms, within the context of the terms of such agreements, mutually advantageous market opportunities for telecommunications products and services. For the current review, the USTR seeks comments on:

(1) Whether any WTO member is acting in a manner that is inconsistent with its obligations under WTO agreements affecting market

opportunities for telecommunications products or services, *e.g.,* the WTO General Agreement on Trade in Services (''GATS''), including the Agreement on Basic Telecommunications Services, the Annex on Telecommunications, and any scheduled commitments including the Reference Paper on Pro-Competitive Regulatory Principles; the WTO Agreement on Subsidies and Countervailing Measures; the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights; or the plurilateral WTO Agreement on Government Procurement.

(2) Whether Canada or Mexico has failed to comply with its telecommunications obligations under the NAFTA;

(3) Whether Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras or Nicaragua has failed to comply with its telecommunications obligations under the CAFTA–DR;

(4) Whether Australia, Bahrain, Chile, Morocco, Oman, Peru, or Singapore has failed to comply with its telecommunications obligations under its FTA with the United States (see *http://www.ustr.gov/trade-agreements/free-trade-agreements* for links to U.S. FTAs);

(5) Whether any country has failed to comply with its obligations under telecommunications trade agreements with the United States other than FTAs, *e.g.,* Mutual Recognition Agreements (MRAs) for Conformity Assessment of Telecommunications Equipment (see *http://ts.nist.gov/standards/conformity/mra/mra.cfm* for links to certain U.S. telecommunications MRAs);

(6) Whether any act, policy, or practice of a country cited in a previous section 1377 review remains unresolved (see *http://www.ustr.gov/trade-topics/services-investment/telecom-e-commerce/section-1377-review* for recent reviews); and

(7) Whether any measures or practices impede access to telecommunications markets or otherwise deny telecommunications products and services market opportunities with respect to any country that is a WTO member or for which an FTA or telecommunications trade agreement has entered into force between such country and the United States. Measures or practices of interest include, for example, efforts by a foreign government or a telecommunications service provider to block services delivered over the Internet (including, but not limited to voice over Internet protocol services, social networking, and search services); requirements for access to or use of networks that limit the products or services U.S. suppliers can offer in specific foreign markets; the imposition of excessively high licensing fees; unreasonable wholesale roaming rates that mobile telecommunications service suppliers in specific foreign markets charge U.S. suppliers that seek to supply international mobile roaming services to their U.S. customers; discriminatory procedures that foreign governments apply in allocating or allowing use of spectrum or other scarce resources; subsidies provided to equipment manufactures which are contingent upon exporting or local content, or have caused adverse effects to domestic equipment manufacturers (supported by evidence and/or identifiable legal measures); and the imposition by foreign governments of unnecessary or discriminatory technical regulations or standards for telecommunications products or services. In all cases, commenters should provide any available documentary evidence, translated into English where necessary, to facilitate evaluation of a claim.

Public Comment and Reply Comment: Requirements for Submission

Comments in response to this notice must be written in English, must identify (on the first page of the comments) the telecommunications trade agreement(s) discussed therein, and must be submitted no later than December 16, 2011. Reply comments must also be in English and must be submitted no later than January 13, 2012. Comments and reply comments must be submitted using *http://www.regulations.gov,* docket number USTR–2010–0034. In the unusual case where submitters are unable to make submissions through Regulations.gov, the submitter must contact Donald W. Eiss at (202) 395–9603 to make alternate arrangements.

To submit comments using *http://www.regulations.gov,* enter docket number USTR–2010–0034 under ''Key Word or ID'' on the home page and click ''Search''. The site will provide a search-results page listing all documents associated with this docket. Locate the reference to this notice by selecting ''Notices'' under ''Document Type'' on the search-results page, and click on the link entitled ''Submit a Comment.'' Follow the instructions given on the screen to submit a comment. The *http://www.regulations.gov* Web site offers the option of providing comments by filling in a ''Type Comment'' field or by attaching a document. While both options are acceptable, USTR prefers submissions in the form of an attachment.

Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the submission itself, not as separate files.

Submitters should provide updated information on all issues they cite in their filings; USTR will not review submissions that are copies of earlier submissions.

Business Confidential Submissions

For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC''. The top of any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL''. Any person filing comments that contain business confidential information must also file in a separate submission a public version of the comments. The file name of the public version of the comments should begin with the character ''P''. The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments. The submitter must include in the comments a written explanation of why the information should be protected. The submission must indicate, with asterisks, where confidential information was redacted or deleted. The top and bottom of each page of the non-confidential version must be marked either ''PUBLIC VERSION'' or ''NON–CONFIDENTIAL''.

Public Inspection of Submissions

Comments will be placed in the docket and open to public inspection, except confidential business information exempt from public inspection. Comments may be viewed on the *http://www.regulations.gov* Web site by entering the relevant docket number in the search field on the home page.

Donald Eiss,

Acting Chair, Trade Policy Staff Committee.

[FR Doc. 2011–29750 Filed 11–17–11; 8:45 am]

BILLING CODE 3190–W2–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Availability of the Final Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for Issuing an Experimental Permit to SpaceX for Operation of the Grasshopper Vehicle at the McGregor Test Site, Texas

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

ACTIONS: Notice.

SUMMARY: In accordance with the National Environmental Policy Act (NEPA) of 1969, 42 United States Code § 4321–4347 (as amended), Council on Environmental Quality (CEQ) NEPA implementing regulations (40 Code of Federal Regulations [CFR] Parts 1500–1508), and FAA Order 1050.1E, Change 1, the FAA is announcing the availability of the Final EA and FONSI for Issuing an Experimental Permit to SpaceX for Operation of the Grasshopper Vehicle at the McGregor Test Site, Texas.

The Final EA was prepared in response to an application for an experimental permit from Space Exploration Technologies Corporation (SpaceX). Under the Proposed Action, the FAA would issue an experimental permit to SpaceX to conduct suborbital launches and landings of the Grasshopper Reusable Launch Vehicle (RLV) from the McGregor test site in McGregor, Texas. The Grasshopper RLV is a vertical takeoff and vertical landing vehicle. The McGregor test site is located within the city limits of the City of McGregor, Texas in Coryell and McLennan Counties, approximately 20 miles southwest of Waco, Texas. The Final EA addresses the potential environmental impacts of implementing the Proposed Action and the No Action Alternative of not issuing an experimental permit to SpaceX.

The FAA has posted the Final EA and FONSI on the FAA/AST Web site at *http://www.faa.gov/about/office_org/headquarters_offices/ast/*. In addition, copies of the Final EA and FONSI were sent to persons and institutions on the distribution list (see Chapter 8 of the Final EA). A paper copy of the Final EA and FONSI may be reviewed during regular business hours at the following location: McGinley Memorial Library, 317 Main Street, McGregor, Texas 76657.

Additional Information: Under the Proposed Action, the FAA would issue an experimental permit to SpaceX, which would authorize SpaceX to conduct suborbital launches and landings of the Grasshopper RLV from the McGregor test site in McGregor, Texas. SpaceX has determined that to support the Grasshopper RLV activities under the experimental permit, it would be necessary to construct a launch pad and additional support infrastructure (water lines). Therefore, the Proposed Action analyzed in the Final EA includes the activities that would be authorized by the experimental permit (*i.e.,* the operation of the launch vehicle) as well as the construction of the launch pad and installation of water lines. The experimental permit would be valid for one year and would authorize an unlimited number of launches. The FAA could renew the experimental permit if requested, in writing, by SpaceX at least 60 days before the permit expires. SpaceX anticipates that the Grasshopper RLV program would require up to 3 years to complete. Therefore, the Proposed Action considers one new permit and two potential permit renewals.

Although an experimental permit would authorize an unlimited number of launches, the FAA, in conjunction with SpaceX, developed a conservative set of assumptions regarding the possible number of launches that could be conducted under any one experimental permit for the Grasshopper RLV at the McGregor test site. The FAA has assumed that SpaceX would conduct up to 70 annual suborbital launches of the Grasshopper RLV under an experimental permit at the McGregor test site. This estimation is a conservative number and considers potential multiple launches per day and potential launch failures.

The only alternative to the Proposed Action analyzed in the Final EA is the No Action Alternative. Under the No Action Alternative, the FAA would not issue an experimental permit to SpaceX for operation of the Grasshopper RLV at the McGregor test site. Existing SpaceX activities would continue at the McGregor test site. Please refer to Section 2.2 of the Final EA for a brief discussion of existing SpaceX activities.

The resource areas considered in the Final EA include air quality; noise and compatible land use; land use (including U.S. Department of Transportation Section 4(f) Properties); biological resources (fish, wildlife, and plants); historical, architectural, archaeological, and cultural resources; hazardous materials, pollution prevention, and solid waste; light emissions and visual resources; natural resources and energy supply; water resources (surface waters and wetlands, groundwater, floodplains, and water quality); socioeconomics, environmental justice, and children's environmental health and safety; and secondary (induced) impacts. Potential cumulative impacts of the Proposed Action were also addressed in the Final EA.

An analysis of the Proposed Action has concluded that there would be no significant short-term, long-term, or cumulative effects to the environment or surrounding populations. Therefore, an Environmental Impact Statement for the Proposed Action is not required. After careful and thorough consideration of the facts contained herein, the FAA finds that the proposed Federal action is consistent with existing national environmental policies and objectives as set forth in Section 101 of NEPA and other applicable environmental requirements and will not significantly affect the quality of the human environment or otherwise include any condition requiring consultation pursuant to Section 102(2)(c) of NEPA.

FOR FURTHER INFORMATION CONTACT: Mr. Daniel Czelusniak, Environmental Program Lead, Office of Commercial Space Transportation, Federal Aviation Administration, 800 Independence Avenue SW., Room 325, Washington, DC 20591; telephone (202) 267–5924; email: *Daniel.Czelusniak@faa.gov.*

Issued in Washington, DC, on November 11, 2011.

Glenn H. Rizner,

Deputy Manager, Space Transportation Development Division.

[FR Doc. 2011–29892 Filed 11–17–11; 8:45 am]

BILLING CODE 4310–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0166]

Parts and Accessories Necessary for Safe Operation; Grant of Temporary Exemption for Con-way Freight, TK Holdings, Inc., and Iteris, Inc.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) announces its decision to grant an exemption to enable Con-way Freight (Con-way), TK Holdings, Inc. (Takata), and Iteris, Inc. (Iteris) to mount lane departure warning system sensors lower in the windshield of a commercial motor vehicle (CMV) than is currently permitted by the Agency's regulations. The lane departure warning system

alerts drivers who unintentionally drift out of their lane of travel, thus promoting improved safety performance.

DATES: This exemption is effective November 18, 2011 through November 18, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Luke W. Loy, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, MC–PSV, (202) 366–0676, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31315 and 31136(e), FMCSA may grant an exemption from the prohibition on obstructions to the driver's field of view requirements in 49 CFR 393.60(e) for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level of safety that would be achieved absent such exemption,'' (49 CFR 381.305(a)).

Applications for Exemptions

On November 11, 2009, Con-way applied for an exemption from 49 CFR 393.60(e)(1) to allow it to install lane departure warning system sensors on 1,272 of its newly purchased power units. Takata and Iteris submitted nearly identical exemption applications for their lane departure warning system sensors on December 15, 2009 and on February 25, 2010, respectively. On June 14, 2010, FMCSA published a notice of these applications, and asked for public comment (75 FR 33666).

Section 393.60(e)(1) of the FMCSRs prohibits the obstruction of the driver's field of view by devices mounted at the top of the windshield. Antennas, transponders and similar devices (collectively, devices) must not be mounted more than 152 mm (6 inches) below the upper edge of the windshield. These devices must be located outside the area swept by the windshield wipers and outside the driver's sight lines to the road and highway signs and signals.

Con-way, Takata, and Iteris state that over the last several years, truck manufacturers have increased the windshield area to maximize driver visibility. As a result, manufacturers have voluntarily installed larger windshield wipers on these windshields that increase the swept area beyond that which is minimally required by Federal Motor Vehicle Safety Standard (FMVSS) No. 104, ''Windshield wiping and washing systems.'' FMVSS No. 104 establishes the requirements applicable to vehicle and equipment manufacturers for windshield wiper system coverage for passenger cars, multi-purpose passenger vehicles, trucks, and buses.

Con-way, Takata, and Iteris provided diagrams and photos showing the dimensions of the lane departure sensors and their mounting locations on vehicle windshields. Specifically, the lane departure sensor device itself measures 2 inches by 3.5 inches and is mounted within the top 2 inches of the windshield wiper sweep. The lane departure system requires the forward lens of the sensor to be in the swept area of the windshield for a clear view in inclement weather.

Con-way, Takata, and Iteris cited the findings of a report published by FMCSA's Office of Analysis, Research and Technology titled ''Benefit-Cost Analyses of Onboard Safety Systems,'' which summarizes the projected safety benefits for various CMV onboard safety technologies, including lane departure warning systems. Using projected efficacy rates ranging from 23 percent to 53 percent, the report estimated that, based on industry-wide use, lane departure warning systems have the potential to eliminate approximately 1,609–2,463 single-vehicle roadway departure crashes, 627–1,307 single-vehicle roadway departure rollovers, 1,111–2,223 same-direction lane departure sideswipes, 997–1,992 opposite-direction lane departure sideswipes, and 59–118 opposite-direction lane departure head-on collisions. Con-way, Takata, and Iteris each stated that without the exemption, they will be unable to (1) implement the lane departure warning system, and (2) realize the potential safety benefits that can be expected with the utilization of this technology as estimated in the FMCSA report described above.

Comments

In response to its notice requesting public comment, the Agency received one comment, from the American Trucking Associations (ATA). The ATA supports the use of lane departure warning systems and identified no specific objection to the exemption applications. The ATA stated that the devices present relatively minor visual obstruction when placed near the upper edge of the windshield wiper sweep, and should not adversely impact the driver's ability to clearly see out of the windshield.

FMCSA Decision

The FMCSA has evaluated the Con-way, Jakarta, and Iteris exemption applications. The Agency believes that granting the temporary exemptions to allow the placement of lane departure warning system sensors lower in the windshield than is currently permitted by the Agency's regulations will provide a level of safety that is equivalent to, or greater than the level of safety achieved without the exemption because (1) based on the technical information available, there is no indication that the lane departure warning system sensors would obstruct drivers' views of the roadway, highway signs and surrounding traffic; (2) generally, trucks and buses have an elevated seating position that greatly improves the forward visual field of the driver, and any impairment of available sight lines would be minimal; and (3) the location within the top two inches of the area swept by the windshield wiper and out of the driver's normal sightline will be reasonable and enforceable at roadside. In addition, the Agency believes that the use of lane departure warning systems by fleets is likely to improve the overall level of safety to the motoring public.

This action is consistent with previous Agency actions permitting the similar placement of video event recorders on CMVs, within the swept area of the windshield wipers. FMCSA has granted temporary exemptions to Greyhound Lines, Inc. and to DriveCam, Inc. regarding the use of the video event recorders to increase safety through (1) identification and remediation of risky driving behaviors such as distracted driving and drowsiness, (2) enhanced monitoring of passenger behavior on CMVs in passenger service, and (3) enhanced collision review and analysis. Both of these exemptions have been renewed for a second 2-year period, as FMCSA is not aware of any evidence showing that the installation of the devices in the upper area of the windshield has resulted in any degradation in safety. Further, FMCSA continues to believe that the potential safety gains from the use of video event recorders to improve driver behavior will improve the overall level of safety to the motoring public. The Agency believes the same is true regarding the use of lane departure warning systems.

Terms and Conditions for the Exemption

The Agency hereby grants the exemptions for a two-year period, beginning November 18, 2011 and ending November 18, 2013. During the temporary exemption period, Con-way and motor carriers using the Takata and Iteris lane departure warning systems must ensure that the sensors are mounted not more than 50 mm (2 inches) below the upper edge of the area swept by the windshield wipers, and

outside the driver's sight lines to the road and highway signs and signals. The exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) Motor carriers and/or commercial motor vehicles fail to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Interested parties possessing information that would demonstrate that Con-way commercial motor vehicles using lane departure warning systems or commercial motor vehicles using lane departure warning systems manufactured by Takata and Iteris are not achieving the requisite statutory level of safety should immediately notify FMCSA. The Agency will evaluate any such information and, if safety is being compromised or if the continuation of the exemption is not consistent with 49 U.S.C. 31136(e) and 31315(b), will take immediate steps to revoke the exemptions granted to Con-way, Takata, and Iteris.

Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with or is inconsistent with this exemption with respect to a person operating under the exemption.

Issued on: November 8, 2011.

Anne S. Ferro,

Administrator.

[FR Doc. 2011–29600 Filed 11–17–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 14, 2011.

The Department of Treasury will submit the following public information collection requirement(s) 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. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11010, 1750 Pennsylvania Avenue NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 19, 2011 to be assured of consideration.

United States Mint

OMB Number: 1525–0013.

Type of Review: Revision of a currently approved collection.

Title: Application for Intellectual Property Use.

Form: Mint Form 3045.

Abstract: The application form allows individuals and business entities to apply to use United States Mint intellectual property and trademark and copyright materials.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 84.

Bureau Clearance Officer: Yvonne Pollard, United States Mint, 799 9th Street NW., 4th Floor, Washington, DC 20220; (202) 354–6784.

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. 2011–29790 Filed 11–17–11; 8:45 am]

BILLING CODE 4810–37–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 15, 2011.

The Department of the Treasury will submit the following public information collection requirement 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 submission may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection 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 December 19, 2011 to be assured consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–NEW.

Type of Review: New collection.

Title: Report of Organizational Actions Affecting Basis of Securities.

Forms: 8937.

Abstract: Organizational actions that affect the basis of stock will be reported on this form. This form will be sent to stock holders of record and nominees affected.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 206,500.

Bureau Clearance Officer: Yvette Lawrence, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224; (202) 927–4374.

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. 2011–29814 Filed 11–17–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8892

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8892, Payment of Gift/GST Tax and/or Application for Extension to File Form 709.

DATES: Written comments should be received on or before January 17, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Payment of Gift/GST Tax and/or Application for Extension to File Form 709.

OMB Number: 1545–1913.

Form Number: Form 8892.

Abstract: Form 8892 was created to serve a dual purpose. First, the form enables the taxpayers to request an extension of time to file Form 709 when they are not filing an individual income tax extension. Second, it serves as a payment voucher for taxpayers who are filing an individual income tax extension (by Form 4868) and will have a gift tax balance due on Form 709.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 10,000.

Estimated Time per Respondent: 44 mins.

Estimated Total Annual Burden Hours: 7,400.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 14, 2011.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2011–29791 Filed 11–17–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2011–60

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 2011–60, North Dakota Low-Income Housing Relief Credit.

DATES: Written comments should be received on or before January 17, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: North Dakota Low-Income Housing Relief Credit.

OMB Number: 1545–2213.

Notice Number: Notice 2011–60.

Abstract: The Internal Revenue Service is suspending certain requirements under § 42 of the Internal Revenue Code for low-income housing credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by flooding in North Dakota on February 14, 2011.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 500.

Estimated Average Time Per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 125.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 14, 2011.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2011–29793 Filed 11–17–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1099–SA

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this

opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1099–SA, Distributions From an HSA, Archer MSA or Medical Advantage MSA.

DATES: Written comments should be received on or before January 17, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Distributions From an HSA, Archer MSA or Medical Advantage MSA.

OMB Number: 1545–1517.

Form Number: 1099–SA.

Abstract: This form is used to report distributions from a medical savings account as required by Internal Revenue Code section 220(h).

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Responses: 25,839.

Estimated Time per Response: 8 min.

Estimated Total Annual Burden Hours: 3,618.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 14, 2011.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2011–29796 Filed 11–17–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Publication of the Tier 2 Tax Rates

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: Publication of the tier 2 tax rates for calendar year 2012 as required by section 3241(d) of the Internal Revenue Code (26 U.S.C. section 3241). Tier 2 taxes on railroad employees, employers, and employee representatives are one source of funding for benefits under the Railroad Retirement Act.

DATES: The tier 2 tax rates for calendar year 2012 apply to compensation paid in calendar year 2012.

FOR FURTHER INFORMATION CONTACT: Kathleen Edmondson, CC:TEGE:EOEG:ET1, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, Telephone Number (202) 622–0047 (not a toll-free number). TIER 2 TAX RATES: The tier 2 tax rate for 2012 under section 3201(b) on employees is 3.9 percent of compensation. The tier 2 tax rate for 2012 under section 3221(b) on employers is 12.1 percent of compensation. The tier 2 tax rate for 2012 under section 3211(b) on employee representatives is 12.1 percent of compensation.

Dated: November 9, 2011.

Victoria A. Judson,

Division Counsel/Associate Chief Counsel, Tax Exempt and Government Entities.

[FR Doc. 2011–29789 Filed 11–17–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-New (VA Form 10–0515)]

Agency Information Collection (Spinal Cord Injury Patient Care Survey) Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 19, 2011.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to ''OMB Control No. 2900-New (VA Form 10–0515)'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–7485, *FAX* (202) 461–0966 or *email denise.mclamb@va.gov.* Please refer to ''OMB Control No. 2900-New (VA Form 10–0515).''

SUPPLEMENTARY INFORMATION:

Title: Spinal Cord Injury Patient Care Survey, VA Form 10–0515.

OMB Control Number: OMB Control No. New (VA Form 10–0515).

Type of Review: New Collection.

Abstract: Information collected on VA Form 10–0515 will be used to determine spinal cord patients' satisfaction with VA rehabilitation and health care system.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 13, 2011, at page 56504.

Affected Public: Individuals or households.

Estimated Annual Burden: 33.

Frequency of Response: One time.

Estimated Average Burden per Respondents: 10 minutes.

Estimated Annual Responses: 200.

Dated: November 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–29821 Filed 11–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0016]

Agency Information Collection (Claim for Disability Insurance Benefits, Government Life Insurance) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 19, 2011.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0016'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–7485, *fax* (202) 461–0966 or *email denise.mclamb@va.gov.* Please refer to ''OMB Control No. 2900–0016.''

SUPPLEMENTARY INFORMATION:

Title: Claim for Disability Insurance Benefits, Government Life Insurance, VA Form 29–357.

OMB Control Number: 2900–0016.

Type of Review: Extension of a currently approved collection.

Abstract: Policyholders complete VA Form 29–357 to file a claim for disability insurance on National Service Life Insurance and United States Government Life Insurance policies. The information collected is used to determine the policyholder's eligibility for disability insurance benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 13, pages 56504–56505.

Affected Public: Individuals or households.

Estimated Annual Burden: 14,175 hours.

Estimated Average Burden per Respondent: 1 hour and 45 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 8,100.

Dated: November 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–29822 Filed 11–17–11; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 76 Friday,

No. 223 November 18, 2011

Part II

Commodity Futures Trading Commission

17 CFR Parts 1, 150 and 151

Position Limits for Futures and Swaps; Final Rule and Interim Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 150 and 151

RIN 3038–AD17

Position Limits for Futures and Swaps

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule and interim final rule.

SUMMARY: On January 26, 2011, the Commodity Futures Trading Commission (''Commission'' or ''CFTC'') published in the **Federal Register** a notice of proposed rulemaking (''proposal'' or ''Proposed Rules''), which establishes a position limits regime for 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts. The Commission is adopting the Proposed Rules, with modifications.

DATES: *Effective date:* The effective date for this final rule and the interim rule at § 151.4(a)(2) is January 17, 2012.

Comment date: The comment period for the interim final rule will close January 17, 2012.

Compliance dates: For compliance dates for these final rules, see **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Stephen Sherrod, Senior Economist, Division of Market Oversight, at (202) 418–5452, *ssherrod@cftc.gov;* B. Salman Banaei, Attorney, Division of Market Oversight, at (202) 418–5198, *bbanaei@cftc.gov,* Neal Kumar, Attorney, Office of General Counsel, at (202) 418–5353, *nkumar@cftc.gov,* Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[1] Title VII of the Dodd-Frank Act [2] amended the Commodity Exchange Act (''CEA'') [3] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

As amended by the Dodd-Frank Act, section 4a(a)(2) of the CEA mandates that the Commission establish position limits for futures and options contracts traded on a designated contract market (''DCM'') within 180 days from the date of enactment for exempt commodities and 270 days from the date of enactment for agricultural commodities.[4] Under section 4a(a)(5), Congress required the Commission to concurrently establish limits for swaps that are economically equivalent to such futures or options contracts traded on a DCM. In addition, the Commission must establish aggregate position limits for contracts based on the same underlying commodity that include, in addition to the futures and options contracts: (1) Contracts listed by DCMs; (2) swaps that are not traded on a registered entity but which are determined to perform or affect a ''significant price discovery function''; and (3) foreign board of trade (''FBOT'') contracts that are price-linked to a DCM or swap execution facility (''SEF'') contract and made available for trading on the FBOT by direct access from within the United States.

To implement the expanded mandate under the Dodd-Frank Act, the Commission issued Proposed Rules that would establish federal position limits and limit formulas for 28 physical commodity futures and option contracts (''Core Referenced Futures Contracts'') and physical commodity swaps that are economically equivalent to such contracts (collectively, ''Referenced Contracts'').[5] The Commission also proposed aggregate position limits that would apply across different trading venues to contracts based on the same underlying commodity. In addition to developing position limits for the Referenced Contracts, the Proposed Rules would implement a new statutory definition of bona fide hedging transactions, revise the standards for aggregation of positions, and establish position visibility reporting requirements. The Proposed Rules would require DCMs and SEFs that are trading facilities to set position limits for exempt and agricultural commodity contracts and establish acceptable practices for position limits and position accountability rules in other commodities.

B. Overview of Public Comments

The Commission received 15,116 comments from a broad range of the industry and other interested persons, including DCMs, trade organizations, banks, investment companies, commercial end-users, academics, and the general public. Of the total comments received, approximately 100 comment letters provided detailed comments and recommendations concerning whether, and how, the Commission should exercise its authority to set position limits pursuant to amended section 4a, as well as other specific aspects of the proposal. The majority of the over 15,000 comment letters received were generally supportive of the proposal. Many urged the Commission promptly to ''restore balance to commodities markets.'' [6] On the other hand, approximately 55 commenters requested that the Commission either significantly alter or withdraw the proposal. The Commission considered all of the comments received in formulating the final regulations.

[1] *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 may be accessed at *http://www.cftc.gov/Law Regulation/OTCDERIVATIVES/index.htm.*

[2] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010.''

[3] 7 U.S.C. 1 *et seq.*

[4] Section 1a(20) of the CEA defines the term ''exempt commodity'' to mean a commodity that is not an excluded or an agricultural commodity. 7 U.S.C. 1a(20). Section 1a(19) defines the term ''excluded commodity'' to mean, among other things, an interest rate, exchange rate, currency, credit risk or measure, debt or equity instrument, measure of inflation, or other macroeconomic index or measure. 7 U.S.C. 1a(19). Although the CEA does not specifically define the term ''agricultural commodity,'' section 1a(9) of the CEA, 7 U.S.C. 1a(9), enumerates a non-exclusive list of agricultural commodities, and the Commission recently added section 1.3(zz) to the Commission's regulations defining the term ''agricultural commodity.'' *See* 76 FR 41048, Jul. 13, 2011.

[5] *See* Position Limits for Derivatives, 76 FR 4752, 4753 Jan. 26, 2011. Specifically, the Commission proposed to withdraw its part 150 regulations, which set out the current position limit and aggregation policies, and replace them with new part 151 regulations.

[6] *See e.g.,* Letter from Professor Greenberger, University of Maryland School of Law on March 28, 2011 (''CL–Prof. Greenberger'') at 6–7; and Petroleum Marketers Association of America (''PMAA'') and New England Fuel Institute (''NEFI'') on March 28, 2011 (''CL–PMAA/NEFI'') at 5. Also, over 6,000 comment letters urged the Commission to ''act quickly'' to adopt position limits.

II. The Final Rules

A. Statutory Framework

In the proposal, the Commission provided general background on the scope of its statutory authority under section 4a (as amended by the Dodd-Frank Act), together with the related legislative history, in support of the Proposed Rules.[7] Many commenters responded with their views and interpretations of the Commission's mandate under the CEA, and in particular whether the Commission must first make findings that position limits are ''necessary'' to diminish, eliminate, or prevent undue burdens on interstate commerce resulting from excessive speculation before imposing them.[8]

As discussed in the proposal, CEA section 4a states that ''excessive speculation'' in any commodity traded on a futures exchange ''causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity is an undue and unnecessary burden on interstate commerce'' and directs the Commission to establish such limits on trading ''as the Commission finds necessary to diminish, eliminate, or prevent such burden.'' [9] This basic statutory mandate has remained unchanged since its original enactment in 1936 and through subsequent amendments to section 4a, including the Dodd-Frank Act.[10]

In section 737 of the Dodd-Frank Act, Congress made major changes to CEA section 4a; among other things, Congress extended the Commission's reach to the heretofore unregulated swaps market.[11] In doing so, Congress reinforced and reaffirmed the Commission's broad authority to set position limits to prevent undue and unnecessary burdens associated with excessive speculation. Specifically, section 4a, as amended by the Dodd-Frank Act, provides that the Commission ''shall'' set position limits ''as appropriate'' and ''to the maximum extent practicable, in its discretion'' in order to protect against excessive speculation and manipulation while ensuring that the markets retain sufficient liquidity for bona fide hedgers and that their price discovery functions are not disrupted.[12] Further, the Dodd-Frank Act amended the CEA to direct the Commission to define the relevant factors to be considered in identifying swaps that serve a ''significant price discovery'' function and thus become subject to position limits.[13] Congress also authorized the Commission to exempt persons or transactions ''conditionally or unconditionally'' from position limits.[14]

In reaffirming the Commission's broad authority to set position limits, Congress also made clear that the Commission must impose them expeditiously. Under amended section 4a(a)(2), Congress directed that the Commission ''shall'' establish limits on the amount of positions, as appropriate, that may be held by any person in physical commodity futures and options contracts traded on a DCM. In section 4a(a)(5), Congress directed the Commission to establish, concurrently with the limits established under section 4a(a)(2), limits on the amount of positions, as appropriate, that may be held by any person with respect to swaps that are economically equivalent to the DCM contracts subject to the required limits under section 4a(a)(2). The Commission was directed to establish the limits within 180 days after enactment for exempt commodities and 270 days after enactment for agricultural commodities.

As discussed in the proposal, the Commission construes the amended CEA to mandate the Commission to impose position limits at the level it determines to be appropriate to diminish, eliminate, or prevent excessive speculation and market manipulation.[15] In setting such limits, the Commission is not required to find that an undue burden on interstate commerce resulting from excessive speculation exists or is likely to occur. Nor is the Commission required to make an affirmative finding that position limits are necessary to prevent sudden or unreasonable fluctuations in prices. Instead, the Commission must set position limits prophylactically, according to Congress' mandate in section 4a(a)(2), and, in establishing the limits Congress has required, exercise its discretion to set a limit that, to the maximum extent practicable, will, among other things, ''diminish, eliminate, or prevent excessive speculation.'' [16]

Commenters were divided on the scope of the Commission's authority under CEA section 4a. A number of commenters supported the view that the Dodd-Frank Act, in extending the Commission's authority to swaps, imposed on the Commission a mandatory obligation to impose position limits.[17] For example, Professor Michael Greenberger stated that ''[s]ection 737 emphatically provides that the Commission '*shall* by rule, regulation, or order establish limits on the amount of positions, as appropriate, other than bona fide hedge positions that may be held by any person[.]' The language could not be clearer. The Commission is *required to establish position limits* as Congress intentionally used the word, 'shall,' to impose the mandatory obligation.'' [18] Professor Greenberger further noted, ''the plain reading of the phrase 'as appropriate' modifies only those position limits mandated to be imposed, *i.e.,* the mandatory position limits must be promulgated 'as appropriate.' The term 'as appropriate' does not modify the heavily emphasized

[7] A more detailed background on the statutory and legislative history is provided in the proposal. *See* 76 FR at 4753–4755.

[8] *See e.g.,* CME Group, Inc. (''CME I'') on March 28, 2011 (''CL–CME I'') at 4, 7.

[9] *See* section 4a(a)(1) of the CEA, 7 U.S.C. 6a(a)(1).

[10] As further detailed in the Proposed Rules, this long-standing statutory mandate is based on Congressional findings that market disruptions can result from excessive speculative trading. In the 1920s and into the 1930s, a series of studies and reports found that large speculative positions in the futures markets for grain, even without manipulative intent, can cause ''disturbances'' and ''wild and erratic'' price fluctuations. To address such market disturbances, Congress was urged to adopt position limits to restrict speculative trading notwithstanding the absence of manipulation. In 1936, based upon such reports and testimony, Congress provided the Commodity Exchange Authority (the predecessor of the Commission) with the authority to impose Federal speculative position limits. In doing so, Congress expressly observed the potential for market disruptions resulting from excessive speculative trading alone and the need for measures to prevent or minimize such occurrences. This mandate and underlying Congressional determination of its need has been re-affirmed through successive amendments to the CEA. *See* 76 FR at 4754–55.

[11] In particular, Congress expanded the scope of transactions that could be subject to position limits to include swaps traded on a DCM or SEF, and swaps not traded on a DCM or SEF, but that perform or affect a significant price discovery function with respect to registered entities. *See* section 4a(a)(1) of the CEA, 7 U.S.C. 6a(a)(1). Congress also directed the Commission to establish aggregate limits on the amount of positions held in the same underlying commodity across markets for DCM contracts, FBOTs (with respect to certain linked contracts) and swaps that perform a ''significant price discovery function.'' section 4a(a)(6) of the CEA, 7 U.S.C. 6a(a)(6).

[12] *See* sections 4a(a)(3) to 4a(a)(5) of the CEA, 7 U.S.C. 6a(a)(3) to 6a(a)(5). Additionally, new section 4a(a)(2)(c) states that, in establishing limits, the Commission ''shall strive to ensure'' that FBOTs trading in the same commodity will be subject to ''comparable'' limits and that any limits imposed by the Commission will not cause the price discovery in the commodity to shift to FBOTs.

[13] *See* section 4a(a)(4) of the CEA, 7 U.S.C. 6a(a)(4).

[14] *See* section 4a(a)(7) of the CEA, 7 U.S.C. 6a(a)(7).

[15] *See* 76 FR at 4754.

[16] Section 4a(a)(3)(B)(i) of the CEA, 7 U.S.C. 6a(a)(3)(B)(i).

[17] *See e.g.,* American Public Gas Association (''APGA'') on March 28, 2011 (''CL–APGA'') at 2–3; Americans for Financial Reform (''AFR'') on March 28, 2011 (''CL–AFR'') at 5; U.S. Senator Harkin on December 15, 2010 (''CL–Sen. Harkin''). *See also* CL–PMAA/NEFI *supra* note 6 at 4–5.

[18] CL–Prof. Greenberger *supra* note 6 at 4 (emphasis added).

mandate that there 'shall' be position limits.'' [19]

Other commenters expressed similar views, asserting that the Commission is not required to demonstrate price fluctuations caused by excessive speculation or the efficacy of position limits in reducing excessive speculation or market manipulation. The Petroleum Marketers Association of America and the New England Fuel Institute (''PMAA/NEFI'') in a joint comment letter argued, for example, that

> the purpose of position limits is not to punish past wrongdoing, but rather to deter and prevent potential future dysfunctions in the commodity staples derivatives markets and to prevent harm to market participants and burdens on interstate commerce. Because the purpose of position limits is to prevent future violations, the Commission should not be required to appreciate the complete and precise level of excessive speculation prior to taking action.''[20]

On the other hand, numerous commenters posited that the Commission did not adequately demonstrate, or perform sufficient analysis establishing, the need for or appropriateness of the proposed limits and related requirements.[21] For example, according to the CME Group, Inc. (''CME''),

> the CEA sets up a two-pronged approach for imposing limits on speculative positions. First, [under CEA section 4a(a)(1)] the Commission must 'find' that any position limits are 'necessary'—a directive that Congress reaffirmed in [the Dodd-Frank Act]. Second, once the Commission makes the 'necessary' finding, [CEA sections 4a(a)(2)(A) and 4a(a)(3) provide that the Commission] must establish a particular position limit regime only 'as appropriate'—a statutory requirement added by Dodd-Frank.''[22]

In this connection, CME and many other commenters asserted that because the Commission did not make a finding that position limits are necessary to prevent undue burdens on interstate commerce resulting from excessive speculation, it did not satisfy the pre-condition to establishing position limits.

Some of these commenters, such as the International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association (''ISDA/SIFMA'') (in a joint comment letter) and the Futures Industry Association (''FIA''), argued that the Commission is directed to set position limits ''as appropriate,'' and ''as appropriate'' requires empirical evidence demonstrating that such limits would diminish, eliminate, or prevent excessive speculation. FIA claimed that in the absence of evidence concerning the impact of excessive speculation, it would be impossible to set position limits that comply with the statutory objectives of section 4a(a)(3). Similarly, Centaurus Energy Master Fund, LP (''Centaurus'') and ISDA/SIFMA commented that the ''as appropriate'' language in section 4a(a)(2)(A) requires factual support before imposing position limits, and that ''the imposition of position limits 'prophylactically' is not mandated by Dodd-Frank and is not supported by the facts.'' [23]

CME also contended that imposing position limits on ''economically equivalent swaps'' would be counter to Dodd-Frank because it will encourage market participants to enter into bespoke, uncleared, non-DCM or SEF-traded swaps.[24] Finally, CME and other commenters, suggested that position limits and position accountability levels should be set and administered by futures exchanges.

Upon careful consideration of the commenters' views, the Commission reaffirms its interpretation of amended section 4a. The Commission disagrees that it must first determine that position limits are necessary before imposing them or that it may set limits only after it has conducted a complete study of the swaps market. Congress did not give the Commission a choice. Congress directed the Commission to impose position limits and to do so expeditiously.[25] Section 4a(a)(2)(B) states that the limits for physical commodity futures and options contracts ''shall'' be established within the specified timeframes, and section 4a(a)(2)(5) states that the limits for economically equivalent swaps ''shall'' be established concurrently with the limits required by section 4a(a)(2). The congressional directive that the Commission set position limits is further reflected in the repeated references to the limits ''required'' under section 4a(a)(2)(A).[26] Section 4a(a)(6) similarly states, without qualification, that the Commission ''shall'' establish aggregate position

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[19] *Id.* at 5. In addition, Professor Greenberger noted that

> Section 719 of the Dodd-Frank Act specifically requires the Commission 'to conduct a study of the effects of the position limits imposed pursuant to the other provisions of this title on excessive speculation and on the movement of transactions.' The Commission is required to submit the report 'within 12 months after the imposition of position limits pursuant to the other provisions of this title.' Why would Congress specifically require the Commission to submit a report after imposing position limits if it had provided by statute (as opponents of position limits mistakenly argue) that the data must be available before the position limit rule is finally promulgated? The short answer is that Congress clearly understood the imminent danger excessive speculation and passive betting on price direction had caused by uncontrollable increases in the prices of energy and agricultural commodities. Therefore, the Commission is statutorily obligated to impose the 'appropriate' position limits.

Id. at 6–7.

[20] CL–PMAA/NEFI *supra* note 6 at 5. *See also* Delta Airlines, Inc. (''Delta'') on March 28, 2011 (''CL–Delta'') at 11. Delta believes that the Commission should instead strive to establish meaningful speculative position limits using sampling and other statistical techniques to make reasonable, working assumptions about positions in various market segments and refining the speculative limits based upon market experience and better data as it is developed. *See also* CL–Sen. Harkin *supra* note 17 at 1 (opposing any delay in the implementation of position limits); and 56 National coalitions and organizations and 28 International coalitions and organizations from 16 countries (''ICPO'') on March 28, 2011 (''CL–ICPO'') at 1 (stating that the proposal regarding position limits should be implemented fully).

[21] *See e.g.,* CL–CME I *supra* note 8; Commodity Markets Council (''CMC'') on March 28, 2011 (''CL–CMC''); PIMCO on March 28, 2011 (''CL–PIMCO''); Edison Electric Institute (''EEI'') and Electric Power Supply Association (''EPSA'') on March 28, 2011 (''CL–EEI/EPSA''); BlackRock, Inc. (''BlackRock'') on March 28, 2011 (''CL–BlackRock''); International Working Group on Trade-Finance Linkages (''IWGTFL'') on March 28, 2011(''CL–IWGTFL''); Coalition of Physical Energy Companies (''COPE'') on March 28, 2011 (''CL–COPE''); Utility Group on March 28, 2011 (''CL–Utility Group'');ISDA/SIFMA on March 28, 2011 (''CL–ISDA/SIFMA''); Futures Industry Association (''FIA I'') on March 25, 2011 (''CL–FIA I''); Katten Muchin Rosenman LLP (''Katten'') on March 31, 2011 (''CL–Katten''); Colorado Public Employees' Retirement (''PERA'') on March28, 2011 (''CL–PERA''); American Petroleum Institute (''API'') on March 28, 2011 (''CL–API''); Sullivan & Cromwell LLP (''Centaurus Energy'') on March 28, 2011 (''CL–Centaurus Energy''); ICI on March 28, 2011 (''CL–ICI''); Morgan Stanley on March 28, 2011 (''CL–Morgan Stanley''); Asset Management Group (''AMG''), Securities Industry and Financial Markets Association (''SIFMA'') on April 5, 2011(''CL–SIFMA AMG I''); World Gold Council (''WGC'') on March 28, 2011 (''CL–WGC''); and Managed Funds Association (''MFA'') on March 28, 2011 (''CL–MFA'').

[22] CME argued the Commission's interpretation of section 4a(a)(1) of the CEA would render the ''as the Commission finds are necessary'' language a nullity, effectively replacing it with statutory language imposing a lower threshold than is found elsewhere in the CEA. *See* CL–CME I *supra* note 8 at 3, citing *Keene Corp.* v. *United States,* 508 U.S. 200, 208 (1993) (''where Congress includes particular language in one section of a statute but omits it in another * * *, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'' quoting *Russello* v. *United States,* 464 U.S. 16, 23 (1983).

[23] CL–ISDA/SIFMA, *supra* note 21 at 3; and CL–Centaurus Energy, *supra* note 21 at 2. *See also* CL–COPE *supra* note 21 at 2–3; and CL–Utility Group *supra* note 21 at 3. Along similar lines, COPE and the Utility Group opined that ''the deadline of 180 days after the date of enactment in clause (B)(i) is only triggered upon a determination that such limits are appropriate. Congress unambiguously modified the word 'shall' with the requirement that limits only be established 'as appropriate.'' *Id.*

[24] CL–CME I, *supra* note 8 at 11.

[25] *See also* CL–Sen. Harkin, *supra* note 17 at 1 (opposing any delay in the implementation of position limits); and CL–ICPO, *supra* note 20 at 1 (stating that the Proposed Rules regarding position limits should be implemented fully).

[26] *See* sections 4a(a)(2)(B)(i)–(ii), 4a(a)(2)(C), and 4a(a)(3) of the CEA, 7 U.S.C. 6a(a)(2)(B)(i)–(ii), 6a(a)(2)(C), 6a(a)(3).

limits.[27] While some commenters seize on the phrase ''as appropriate,'' which appears in sections 4a(a)(2)(A), 4a(a)(3), and 4a(a)(5), that phrase, when considered in the context of the position limits provisions as a whole, is most sensibly read as directing the Commission to exercise its discretion in determining the extent of the limits that Congress required the Commission to impose.[28]

In accordance with the statutory mandate, the Commission has established position limits and has exercised its discretion to set position limit levels to further the congressional objectives set out in section 4a(a)(3)(B) based upon the Commission's experience with existing position limits.[29] In adding section 4a(a)(3)(B), Congress reaffirmed the Commission's broad discretion to fix position limit levels (and to adopt related requirements) aimed at combating excessive speculation and market manipulation, while also protecting market liquidity (for bona fide hedgers) and price discovery. The provision reflects the Commission's historical approach to setting position limits, and it is consistent with the longstanding congressional directive in section 4a(a)(1) that the Commission set position limits in its discretion to prevent or minimize burdens that could result from excessive speculative trading.[30]

In sum, the contention that the Commission is required to demonstrate that position limits (or position limit levels) are necessary is contrary not only to the language of, and congressional objectives underlying, amended section 4a, but also to the regulatory history of position limits and to the choices Congress made in the Dodd-Frank Act in light of that history.[31]

For the reasons stated above, and for the reasons provided in the proposal, the Commission finds that it has authority under CEA section 4a, as amended by the Dodd-Frank Act, to impose the position limits herein.[32]

B. Referenced Contracts

The Commission identified 28 Core Referenced Futures Contracts and proposed to apply aggregate limits on a futures equivalent basis across all derivatives that are (i) Directly or indirectly linked to the price of a Core Referenced Futures Contract; or (ii) based on the price of the same underlying commodity for delivery at the same delivery location as that of a Core Referenced Futures Contract, or another delivery location having substantially the same supply and demand fundamentals (such derivative products are collectively defined as ''Referenced Contracts'').[33] These Core Referenced Futures Contracts were selected on the basis that such contracts: (1) Have high levels of open interest and significant notional value; or (2) serve as a reference price for a significant number of cash market transactions.

Edison Electric Institute and the Electric Power Supply Association argued that the Commission did not provide a reasoned explanation for selecting the 28 Referenced Contracts.[34] Other commenters requested that the Commission clarify the definition of Referenced Contracts or restrict it to

[27] Section 4a(a)(6) of the CEA directs the Commission to impose aggregate limits for contracts based on the same underlying commodity across: (a) DCM contracts, (b) FBOT contracts offered via direct access from inside the United States that are linked to contracts listed on a registered entity; and (c) swap contracts that perform or affect a significant price discovery function (''SPDF'') with respect to registered entities. 7 U.S.C. 6a(a)(6). Although the scope of SPDF swaps is currently limited to economically equivalent swaps discussed herein, the Commission intends to address in a subsequent rulemaking, as was discussed in the proposal, a process by which SPDF swaps can be identified. *See* Position Limits for Derivatives, 76 FR 4752, 4753, Jan. 26, 2011.

[28] Section 719 of the Dodd-Frank Act requires the Commission to submit a report on the effects of the position limits imposed pursuant to the other provisions of this title. Such a provision gives further support to the Commission's view that Congress mandated that the Commission impose position limits, setting levels as appropriate, because the reporting requirement presupposes that limits will be imposed. Congress did not intend the Commission to have to demonstrate that such limits are ''necessary'' or that position limits in general are ''appropriate'' before imposing them and reporting on their operation. *See also* CL–Prof. Greenberger *supra* note 6 at 6–7.

[29] The Commission has applied those limits to specified Referenced Contracts based on their high levels of open interest and significant notional value or their capacity to serve as a reference price for a significant number of cash market transactions.

[30] Consistent with the congressional findings and objectives, the Commission has previously set position limits without finding excessive speculation or an undue burden on interstate commerce, and in so doing has expressly stated that such additional determinations by the Commission were not necessary in light of the congressional findings in section 4a of the Act. In its 1981 rulemaking to require all exchanges to adopt position limits for commodities for which the Commission itself had not established limits, the Commission stated, in response to similar comments that it had not made any factual determinations that excessive speculation had occurred or analytically demonstrated that the proposed limits were necessary to prevent excessive speculation in the future:

> [T]he prevention of large or abrupt price movements which are attributable to the extraordinarily large speculative positions is a congressionally endorsed regulatory objective of the Commission. Further, it is the Commission's view that this objective is enhanced by the speculative position limits since it appears that the capacity of any contract to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, *i.e.,* the capacity of the market is not unlimited.

Establishment of Speculative Position Limits, 46 FR 50938, Oct. 16, 1981 (adopting then § 1.61 (now part of § 150.5)). The Commission reiterated this point in the proposed rulemaking in early 2010, before enactment of the Dodd-Frank Act. Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations,75 FR 4144, at 4146, 4148–49, Jan. 26, 2010 (''[t] he Congressional endorsement [in section 4a] of the Commission's prophylactic use of position limits rendered unnecessary a specific finding that an undue burden on interstate commerce had actually occurred'' because section 4a(a) represents an explicit Congressional finding that extreme or abrupt price fluctuations attributable to unchecked speculative positions are harmful to the futures markets and that position limits can be an effective prophylactic regulatory tool to diminish, eliminate or prevent such activity''); withdrawn, 75 FR 50950, Aug. 18, 2010. During the consideration of the Dodd-Frank Act—as well as in the nearly three decades since the Commission issued its interpretation of section 4a in 1981—Congress was aware of the Commission's longstanding approach to position limits, including its interpretation that the Commission is not required to make a predicate finding prior to establishing limits. Congress did not disturb the language under which the Commission previously acted to impose position limits, and added new language that makes clear that the types of limits described in sections 4a(a)(2), (a)(5), and (a)(6) are required.

[31] The Commission also notes that Congress has reauthorized the Commission several times, both before and after the Commission established a position limit regime, without making a finding that position limits were ''necessary'' to combat excessive speculation. In this regard, Congress was aware of the Commission's historical interpretation of section 4a and has not elected to amend the relevant text, including in the Dodd-Frank Act, of that section. If Congress intended a different interpretation, Congress would have amended the language of section 4a. *See Commodity Futures Trading Commission* v. *Schor,* 478 U.S. 833, 846 (1986) (''It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress'''') citing *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 274–275 (1974).

[32] Some commenters submitted a number of studies and reports addressing the issue of whether position limits are effective or necessary to address excessive speculation. For the reasons explained above, the Commission is not required to make a finding as to whether position limits are effective or necessary to address excessive speculation. Accordingly, these studies and reports do not present facts or analyses that are material to the Commission's determinations in finalizing the Proposed Rules. A discussion of these studies is provided in section III A *infra.*

[33] 76 FR at 4752, 4753. These Core Referenced Futures Contracts are: Chicago Board of Trade (''CBOT'') Corn, Oats, Rough Rice, Soybeans, Soybean Meal, Soybean Oil and Wheat; Chicago Mercantile Exchange Feeder Cattle, Lean Hogs, Live Cattle and Class III Milk; Commodity Exchange, Inc. Gold, Silver and Copper; ICE Futures U.S. Cocoa, Coffee C, FCOJ–A, Cotton No.2, Sugar No. 11 and Sugar No. 16; Kansas City Board of Trade (''KCBT'') Hard Winter Wheat; Minneapolis Grain Exchange Hard Red Spring Wheat; and New York Mercantile Exchange Palladium, Platinum, Light Sweet Crude Oil, New York Harbor No. 2 Heating Oil, New York Harbor Gasoline Blendstock and Henry Hub Natural Gas.

[34] CL–EEI/EPSA, *supra* note 21 at 5.

those contracts sharing a common delivery point.[35]

Some commenters argued that the Commission should narrow the definition of economically equivalent swaps to cleared swaps.[36] Conversely, other commenters asked the Commission to broaden its definition of Referenced Contracts. For example, Better Markets asked the Commission to consider a ''market-based approach'' to determine whether to include a contract within a Referenced Contract category, including hedging relationships used by market participants, cross-contract netting practices of clearing organizations, enduring price relationships, and physical characteristics.[37]

The Edison Electric Institute and Electrical Power Suppliers Association opined that the Commission should allow market participants to define what constitutes an economically equivalent contract consistent with commercial practices and to allow for a good-faith exemption for market participants relying on their own determination consistent with Commission guidance.[38] ISDA/SIFMA argued that the Commission should ensure that the concept of an economically equivalent derivative contract covers contracts whose correlation with futures can be established through accepted models that address features such as maturity, payout structure, locations basis, product basis, *etc.*[39]

The proposed § 151.1 definition of Referenced Contract excluded basis contracts and commodity index contracts.[40] Proposed § 151.1 defined basis contract as those contracts that are ''cash settled based on the difference in price of the same commodity (or substantially the same commodity) at different delivery points.'' Commodity index contracts were defined in the proposal as contracts that are ''based on an index comprised of prices of commodities that are not the same nor [sic] substantially the same.'' The proposal further excluded intercommodity spread contracts,[41] calendar spread contracts, and basis contracts from the definition of ''commodity index contract.'' Many commenters appeared to interpret the proposal as subjecting positions in basis contracts or commodity index contracts to the position limits set forth in proposed § 151.4.[42] The Coalition of Physical Energy Companies and the Utility Group found that the definition of Referenced Contract was ''vague'' and ''clearly extraordinarily broad'' because, inter alia, it appeared to include some over-the-counter (''OTC'') swaps that utilized a Core Referenced Futures Contract price as a component of a floating price calculation.[43] The Coalition of Physical Energy Companies and the Utility Group opined that even if the proposed class of Referenced Contracts that are priced based on ''locations with substantially the same supply and demand fundamentals, as that of any Core Referenced Futures Contract'' it is unclear whether the definition of Referenced Contract extends to ''those [swaps] that are actually economically equivalent, *e.g.,* look alikes.''[44]

The Commission is adopting the proposal regarding Referenced Contracts with modifications and clarifications responsive to the comments. The Commission clarifies that the term ''Referenced Contract'' includes: (1) The Core Referenced Futures Contract; (2) ''look-alike'' contracts (*i.e.,* those that settle off of the Core Referenced Futures Contract and contracts that are based on the same commodity for the same delivery location as the Core Referenced Futures Contract); (3) contracts with a reference price based only on the combination of at least one Referenced Contract price and one or more prices in the same or substantially the same commodity as that underlying the relevant Core Referenced Futures Contract;[45] and (4) intercommodity spreads with two components, one or both of which are Referenced Contracts. These criteria capture contracts with prices that are or should be closely correlated to the prices of the Core Referenced Futures Contract.[46]

In response to commenters, the Commission is eliminating a proposed category of Referenced Contracts, namely, those based on ''substantially the same supply and demand fundamentals.'' The Commission notes that the ''substantially the same supply and demand fundamentals'' criterion would require individualized evaluation of certain trading data to determine whether the price of a commodity may or may not be substantially related to a Core Referenced Futures Contract. Such analysis may require access to, among other things, data concerning bids and offers and transaction information regarding the cash market, which are not readily available to the Commission at this time.

The remaining categories of Referenced Contract, *i.e.,* derivatives that are directly or indirectly linked to or based on the same commodity for delivery at the same delivery location as

[35] Alternative Investment Management Association (''AIMA'') on March 28, 2011 (''CL–AIMA'') at 2; CL–API *supra* note 21 at 5; BG Americas & Global LNG (''BGA'') on March 28, 2011 (''CL–BGA'') at 18; Chris Barnard on March 28, 2011 at 1; CL–COPE *supra* note 21 at 6; CL–ISDA/SIFMA *supra* note 21 at 20; Shell Trading (''Shell'') on March 28, 2011 (''CL–Shell'') at 7–8; CL–Utility Group *supra* note 21 at 7; and Working Group of Commercial Energy Firms (''WGCEF'') on March 28, 2011 (''CL–WGCEF'') at 22.

[36] CL–API, *supra* note 21 at 13; and CL–BGA, *supra* note 35 at 18. American Petroleum Institute explained that extending the definition of ''Referenced Contract'' beyond standardized cleared contracts would not be cost-effective. Similarly, BGA argued that because the Commission cannot identify uncleared contracts until they are executed, the scope of economically equivalent swaps should be limited to only those that are cleared.

[37] Better Markets, Inc. (''Better Markets'') on March 28, 2011 (''CL–Better Markets'') at 68–69.

[38] CL–EEI/EPSA, *supra* note 21 at 12.

[39] CL–ISDA/SIFMA *supra* note 21 at 23.

[40] The proposed definition of a Referenced Contract included contracts (i) Directly or indirectly linked, including being partially or fully settled on, or priced at a differential to, the price of any Core Referenced Futures Contract; or (ii) directly or indirectly linked, including being partially or fully settled on, or priced at a differential to, the price of the same commodity for delivery at the same location, or at locations with substantially the same supply and demand fundamentals, as that of any Core Referenced Futures Contract.

[41] Proposed § 151.1 defined ''intercommodity spread'' contracts as those contracts that ''represent[] the difference between the settlement price of a Referenced Contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.''

[42] *See e.g.,* CL–Utility Group *supra* note 21 at 7–8; CL–COPE *supra* note 21 at 6; Commercial Alliance (''Commercial Alliance I'') on June 5, 2011 (''CL–Commercial Alliance I'') at 5–10 (arguing for the extension of the bona fide hedge exemption for physical market transactions and anticipated physical market transactions that could be hedged with a basis contract position).

[43] CL–Utility Group *supra* note 21 at 7–8 (arguing that ''virtual tolling swaps'' that utilize a Referenced Contract-derived price series as a component of a floating price appear to be covered by the definition of ''Referenced Contract''); and CL–COPE *supra* note 21 at 6.

[44] *Id.*

[45] *E.g.,* a swap with a floating price based on the average of the settlement price of the New York Mercantile Exchange (''NYMEX'') Light, Sweet Crude Oil futures contract and the settlement price of the IntercontinentalExchange (''ICE'') Brent Crude futures contract.

[46] Under amended section 4a(a)(1), the Commission is required to establish aggregate position limits on contracts based on the same underlying commodity, including those swaps that are not traded on a DCM or SEF but which are determined to perform or affect a significant price discovery function (''SPDF''). 7 U.S.C. 6a(a)(1). The Commission currently lacks the data necessary to evaluate the pricing relationships between potential SPDF swaps and Referenced Contracts and therefore has determined not to set forth, at this time, standards for determining significant price discovery function swaps. As the Commission gathers additional data on the effect of position limits on the 28 Referenced Contracts and these contracts' relationship with other contracts, it could, in its discretion, extend position limits to additional contracts beyond the current set of Referenced Contracts. The Commission could determine, for example, that a contract, due to certain shared qualitative or quantitative characteristics with Referenced Contracts, performs a SPDF with respect to Referenced Contracts.

a Core Referenced Futures Contract, are based on objective criteria and readily available data, which should provide market participants with clarity as to the scope of economically equivalent contracts.[47] The Commission clarifies that if a swap contract that utilizes as its sole floating reference price the prices generated directly or indirectly[48] from the price of a single Core Referenced Futures Contract, then it is a look-alike Referenced Contract and subject to the limits set forth in § 151.4.[49] If such a swap is priced based on a fixed differential to a Core Referenced Futures Contract, it is similarly a Referenced Contract.[50]

With respect to comments that the Commission should broaden the scope of Referenced Contracts, the Commission notes that expanding the scope of position limits based, for example, on cross-hedging relationships or other historical price analysis would be problematic. Historical relationships may change over time and, additionally, would require individualized determinations. For example, if the standard for determining economic equivalence was some level of historical correlation, then a commodity derivative might have met the correlation metric yesterday, fail it today, and again meet the metric tomorrow.[51] Under these circumstances, the Commission does not believe that it is necessary to expand the scope of position limits beyond those proposed. In this regard, the Commission notes that the commenters did not provide specific criteria or thresholds for making determinations as to which price-correlated commodity contracts should be subject to limits.[52] The Commission further notes that it would consider amending the scope of economically equivalent contracts (and the relevant identifying criteria) as it gains experience in this area. For clarity, the Commission has deleted the definition of the proposed term ''Referenced paired futures contract, option contract, swap, or swaption'' since that term was only used in the definitions section and incorporated the relevant provisions of that proposed term into the definition of Referenced Contracts. Lastly, the Commission has made amendments in § 151.2 that clarify that ''Core Referenced Futures Contracts'' include options that expire into outright positions in such contracts.

C. Phased Implementation

The Commission proposed to implement the position limit rule in two phases. In the first phase, the spot-month limits for Referenced Contracts would be set at a level based on existing limits determined by the appropriate DCM. In the second phase, the spot-month limits would be adjusted on a regular schedule, set to 25 percent of the Commission's determination of estimated deliverable supply, which would be based on DCM-provided estimates or the Commission's own estimates. The Commission believes that spot-month position limits can be implemented on an advanced schedule, because such limits will initially be based on existing DCM limits or on estimates of deliverable supply for which data is available.

In the proposal, non-spot-month energy, metal, and ''non-enumerated''[53] agricultural Referenced Contract limits would be based on open interest and would be set in the second phase pending the availability of certain positional data on physical commodity swaps.[54]

In general, commenters were divided on whether the Commission should, in whole or in part, delay the imposition of position limits. Some commenters stated that the Commission should stay or withdraw its proposal until such time that the Commission has gathered and analyzed data to determine if position limits are necessary or appropriate.[55] CME asserted that the Commission cannot impose spot-month limits until it has received and analyzed data on economically equivalent swaps since the limits cover such swaps.[56] Conversely, some commenters rejected the phased implementation of non-spot-month position limits and urged the Commission to implement such limits on a more expedited timeframe. One such commenter, Delta, argued ''that the Commission should instead strive to establish meaningful speculative position limits using sampling and other statistical techniques to make reasonable, working assumptions about positions in various market segments and refining the speculative limits based upon market experience and better data as it is developed.''[57] The Commission also received many letters requesting that the Commission impose position limits generally on an expedited basis.[58]

The Commission is finalizing the phased implementation schedule generally as proposed and in furtherance of the congressional directive that the Commission establishes position limits on an

[47] In finalizing the Commission's Large Trader Reporting for Physical Commodity Swaps rulemaking, and also in response to comments, the Commission modified the proposed definition of ''paired swap'' to exclude contracts based on the same commodity at different locations with substantially the same supply and demand fundamentals as that of any Core Referenced Futures Contract. *See* 76 FR 43855, Jul. 22, 2011.

[48] An ''indirect'' price link to a Core Referenced Futures Contract includes situations where the swap reference price is linked to prices of a cash-settled Referenced Contract that itself is cash-settled based on a physical-delivery Referenced Contract settlement price.

[49] The Commission clarifies, by way of example, that a swap based on the difference in price of a commodity (or substantially the same commodity) at different delivery locations is a ''basis contract'' and therefore not subject to the limits set forth in § 151.4. In addition, if a swap is based on prices of multiple different commodities comprising an index, it is a ''commodity index contract'' and therefore is not subject to the limits set forth in § 151.4. In contrast, if a swap is based on the difference between two prices of two different commodities, with one linked to a Core Referenced Futures Contract price (and the other either not linked to the price of a Core Referenced Futures Contract or linked to the price of a different Core Referenced Futures Contract), then the swap is an ''intercommodity spread contract,'' is not a commodity index contract, and is a Referenced Contract subject to the position limits specified in § 151.4. The Commission further clarifies that a contract based on the prices of a Referenced Contract and the same or substantially the same commodity (and not based on the difference between such prices) is not a commodity index contract and is a Referenced Contract subject to position limits specified in § 151.4.

[50] The Commission has clarified in its definition of ''Referenced Contract'' that position limits extend to contracts traded at a fixed differential to a Core Referenced Futures Contract (*e.g.,* a swap with the commodity reference price NYMEX Light, Sweet Crude Oil +$3 per barrel is a Referenced Contract) or based on the same commodity at the same delivery location as that covered by the Core Referenced Futures Contract, and not to unfixed differential contracts (*e.g.,* a swap with the commodity reference price Argus Sour Crude Index is not a Referenced Contract because that index is computed using a variable differential to a Referenced Contract).

[51] Nevertheless, a trader may decide to assume the risk that the historical price relationship might not hold and enter into a cross-hedging transaction in a derivative that has been and is expected to be price-fluctuation-related to that trader's cash market commodity and seek (and obtain) a bona fide hedge exemption.

[52] For example, the commenters did not address whether a derivatives contract on a commodity should be included if there were observed historical associated price correlations but no identified causation relationship.

[53] In the final rulemaking, the term ''legacy'' replaced the term ''enumerated'' used in the proposal. The Commission has made this change in order to avoid unnecessary confusion.

[54] As discussed in the proposal, the Commission retained the position limits for the enumerated agricultural Referenced Contracts ''as an exception to the general open interest based formula.'' 76 FR at 4752, 4760.

[55] CL–FIA I, *supra* note 21 at 8; CL–COPE, *supra* note 21 at 4; CL–Utility Group, *supra* note 21 at 5; CL–EEI/EPSA *supra* note 21 at 2; CL–Centaurus Energy, *supra* note 21 at 3; CL–PIMCO *supra* note 21 at 6; CL–SIFMA AMG I, *supra* note 21 at 15–16; CL–PERA, *supra* note 21 at 2; CL–Morgan Stanley, *supra* note 21 at 1; and CL–CMC, *supra* note 21 at 2.

[56] CL–CME I, *supra* note 8 at 7–8.

[57] CL–Delta, *supra* note 20 at 11.

[58] *See e.g.,* Gary Krasilovsky on February 6, 2011 (''CL–Krasilovsky''); and Alan Murphy (''Murphy'') on January 6, 2011 (''CL–Murphy'').

expedited timeframe. As stated above, spot-month limits, which are based on existing DCM limits and data that is available, can be implemented on an expedited timeframe. In addition, non-spot-month legacy limits do not require swap positional data to set the limits, and, thus, can be set on an expedited timeframe.[59] With respect to non-spot-month limits for non-legacy Referenced Contracts, which are dependent on open interest levels and thus dependent on swaps positional data, the Commission will initially set such limits following the collection of approximately 12 months of swaps positional data.[60]

1. Compliance Dates

In light of the above referenced timeframe for implementation, the compliance date for all spot-month limits and non-spot-month legacy limits shall be 60 days after the term ''swap'' is further defined pursuant to section 721 of the Dodd-Frank Act (*i.e.,* 60 days after the further definition of ''swap'' as adopted by the Commission and the Securities and Exchange Commission is published by the **Federal Register**). Prior to the Commission further defining the term swap, market participants shall continue to comply with the existing position limits regime contained in part 150 and any applicable DCM position limits or accountability levels. After the compliance date, the Commission will revoke part 150, and persons will be required to comply with all the provisions of this part 151, including § 151.5 for bona fide hedging and § 151.7 related to the aggregation of accounts. For non-spot-month non-legacy Referenced Contracts, the compliance date shall be set forth by Commission order establishing such limits approximately 12 months after the collection of swap positional data.[61]

Although the Commission proposed to revoke part 150 in the Proposed Rules, the Commission is retaining this provision until the compliance dates set forth above.

2. Transitional Compliance

As discussed below in detail in section II.B. of this release, § 151.1 excludes ''basis contracts'' and ''commodity index contracts'' from the definition of Referenced Contract. However, part 20 of the Commission's regulations requires reporting entities to report commodity reference price data sufficient to distinguish between basis and non-basis swaps and between commodity index contract and non-commodity index contract positions in covered contracts.[62] Therefore, the Commission intends to rely on the data elements in § 20.4(b) to distinguish data records subject to § 151.4 position limits from those contracts that are excluded from § 151.4. This will enable the Commission to set position limits using the narrower data set (*i.e.,* Referenced Contracts subject to § 151.4 position limits) as well as conduct surveillance using the broader data set.

In addition, § 151.9 provides that traders may determine to either exclude (*i.e.,* not aggregate) or net their pre-existing swap positions (as discussed below), while part 20 does not require a distinction to be made for reporting pre-existing swap positions. The Commission believes it is appropriate to include pre-existing swap positions in the basis for setting position limits and, thus, the part 20 data collection will provide this broader data set. This is because limits based on a narrower data set (that is, excluding pre-existing swaps) may be overly restrictive and, thus, may not provide adequate liquidity for bona fide hedgers, in light of the biennial reset of most non-spot-month position limits under § 151.4(d)(3). Nonetheless, and consistent with the statutory exclusion of swaps pre-existing the Dodd-Frank Act, position limits will not apply to such pre-existing swap positions.[63]

The Commission understands that most uncleared swaps are executed opposite a clearing member or swap dealer and would therefore result in positions reportable to the Commission under part 20. Part 20 reports will not provide data on positions where neither party to a swap is a clearing member or swap dealer, but these positions represent a small fraction of all uncleared swaps. Since most uncleared swaps will be reportable under part 20, the Commission believes the swaps' data set will be adequate to set position limits.[64]

In order to determine a trader's compliance with position limits in light of the pre-existing position exemption and the sampling inherent in requiring swap position data reporting from clearing members and swap dealers, the Commission will utilize one existing and one new means to conduct the necessary market surveillance. First, the Commission may issue special calls under § 20.6(b) in instances where traders appear to have positions exceeding part 151 position limits. Traders subject to these special calls would then be afforded an opportunity to provide information on their positions demonstrating compliance with a part 151 position limit. Second, the Commission notes that traders are required to provide position visibility on their uncleared swaps positions under § 151.6(c) in 401 filings that would reflect all of their uncleared swap positions in Referenced Contracts as well as their total positions in Referenced Contracts, irrespective of whether these swaps were executed opposite a clearing member or swap dealer. These filings would allow the Commission to determine whether the trader is in compliance with part 151 position limits. The Commission clarifies that such 401 filings require the reporting of gross long and gross short positions in Referenced Contracts, excluding those positions that are not included in the definition of Referenced Contracts (*e.g.,* excluding those positions arising from basis contract positions, pre-existing swap positions, and diversified commodity index positions).[65]

D. Spot-Month Limits

Proposed § 151.4 would apply spot-month position limits separately for physically-delivered contracts and cash-settled contracts (*i.e.,* cash-settled

[59] Non-spot-month limits for agricultural contracts currently subject to Federal position limits under part 150 are referred to herein as ''legacy limits.'' As noted earlier, such Referenced Contracts are generally referred to as ''enumerated'' agricultural contracts. 17 CFR 150.2.

[60] The Commission recently adopted reporting regulations that require routine position reports from clearing organizations, clearing members, and swap dealers. *See* 76 FR 43851, Jul. 22, 2011. The swaps positional data obtained through these reports are expected to serve as a primary source for determining open interests.

[61] Prior to the compliance date, persons shall continue to comply with applicable exchange-set position limits and accountability levels.

[62] *See* § 20.2, 17 CFR 20.11 for a list of covered contracts.

[63] While requiring reporting entities to submit data sufficient to allow the Commission to distinguish pre-existing positions from other positions would be helpful to the Commission, the Commission does not currently believe it would be cost-effective to impose this requirement broadly as it would require reporting entities to revisit transaction trade confirmation records that may or may not be readily linked to position-tracking databases. Moreover, the Commission could develop a reasonable estimate of the extent of a trader's pre-existing positions by comparing their positions as of the effective date with the positions held on a date in interest (*e.g.,* when a trader appears to establish a position exceeding a position limit).

[64] Proposed § 151.4(e)(3) based the uncleared swap component of the open interest figure used to set non-spot-month position limits on open interest attributed to swap dealers. Section 20.4 requires position reporting from swap dealers as well as clearing organizations and clearing members. Final rule § 151.4(b)(2)(ii) permits estimation of the uncleared swap component using clearing organization or clearing member data obtained under § 20.4 reports.

[65] *See supra* under II.B. discussing the definition of Referenced Contract.

futures and swaps).[66] A trader could therefore hold positions up to the spot-month position limit in both the physical-delivery and cash-settled contracts but a trader could not net cash-settled contracts with the physical-delivery contracts.[67] The proposed spot-month position limits for physical-delivery Core Referenced Futures Contracts initially would be set at existing DCM levels; cash-settled Referenced Contracts would be subject to limits set at the same level. As discussed above, during the second phase of implementation, the spot-month limits would be based on 25 percent of estimated deliverable supply, as determined by the Commission in consultation with DCMs. The Commission has determined to adopt the spot-month limits substantially as proposed but with certain changes to address commenters' concerns.

1. Definition of ''Deliverable Supply''

In the proposal, the Commission defined ''deliverable supply'' generally as ''the quantity of the commodity meeting a derivative contract's delivery specifications that can reasonably be expected to be readily available to short traders and saleable by long traders at its market value in normal cash marketing channels at the derivative contract's delivery points during the specified delivery period, barring abnormal movement in interstate commerce.'' [68] Several commenters supported ''deliverable supply'' as an appropriate basis for spot-month limits for physical-delivery contracts.[69] Other commenters disagreed, stating that ''deliverable supply'' was inappropriate, even for physical-delivery contracts, because it would result in overly stringent limits.[70] ISDA/SIFMA suggested that the Commission instead base spot-month limits on ''available deliverable supply,'' a broader measure of physical supply.[71]

Similarly, two commenters suggested that the Commission include supply committed to long-term supply contracts in its definition of ''deliverable supply'' to avoid artificially reduced spot-month position limits.[72] In the Commission's experience overseeing the position limits established at the exchanges as well as federally-set position limits, ''spot-month speculative position limits levels are 'based most appropriately on an analysis of current deliverable supplies and the history of various spot-month expirations.' '' [73]

Other commenters argued that ''deliverable supply'' should not be the basis for position limits on cash-settled Referenced Contracts.[74] Niska, for example, asked the Commission to explain why spot-month limits for cash-settled contracts should be linked to deliverable supply.[75] Another commenter, BGA, opined that the Commission should set position limits for cash-settled swap Referenced Contracts based on the size of the swap market because swap contracts do not contemplate delivery of the underlying contract and therefore are not ''tied to the physical limits of the market.'' [76]

The Commission finds that the use of deliverable supply to set spot-month limits is wholly consistent with its historical approach to setting spot-month limits and overseeing DCMs' compliance with Core Principles 3 and 5.[77] Currently, in determining whether a physical-delivery contract complies with Core Principle 3, the Commission staff considers whether the specified contract terms and conditions may result in a deliverable supply that is sufficient to ensure that the contract is not conducive to price manipulation or distortion. In this context, the term ''deliverable supply'' generally means the quantity of the commodity meeting a derivative contract's delivery specifications that can reasonably be expected to be readily available to short traders and saleable by long traders at its market value in normal cash marketing channels at the derivative contract's delivery points during the specified delivery period, barring abnormal movement in interstate commerce.[78] The spot-month limit pursuant to Core Principle 5 is similarly established based on the analysis of deliverable supplies. The Acceptable Practices for Core Principle 5 state that, with respect to physical-delivery contracts, the spot-month limit should not exceed 25 percent of the estimated deliverable supply.[79] Lastly, with

[66] For the ICE Futures U.S. Sugar No. 16 (SF) and CME Class III Milk (DA), the Commission proposed to adopt the DCM single-month limits for the nearby month or first-to-expire Referenced Contract as spot-month limits. These contracts currently have single-month limits that are enforced in the spot month.

[67] Thus, for example, if the spot-month limit for a Referenced Contract is 1,000 contracts, then a trader could hold up to 1,000 contracts long in the physical-delivery contract and 1,000 contracts long in the cash-settled contract. However, the same trader could not hold 1,001 contracts long in the physical-delivery contract and hold 1 contract short in the cash-settled and remain under the limit for the physical-delivery contract. A trader's cash-settled contract position would be a function of the trader's position in Referenced Contracts based on the same commodity that are cash-settled futures and swaps. For purposes of applying the limits, a trader shall convert and aggregate positions in swaps on a futures equivalent basis consistent with the guidance in the Commission's Appendix A to Part 20, Large Trader Reporting for Physical Commodity Swaps. *See* 76 FR 43851, 43865 Jul. 22, 2011.

[68] 76 FR at 4752, 4757.

[69] *See* CL–AFR *supra* note 17 at 7–8; CL–AIMA *supra* note 35 at 2; CL–Prof. Greenberger *supra* note 6 at 17; InterContinental Exchange, Inc. (''ICE I'') on March 28, 2011 (''CL–ICE I'') at 5; and Natural Gas Exchange (''NGX'') on March 28, 2011 (''CL–NGX'') at 3.

[70] CL–ISDA/SIFMA *supra* note 21 at 21; and CL–FIA I *supra* note 21 at 9.

[71] ''Available deliverable supply'' includes: (1) All available local supply (including supply committed to long-term commitments); (2) all deliverable non-local supply; and (3) all comparable supply (based on factors such as product and location). *See* CL–ISDA/SIFMA *supra* note 21 at 21. Another commenter, the Alternative Investment Management Association, similarly advocated a more expansive definition of ''deliverable supply.'' CL–AIMA *supra* note 35 at 3 (''This may include all supplies available in the market at all prices and at all locations, as if a party were seeking to buy a commodity in the market these factors would be relevant to the price.'')

[72] National Grain and Feed Association (''NGFA'') on March 28, 2011 (''CL–NGFA'') at 5; and CL–CME I *supra* note 8 at 9 (suggesting that if the Commission decides to retain this exclusion, it should define what it understands a ''long-term'' agreement to be and ensure consistency with the deliverable supply definition in the Core Principles and Other Requirements for Designated Contract Markets proposed rulemaking). *Id.* citing Appendix C of Part 38, 75 FR 80572, 80631, Dec. 22, 2010. (In Appendix C, the Commission states that commodity supplies that are ''committed to some commercial use'' should be excluded from deliverable supply, and requires DCMs to consult with market participants to estimate these supplies on a monthly basis).

[73] 64 FR 24038, 24039, May 5, 1999.

[74] Minneapolis Grain Exchange, Inc. (''MGEX'') on March 28, 2011 (''CL–MGEX'') at 4; CL–MFA *supra* note 21 at 16; Niska Gas Storage LLC (''Niska'') on March 28, 2011 (''CL–Niska'') at 2. *See also* CL–AIMA *supra* note 35 at 2 (asking the Commission to reconsider position limits on cash-settled contracts).

[75] CL–Niska *supra* note 75 at 2.

[76] CL–BGA *supra* note 35 at 19. *See also* Cargill, Incorporated (''Cargill'') on March 28, 2011 (''CL–Cargill'') at 13 (urging the Commission to study the impact of applying any position limit based on ''deliverable supply'' to the swaps market).

[77] Core Principle 3 specifies that a board of trade shall list only contracts that are not readily susceptible to manipulation, while Core Principle 5 obligates a DCM to establish position limits or position accountability provisions where necessary and appropriate ''to reduce the threat of market manipulation or congestion, especially during the delivery month.''

[78] *See e.g.,* the discussion of deliverable supply in Guideline No. 1. 17 CFR part 40, app. A. *See also* the discussion of deliverable supply in the first publication of Guideline No. 1. 47 FR 49832, 49838, Nov. 3, 1982.

[79] Indeed, with three exceptions, the § 151.2-listed contracts with DCM-defined spot months are currently subject to exchange-set spot-month position limits, which would have been established in this manner. The only contracts based on a physical commodity that currently do not have spot-month limits are the COMEX mini-sized gold, silver, and copper contracts that are cash settled based on the futures settlement prices of the physical-delivery contracts. The cash-settled contracts have position accountability provisions in the spot month, rather than outright spot-month limits. These cash-settled contracts have relatively small levels of open interest.

respect to cash-settled contracts on agricultural and exempt commodities, the spot-month limit is set at some percentage of calculated deliverable supply. Accordingly, the Commission is adopting deliverable supply as the basis of setting spot-month limits. In response to commenters, the Commission added § 151.4(d)(2)(iv) to clarify that, for purposes of estimating deliverable supply, DCMs may use any guidance issued by the Commission set forth in the Acceptable Practices for Core Principle 3.

2. Twenty-Five Percent as the Deliverable Supply Formula

ICE commented that spot-month limits for physical-delivery contracts (but not cash-settled contracts) set at 25 percent of deliverable supply are necessary to prevent corners and squeezes.[80] Other commenters, however, opined that spot-month position limits based on 25 percent of deliverable supply are insufficient to prevent excessive speculation.[81] Americans for Financial Reform (''AFR''), for example, argued that while ''deliverable supply'' is an appropriate basis for setting spot-month limits,[82] the proposed spot-month limit addresses manipulation by a single actor and would not be set low enough to combat excessive speculation in the market as a whole and the volatility and delinking of commodities prices from economic fundamentals caused by excessive speculation.[83] Some commenters recommended that the Commission set the spot-month limits based on the ''individual characteristics'' of each Core Referenced Futures Contract, and not necessarily an exchange's deliverable supply estimate.[84]

The Commission has determined to adopt the 25 percent level of deliverable supply for setting spot-month limits. This formula is consistent with the long-standing Acceptable Practices for Core Principle 5,[85] which provides that, for physical-delivery contracts, the spot-month limit should not exceed 25 percent of the estimated deliverable supply. The use of the existing industry standard would provide clarity concerning the underlying methodology. Further, the Commission believes that, based on its experience, the formula has appeared to work effectively as a prophylactic tool to reduce the threat of corners and squeezes and promote convergence without compromising market liquidity.[86] In making an estimate of deliverable supply, the Commission reminds DCMs to take into consideration the individual characteristics of the underlying commodity's supply and the specific delivery features of the futures contract.[87]

3. Cash-Settled Contracts

With respect to cash-settled contracts, proposed § 151.4 incorporated a conditional spot-month limit permitting traders without a hedge exemption to acquire position levels that are five times the spot-month limit if such positions are exclusively in cash-settled contracts (*i.e.,* the trader does not hold positions in the physical-delivery Referenced Contract) and the trader holds physical commodity positions that are less than or equal to 25 percent of the estimated deliverable supply. The proposed conditional-spot-month position limits generally tracked exchange-set position limits currently implemented for certain cash-settled energy futures and swaps.[88]

Currently, with the exception of significant price discovery contracts, traders' swaps positions are not subject to position limit restrictions. The Commission is aware that counterparties to uncleared swaps may impose prudential credit restrictions that may directly (for example, by one party setting a maximum notional amount restriction that it will execute with a particular counterparty) or indirectly (for example, by one party setting a credit annex requirement such as posting of initial collateral by a counterparty) restrict the amount of bilateral transactions between the parties. However, the proposed spot month limits would be the first broad position limit régime imposed on swaps.

Several commenters questioned the application of proposed spot-month position limits to cash-settled contracts.[89] Some of these commenters suggested that cash-settled contracts, if subject to any spot-month position limits at all, should be subject to relatively less restrictive limits that are not based on estimated deliverable supply.[90] BGA, for example, argued that position limits on swaps should be set based on the size of the open interest in the swaps market because swap contracts do not provide for physical delivery.[91] Further, certain commenters argued that imposing a single speculative limit on all cash-settled contracts would substantially reduce the cash-settled positions that a trader can hold because currently, each cash-settled contract is subject to a separate limit.[92] Other commenters urged the Commission to eliminate class limits and allow for netting across futures and swaps contracts so as not to impact liquidity.[93]

A number of commenters objected to limiting the availability of a higher limit in the cash-settled contract to traders not holding any physical-delivery contract.[94] For example, CME argued that the proposed conditional limits would encourage price discovery to migrate to the cash-settled contracts, rendering the physical-delivery contract ''more susceptible to sudden price

[80] CL–ICE I *supra* note 69 at 5.

[81] CL–AFR *supra* note 17 at 5; American Trucking Association (''ATA'') on March 28, 2011 (''CL–ATA'') at 3; Food & Water Watch (''FWW'') on March 28, 2011 (''CL–FWW'') at 10; National Farmers Union (''NFU'') on March 28, 2011 (''CL–NFU'') at 2; and CL–PMAA/NEFI *supra* note 6 at 7.

[82] CL–AFR *supra* note 17 at 7–8.

[83] *See* CL–AFR *supra* note 17 at 5, 7.

[84] CL–FIA I *supra* note 21 at 9; CL–ISDA/SIFMA *supra* note 21 at 21; and CL–MFA *supra* note 21 at 18.

[85] Core Principle 5 obligates a DCM to establish position limits and position accountability provisions where necessary and appropriate ''to reduce the threat of market manipulation or congestion, especially during the delivery month.''

[86] In this respect, the proposed limits formula is not intended to address speculation by a class or group of traders.

[87] As under current practice, DCM estimates of deliverable supplies (and the supporting data and analysis) will be subject to Commission staff review.

[88] For example, the NYMEX Henry Hub Natural Gas Last Day Financial Swap, the NYMEX Henry Hub Natural Gas Look-Alike Last Day Financial Futures, and the ICE Henry LD1 swap are all cash-settled contracts subject to a conditional-spot-month limit that, with the exception of the requirement that a trader not hold large cash commodity positions, is identical in structure to the proposed limit.

[89] CL–ISDA/SIFMA *supra* note 21 at 6–7, 19; Goldman, Sachs & Co. (''Goldman'') on March 28, 2011 (''CL–Goldman'') at 5; CL–ICI *supra* note 21 at 10; CL–MGEX *supra* note 74 at 4 (particularly current MGEX Index Contracts that do not settle to a Referenced Contract should be considered exempt from position limits because cash-settled index contracts are not subject to potential market manipulation or creation of market disruption in the way that physical-delivery contracts might be); CL–WGCEF *supra* note 35 at 20 (''the Commission should reconsider setting a limit on cash-settled contracts as a function of deliverable supply and establish a much higher, more appropriate spot-month limit, if any, on cash-settled contracts''); CL–MFA *supra* note 21 at 16–17; and CL–SIFMA AMG I *supra* note 21 at 7.

[90] CL–BGA *supra* note 35 at 19; CL–ICI *supra* note 21 at 10; CL–MFA *supra* note 21 at 16–17; CL–WGCEF *supra* note 35 at 20; CL–Cargill *supra* note 76 at 13; CL–EEI/EPSA *supra* note 21 at 9; and CL–AIMA *supra* note 35 at 2.

[91] CL–BGA *supra* note 35 at 10.

[92] *See e.g.,* CL–FIA I *supra* note 21 at 10; and CL–ICE I *supra* note 69 at 6

[93] *See e.g.,* CL–ISDA/SIFMA *supra* note 21 at 8.

[94] American Feed Industry Association (''AFIA'') on March 28, 2011 (''CL–AFIA'') at 3; CL–AFR *supra* note 17 at 6; Air Transport Association of America (''ATAA'') on March 28, 2011 (''CL–ATAA'') at 7; CL–BGA *supra* note 35 at 11–12; CL–Centaurus Energy *supra* note 21 at 3; CL–CME I *supra* note 8 at 10; CL–WGCEF *supra* note 35 at 21–22; and CL–PMAA/NEFI *supra* note 6 at 14.

movements during the critical expiration period.'' [95] AIMA commented that the prohibition against holding positions in the physical-delivery Referenced Contract will cause investors to trade in the physical commodity markets themselves, resulting in greater price pressure in the physical commodity.[96]

Some of these commenters, including the CME and the KCBT, argued against the proposed restriction with respect to cash-settled contracts and recommended that cash-settled Referenced Contracts and physical-delivery contracts should be subject to the same position limits.[97] Two commenters opined that if the conditional limits are adopted, they should be increased from five times 25 percent of deliverable supply.[98] ICE recommended that they be increased to at least ten times 25 percent of deliverable supply.[99]

In support of their view, the CME submitted data concerning its natural gas physical-delivery contract.[100] The data, however, generally indicates that the trading volume in the contract in the spot month has increased since the implementation of a conditional-spot-month limit, suggesting little (if any) adverse impact on market liquidity for the contract. Moreover, according to the same data set, both the outright volume and the average price range in the settlement period on the last trade day in the closing range have declined.[101] Other measures of average price range in the spot period also have declined.

The CME also submitted, for the same physical-delivery contract, a measure of the relative closing range as a ratio to volatility (''RCR'')—that is, the ratio of the closing range to the 20-day standard deviation of settlement prices. The RCR measure has declined on average after implementation of the conditional limits across 17 expirations, while the RCR on two individual expirations was higher after implementation of the conditional limits, indicating a higher relative price volatility on those two days. However, during one of those two days, certain traders were active in the physical-delivery futures contracts and concurrently held cash-settled contracts, in excess of one times the limit on the physical-delivery contract; in the other day, this was not the case. In summary, the Commission does not believe that the data submitted by CME supports the assertion that setting the existing conditional limits on cash-settled contracts in the natural gas market has materially diminished the price discovery function of physical-delivery contracts.

Considering the comments that were received, the Commission is adopting, on an interim final rule basis, the proposed spot-month position limit provisions with modifications. Under the interim final rule, the Commission will apply spot-month position limits for cash-settled contracts using the same methodology as applied to the physical-delivery Core Referenced Future Contracts, with the exception of natural gas contracts, which will have a class limit and aggregate limit of five times the level of the limit for the physical-delivery Core Referenced Futures Contract. As further described below, the Commission is adopting these spot-month limit methodologies as interim final rules in order to solicit additional comments on the appropriate level of spot-month position limits for cash-settled contracts.

Specifically, the Commission is adopting, on an interim final rule basis, a spot-month position limit for cash-settled contracts (other than natural gas) that will be set at 25 percent of estimated deliverable supply, in parity with the methodology for setting spot-month limit levels for the physical-delivery Core Referenced Futures Contracts. The Commission believes, consistent with the comments, that parity should exist in all position limits (including spot-month limits) between physical-delivery and cash-settled Referenced Contracts (other than in natural gas); otherwise, these limits would permit larger position in look-alike cash-settled contracts that may provide an incentive to manipulate and undermine price discovery in the underlying physical-delivery futures contract. However, the Commission has a reasonable basis to believe that the cash-settled market in natural gas is sufficiently different from the cash-settled markets in other physical commodities to warrant a different spot-month limit methodology.

With respect to NYMEX Light, Sweet Crude Oil (''WTI crude oil''), NYMEX New York Harbor Gasoline Blendstock (''RBOB''), and NYMEX New York Harbor Heating Oil (''heating oil'') contracts, administrative experience, available data, and trade interviews indicate that the sizes of the markets in cash-settled Referenced Contracts (as measured in notional value) are likely to be no greater in size than the related physical-delivery Core Referenced Futures Contracts. This is because there are alternative markets which may satisfy much of the demand by commercial participants to engage in cash-settled contracts for crude oil. These include a market for generally short-dated WTI crude oil forward contracts, as well as a well-developed forward market for Brent oil and an active cash-settled WTI futures contract (the cash-settled ICE Futures (Europe) West Texas Intermediate Light Sweet Crude Oil futures contract). That futures contract had, as of October 4, 2011, an open interest of less than one-third that of the physical-delivery NYMEX Light Sweet Crude Oil futures contract, as reported in the Commission's Commitment of Traders Report. That contract is subject to a spot-month limit equal to the spot-month limit imposed by NYMEX on the relevant physical-delivery futures contract, as a condition of a Division of Market Oversight no-action letter issued on June 17, 2008, CFTC Letter No. 08–09. A review of the Commission's large trader reporting system data indicated fewer than five traders recently held a position in that cash-settled ICE contract in excess of 3,000 contracts in the spot month, pursuant to exemptions granted by the exchange. Accordingly, given that the size of the cash-settled swaps market involving WTI does not appear to be materially larger than that of the physical-delivery Core Referenced Futures Contract, parity in spot month limits in WTI crude oil between physical-delivery and cash-settled contracts should ensure sufficient

[95] CL–CME I *supra* note 8 at 10. Similarly, BGA argued that conditional limits incentivize the migration of price discovery from the physical contracts to the financial contracts and have the unintended effect of driving participants from the market and thereby increasing the potential for market manipulation with a very small volume of trades. CL–BGA *supra* note 35 at 12.

[96] CL–AIMA *supra* note 35 at 2.

[97] CL–CME I *supra* note 8 at 10; Kansas City Board of Trade (''KCBT I'') on March 28, 2011 (''CL–KCBT I'') at 4; and CL–APGA *supra* note 17 at 6, 8. Specifically, KCBT argued that parity should exist in all position limits (including spot-month limits) between physical-delivery and cash-settled Referenced Contracts; otherwise, these limits would unfairly advantage the look-alike cash-settled contracts and result in the cash-settled contract unduly influencing price discovery. Moreover, the higher spot-month limit for the financial contract unduly restricts the physical market's ability to compete for spot-month trading, which provides additional liquidity to commercial market participants that roll their positions forward. CL–KCBT I at 4.

[98] CL–AIMA *supra* note 35 at 2; and CL–ICE I *supra* note 70 at 8.

[99] CL–ICE I *supra* note 69 at 8. ICE also recommended that the Commission remove the prohibition on holding a position in the physical-delivery contract or shorten the duration to a narrower window of trading than the final three days of trading.

[100] CME Group, Inc. (''CME III'') on August 15, 2011 (''CL–CME III'').

[101] ''Outright volume'' means the volume of electronic outright transactions that the DCM used for purposes of calculating settlement prices and excludes, for example, spread exemptions executed at a differential.

liquidity for bona fide hedgers in the cash-settled contracts.

With respect to the other energy commodities, based on administrative experience, available data, and trade interviews, the Commission understands the swaps markets in RBOB and heating oil are small relative to the relevant Core Referenced Futures Contracts. In this regard, unlike natural gas, there has been a small amount of trading in exempt commercial markets in RBOB and heating oil. Thus, parity in spot month limits in RBOB and heating oil between physical-delivery and cash-settled contracts should ensure sufficient liquidity for bona fide hedgers in the cash-settled contracts.

With respect to agricultural commodities, administrative experience, available data, and trade interviews indicate that the sizes of the markets in cash-settled Referenced Contracts (as measured in notional value) are small and not as large as the related Core Referenced Futures Contracts. This is likely due to the fact that, currently, off-exchange agricultural commodity swaps (that are not options) may only be transacted pursuant to part 35 of the Commission's regulations. Under current rules, exempt commercial markets and exempt boards of trade have not been permitted to, and have not, listed agricultural swaps (although the Commission has repealed and replaced part 35, effective December 31, 2011, at which point the Commission regulations would permit agricultural commodity swaps to be transacted under the same requirements governing other commodity swaps). Regarding off-exchange agricultural trade options, part 35 is not available; such transactions must be pursuant to the Commission's agricultural trade option rules found in Commission regulation 32.13. Under regulation 32.13, parties to the agricultural trade option must have a net worth of at least $10 million and the offeree must be a producer, processor, commercial user of, or merchant handling the agricultural commodity which is the subject of the trade option. Based on interviews with offerors of agricultural trade options believed to be the largest participants, administrative experience is that the off-exchange markets are smaller than the relevant Core Referenced Futures Contracts. Accordingly, parity in spot month limits in agricultural commodities between physical-delivery and cash-settled contracts should ensure sufficient liquidity for bona fide hedgers in the cash-settled contracts.

With respect to the metal commodities, based on administrative experience, available data, and trade interviews, the Commission understands the cash-settled swaps markets also are small. Based on interviews with market participants, the Commission understands there is an active cash forward market and lending market in metals, particularly in gold and silver, which may satisfy some of the demand by commercial participants to engage in cash-settled contracts. The cash-settled metals contracts listed on DCMs generally are characterized by a low level of open interest relative to the physical-delivery metals contracts. Moreover, as is the case for RBOB and heating oil, there has not been appreciable trading in exempt commercial markets in metals. Accordingly, parity in spot month limits in metals commodities between physical-delivery and cash-settled contracts should ensure sufficient liquidity for bona fide hedgers in the cash-settled contracts.

In contrast, regarding natural gas, there are very active cash-settled markets both at DCMs and exempt commercial markets. NYMEX lists a cash-settled natural gas futures contract linked to its physical-delivery futures contract that has significant open interest. Similarly, ICE, an exempt commercial market, lists natural gas swaps contracts linked to the NYMEX physical-delivery futures contract. Moreover, both NYMEX and ICE have gained experience with conditional spot-month limits in natural gas where the cash-settled limit is five times the limit for the physical-delivery futures contract. In this regard, NYMEX imposed the same limit on its cash-settled natural contract as ICE imposed on its cash-settled natural gas contract when ICE complied with the requirements of part 36 of the Commission's regulations regarding SPDCs. As discussed above, the Commission believes the existing conditional limits on cash-settled natural gas contracts have not materially diminished the price discovery function of physical-delivery contracts. The final rules relax the conditional limits by removing the condition, but impose a tighter limit on cash-settled contracts by aggregating all economically similar cash-settled natural gas contracts.[102]

Thus, the Commission has determined that the one-to-one ratio (between the level of spot-month limits on physical-delivery contracts and the level of the spot-month limits on cash-settled contracts in the agricultural, metals, and energy commodities other than natural gas) maximizes the objectives enumerated in section 4a(a)(3). Specifically, such limits ensure market liquidity for bona fide hedgers and protect price discovery, while deterring excessive speculation and the potential for market manipulation, squeezes, and corners. The Commission further notes that the formula is consistent with the level the Commission staff has historically deemed acceptable for cash-settled contracts, as well as the formula for physical-delivery contracts under Acceptable Practices for Core Principle 5 in part 38. Nevertheless, the Commission recognizes that after experience with the one-to-one ratio and additional reporting of swap transactions, it may be possible to maximize further these objectives with a different ratio and therefore will revisit the issue after it evaluates the effects of the interim final rule.

In addition to the spot-month limit for cash-settled natural gas contracts, the interim final rule also provides for an aggregate spot-month limit set at five times the level of the spot-month limit in the relevant physical-delivery natural gas Core Referenced Futures Contract. A trader therefore must at all times fall within the class limit for the physical-delivery natural gas Core Referenced Futures Contract, the five-times limit for cash-settled Referenced Contracts in natural gas, and the five-times aggregate limit.

To illustrate the application of the spot-month limits in natural gas contracts, assume a physical-delivery Core Referenced Futures Contract limit on a particular commodity is set to a level of 100. Thus, a trader may hold a net position (long or short) of 100 contracts in that Core Referenced Futures Contract and a net position (long or short) of 500 contracts in the cash-settled Referenced Contracts on that same commodity, provided that the total directional position of both contracts is below the aggregate limit. Therefore, to comply with the aggregate

[102] The Commission is removing the proposed restrictions for claiming the higher limit in cash-settled Referenced Contracts in the spot month. Unlike the proposed conditional limit, under the aggregate limit, a trader in natural gas can utilize the five times limit for the cash-settled Referenced Contract and still hold positions in the physical-delivery Referenced Contract. In addition, there is no requirement that the trader not hold cash or forward positions in the spot month in excess of 25 percent of deliverable supply of natural gas. Although the Commission's experience with DCMs using the more restrictive conditional limit in natural gas has been generally positive, the Commission, in agreeing with commenters, will wait to impose similar conditions until the Commission gains additional experience with the limits in the interim final rule. In this regard, the Commission will monitor closely the spot-month limits in these final rules and may revert to a conditional limit in the future in response to market developments.

limit, if a trader wanted to hold the maximum directional position of 100 contracts in the physical-delivery contract, the trader could hold only 400 contracts on the same side of the market in cash-settled contracts.[103] Thus, while the aggregate limit in isolation may appear to allow a trader to establish a position of 600 contracts in cash-settled contracts and 100 contracts on the opposite side of the market in the physical-delivery contract (that is, an aggregate net position of 500 contracts), the class limits restrict that trader to no more than 500 contracts net in cash-settled contracts. The aggregate limit is less restrictive than the proposed conditional limit in that a trader may elect to hold positions in both physical-delivery and cash-settled contracts, subject to the aggregate limit.

The Commission believes that, based on current experience with existing DCM and exempt commercial market (''ECM'') conditional limits, the one-to-five ratio for natural gas contracts maximizes the statutory objectives, as set forth in section 4a(a)(3)(B) of the CEA, of preventing excessive speculation and market manipulation, ensuring market liquidity for bona fide hedgers, and promoting efficient price discovery. Nevertheless, the Commission recognizes that after experience with the one-to-five ratio and additional reporting of swap transactions, it may be possible to maximize further these objectives with a different ratio and therefore will revisit the issue after it evaluates the effects of the interim final rule. Accordingly, the Commission is implementing the one-to-five ratio in natural gas contracts on an interim final rule basis and is seeking comments on whether a different ratio can further maximize the statutory objectives in section 4a(a)(3)(B) of the CEA.

The Commission notes that, as would have been the case with the proposed conditional limits, the spot-month limits on cash-settled natural gas contracts will be more restrictive than the current natural gas conditional spot-month limits. The NYMEX Henry Hub Natural Gas (''NG'') physical-delivery futures contract has a spot-month limit of 1,000 contracts. Both the NYMEX cash-settled natural gas futures contract (''NN'') and the ICE Henry Hub Physical Basis LD1 contract (''LD1'') have conditional-spot-month limits equivalent to 5,000 contracts in the NG futures contract. In contrast to the LD1 contract, swap contracts that are not significant price discovery contracts (''SPDCs'') have not been subject to any position limits. However, the final rule aggregates the related cash-settled contracts, whether swaps or futures. For example, a trader under current rules may hold a position equivalent to 5,000 NG contracts in each of the NN and LD1 contracts (10,000 in total), but under the final rule, a speculative trader may hold only 5,000 cash-settled contracts net under the aggregate spot month limit (since a trader must add its NN position to its LD1 position). Further, other economically-equivalent contracts would be aggregated with a trader's cash-settled contracts in NN and LD1.

Proposed § 151.11(a)(2) required that a DCM or SEF that is a trading facility adopt spot-month limits on cash-settled contracts for which no federal limits apply, based on the methodology in proposed § 151.4 (*i.e.,* 25 percent of deliverable supply). Proposed § 151.4(a) did not establish spot-month limits in the cash-settled Core Referenced Futures Contracts (*i.e.,* Class III Milk, Feeder Cattle, and Lean Hog contracts). Thus, under the proposal, a DCM or SEF that is a trading facility would be required to set a spot-month limit on such contracts at a level no greater than 25 percent of deliverable supply.

The final rules provide that the spot-month position limit for cash-settled Core Referenced Futures Contracts (*i.e.,* Class III Milk, Feeder Cattle, and Lean Hog contracts) and related cash-settled Referenced Contracts will be set by the Commission at a level equal to 25 percent of deliverable supply.[104]

The Commission is also retaining class limits in the spot month for physical-delivery and cash-settled contracts. Under the class limit restriction, a trader may hold positions up to the spot-month limit in the physical-delivery contracts, as well as positions up to the applicable spot-month limit in cash-settled contracts (*i.e.,* cash-settled futures and swaps), but a trader in the spot month may not net across physical-delivery and cash-settled contracts.[105] Absent such a restriction in the spot month, a trader could stand for 100 percent of deliverable supply during the spot month by holding a large long position in the physical-delivery contract along with an offsetting short position in a cash-settled contract, which effectively would corner the market.[106]

In the Commission's view, the aggregate limit for natural gas will ensure that no trader amasses a speculative position greater than five times the level of the physical-delivery Referenced Contract position limit and thereby, the limit ''diminishes the incentive to exert market power to manipulate the cash-settlement price or index to advantage a trader's position in the cash-settlement contract.'' [107]

As noted above, the Commission has developed the limits on economically equivalent swaps concurrently with limits established for physical commodity futures contracts and has established aggregate requirements for cash-settled futures and swaps. In establishing the spot-month limits for cash-settled futures, options, and swaps, the Commission seeks to ensure, to the maximum extent practicable, that there will be sufficient market liquidity for bona fide hedgers in swaps, especially those seeking to offset open positions in such contracts. Permitting traders to hold larger positions in natural gas cash-settled contracts near expiration should not materially affect the potential for market abuses, as the current Commission surveillance system serves to detect and prevent market manipulation, squeezes, and corners in the physical-delivery futures contracts as well as market abuses in cash-settled contracts on which position information is collected. In this regard, the Swaps Large Trader Reporting system will enhance the Commission's surveillance efforts by providing the Commission with transparency for the positions of traders holding large swap positions. The Commission will monitor closely the effects of its spot-month position limits to ensure that they do not disrupt the price discovery function of the underlying market and that they are effective in addressing the potential for market abuses in cash-settled contracts.

4. Interim Final Rule

The Commission believes that, based on administrative experience, available data, and trade interviews, the spot month limits formulas for energy, agricultural and metals contracts, as described above, at this time best maximizes the statutory objectives set forth in CEA section 4a(a)(3)(B) of preventing excessive speculation and market manipulation, ensuring market liquidity for bona fide hedgers, and promoting efficient price discovery. However, commenters presented a range of views as to the appropriate formula with respect to cash settled contracts. Some commenters believed that either a

[103] Further to this example, if a trader wanted to hold 100 contracts in the physical-delivery contract in one direction, the trader could hold 500 cash-settled contracts in the opposite direction as the physical-delivery contract.

[104] *See* § 151.4(a).

[105] As discussed above, the Commission is eliminating the conditional spot-month limit.

[106] As will be discussed further below, the Commission is eliminating class limits outside of the spot month.

[107] 76 FR at 4752, 4758.

larger ratio was appropriate or there should be no limit on cash-settled contracts at all.[108] Other commenters believed there should be parity in the limits between physical-delivery contracts and cash-settled contracts.[109] Accordingly, the Commission is implementing the spot month limits on an interim rule basis and is seeking comments on whether a different ratio (*e.g.,* one-to-three or one-to-four) can maximize further the statutory objectives in section 4a(a)(3)(B).

Specifically, the Commission invites commenters to address whether the interim final rule best maximizes the four objectives in section 4a(a)(3)(B). The Commission also seeks comments on whether it should set a different ratio for different commodities. Should the Commission consider setting the ratio higher than one-to-one and, if so, in which commodities? Commenters are encouraged, to the extent feasible, to be comprehensive and detailed in providing their approach and rationale. Commenters are requested to address how their suggested approach would better maximize the four objectives in section 4a(a)(3).

Additionally, commenters are encouraged to address the following questions:

Should the Commission consider the relationship between the open interest in cash-settled contracts in the spot month and open interest in the physical-delivery contract in the spot month in setting an appropriate ratio?

Are there other metrics that are relevant to the setting of a spot-month limit on cash-settled contracts (*e.g.,* volume of trading in the physical-delivery futures contract during the period of time the cash-settlement price is determined)?

What criteria, if any, could the Commission use to distinguish among physical commodities for purposes of setting spot-month limits (*e.g.,* agricultural contracts of relatively limited supplies constrained by crop years and limited storage life) and how would those criteria be related to the levels of limits?

The Commission also invites comments on the costs and benefits considerations under CEA section 15a. The Commission further requests commenters to submit additional quantitative and qualitative data regarding the costs and benefits of the interim final rule and any suggested alternatives. Thus, the Commission is seeking comments on the impact of the interim final rule or any alternative ratio on: (1) The protection of market participants and the public; (2) the efficiency, competitiveness, and financial integrity of the futures markets; (3) the market's price discovery functions; (4) sound risk management practices; and (5) other public interest considerations.

The comment period for the interim final rule will close January 17, 2012.

After the Commission gains some experience with the interim final rule and has reviewed swaps data obtained through the Swaps Large Trader Reports, the Commission may further reevaluate the appropriate ratio between physical-delivery and cash-settled spot-month position limits and, in that connection, seek additional comments from the public.

5. Resetting Spot-Month Limits

The Proposed Rules required that DCMs submit estimates of deliverable supply to the Commission by the 31st of December of each calendar year. The Proposed Rules also provided that the Commission would rely on either these DCM estimates or its own estimates to revise spot-month position limits on an annual basis.[110] Two commenters commented that the Commission's proposed process for DCMs providing their deliverable supply estimates within the proposed timeframe was operationally infeasible.[111]

Others criticized the setting of spot-month limits on an annual basis. MFA commented that the limits should reflect seasonal deliverable supply by using either data based on the prior year's deliverable supply estimates or more frequent re-setting.[112] The Institute for Agriculture and Trade Policy (''IATP'') commented that the spot-month position limits for legacy agricultural commodities will likely require more than annual revision due to the effects of climate change on the estimated deliverable supply for each Referenced Contract.[113] IATP also urged the Commission to amend the proposal to provide for emergency meetings to estimate deliverable supply if prices or supply become volatile.[114]

Two commenters expressed concern about the potential volatility in the limit levels introduced by the Commission's proposed annual process for setting spot-month limits. BGA commented that spot-month limits that are changed too frequently (annually would be too frequent in their view) could result in a ''flash crash'' as traders make large position changes in order to comply with a potentially new lower limit.[115] BGA suggested that this concern could be addressed through, among other things, less frequent changes to the spot-month position limit levels and by providing the market a several-month ''cure period.'' [116] ISDA/SIFMA suggested that year-to-year spot-month limit level volatility could be addressed by using a five-year rolling average of estimated deliverable supply.[117]

The Commission recognizes the concerns regarding the necessity and desirability of an annual updating of the deliverable supply calculations on a single anniversary date, and that under normal market conditions, agricultural, energy, and metal commodities typically do not exhibit dramatic and sustained changes in their supply and demand fundamentals from year-to-year. Accordingly, the Commission has determined to update spot-month limits biennially (every two years) for energy and metal Referenced Contracts instead of annually, and to stagger the dates on which estimates of deliverable supply shall be submitted by DCMs. These changes should mitigate the costs of compliance for DCMs to prepare and submit estimates of deliverable supply to the Commission. Under the final rule, DCMs may petition the Commission to update the limits on a more frequent basis should supply and demand fundamentals warrant it.

Finally, in response to comments, the Commission has made minor modifications to the definition of the ''spot month'' to provide for consistency with DCMs' current practices in the administration of spot-month limits for the Referenced Contracts.

E. Non-Spot-Month Limits

The Commission proposed to impose aggregate position limits outside of the spot month in order to prevent a speculative trader from acquiring excessively large positions and, thereby, to help prevent excessive speculation and deter and prevent market

[108] *See e.g.,* CL–ICE I, *supra* note 69 at 8, CL–Centaurus, *supra* note 21 at 3; CL–BGA, *supra* note 35 at 12.

[109] *See e.g.,* CL–CME I, *supra* note 8 at 10; CL–KCBT, *supra* note 97 at 4; CL–APGA, *supra* note 17 at 6,8.

[110] *See* § 151.4(c). Under the Proposed Rules, spot-month legacy limits would not be subject to periodic resets.

[111] CL–CME I *supra* note 8 at 9; and CL–MGEX *supra* note 75 at 2. In addition, the MGEX stated that it is impractical to try to ascertain an accurate estimate of deliverable supply because there are too many variable and unknown factors that affect an agricultural commodity's production and the amount that is sent to delivery points. CL–MGEX *supra* note 74 at 2.

[112] CL–MFA *supra* note 21 at 18.

[113] IATP on March 28, 2011 (''CL–IATP'') at 5.

[114] *Id.* at 3.

[115] CL–BGA *supra* note 35 at 20.

[116] *Id.*

[117] CL–ISDA/SIFMA *supra* note 21 at 22.

manipulations, squeezes, and corners.[118] Furthermore, the Commission provided that the ''resultant limits are purposely designed to be high in order to ensure sufficient liquidity for bona fide hedgers and avoid disrupting the price discovery process given the limited information the Commission has with respect to the size of the physical commodity swap markets.'' [119]

In the proposal, the formula for the non-spot-month position limits is based on total open interest for all Referenced Contracts in a commodity. The actual position limit is based on a formula: 10 percent of the open interest for the first 25,000 contracts and 2.5 percent of the open interest thereafter.[120] The limits for each Referenced Contracts included class limits with one class comprised of all futures and option contracts and the second class comprised of all swap contracts. A trader could net positions within the same class, but could not net its position across classes. The limits also included an aggregate all-months-combined limit and a single month limit; however, the limit for the single month would be the same size as the limit for all months.

The Commission received many comments about the rationale for and design of the proposed non-spot-month limits. Many commenters opined that the proposed aggregate non-spot-month limits would not be sufficiently restrictive to prevent excessive speculation.[121] Better Markets explained, for example, that the proposed non-spot-month limits address manipulation by limiting the position size of a single individual while position limits intended to reduce excessive speculation should aim to reduce total speculative participation in the market.[122] These commenters recommended that, in order to address excessive speculation, the Commission should set limits designed to limit speculative activity to a target level.[123]

Other commenters questioned the utility of non-spot-month limits generally.[124] AIMA, for example, opined that ''[a]lthough * * * limits within the spot-month may be effective to prevent 'corners and squeezes' at settlement, the case for placing position limits in non-spot-months is less convincing and has not been made by the Commission.'' [125] The FIA commented that non-spot-month position limits are not necessary to prevent excessive speculation.[126]

A number of commenters opined that the Commission should increase the open interest multipliers in the formula used in determining the non-spot-month position limits.[127] Other commenters opined that the Commission should decrease the open interest multipliers to 5 percent of open interest for first 25,000 contracts and then 2.5 percent.[128] PMAA and the NEFI commented that the formula, which was developed in 1992 in the context of agricultural commodities, is inappropriate for current markets with larger open interest relative to the agricultural markets.[129]

Goldman Sachs recommended that the Commission use a longer observation period than one year for setting position limits and provided as an example five years in order to reduce pro-cyclical effects (*e.g.,* a decrease in open interest due to decreased speculative activity in one period results in a limit in the subsequent period that is excessively restrictive or vice-versa).[130]

As stated in the proposal, the non-spot-month position limits are intended to maximize the CEA section 4a(a)(3)(B) objectives, consistent with the Commission's historical approach to setting non-spot-month speculative position limits.[131] Such a limits formula, in the Commission's view, prevents a speculative trader from acquiring excessively large positions and thereby would help prevent excessive speculation and deter and prevent market manipulations, squeezes, and corners. The Commission also believes, based on its experience under part 150, that the 10 and 2.5 percent formula will ensure sufficient liquidity for bona fide hedgers and avoids disruption to the price discovery process.

The Commission notes that Congress implicitly recognized the inherent uncertainty regarding future effects associated with setting limits prophylactically and therefore directed the Commission, under section 719(a) of the Dodd-Frank Act, to study on a

[118] 76 FR at 4752, 4759.

[119] *Id.*

[120] By way of example, assuming a Referenced Contract has average all-months-combined aggregate open interest of 1 million contracts, the level of the non-spot-month position limits would equal 26,900 contracts. This level is calculated as the sum of 2,500 (*i.e.,* 10 percent times the first 25,000 contracts open interest) and 24,375 (*i.e.,* 2.5 percent of the 975,000 contracts remaining open interest), which equals 26,875 (rounded up to the nearest 100 under the rules (*i.e.,* 26,900)).

[121] CL–ATA *supra* note 81 at 3–4; CL–ATAA *supra* note 94 at 7; CL–Better Markets *supra* note 37 at 70–71; CL–Delta *supra* note 20 at 2–6; CL–FWW *supra* note 81 at 11; and CL–PMAA/NEFI *supra* note 6 at 7, 10. 3,178 form comment letters asked the Commission to impose a limit of 1,500 contracts on Referenced Contracts in silver.

[122] *See e.g.,* CL–Better Markets *supra* note 37 at 61–64.

[123] CL–ATA *supra* note 81 at 4–5; CL–AFR *supra* note 17 at 5–6; CL–ATAA *supra* note 94 at 3, 6, 9–10, 12; CL–Better Markets *supra* note 37 at 70–71 (recommending the Commission to limit non-commodity index and commodity index speculative participation in the market to 30 percent and 10 percent of open interest, respectively); CL–Delta *supra* note 20 at 5; and CL–PMAA/NEFI *supra* note 6 at 7. *See also* Daniel McKenzie on March 28, 2011 (''CL–McKenzie'') at 3. The Petroleum Marketers Association of America and the New England Fuel Institute, for example, suggested that the distribution of large speculative traders' positions in the market may be an appropriate factor to be considered in developing these speculative target limits.

[124] American Gas Association (''AGA'') on March 28, 2011 (''CL–AGA'') at 13; CL–AIMA *supra* note 35 at 3; CL–BlackRock *supra* note 21 at 18; CL–CME I *supra* note 8 at 21; CL–FIA I *supra* note 21 at 11 (Commission's prior guidance does not provide a basis today for an exemption from hard speculative position limits for markets with large open-interest, high trading volumes and liquid cash markets); CL–Goldman *supra* note 89 at 6; CL–ISDA/SIFMA *supra* note 21 at 18; CL–MGEX *supra* note 74 at 1 (Commission's proposed formulaic approach to non-spot-month position limits seems arbitrary); Natural Gas Supply Association (''NGSA'') and National Corn Growers Association (''NCGA'') on March 28, 2011, (''CL–NGSA/NCGA'') at 4–5 (position limits outside the spot month should be eliminated or be increased substantially because threats of manipulation and excessive speculation are primarily of concern in the physical-delivery spot month contract); CL–PIMCO *supra* note 21 at 6; Global Energy Management Institute, Bauer College of Business, University of Houston (''Prof. Pirrong'') on January 27, 2011 (''CL–Prof. Pirrong'') at para. 21 (Commission has provided no evidence that the limits it has proposed are necessary to reduce the Hunt-like risk that the Commission uses as a justification for its limits); CL–SIFMA AMG I *supra* note 21 at 8; Teucrium Trading LLC (''Teucrium'') on March 28, 2011 (''CL–Teucrium'') at 2 (limiting the size of positions that a non-commercial market participant can hold in forward (non-spot) futures contracts or financially-settled swaps, the Commission will restrict the flow of capital into an area where it is needed most—the longer term price curve); and CL–WGCEF *supra* note 35 at 4.

[125] CL–AIMA *supra* note 35 at 3.

[126] CL–FIA I *supra* note 21 at 11.

[127] *See* CL–AIMA *supra* note 35 at 3; CL–CME I *supra* note 8 at 12 (for energy and metals); CL–FIA I *supra* note 21 at 12 (10 percent of open interest for first 25,000 contracts and then 5 percent); CL–ICI *supra* note 21 at 10 (10 percent of open interest until requisite market data is available); CL–ISDA/SIFMA *supra* note 21 at 20; CL–NGSA/NCGA *supra* note 125 at 5 (25 percent of open interest); and CL–PIMCO *supra* note 21 at 11.

[128] *See* CL–Prof. Greenberger *supra* note 6 at 13; and CL–FWW *supra* note 82 at 12.

[129] CL–PMAA/NEFI *supra* note 6 at 9 (PMAA/NEFI commented that as open interest in markets has grown well beyond the open interest assumptions made in 1992, the size of large speculative positions has not grown commensurately and that therefore the Commission should decrease the marginal multiplier in the position limit formula as open interest increases. PMAA/NEFI commented further that the Commission should look at the actual positions by traders and set limits to constrain the largest positions in the resulting distribution).

[130] *See* CL–Goldman *supra* note 90 at 6–7.

[131] The Commission has used the 10 and 2.5 percent formula in administering the level of the legacy all-months position limits since 1999. *See e.g.,* 64 FR 24038, 24039, May 5, 1999. *See also* 17 CFR 150.5(c)(2).

retrospective basis the effects (if any) of the position limits imposed pursuant to section 4a on excessive speculation and on the movement of transactions from DCMs to foreign venues.[132] This study will be conducted in consultation with DCMs and is to be completed within 12 months after the imposition of position limits. Following Congress' direction, the Commission will conduct an evaluation of position limits in performing this study and, thereafter, the Commission plans to continue monitoring these limits, considering the statutory objectives under section 4a(a)(3), and, if warranted, amend by rulemaking, after notice and comment, the formula adopted herein to determine non-spot-month position limits. The Commission may determine to reassess the formula used to set non-spot-month position limits based on the study's findings.

1. Single-Month, Non-Spot Position Limits

Under proposed § 151.4(d)(1), the Commission proposed to set the single-month limit at the same level as the all-months-combined position limit. Several commenters requested that the Commission reconsider this approach.[133] The Air Transportation Association of America, for example, argued that the proposed level would exacerbate the problem of speculative trading in the nearby (next to expire) futures month, the month upon which energy prices typically are determined.[134]

Three commenters, including ICE, cautioned the Commission not to impose position limits that constrain speculative liquidity in the outer month expirations of Referenced Contracts, that is, in contracts that expire in distant years, as opposed to nearby contract expirations.[135] ICE further asked the Commission to consider whether all-months-combined limits are necessary or appropriate in energy markets in the outer months. ICE stated that such limits would decrease liquidity for hedgers in the outer months and, moreover, all-months limits are not appropriate for energy markets where hedging is done on a much longer term basis relative to the agricultural markets where hedging is primarily conducted to hedge the next year's crops.[136] Teucrium Trading argued that by limiting the size of positions that a non-commercial market participant can hold in forward (non-spot) futures contracts or financially-settled swaps, the Commission would restrict the flow of capital into an area where it is needed most—the longer term price curve, that is, contracts that expire in distant years.[137]

The Commission has determined to set the single-month position limit levels at the same level as the all-months-combined limits, consistent with the proposal. Under current part 150, the Commission sets a single-month limit at a level that is lower than the all-months-combined limit; it also provides a limited exemption for calendar spread positions to exceed that single-month limit under § 150.4(a)(3), as long as the single month position (including calendar spread positions) is no greater than the level of the all-months-combined limit. Further, the Commission does not have a standard methodology for determining how much smaller the level of the single-month limit is set in comparison to the level of the all-months-combined limit.

The Commission has made this determination for two reasons. First, setting the single-month limit to the same level as that of the all-months-combined limit simplifies the compliance burden on market participants and renders the calendar spread exemption unnecessary. Second, setting the limits at the same level for both spreaders and other speculative traders will permit parity in position size between these speculative traders in a single calendar month and, thus, may serve to diminish unwarranted price fluctuations.[138]

With respect to objections to deferred-month limits, the Commission notes that Congress instructed the Commission to set limits on the spot month, each other month, and the aggregate number of positions that may be held by any person for all months.[139]

Finally, the Commission will continually monitor the size, behavior, and impact of large speculative positions in single contract months in order to determine whether it should adjust the single-month limit levels.

2. ''Step-Down'' Position Limit

Three commenters recommended that the Commission adopt, in addition to the spot-month limit and the single-month and all-months-combined limits, an intermediate ''step-down'' limit between the spot-month position limit and the single-month non-spot-month position limit.[140] This ''step-down'' limit would be less restrictive than the spot-month limit, but more restrictive than the single-month limit. BGA recommended that the single-month limit should be scaled down rationally before it reaches the spot month so that the market will not be disrupted by panic selling on the day before the spot-month limit becomes effective.[141] The commenters did not propose alternative criteria for imposing a step-down provision.

Currently, the Commission and DCMs establish a single date when the spot-month limit becomes effective. DCMs publicly disseminate this date as part of their contracts' rules. The advance notice provides sufficient time for market participants to reduce their positions as necessary. The Commission is not aware of material issues related to these provisions regarding the implementation of spot month limits. The Commission further believes this practice ensures sufficient market liquidity for bona fide hedgers and helps to deter and prevent squeezes and corners in the spot period while providing trader flexibility to manage positions and remain in compliance with the limits. The Commission notes, however, that it will monitor trading activity and resulting changes in prices in the transition period into the spot month in order to determine whether it should impose a new ''step-down'' limit for Referenced Contracts nearing the spot-month period.

3. Setting and Resetting Non-Spot-Month Limits

The Commission proposed all-months-combined aggregate limits and single-month aggregate limits in proposed § 151.4(d)(1). The Commission is adopting those proposed limits in final § 151.4(b)(1), which sets forth single-month and all-months-combined position limits for non-legacy Referenced Contracts (*i.e.,* those agricultural contracts that currently are not subject to Federal position limits as well as energy and metal contracts).

[132] Dodd-Frank Act, *supra* note 1, section 719(a).

[133] CL–APGA *supra* note 17 at 2–3; CL–ATAA *supra* note 94 at 6, 13; CL–PMAA/NEFI *supra* note 6 at 11. 6,074 form comment letters asked the Commission to adopt ''single-month limits that are no higher than two-thirds of the all-months-combined levels.''

[134] CL–ATAA *supra* note 94 at 6. They also asserted that the Commission did not provide adequate justification for substantially raising the single month limit to the same level as the all-months combined limit. *Id.* at 13.

[135] CL–ICE I *supra* note 69 at 9–10; CL–ISDA/SIFMA *supra* note 21 at 19; and CL–Teucrium *supra* note 124 at 2.

[136] CL–ICE I *supra* note 69 at 9–10.

[137] CL–Teucrium *supra* note 124 at 2.

[138] The Commission notes that commenters arguing for more restrictive individual month limits did not provide any supporting data.

[139] CEA section 4a(a)(3)(A), 7 U.S.C. 6a(a)(3)(A).

[140] CL–BGA *supra* note 35 at 11; GFI Group (''GFI'') on January 31, 2011 (''CL–GFI'') at 2 (progressively tighter limits should apply for physically-delivered energy contracts as they near expiration/delivery); and CL–PMAA/NEFI *supra* note 6 at 11.

[141] CL–BGA *supra* note 35 at 11.

These limits would be fixed based on the following formula: 10 percent of the first 25,000 contracts of average all-months-combined aggregated open interest and 2.5 percent of the open interest for any amounts above 25,000 contracts of average all-months-combined aggregated open interest.

Under proposed § 151.4(b)(1)(i), aggregated open interest is derived from month-end open interest values for a 12-month time period. The Commission would use open interest to determine the average all-months-combined open interest for the relevant period, which, in turn, will form the basis for the non-spot-month position limits.

Under the Proposed Rules, the Commission would calculate, for all Referenced Contracts, open interest on an annual basis for a 12-month period, January to December, and then, based on those calculations, publish the updated non-spot-month position limits by January 31st of the following calendar year. The updated limits would become effective 30 business days after such publication. With respect to the initial limits, they would become effective pursuant to a Commission order under proposed § 151.4(h)(3) and would be based on 12 months of open interest data.

Several commenters urged the Commission to use a transparent and accessible methodology to determine non-spot-month position limits.[142] Some of these commenters recommended that updated non-spot-month limits be determined through rulemaking, and not through automatic annual recalculations as proposed.[143]

The World Gold Council argued that uncertainty associated with floating, annually-set position limits may inadvertently discourage market participants from providing the requisite long-term hedges.[144] Encana asked the Commission to consider adopting procedures for a periodic reevaluation of the formulas to ensure that they do not reduce liquidity or impair the price discovery function of the markets.[145]

Many commenters objected to the proposed timeline for setting initial limits.[146] For example, many comments urged the Commission to act ''expeditiously.'' Delta recommended the Commission should use sampling and other statistical techniques to make reasonable, working assumptions about positions in various market segments to set initial limits.

In response to comments, the Commission has determined to amend the proposed process for setting initial and subsequent non-spot-month position limits. With respect to initial non-spot-month position limits, under § 151.4(d)(3)(i) the initial non-spot-month limits for non-legacy Referenced Contracts will be calculated and published after the Commission has received data sufficient to determine average all-months-combined aggregate open interest for a full 12-month period. The aggregate open interest will be derived from various sources, including data received from DCMs pursuant to part 16, swaps data under part 20, and data regarding linked, direct access FBOT contracts under a condition of a no-action letter and subsequently under part 48 regarding FBOT registration with the Commission, when finalized and made effective. The Commission accepts part of Delta's recommendation to utilize reasonable, working assumptions about positions in various market segments to set initial limits. In this regard, the Commission will strive to establish non-spot-month position limits in an expedited manner that complies with the directives of Congress, while ensuring that it has sufficient swaps data to properly estimate open interest levels for Referenced Contracts.

To compute 12 months of open interest data in uncleared all-months-combined swaps open interest, prior to the timely reporting of all swap dealers' net uncleared open swaps and swaptions positions by counterparty, the Commission may estimate uncleared open swaps positions, based upon uncleared open interest data submitted by clearing organizations or clearing members under part 20, in lieu of the aggregate of swap dealers' net uncleared open swaps. In developing accurate estimates of aggregate open interest under § 151.4(b)(2)(i), the Commission will adjust such uncleared open interest data submitted by clearing organizations or clearing members by an appropriate ratio if it determines, using data regarding later periods submitted by swap dealers and clearing members, that the uncleared open interest data submitted by clearing members differ significantly from the open interest data submitted by swap dealers.[147] The Commission has accordingly provided, under § 151.4(b)(2)(ii), that, based on data provided to the Commission under part 20, it may estimate uncleared swaps open positions for the purpose of setting initial non-spot-month position limits.

Under final § 151.4(d)(3)(i), the Commission will review the staff computations, including the assumptions made in estimating 12 months of uncleared all-months-combined swap open interest, for consistency with the formula in the final rules. Once the Commission determines that the staff computations conform to the established formula, the Commission will approve and issue an order under final § 151.4(d)(3)(iii), publishing the initial levels of the non-spot-month position limits.

Under final § 151.4(d)(3)(ii), subsequent non-spot-month limits for non-legacy Referenced Contracts will be updated and published every two years, commencing two years after the initial determinations. These subsequent position limits would be based on the higher of the most recent 12 months average all-months-combined aggregate open interest or 24 months average all-months-combined aggregate open interest.[148] Under § 151.4(e), these limits would be made effective on the first calendar day of the third calendar month after the date of publication on the Commission's Web site.

This procedure may provide for limits that would be generally less restrictive than the proposed limits, since, by way of example, a continued decline in open interest over two years under the Proposed Rule would result in a lower

[142] CL–FIA I *supra* note 21 at 12; CL–BlackRock *supra* note 21 at 18; CL–CME I *supra* note 8 at 12; CL–EEI/EPSA *supra* note 21 at 11; CL–KCBT I *supra* note 97 at 3; CL–NGFA *supra* note 72 at 3; CL–WGC *supra* note 21 at 5; and CL–ISDA/SIFMA *supra* note 21 at 21.

[143] CL–BlackRock *supra* note 21 at 18; CL–CME I *supra* note 8 at 12; CL–EEI/EPSA *supra* note 21 at 11; CL–KCBT I *supra* note 97 at 3; CL–NGFA *supra* note 70 at 3; and CL–WGC *supra* note 21 at 5. BlackRock argued that a formal rulemaking process for adjusting position limit levels would provide market participants with advanced notice of any potential changes and an opportunity to express their views on such changes.

[144] CL–WGC *supra* note 21 at 5.

[145] Encana Marketing (USA) Inc. (''Encana'') on March 28, 2011 (''CL–Encana'') at 2.

[146] *See e.g.,* CL–Delta *supra* note 20 at 11.

[147] An appropriate ratio is the ratio of uncleared open interest submitted by swap dealers in such later periods to the uncleared open interest submitted by clearing members in such later periods.

[148] For example, assume in a particular Referenced Contract that open interest has declined over a 24-month period; the average all-months-combined aggregate open interest levels are 900,000 contracts for the most recent 12 months and 1,000,000 contracts for the most recent 24 months. Position limits would be based on the higher 24-month average level of 1,000,000 contracts. Thereby, the higher level of the position limit may serve to ensure sufficient market liquidity for bona fide hedgers in the event, for example, a decline in use of derivatives occurred in the historical measurement period that may be associated with a recession. Because position limits apply to prospective time periods, the use of the higher level may be appropriate, for example, with a subsequent expansionary period.

limit each year, whereas under the final rule the limit for the first year would not decline and the limit for the second year would be based on the higher 24-month average open interest. The Commission also notes that under § 151.4(e) the public would have notice of updated position limit levels at least two months in advance of the effective date of such limits (*i.e.,* such limits would be made effective on the first calendar day of the third calendar month immediately following the publication of new limit levels).[149] Final § 151.5(e) requires the Commission to provide all relevant open interest data used to derive updated position limit levels. By making public this open interest data, the public can monitor and anticipate future position limit levels, consistent with the transparency suggestions made by several commenters.

In addition, § 151.4(b)(2)(i)(C) provides that, upon the entry of an order under Commission regulation 20.9 of the Commission's regulations determining that operating swap data repositories (''SDRs'') are processing positional data that will enable the Commission to conduct surveillance in the relevant swaps markets, the Commission shall rely on such data in order to determine all-months-combined swaps open interest.

4. ''Legacy Limits'' for Certain Agricultural Commodities

The Proposed Rule would set non-spot-month limits for Reference Contracts in legacy agricultural commodities at the Federal levels currently in place (referred to herein as ''legacy limits''). Several commenters recommended that the Commission should keep the legacy limits.[150] The American Bakers Association argued that raising these legacy limits would increase hedging margins and increase volatility which would ultimately undermine commodity producers' ability to sell their product to consumers.[151] Amcot opined that the Commission need not proceed with phased implementation for the legacy agricultural markets because it could set their limits based on existing legacy limits.[152]

Several other commenters recommended that the Commission abandon the legacy limits.[153] U.S. Commodity Funds argued that the Commission offered no justification for treating legacy agricultural contracts differently than other Referenced Contract commodities.[154] Some of these commenters endorsed the limits proposed by CME.[155] Other commenters recommended the use of the open interest formula proposed by the Commission in determining the position limits applicable to the legacy agricultural Referenced Contract markets.[156] Finally, four commenters expressed their preference that non-spot position limits be kept consistent for the three wheat Core Referenced Futures Contracts.[157]

The Commission has determined to adopt the position limit levels proposed by the CME for the legacy Core Referenced Futures Contracts. Such levels would be effective 60 days after the publication date of this rulemaking and those levels would be subject to the existing provisions of current part 150 until the compliance date of these rules, which is 60 days after the Commission further defines the term ''swap'' under the Dodd-Frank Act. At that point, the relevant provisions of this part 151, including those relating to bona-fide hedging and account aggregation, would also apply. In the Commission's judgment, the CME proposal represents a measured approach to increasing legacy limits, similar to that previously implemented.[158] The Commission will use the CME's all-months-combined petition levels as the basis to increase the levels of the non-spot-month limits for legacy Referenced Contracts. The petition levels were based on 2009 average month-end open interest. Adoption of the petition levels results in increases in limit levels that range from 23 to 85 percent higher than the levels in existing § 150.2.

The Commission has determined to maintain the current approach to setting and resetting legacy limits because it is consistent with the Commission's historical approach to setting such limits. To ensure the continuation of maintaining a parity of limit levels for the major wheat contracts at DCMs and in response to comments supporting this approach, the Commission will also increase the levels of the limits on wheat at the MGEX and the KCBT to the level for the wheat contract at the CBOT.[159]

5. Non-Spot Month Class Limits

The Commission proposed to create two classes of contracts for non-spot-month limits: (1) Futures and options on futures contracts and (2) swaps. The Proposed Rule would apply single-month and all-months-combined position limits to each class separately.[160] The aggregate position limits across contract classes are in addition to the position limits within each contract class. Therefore, a trader could hold positions up to the allowed limit in each class (futures and options and swaps), provided that their overall position remains within the applicable position limits. Under the proposal, a trader could net positions within a class, such as a long swap position with a short swap position, but could not net positions in different classes, such as a long futures position with a short swap position. The class limits were designed to diminish the possibility that a trader could have market power as a result of a concentration in any one submarket and to prevent a trader that had a flat net aggregate position in futures and swaps combined from establishing extraordinarily large offsetting positions.

Several commenters stated that the class limits proposal was flawed and therefore should not be adopted.[161] For

[149] For example, any limits fixed during the month of October would take effect on January 1.

[150] American Bakers Association (''ABA'') on March 28, 2011 (''CL–ABA'') at 3–4; CL–AFIA *supra* note 94 at 3; Amcot on March 28, 2011 (''CL–Amcot'') at 2; CL–FWW *supra* note 81 at 13; CL–IATP *supra* note 113 at 5; and CL–NGFA *supra* note 72 at 1–2.

[151] CL–ABA *supra* note 150 at 3–4.

[152] CL–Amcot *supra* note 150 at 3.

[153] CL–AIMA *supra* note 35 at 4; Bunge on March 28, 2011 (''CL–Bunge'') at 1–2; Deutsche Bank AG (''DB'') on March 28, 2011 (''CL–DB'') at 6; Gresham Investment Management LLC (''Gresham'') on February 15, 2011 (''CL–Gresham'') at 4–5; CL–FIA I *supra* note 21 at 12; CL–MGEX *supra* note 74 at 2; CL–MFA *supra* note 21 at 18–19; and United States Commodity Funds LLC (''USCF'') on March 25, 2011 (''CL–USCF'') at 10–11.

[154] CL–USCF *supra* note 153 at 10–11.

[155] CL–Bunge *supra* note 153 at 1–2; CL–FIA I *supra* note 21 at 12; and CL–Gresham *supra* note 153 at 5. *See* CME Petition for Amendment of Commodity Futures Trading Commission Regulation 150.2 (April 6, 2010), *available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/df26_cmepetition.pdf.*

[156] CL–CMC *supra* note 21 at 3; CL–DB *supra* note 153 at 10; and CL–MFA *supra* note 21 at 19.

[157] CL–CMC *supra* note 21 at 3; CL–KCBT I *supra* note 97 at 1–2; CL–MGEX *supra* note 74 at 2; and CL–NGFA *supra* note 72 at 4.

[158] 58 FR 18057, April 7, 1993.

[159] For a discussion of the historical approach, *see* 64 FR 24038, 24039, May 5, 1999.

[160] Within a contract class, the limits would be set at an amount equal to 10 percent of the first 25,000 contracts of average all-months-combined aggregate open interest in the contract and 2.5 percent of the open interest for any amounts above 25,000 contracts. The aggregate all-months-combined limits across contract classes would be set at 10 percent of the first 25,000 contracts of average all-months-combined aggregated open interests, and 2.5 percent of the open interest thereafter. The average all-months-combined aggregate open interest, which is the basis of these calculations, is determined annually by adding the all-months futures open interest and the all-month-combined swaps open interest for each of the 12 months prior to the effective date and dividing that amount by 12. Each trader's positions would be netted for the purpose of determining compliance with position limits.

[161] CL–AIMA *supra* note 35 at 3 (they add ''an unnecessary level of complexity''); CL–BlackRock

example, the CME argued that because the class limits would not permit netting across contract classes (that is, across futures and swaps), the class limits would not appropriately limit a trader's actual (net) speculative positions. CME further objected to this proposal by stating that the Commission provided no rationale as to why the positions in two futures contracts could be netted but positions in swaps and futures could not be netted.[162] Another commenter similarly argued that economically equivalent contracts (futures or swaps) are simply two components of a broader derivatives market for a particular commodity and, therefore, the concept of establishing limits on a class of economically equivalent derivatives was logically flawed.[163]

In response to the comments, the Commission has determined to eliminate class limits from the final rules. The Commission believes that comments regarding the ability of market participants to net swaps and future positions that are economically equivalent have merit. The Commission believes that concerns regarding the potential for market abuses through the use of futures and swaps positions can be addressed adequately, for the time being, by the Commission's large trader surveillance program. The Commission will closely monitor speculative positions in Referenced Contracts and may revisit this issue as appropriate.

F. Intraday Compliance With Position Limits

The Commission proposed to apply position limits on an intraday basis, and some commenters urged the Commission to reconsider such a requirement.[164] Barclays commented that the Commission should recognize intraday violations of aggregate limits as a form of excusable overage because of the challenge of sharing and collating position information on a real-time basis.

In the Commission's judgment, intraday compliance would constitute a marginal compliance cost and not be overly-burdensome. The Commission notes that firms may impose risk limits (*i.e.,* position limits determined by the internal risk management department or equivalent unit) on individual traders and among related entities required to aggregate positions under § 151.7 to mitigate the need to create systems to ensure intraday compliance. Moreover, the expected levels of limits outside of the spot-month are not expected to affect many firms and those affected firms should have the capability to establish internal risk limits or real-time position reporting to ensure intraday compliance with position limits. Finally, the Commission notes that intraday compliance with position limits is consistent with existing Commission[165] and DCM[166] policy. The Commission's policy on intraday compliance reflects its concerns with very large speculative positions, whether or not they persist through the end of a trading day.

G. Bona Fide Hedging and Other Exemptions

The new statutory definition of bona fide hedging transactions or positions in section 4a(c)(2) of the CEA generally follows the definition of bona fide hedging in current Commission regulation 1.3(z)(1), with two significant differences. First, the new statutory definition recognizes a position in a futures contract established to reduce the risks of a swap position as a bona fide hedge, provided that either: (1) The counterparty to such swap transaction would have qualified for a bona fide hedging transaction exemption, *i.e.,* the ''pass-through'' of the bona fides of one swap counterparty to another (such swaps may be termed ''pass-through swaps''); or (2) the swap meets the requirements of a bona fide hedging transaction. Second, a bona fide hedging transaction or position must represent a substitute for a physical market transaction.[167]

Section 4a(c)(1) of the CEA authorizes the Commission to define bona fide hedging transactions or positions ''consistent with the purposes of this Act.'' Congress directed the Commission, in amended CEA section 4a(c)(2), to adopt a definition of bona fide hedging transactions or positions for futures contracts (and options) for purposes of setting the position limits mandated by CEA section 4a(a)(2)(A). Pursuant to this authority, the Commission proposed a new regulatory definition of bona fide hedging transactions or positions in proposed § 151.5(a).[168] The Commission also proposed § 151.5 to establish five enumerated exemptions from position limits for bona fide hedging transactions or positions for exempt and agricultural commodities.

Under the proposal, a trader must meet the general requirements for a bona fide hedging transaction or position in proposed § 151.5(a)(1) and also meet the requirements for an enumerated hedging transaction in proposed § 151.5(a)(2). The general requirements call for the bona fide hedging transaction or position to represent a substitute for transactions in a physical marketing channel (that is, the cash market for a physical commodity), to be economically appropriate to the reduction of risks in

supra note 21 at 17; CL–Cargill *supra* note 76 at 10; CL–CME I *supra* note 8 at 13; CL–DB *supra* note 153 at 8–9; CL–Goldman *supra* note 89 at 6; CL–ICE I *supra* note 69 at 9; CL–ISDA/SIFMA *supra* note 21 at 23; CL–MFA *supra* note 21 at 18; CL–Prof. Pirrong *supra* note 124 at paras. 24–30; and CL–Shell *supra* note 35 at 6.

[162] CL–Shell *supra* note 35 at 6; CL–BlackRock *supra* note 21 at 17 (arguing that the Commission failed to demonstrate that large positions in a submarket implies market power). *See also* CL–Cargill *supra* note 76 at 10; CL–AIMA *supra* note 35 (commenting that the proposed class limits add ''an unnecessary level of complexity''); CL–ISDA/SIFMA *supra* note 21 at 23; CL–ICE I *supra* note 69 at 9; CL–CME I *supra* note 8 at 13; CL–DB *supra* note 153 at 8–9; CL–Goldman *supra* note 89 at 6; CL–MFA *supra* note 21 at 18; and CL–Prof. Pirrong *supra* note 124 at paras. 24–30.

[163] CL–ICE I *supra* note 69 at pg. 9.

[164] CL–Shell *supra* note 35 at 6–7; CL–API *supra* note 21 at 14 (Commission should engage in a rigorous analysis of the regulatory burdens of intraday limits and ultimately clarify that position limits will only apply at the end of each trading day); Barclays Capital (''Barclays I'') on March 28, 2011 (''CL–Barclays I'') at 4–5 (Commission should reconsider requiring intraday compliance for non-spot-month position limits).

[165] Commodity Futures Trading Commission Division of Market Oversight, Advisory Regarding Compliance with Speculative Position Limits (May 7, 2010), *available at http://www.cftc.gov/ucm/groups/public/@industryoversight/documents/file/specpositionlimitsadvisory0510.pdf.*

[166] *See e.g.,* CME Rulebook, Rule 443, *available at http://www.cmegroup.com/rulebook/files/CME_Group_RA0909-5.pdf'')* (amended Sept. 14, 2009); ICE OTC Advisory, Updated Notice Regarding Position Limit Exemption Request Form for Significant Price Discovery Contracts, *available at https://www.theice.com/publicdocs/otc/advisory_notices/ICE_OTC_Advisory_0110001.pdf* (Jan. 4, 2010).

[167] In 1977, the Commission proposed a general or conceptual definition of bona fide hedging that did not include the modifying adverb ''normally'' to the verb ''represent.'' 42 FR 14832, Mar. 17, 1977. The Commission introduced the adverb normally in the subsequent final rulemaking in order to accommodate balance sheet hedging that would otherwise not have met the general definition of bona fide hedging. 42 FR 42748, Aug. 24, 1977. The Commission noted that, for example, hedges of asset value volatility associated with depreciable capital assets might not represent a substitute for subsequent transactions in a physical marketing channel. *Id.* at 42749.

[168] By its terms, the definition of bona fide hedging applies only to futures (and options). Pursuant to section 4a(c), the Commission proposed to extend the definition of bona fide hedging transactions and positions to all Referenced Contracts, including swaps. The Commission is adopting the definition of bona fide hedging substantially as proposed. The Commission believes that applying the statutory definition of bona fide hedging to swaps is consistent with congressional intent as embodied in the expansion of the Commission's authority to swaps (*i.e.,* those that are economically-equivalent and SPDFs). In granting the Commission authority over such swaps, Congress recognized that such swaps warrant similar treatment to their economically equivalent futures for purposes of position limits and therefore, intended that the statutory definition of bona fide hedging also be extended to swaps.

the conduct and management of a commercial enterprise, and to arise from the potential change in the value of certain assets, liabilities, or services. The five proposed enumerated hedging transactions are discussed below. The proposed section did not provide for non-enumerated hedging transactions or positions, which current Commission regulations 1.3(z)(3) and 1.47 permit. Under the proposal, Commission regulation 1.3(z) would be retained only for excluded commodities.

Proposed § 151.5(b) established reporting requirements for a trader upon exceeding a position limit. The trader would be required to submit information not later than 9 a.m. on the business day following the day the limit was exceeded. Proposed § 151.5(c) specified application and approval requirements for traders seeking an anticipatory hedge exemption, incorporating the current requirements of Commission regulation 1.48. Proposed § 151.5(d) established additional reporting requirements for a trader who exceeded the position limits in order to reduce the risks of certain swap transactions, discussed above.

Proposed § 151.5(e) specified recordkeeping requirements for traders that acquire positions in reliance on bona fide hedge exemptions, as well as for swap counterparties for which a counterparty represents that the transaction would qualify as a bona fide hedging transaction. Swap dealers availing themselves of a hedge exemption would be required to maintain a list of such counterparties and make that list available to the Commission upon request. Proposed §§ 151.5(g) and (h) provided procedural documentation requirements for such swap participants.

Proposed § 151.5(f) required a cross-commodity hedger to provide conversion information, as well as an explanation of the methodology used to determine such conversion information, between the commodity exposure and the Referenced Contracts used in hedging. Proposed § 151.5(i) required reports by bona fide hedgers to be filed for each business day, up to and including the day the trader's position level first falls below the position limit that was exceeded.

The Commission has responded to the many comments received by making substantial changes to the Proposed Rules. A full discussion of the comments received and of the Commission's responses is found below. In summary, in the final rules, the Commission: (1) Clarifies that a transaction qualifies as a bona fide hedging transaction without regard to whether the hedger's position would otherwise exceed applicable position limits; (2) expands the list of enumerated hedging transactions to include hedging of anticipated merchandising activity, royalty payments, and service contracts; (3) clarifies the conditions under which swaps executed opposite a commercial counterparty would be recognized as the basis for bona fide hedging; (4) reduces the burden of claiming a pass-through swap exemption; (5) introduces new § 151.5(b) to make the aggregation and bona fide hedging provisions of part 151 consistent; (6) clarifies that cash market risk can be hedged on a one-to-one transactional basis or can be hedged as a portfolio of risk; (7) eliminates the restriction on holding hedges in cash-settled contracts up through the last trading day; (8) reduces the daily filing requirement for cash market information on the Form 404 and Form 404S to a monthly filing of daily reports; (9) allows for self-effectuating notice filings for those hedge exemptions that require such a filing; and (10) provides an exemption for situations involving ''financial distress.''

1. Enumerated Hedges

Under proposed § 151.5(a)(1), no transaction or position would be classified as a bona fide hedging transaction unless it also satisfies the requirements for one of five categories of enumerated hedging transactions.[169]

The Commission received many comment letters regarding the proposed definition of bona fide hedging, with a number of commenters expressing concern that the proposed definition was ambiguous and overly restrictive.[170] Morgan Stanley, for example, opined that the ''very narrow'' definition of bona fide hedging in the Proposed Rule would unnecessarily limit the ability of many market participants to engage in ''many well-established risk reducing activities.'' [171] Several commenters requested bona fide hedging recognition for transactions beyond those expressly enumerated.[172] In this respect, some commenters, including the FIA and Morgan Stanley, urged the Commission to exercise its broad exemptive authority under CEA section 4a(a)(7) to accommodate a wider range of legitimate hedging activities, including the hedging of general swap position risk, otherwise known as a risk management exemption.[173]

Several commenters argued that not permitting a risk management exemption would be inconsistent with other parts of the Act and Commission rulemakings.[174] For example, CME argued that the hedging standard under the major swap participant (''MSP'') definition includes swap positions ''maintained by [pension plans] for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan.'' [175] CME also pointed to the commercial end-user exception to mandatory clearing requirements, where the Commission's proposed definition of hedging ''covers swaps used to hedge or mitigate any of a person's business risks.'' [176]

As discussed above, the Commission is authorized to define bona fide hedging for swaps. The Commission, however, does not believe that including a risk management provision is necessary or appropriate given that the elimination of the class limits outside of the spot-month will allow entities, including swap dealers, to net Referenced Contracts whether futures or economically equivalent swaps. As such, under the final rules, positions in Referenced Contracts entered to reduce the general risk of a swap portfolio will be netted with the positions in the portfolio.

Some commenters also objected to the Commission's failure to recognize as bona fide hedging swap transactions that qualify for the end-user clearing exception. Such omission, these commenters added, will lead to unnecessary disruption to commercial hedgers' legitimate business practices.[177] The end-user clearing exception is available for swap transactions used to hedge or mitigate

[169] Thus, for example, an anticipatory merchandising transaction could only serve as a basis of an enumerated hedge if it, *inter alia,* reduces the risks attendant to transactions anticipated to be made in the physical marketing channel.

[170] *See e.g.,* CL–FIA I *supra* note 21 at 14–15; CL–Morgan Stanley *supra* note 21 at 4, 5; and CL–ISDA/SIFMA *supra* note 21 at 9.

[171] CL–Morgan Stanley *supra* note 21 at 5. According to Morgan Stanley, the proposed definition may preclude market participants from (i) netting exposure across different categories of related futures and swaps; (ii) hedging long-term risks in illiquid markets, common in the development of large infrastructure projects; and (iii) assuming the positions of a less stable market participant during times of market distress.

[172] *See e.g.,* CL–Commercial Alliance I *supra* note 42 at 2–3; CL–FIA I *supra* note 21 at 13; and Economists Inc. on March 28, 2011 (''CL–Economists Inc.'') at 2.

[173] *See e.g.,* CL–FIA I *supra* note 21 at 13; CL–ISDA/SIFMA *supra* note 21 at 8; CL–BlackRock *supra* note 21 at 16; CL–Barclays I *supra* note 164 at 3; and CL–ICI *supra* note 21 at 9.

[174] *See e.g.,* CL–CME I *supra* note 8 at 18.

[175] *See id.* at 18 citing New CEA section 1a(33), 7 U.S.C. 1a(33).

[176] *See id.* at 18 citing 75 FR 80747 (Dec. 23, 2010).

[177] *See e.g.,* CL–FIA I *supra* note 21 at 15l and CL–EEI/EPSA *supra* note 21 at 15.

commercial risk. When Congress inserted a general definition of bona fide hedging in CEA section 4a(c)(2), Congress did not include language that paralleled the end-user clearing exception; rather, Congress included different criteria for bona fide hedging transactions or positions.[178] Accordingly, the Commission believes that the end-user exception's broader sweep, that the swap be used for ''hedg[ing] or mitigat[ing] commercial risk,'' is not appropriate for a definition of a bona fide hedging transaction.[179]

Several commenters expressed concern that exemptions were not provided for arbitrage or spread positions in the list of enumerated bona fide hedges.[180] Some commenters, such as ISDA/SIFMA, argued that the Commission should use its exemptive authority under CEA section 4a(a)(7) to include an exemption for inter-commodity spread and arbitrage transactions, ''which reflect a relationship between two commodities rather than an outright directional position in the spread components * * *. Arbitrage and inter-commodity spreads do not raise the same price volatility concerns as outright positions. On the contrary, they constitute a standard investment practice that minimizes exposure while capturing inefficiencies in an established relationship and aiding price discovery in each contract.'' [181]

With regard to spread exemptions, under current § 150.3(a)(3), a trader may use this exemption to exceed the single-month limit outside the spot month in a single futures contract or options thereon, but not to exceed the all-months limit in any single month. As explained in the proposal, the Commission proposed to set the single-month limit at the level of the all-months limit, making the ''spread'' exemption no longer necessary. Since the final rule retains the individual-month limit at the same level as the all-months-combined limit, it remains unnecessary to extend an exemption to spread positions.

With respect to the existing DCM arbitrage exemptions, under existing DCM rules a trader may receive an arbitrage exemption to the extent that the trader has offsetting positions at a separate trading venue. The Commission does not believe that it is necessary to provide for such an exemption from aggregate position limits because the Commission has eliminated class limits in these final rules for non-spot-month position limits. As such, a trader's offsetting positions among Referenced Contracts outside of the spot month, whether futures or economically-equivalent swaps, would be netted for purposes of applying the position limits and, therefore, there is no need for arbitrage exemptions. As discussed in further detail under II.N.3. below, however, the Commission has provided for an arbitrage exemption from DCM or SEF position limits under certain circumstances.

With regard to inter-commodity spreads, traders would not be able to net such positions unless the positions fall within the same category of Referenced Contracts. However, a trader offsetting multiple risks in the physical marketing channel may be eligible for a bona fide hedging exemption. For example, a processor seeking to hedge the price risk associated with anticipated processing activity may receive bona fide hedging treatment for an inter-commodity spread economically appropriate to the reduction of its anticipated price risks under final § 151.5(a)(ii)(C).

As discussed above, the final rules retain the class limits within the spot-month. Otherwise, if a trader were permitted to claim an arbitrage exemption in the spot-month across physically-delivered and cash-settled spot-month class limits, then that trader would be able to amass an extraordinarily large long position in the physically-delivered Referenced Contract with an offsetting short position in a cash-settled Referenced Contract, effectively cornering the market at the entry prices to the contracts. In the proposal, the Commission asked whether it should grant a bona fide hedge exemption to an agent that is not responsible for the merchandising of the cash positions, but is linked to the production of the physical commodity, *e.g.,* if the agent is the provider of crop insurance. Amcot recommended that the Commission deny exemptions to crop insurance providers.[182] Similarly, Food and Water Watch questioned whether agents merely linked to production should be allowed to claim bona fide hedges.[183] CME, in contrast, argued that extending the bona fide hedge exemption to these entities would be appropriate.[184] The Commission notes that crop insurance providers and other agents that provide services in the physical marketing channel could qualify for a bona fide hedge of their contracts for services arising out of the production of the commodity underlying a Referenced Contract under § 151.5(a)(2)(vii).

In response to comments, the Commission clarifies in the final rule that whether a transaction qualifies as a bona fide hedging transaction or position is determined without regard to whether the hedger's position would otherwise exceed applicable position limits.[185] Accordingly, a person who uses a swap to reduce risks attendant to a position that qualifies for a bona fide hedging transaction may pass-through those bona fides to the counterparty, even if the person's swap position is not in excess of a position limit.

Proposed § 151.5(a)(2)(ii) stated that purchases of Referenced Contracts may qualify as bona fide hedges. However, the language in proposed § 151.5(a)(2)(i) provided that sales of any commodity underlying Referenced Contracts may qualify as bona fide hedges. Existing Commission regulation 1.3(z) treats equally purchases and sales of futures contracts (and does not explicitly cover sales or purchases of any commodity

[178] The Commission notes that Congress also referred to positions held ''for hedging or mitigating commercial risk'' in the definition of major swap participant. CEA section 1a(33), 7 U.S.C. 1a(33). Due to the nearly identical wording, the Commission has proposed to interpret this phrase in the implementation of the end-user exception in a near-identical manner in the further definition of major swap participant. CFTC, Notice of Proposed Rulemaking, End-User Exception to Mandatory Clearing of Swaps, 75 FR 80747, 80752–3, Dec. 23, 2010. In light of Congress's nearly identical use of this language in two separate provisions of the Dodd-Frank Act, but not within the definition of bona fide hedging, the Commission does not believe that Congress intended that the different wording in section 4a(c)(2) should be interpreted in an identical manner to these differently worded provisions.

[179] Under the new statutory definition of a bona fide hedge, positions must meet the following requirements: (1) They must represent a substitute for transactions made or to be made or positions taken or to be taken at a later time in the physical marketing channel; (2) they must be economically appropriate to the reduction of risk in the conduct and management of a commercial enterprise; and (3) the hedge must manage price risks associated with specific types of activities in the physical marketing channel (*e.g.,* the production of commodity assets). CEA section 4a(c)(2), 7 U.S.C. 6a(c)(2). The conditions for the end-user exception may overlap with the general statutory definition of bona fide hedging on one of the latter's three prongs. Similarly, the statutory direction to define bona fide hedging does address whether at least one counterparty is not a financial entity and does not address how one meets its financial obligations, which are conditions for claiming the end-user exception.

[180] *See e.g.,* CL–CME I *supra* note 8 at 18; CL–Commercial Alliance I *supra* note 42 at 3, 7, 9, CL–ISDA/SIFMA *supra* note 21 at 11; and CL–MFA *supra* note 21 at 18.

[181] CL–ISDA/SIFMA *supra* note 21 at 17.

[182] CL–Amcot *supra* note 150 at 2.

[183] CL–FWW *supra* note 81 at 2.

[184] CL–CME I *supra* note 8 at 8.

[185] The Commission also notes that the bona fide hedge definition in new CEA section 4a(c)(2), 7 U.S.C. 6a(c)(2), deals with an entity's transaction and not the entity itself. As such, the Commission declines to provide bona fide hedge status to an entity without reference to the underlying transaction.

underlying). BGA requested that the Commission harmonize the perceived difference between the current and Proposed Rule texts.[186] The Commission has deleted the phrase ''any commodity underlying'' from ''sales of any commodity underlying Referenced Contracts'' in § 151.5(a)(2)(i) in order to clarify that it does not intend to treat hedges involving the sales of Referenced Contracts any differently than hedges involving the purchases of Referenced Contracts.

The Commission received many comments describing transactions that the commenters believed would not be covered by the Commission's proposed bona fide hedging provisions. Appendix B to part 151 has been added to list some of the transactions or positions that the Commission deems to qualify for the bona fide hedging exemption.[187] The appendix includes an analysis of each fact pattern to assist market participants in understanding the enumerated hedging transactions in final § 151.5(a)(2). As discussed in section II.G.4. and provided for in § 151.5(a)(5), if any person is engaging in other risk-reducing practices commonly used in the market which the person believes may not be specifically enumerated above, such person may ask for relief regarding the applicability of the bona fide hedging exemption from the staff under § 140.99 or the Commission under section 4a(a)(7) of the CEA.

Further, to provide transparency to the public, the Commission is considering publishing periodically general statistical information gathered from the bona fide hedging exemptions to inform the public of the extent of commercial firms' use of exemptions. This summary data may include the number of persons and extent to which such persons have availed themselves of cash-market, anticipatory, and pass-through-swaps bona fide hedge exemptions.

2. Anticipatory Hedging

As discussed in II.G.1. above, some commenters objected that proposed § 151.5(a)(1) included the anticipated ownership or merchandising of an exempt or agricultural commodity, but such transactions were not included in the list of enumerated hedges.[188] Commenters pointed out that, while the statutory definition of bona fide hedging appears to contemplate hedges of asset price risk,[189] including royalty or volumetric production payments,[190] hedges of liabilities or services,[191] and anticipatory ownership and merchandising,[192] these types of hedge transactions are not recognized among enumerated hedge transactions in the proposal.

In response to commenters, the Commission is expanding the list of enumerated hedging transactions to recognize, in final §§ 151.5(a)(2)(v)–(vii), the hedging of anticipated merchandising activity, royalty payments (a type of asset), and service contracts, respectively, under certain circumstances as discussed below in detail. The Commission has determined that the transactions fall within the statutory definition of bona fide hedging transactions and are otherwise consistent with the purposes of section 4a of the Act.

The Commission had never recognized anticipated ownership and merchandising transactions as bona fide hedging transactions,[193] due to its historical view that anticipatory ownership and merchandising transactions generally fail to meet the second ''appropriateness'' prong of the Commission's definition of a bona fide hedging transaction, [194] which requires that a hedge be economically appropriate and that it reduce risks in the conduct and management of a commercial enterprise. For example, a merchant may anticipate that it will purchase and sell a certain amount of a commodity, but has not acquired any inventory or entered into fixed-price purchase or sales contracts. Although the merchant may anticipate such activity, the price risk from merchandising activity is yet to be assumed and therefore a transaction in Referenced Contracts could not reduce this yet-to-be-assumed risk. Such a merchant would not meet the second prong of the bona fide hedging definition. To the extent that a merchant acquires inventory or enters into fixed-price purchase or sales contracts, the merchant would have established a position of risk and may meet the requirements of the second prong and the long-standing enumerated provisions to hedge those risks.

In response to comments, the Commission recognizes that in some circumstances, such as when a market participant owns or leases an asset in the form of storage capacity, the market participant could establish market positions to reduce the risk associated with returns anticipated from owning or leasing that capacity. In these narrow circumstances, the transactions in question may meet the statutory definition of a bona fide hedging transaction. However, to address Commission concerns about unintended consequences (*e.g.,* creating a potential loophole that may result in granting hedge exemptions for types of speculative activity), the Commission will recognize anticipatory merchandising transactions as a bona fide hedge, provided the following conditions are met: (1) The hedger owns or leases storage capacity; (2) the hedge is no larger than the amount of unfilled storage capacity currently, or the amount of reasonably anticipated unfilled storage capacity during the hedging period; (3) the hedge is in the form of a calendar spread (and utilizing a calendar spread is economically appropriate to the reduction of risk associated with the anticipated merchandising activity) with component contract months that settle in not more than twelve months; and (4) no such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract for agricultural or metal contracts or during the spot month for other commodities.[195] In addition, the anticipatory merchandiser must meet specific new filing requirements under § 151.5(d)(1). As is the case with other anticipated hedges, the Commission clarifies in the final rule that such a hedge can only be maintained so long as

[186] CL–BGA *supra* note 35 at 15. *See also* CL–FIA I *supra* note 21 at 15; and CL–Morgan Stanley *supra* note 21 at 5.

[187] Many of these transactions were described in comment letters. *See e.g.,* CL–Economists Inc. *supra* note 172 at 10–17; CL–Commercial Alliance I *supra* note 42 at 5–10; and CL–FIA I *supra* note 21 at 14–15.

[188] *See e.g.,* CL–FIA I *supra* note 21 at 15; CL–BGA *supra* note 35 at 14; CL–ISDA/SIFMA *supra* note 21 at 11; and CL–EEI/EPSA *supra* note 21 at 15.

[189] *See* CL–Commercial Alliance I *supra* note 42 at 3. *See also* CL–Bunge *supra* note 153 at 3–4 (describing ''enterprise hedging'' needs arising from, *inter alia,* investments in operating assets and forward contract relationships with farmers and consumers that create timing mismatches between the cash flow associated with the physical commodity commitment and the hedge's cash flow).

[190] *See e.g.,* CL–FIA I *supra* note 21 at 15.

[191] *See e.g.,* CL–FIA I *supra* note 21 at 14; CL–Commercial Alliance I *supra* note 42 at 3; CL–BGA *supra* note 35 at 14; CL–ISDA/SIFMA *supra* note 21 at 11; and CL–EEI/EPSA *supra* note 21 at 14.

[192] *See e.g.,* CL–FIA I *supra* note 21 at 15; CL–BGA *supra* note 35 at 14; CL–ISDA/SIFMA *supra* note 21 at 11; and CL–EEI/EPSA *supra* note 21 at 15.

[193] The Commission historically has recognized a merchandising transaction as a bona fide hedge in the narrow circumstances of an agent responsible for merchandising a cash market position which is being offset. 17 CFR 1.3(z)(3).

[194] The ''appropriateness'' test was contained in Commission regulation 1.3(z)(1). Congress incorporated that provision in the new statutory definition in 4a(c)(2)(A)(ii), 7 U.S.C. 6a(c)(2)(A)(ii).

[195] A specific example of this type of anticipated merchandising is described in Appendix B to the final rule.

the trader is reasonably certain that he or she will engage in the anticipated merchandising activity.

New §§ 151.5(a)(2)(vi)–(vii) provide for royalty and services hedges that are available only if: (1) The royalty or services contract arises out of the production, manufacturing, processing, use, or transportation of the commodity underlying the Referenced Contract; and (2) the hedge's value is ''substantially related'' to anticipated receipts or payments from a royalty or services contract. Specific examples of what types of royalties or service contracts would comply with § 151.5(a)(1) and would therefore be eligible as a basis for a bona fide hedge transaction are described in Appendix B to the final rule.

Under proposed § 151.5(c), the Commission also limited the availability of an anticipatory hedge to a period of one year after the request date, in contrast to proposed § 151.5(a)(2), which only imposed this requirement for Referenced Contracts in agricultural commodities. Several commenters requested that the Commission expand the scope of anticipatory hedging to include hedging periods beyond one year.[196] These commenters opined that limiting anticipatory hedging to one year may make sense in the agricultural context because the risks are typically associated with an annual crop cycle; however, this same analysis does not apply to other commodities, particularly for electricity generators, utilities, and other energy companies.[197] For example, this restriction would be commercially unworkable for infrastructure projects that require multi-year hedges in order to secure financing.[198]

The Commission has amended the appropriate exemptions for anticipatory activities under § 151.5(a)(2) to clarify that the one-year limitation for production, requirements, royalty rights, and service contracts applies only to Referenced Contracts in an agricultural commodity, except that a one-year limitation for anticipatory merchandising, applies to all Referenced Contracts.

The Commission proposed in § 151.5(a)(2)(i) to recognize the hedging of unsold anticipated production as an enumerated hedge. The Commission clarifies in the final rule that anticipated production includes anticipated agricultural production, *e.g.,* the anticipated production of corn in advance of a harvest.

3. Pass-Through Swaps

In the proposal, the Commission explained that under CEA section 4a(c)(2)(B), pass-through swaps are recognized as the basis for bona fide hedges if the swap was executed opposite a counterparty for whom the transaction would qualify as a bona fide hedging transaction pursuant to CEA section 4a(c)(2)(A). Further, a swap in a Referenced Contract may be used as a bona fide hedging transaction if that swap itself meets the requirements of CEA section 4a(c)(2)(A). CEA section 4a(c)(2)(A) provides the general definition of a bona fide hedge transaction.

Several commenters requested clarification concerning the so-called pass-through provision.[199] For example, Cargill maintained that the rule is not clear on whether the non-hedging counterparty may claim a hedge exemption for the swap, and without such an exemption there would be less liquidity available to hedgers using swaps because potential counterparties would be subject to position limits for the swap itself.[200]

The Commission clarifies through new § 151.5(a)(3) (entitled ''Pass-through swaps'') that positions in futures or swaps Referenced Contracts that reduce the risk of pass-through swaps qualify as a bona fide hedging transaction. In response to comments regarding the bona fide hedging status of the pass-through swap itself, [201] the Commission also clarifies that the non-bona-fide counterparty (*e.g.,* a swap-dealer) may classify this swap as a bona fide hedging transaction only if that non-bona-fide counterparty enters risk reducing positions, including in futures or other swap contracts, which offset the risk of the pass-through swap. For example, if a person entered a pass-through swap opposite a bona fide hedger, either within or outside of the spot-month, that resulted in a directional exposure of 100 long positions in a Referenced Contract, that person could treat those 100 long positions as a bona fide hedging transaction only if that person also entered into 100 short positions to reduce the risk of the pass-through swap. Absent this restriction, a non-bona-fide counterparty could create a large speculative directional position in excess of limits simply by entering into pass-through swaps.

The Commission notes that regardless of the bona fide status of the pass-through swap, outside of the spot-month the risk-reducing positions in a Referenced Contract will net with the positions from the pass-through swap. Similarly, within the spot-month, if the non-bona-fide counterparty to a pass-through swap reduces the risk of that swap with cash-settled Referenced Contracts, the risk reducing positions in cash-settled contracts would net with the pass-through swap for purposes of the spot-month position limit.

Because the spot-month limits include class limits for physical-delivery futures contracts and cash-settled contracts, the bona fide hedging status of the pass-through swap would impact spot-month compliance if the non-bona-fide counterparty reduced the risk of the pass-through swap with physical-delivery futures contracts in the spot-month. However, as discussed above, so long as the risk of the pass-through swap is offset, these final rules would treat both the pass-through swap and the risk reducing positions as bona fide hedges. In this connection, the Commission notes that the non-bona-fide counterparty would still be subject to 151.5(a)(1)(v), and must exit the physical delivery futures contract in an orderly manner as the person ''lifts'' the hedge of the pass-through swap. Similarly, as with all transactions in Referenced Contracts, the person would be subject to the intra-day application of position limits. Therefore, as the person ''lifts'' the hedge of the pass-through swap, if the pass-through swap is no longer offset, only the extent of the pass-through swap that is offset would qualify as a bona fide hedge.

The Commission clarifies through new § 151.5(a)(4) (entitled ''Pass-through swap offsets'') that a pass-through swap position will be classified as a bona fide hedging transaction for the counterparty for whom the swap would not otherwise qualify as a bona fide hedging transaction pursuant to paragraph (a)(2) of this section (the ''non-hedging counterparty''), *provided that* the non-hedging counterparty purchases or sells Referenced Contracts that reduce the risks attendant to such pass-through swaps.

Commenters also requested further clarity concerning proposed § 151.5(g), which set forth certain procedural requirements for pass-through swap counterparties. FIA and ISDA, for example, stated that it was unclear whether the pass-through provision is limited to transactions where the swap counterparty is relying on an exemption

[196] CL–Cargill *supra* note 76 at 5; CL–FIA I *supra* note 21 at 16; CL–AGA *supra* note 124 at 7–8; and CL–EEI/EPSA *supra* note 21 at 5.

[197] *See* CL–EEI/EPSA *supra* note 21 at 18.

[198] *See* CL–FIA *supra* note 21 at 6; and CL–Morgan Stanley *supra* note 21 at 6.

[199] *See e.g.,* CL–Cargill *supra* note 76 at 6; and CL–FIA I *supra* note 21 at 17.

[200] *See* CL–Cargill *supra* note 76 at 6; and CL–EEI/EPSA *supra* note 21 at 17.

[201] *See e.g.,* CL–Cargill *supra* note 76 at 6.

to exceed the limits, and not simply entering a swap with a counterparty that is a bona fide hedger.[202] Other commenters requested clarification as to whether the hedger must wait until all written communications have been exchanged before it can enter into a hedging transaction.[203] According to these commenters, such a requirement could delay entering a swap for hours if not days,[204] forcing the hedger to assume the risk of price changes during the period between when it enters the swap and when the parties complete the written documentation process.[205] Finally, commenters believed the rule was unclear on the type of representation that must be provided by an end-user and may be relied upon by dealers.[206]

Some commenters recommended a less-costly verification regime that would allow parties to rely upon a one-time representation concerning eligibility for the bona fide hedging exemption.[207] ISDA/SIFMA also argued that the Commission should confirm the bona fide hedger status of a party in order to prevent, among other things, unwarranted disclosure of confidential information from an end-user to a dealer.[208] Further, ISDA/SIFMA argued that the determination should be on an entity-by-entity basis, and not on a transaction-by-transaction basis, in order to promote certainty for bona fide hedgers and their swap counterparties.[209] BGA argued that the proposal to require a dealer to continuously monitor whether the underlying swap continues to offset the cash commodity risk of the hedging counterparty would result in significant and costly burdens on end-users and other hedgers.[210]

In response to these comments, the Commission has determined to reduce the burden of claiming a pass-through swap exemption. Under new § 151.5(i), in order to rely on a pass-through exemption, a counterparty would be required to obtain from its counterparty a representation that the swap, in its good-faith belief, would qualify as an enumerated hedge under § 151.5(a)(2). Such representation must be provided at the inception (*i.e.,* execution) of the swap transaction and the parties to the swap must keep records of the representation. This representation, which may be made in a trade confirmation, must be kept for a period of at least two years following the expiration of the swap and furnished to the Commission upon request.

Deutsche Bank also requested clarification as to whether the immediate counterparty to the swap must be a bona fide hedger or whether the Commission will look to a series of transactions to determine if it was connected to a bona fide hedger.[211] Deutsche Bank argued that given the complexity of the swaps marketplace, market participants often hedge their risk through multiple combinations of intermediaries; hence, the Commission should not require that the immediate counterparty be a bona fide hedger, but rather part of a network of transactions connected to a bona fide hedger.[212]

The Commission rejects extending the pass-through exemption to a series of swap transactions. Rather, consistent with this Congressional direction, a pass-through swap will be recognized as a bona fide hedge only to the extent it is executed opposite a counterparty eligible to claim an enumerated hedge exemption.[213]

The Commission clarifies that the pass-through swap exemption will allow non-hedging counterparties to such swaps to offset non-Referenced Contract swap risk in Referenced Contracts.[214]

Some commenters recommended that the Commission exclude inter-affiliate swaps from any calculation of a trader's position for position limit compliance purposes.[215] API, for example, argued that swaps among affiliates would have no net effect on the positions of affiliated entities and the final rule should therefore make it clear that the Commission will not consider such swaps for purposes of position limits.[216] API commented further that this approach would be consistent with the Commission's treatment of inter-affiliate swaps in other proposed rulemakings, for example, the proposed rulemaking further defining, inter alia, swap dealer.[217]

In light of the structure of the aggregation rules regarding the treatment of a single person or a group of entities under common ownership or control, as provided for under § 151.7, the Commission has introduced § 151.5(b). This subsection clarifies that entities required to aggregate accounts or positions under § 151.7 shall be considered the same person for the purpose of determining whether a person or persons are eligible for a bona fide hedge exemption under § 151.5(a) to the extent that such positions are attributed among these entities. The Commission's intention in introducing new § 151.5(b) is to make the aggregation and bona fide hedging provisions of part 151 consistent. For example, a holding company that owns a sufficient amount of equity in an operating company would need to aggregate the operating company's positions with those of the holding company in order to determine compliance with position limits. Commission regulation 151.5(b) would clarify that the holding company could enter into bona fide hedge transactions related to the operating company's cash market activities, provided that the operating company has itself not entered into such hedge transactions with another person with whom it is not aggregated (*i.e.,* the holding company's hedge activity must comply with the appropriateness requirement of § 151.5(a)(1)). Appendix B to the final regulations provides an illustrative example as to how this provision would operate.

4. Non-Enumerated Hedges

Many of the commenters objecting to the proposed definition of bona fide

[202] *See e.g.,* CL–FIA I *supra* note 21 at 19; and CL–ISDA/SIFMA *supra* note 21 at 10.

[203] *See* CL–FIA I *supra* note 21 at 18.

[204] *See* CL–EEI/EPSA *supra* note 21 at 17.

[205] *See* CL–FIA I *supra* note 21 at 19.

[206] *See e.g.,* CL–BGA *supra* note 35 at 16.

[207] *See e.g.,* CL–EEI/EPSA *supra* note 21 at 17; CL–ISDA/SIFMA *supra* note 21 at 12; and CL–FIA I *supra* note 21 at 19.

[208] *See* CL–ISDA/SIFMA *supra* note 21 at 13.

[209] *See id.*

[210] *See e.g.,* CL–BGA *supra* note 35 at 17; and ISDA/SIFMA *supra* note 21 at 12.

[211] *See* CL–DB *supra* note 153 at 8.

[212] *See id.* Barclays similarly noted that it should not matter whether the original holder of a pass-through swap risk manages the risk itself or asks another to manage it for them and that overall systemic risk would increase if risk transfer is made more difficult. CL–Barclays I *supra* note 164 at 4.

[213] *See* CEA section 4a(c)(2)(B)(i), 7 U.S.C. 6a(c)(2)(B)(i). The Commission notes that the same restrictions on holding a position in the spot month or the last five days of trading of physical-delivery Core Referenced Futures Contracts that would apply to the swap counterparty with the underlying bona fide risk also apply to the holder of the pass-through swap. For example, if a swap dealer enters into a crude oil swap with an anticipatory production hedger, then it would be subject to the same restrictions on holding the hedge of that pass-through swap into the spot month of the appropriate physical-delivery Referenced Contract.

[214] For example, Company A owns cash market inventory in a non-Referenced Contract commodity and enters into a Swap N with Bank B. Swap N would be an enumerated bona fide hedging transaction for Company A under the rules of a DCM or SEF. Because Swap N is not a Referenced Contract, Bank B does include Swap H in measuring compliance with position limits. However, Bank B, as is economically appropriate, may enter into a cross-commodity hedge to reduce the risk associated with Swap N. That risk reducing transaction is a bona fide hedging transaction for Bank B.

[215] CL–COPE *supra* note 21 at 13; CL–API *supra* note 21 at 11; CL–Shell *supra* note 35 at 4–5; and CL–WGCEF *supra* note 35 at 23.

[216] CL–API *supra* note 21 at 11.

[217] *Id.*

hedging requested that the Commission reintroduce a process for claiming non-enumerated hedging exemptions.[218] The Working Group of Commercial Energy Firms (''Working Group''), for example, argued that the Commission should maintain its current flexibility and preserve its ability to allow exemptions.[219] FIA commented further that such a provision is expressly authorized under CEA section 4a(a)(7).[220] The Commission has considered the comments and has expanded the list of enumerated hedge transactions, consistent with the statutory definition of bona fide hedging.

In response to questions raised by commenters, the Commission notes that market participants may request interpretive guidance (under § 140.99(a)(3)) regarding the applicability of any of the provisions of this part, including whether a transaction or class of transactions qualify as enumerated hedges under § 151.5(a)(2). Market participants may also petition the Commission to amend the current list of enumerated hedges or the conditions therein. Such a petition should set forth the general facts surrounding such class of transactions, the reasons why such transactions conform to the requirements of the general definition of bona fide hedging in § 151.5(a)(1), and the policy purposes furthered by the recognition of this class of transactions as the basis for enumerated bona fide hedges.

5. Portfolio Hedging

Some commenters requested clarification as to whether the new bona fide hedging exemption would require one-to-one tracking, and argued that portfolio hedging should be allowed because the combination of hedging instruments, such as futures, swaps and options, generally cannot be individually identified to particular physical transactions.[221] Some of these commenters argued that if the Commission does not permit portfolio hedging, the requirement to one-to-one track physical commodity transactions with corresponding hedge transactions will increase risk by preventing end-users from effectively hedging their commercial exposure.[222]

The Commission notes that the final § 151.5(a)(2) provides for bona fide hedging transactions and positions. The Commission intends to allow market participants either to hedge their cash market risk on a one-to-one transactional basis or to combine the risk associated with a number of enumerated cash market transactions in establishing a bona fide hedge, provided that the hedge is economically appropriate to the reduction of risk in the conduct and management of a commercial enterprise, as required under § 151.5(a)(1)(ii). The Commission has clarified this intention by adding after ''potential change in the value of'' in § 151.5(a)(1)(iii) the phrase ''one or several.'' [223]

6. Restrictions on Hedge Exemptions

Proposed § 151.5(a)(2)(v) generally followed the Commission's existing agricultural commodity position limits regime, which restricts cross-commodity hedge transactions from being classified as a bona fide hedge during the last five days of trading on a DCM.[224] Some commenters recommended that the Commission eliminate this prohibition, otherwise market participants will have to assume risks during that time period instead of shifting risks to those willing to assume them.[225] According to the FIA, unhedged risk, such as a commercial company unable to hedge jet fuel price exposure with heating oil futures or swap contracts in the last five days of trading, would reduce market liquidity and increase the risk of operating a commercial business.[226] Further, ISDA opined that the Commission did not adequately justify the purpose of applying a prohibition from the Commission's agricultural commodity position limits to other commodities.[227]

The Commission recognizes the restriction on holding cross-commodity hedges in the last five days of trading may increase tracking risk if the trader were forced out of the Referenced Contract into a lesser correlated contract, or into a deferred contract month that was less correlated with the relevant cash market risk than the spot month. However, the Commission also continues to believe that such cross-commodity hedges are not appropriately recognized as bona fide in the physical-delivery contracts in the last five days of trading for agricultural and metal Referenced Contracts or the spot month for energy Referenced Contracts since the trader does not hold the underlying commodity for delivery against, or have a need to take delivery on, the underlying commodity The Commission agrees with the comments regarding the elimination of the restriction on holding a cross-commodity hedge in cash-settled contracts during the last five days of trading for agricultural and metal contracts and the spot month for other contracts and has relaxed this restriction for hedge positions established in cash-settled contracts. Under the final rules, traders may maintain their cross-commodity hedge positions in a cash-settled Referenced Contract through the final day of trading.

The Commission received a number of comments on similar restrictions proposed to apply to other enumerated hedge transactions.[228] The National Milk Producers Federation, for example, argued that the restriction on holding a hedge position through the last days of trading for cash-settled contracts should be eliminated because if a trader carried positions through the last days of trading in a cash-settled contract then it could not impact the orderly liquidation of the market.[229]

In response to these comments, the Commission has eliminated all restrictions on holding a bona fide hedge position for cash-settled contracts and narrowed the restriction on holding a bona fide hedge position in physical-delivery contracts. Specifically, a bona fide hedge position for anticipatory hedges for production, requirements, merchandising, royalty rights, and service contract, and unfixed-price calendar spread risk hedges

[218] *See e.g.,* CL–FIA I *supra* note 21 at 15; CL–EEI/EPSA *supra* note 21 at 15; CL–CME I *supra* note 8 at 19; CL–Morgan Stanley *supra* note 21 at 6; and CL–WGCEF *supra* note 35 at 5. It should be noted, however, that at least 184 comment letters opined that the Commission should define the bona fide hedge exemption ''in the strictest sense possible'' and that ''[b]anks, hedge funds, private equity and all passive investors in commodities should not be deemed as bona fide hedgers.''

[219] CL–WGCEF *supra* note 35 at 5.

[220] CL–FIA I *supra* note 21 at 15.

[221] *See e.g.,* CL–Cargill *supra* note 76 at 2–3; CL–BGA *supra* note 35 at 15; and CL–ISDA/SIFMA *supra* note 21 at 10–11.

[222] *See e.g.,* CL–BGA *supra* note 35 at 15.

[223] Similarly, and in light of comments, the Commission has elected not to adopt proposed § 151.5(j) in recognition of the confusion this provision could have caused to market participants who hedge on a portfolio basis and to reduce the burden of requiring a continuing representation of bona fides by the swap counterparty. The proposed § 151.5(j) provided that a party to a swap opposite a bona fide hedging counterparty could establish a position in excess of the position limits, offset that position, and then re-establish a position in excess of the position limits, so long as the swap continued to offset the cash market commodity risk of a bona fide hedging counterparty.

[224] *See* § 1.3(z)(2)(iv). In the proposal, anticipatory hedge transactions could not be held during the five last trading days of any Referenced Contract. This restriction has been clarified to be aligned with the trading calendar of the Core Referenced Futures Contract and applies to all anticipatory transaction hedges.

[225] *See e.g.,* CL–FIA I *supra* note 21 at 16l and CL–ISDA/SIFMA *supra* note 21 at 11.

[226] *See* CL–FIA I *supra* note 21 at 16.

[227] *See* CL–ISDA/SIFMA *supra* note 21 at 11.

[228] *See e.g.,* CL–Commercial Alliance I *supra* note 42 at 9; and National Milk Producers Federation (''NMPF'') on July 25, 2011 (''CL–NMPF'') at 3–4.

[229] CL–NMPF, *supra* note 228 at 3–4.

(§ 151.5(a)(2)(iii), and, as discussed above, cross-commodity hedges in all bona fide hedge circumstances will not retain bona fide hedge status if held, for physical-delivery agricultural and metal contracts, in the last five trading days and in the spot month for all other physical-delivery contracts. The Commission has modified the Proposed Rule in recognition of potential circumstances where inefficient hedging would be required if the restriction were maintained as proposed, the reduced concerns with a negative impact on the market of maintaining such a hedge if held in a cash-settled contract (as opposed to a physical-delivery contract), and a generally cautious approach to imposing new restrictions on the ability of traders active in the physical marketing channel to enter into cash-settled transactions to meet their hedging needs.

7. Financial Distress Exemption

Some commenters requested that the Commission introduce an exemption for market participants in financial distress scenarios. Morgan Stanley, for example, commented that during periods of financial distress, it may be beneficial for a financially sound entity to assume the positions (and corresponding risk) of a less stable market participant.[230] Morgan Stanley argued that not providing for an exemption in these types of situations could reduce liquidity and increase systemic risk. Similarly, Barclays argued that the Commission should preserve the flexibility to accommodate situations involving, for example, the exit of a line of business by an entity, a customer default at a futures commission merchant (''FCM''), or in the context of potential bankruptcy.[231]

In recognition of the public policy benefits of including such an exemption, the Commission has provided, in § 151.5(j), for an exemption for situations involving financial distress. The Commission's authority to provide for this exemption is derived from CEA section 4a(a)(7).[232] In this regard, the Commission clarifies that this exemption for financial distress situations does not establish or otherwise represent a form of hedging exemption.

8. Filing Requirements

Under the proposal, once an entity's total position exceeds a position limit, the entity must file daily reports on Form 404 for cash commodity transactions and corresponding hedge transactions and on Form 404S for information on swaps used for hedging.[233] Several commenters argued that bona fide hedgers should only be required to file monthly reports to the Commission because daily reporting is onerous and unnecessary.[234] In addition, the commenters pointed out that daily reporting will also be costly for the Commission,[235] and argued that the Commission should instead utilize its special call authority on top of monthly reporting to ensure that it has sufficient information.[236]

The Commission has determined to address these concerns by requiring that a trader file a Form 404 three business days following the day that a position limit is exceeded and thereafter file daily data on a monthly basis. These monthly reports would, under § 151.5(c)(1), provide cash market positions for each day that the trader exceeded the position limits during the monthly reporting period. This amendment would reduce the filing burden on market participants. The Commission believes the monthly reports, though less timely, would generally provide information sufficient to determine a trader's daily compliance with position limits, without requiring a trader to file additional information under a special call or, as discussed below, follow-up information on his or her notice filings. The Commission has also reduced the filing burden by allowing all such reports of cash market positions to be filed by the third business day following the day that a position limit is exceeded, rather than on the next business day.

Final § 151.5(d) asks for information relevant to the three new anticipatory hedging exemptions—for merchandising, royalties, and services contracts—that would be helpful for the Commission in evaluating the validity of such claims. For anticipated merchandising hedge exemptions, the Commission is most interested in understanding the storage capacity relating to the anticipated and historical merchandising activity. For anticipated royalty hedge exemptions, the Commission is interested in understanding the basis for the projected royalties. For anticipated services, the Commission is interested in understanding what types of service contracts have given rise to the trader's anticipated hedging exemption request.

The Commercial Alliance recommended that Form 404A filings for anticipatory hedgers be modified to require descriptions of activity, as opposed to calling for the submission of data reflecting a one-for-one correlation between an anticipated market risk and a hedge position.[237] The Commercial Alliance stated that companies are not managed in this manner and the data could not be collated and provided to the Commission in this way.[238] The Commercial Alliance provided recommended amendments to the requirements for Form 404A filers to reflect that information concerning anticipated activities would be appropriate to justify a hedge position, in accordance with regulations 151.5(a)(1) and (a)(2).

The Commission agrees with many of the Commercial Alliance's suggestions. For example, § 151.5(c)(2) closely tracks the Commercial Alliance's suggested language revisions. The information required by this section should allow the Commission to understand whether the trader's bona fide hedging activity complies with the requirements of § 151.5(a)(1). Final § 151.5(c)(2) clarifies that the 404 filing is a notice filing made effective upon submission.

Many commenters opined that the application and approval process for receiving an anticipatory hedge exemption set forth in proposed § 151.5(c) would impose an unnecessary compliance burden on hedgers.[239] In response to such comments, the Commission has amended the process for claiming an anticipatory hedge in § 151.5(d)(2) to allow market participants to claim an exemption by notice filing. The notice must be filed at least ten days in advance of the date the person expects to exceed the position limits and is effective after that ten-day period unless so notified by the Commission.

In response to commenters seeking greater procedural certainty for obtaining bona fide hedge

[230] CL–Morgan Stanley *supra* note 21 at 16.

[231] CL–Barclays I *supra* note 164 at 5.

[232] New CEA section 4a(a)(7) provides that the Commission may ''by rule, regulation, or order * * * exempt * * * any person or class of persons'' from any requirement it may establish under section 4a. 7 U.S.C. 6a(a)(7). This provision requires that any exemption, general or bona fide, to position limits granted by the Commission, be done by Commission action.

[233] *See* §§ 151.5(b) and (d).

[234] *See e.g.,* CL–Cargill *supra* note 76 at 3; CL–FIA I *supra* note 21 at 20; CL–Commercial Alliance I *supra* note 42 at 3–4; CL–BGA *supra* note 35 at 17; CL–EEI/EPSA *supra* note 21 at 15–16; and CL–Utility Group *supra* note 21 at 14. *See also* CL–ISDA/SIFMA *supra* note 21 at 12 (opposing daily reporting).

[235] *See* CL–FIA I *supra* note 21 at 21; and CL–ISDA/SIFMA *supra* note 21 at 12.

[236] *See e.g.,* CL–Cargill *supra* note 76 at 4.

[237] Commercial Alliance (''Commercial Alliance II'') on July 20, 2011 (''CL–Commercial Alliance II'') at 1.

[238] *Id.*

[239] *See e.g.,* CL–ICE I *supra* note 69 at 12; and CL–WGCEF *supra* note 35 at 2–3.

exemptions,[240] § 151.5(e) clarifies the conditions of the Commission's review of 404 and 404A notice filings submitted under §§ 151.5(c) and 151.5(d), respectively. Traders submitting these filings may be notified to submit additional information to the Commission in order to support a determination that the statement filed complies with the requirements for bona fide hedging exemptions under paragraph (a) of § 151.5.

H. Aggregation of Accounts

The proposed part 151 regulations would significantly alter the existing position aggregation rules and exemptions currently available in part 150. Specifically, the aggregation standards under proposed § 151.7 would eliminate the independent account controller (''IAC'') exemption under § 150.3(a)(4), restrict many of the disaggregation provisions currently available under § 150.4, and create a new owned-financial entity exemption. The proposal would also require a trader to aggregate positions in multiple accounts or pools, including passively-managed index funds, if those accounts or pools have identical trading strategies. Lastly, disaggregation exemptions would no longer be available on a self-executing basis; rather, an entity seeking an exemption from aggregation would need to apply to the Commission, with the relief being effective only upon Commission approval.[241]

Some commenters supported the proposed aggregation standards, contending that the revised standards would enhance the Commission's ability to monitor and enforce position limits by preventing institutional investors, including hedge funds, from evading application of position limits by creating multiple smaller investment funds.[242] However, many of the commenters on the account aggregation rules objected to the change in the aggregation policy and, in particular, the proposed elimination of the IAC exemption.[243] Generally, these commenters expressed concern that the proposed aggregation standards would result in an inappropriate aggregation of independently controlled accounts, potentially cause harmful consequences to investors and investment managers, and potentially reduce liquidity in the commodities markets.

In response to comments, the Commission is adopting the proposed aggregation standard, with modifications as discussed below. In brief, the final rules largely retain the provisions of the existing IAC exemption and pool aggregation standards under current part 150. The final rules reaffirm the Commission's current requirements to aggregate positions that a trader owns in more than one account, including accounts held by entities in which that trader owns a 10 percent or greater equity interest. Thus, for example, a financial holding company is required to aggregate house accounts (that is, proprietary trading positions of the company) across all wholly-owned subsidiaries.

1. Ownership or Control Standard

Under proposed § 151.7, a trader would be required to aggregate all positions in accounts in which the trader, directly or indirectly, holds an ownership or equity interest of 10 percent or greater, as well as accounts over which the trader controls trading.[244] The Proposed Rule also treats positions held by two or more traders acting pursuant to an express or implied agreement or understanding the same as if the positions were held by a single trader.

As proposed, a trader also would be required to aggregate interests in funds or accounts with identical trading strategies. Proposed § 151.7 would require a trader to aggregate any positions in multiple accounts or pools, including passively-managed index funds, if those accounts or pools had identical trading strategies. The Commission is finalizing this provision as proposed.[245]

2. Independent Account Controller Exemption

The Commission proposed to eliminate the IAC exemption in part 150. Numerous commenters asserted that the Commission failed to provide a reasoned explanation for the departure from its long-standing exception from aggregation for independently controlled accounts.[246] These commenters also asserted that the elimination of the IAC exemption would force aggregation of accounts that are under the control of independent managers subject to meaningful information barriers and, hence, do not entail risk of coordinated excessive speculation or market manipulation.[247] Morgan Stanley asserted that the rationale for permitting disaggregation for separately controlled accounts is that ''the correct application of speculative position limits hinges on attributing speculative positions to those actually making trading decisions for a particular account.'' [248] In absence of the IAC

[240] *See e.g.,* CL–WGCEF *supra* note 35 at 2–3.

[241] The Commission did not propose any substantive changes to existing § 150.4(d), which allows an FCM to disaggregate positions in discretionary accounts participating in its customer trading programs provided that the FCM does not, among other things, control trading of such accounts and the trading decisions are made independently of the trading for the FCM's other accounts. As further described below, however, the FCM disaggregation exemption would no longer be self-executing; rather, such relief would be contingent upon the FCM applying to the Commission for relief.

[242] *See e.g.,* CL–PMAA/NEFI *supra* note 6 at 16–17; CL–Prof. Greenberger *supra* note 6 at 18; CL–AFR *supra* note 17 at 8; and CL–FWW *supra* note 81 at 16.

[243] *See e.g.,* CL–FIA I *supra* note 21; CL–Commercial Alliance II *supra* note 237 at 1; CL–DB *supra* note 153 at 6; CL–CME I *supra* note 8 at 15–16; ICI *supra* note 21 at 8; CL–BlackRock *supra* note 21 at 9; New York City Bar Association—Committee on Futures and Derivatives (''NYCBA'') on April 11, 2011 (''CL–NYCBA'') at 2; and CL–SIFMA AMG *supra* note 21 at 10. One commenter did ask that the Commission allow for a significant amount of time for an orderly transition from the IAC to the more limited account aggregation exemptions in the proposed rules. *See* CL–Cargill *supra* note 76 at 7.

[244] In this regard, the Commission interprets the ''hold'' or ''control'' criterion as applying separately to ownership of positions and to control of trading decisions.

[245] Barclays requested that, in light of the fundamental changes to the aggregation policy, the Commission should reconsider the 10 percent ownership standard. Specifically, Barclays stated that the ownership test should be tied to a ''meaningful actual economic interest in the result of the trading of the positions in question,'' and that 10 percent ownership, in absence of control, is no longer a ''viable'' standard. *See* CL–Barclays I *supra* note 164 at 3. In view of the fact that the Commission is finalizing the aggregation provisions with modifications to the proposal that will substantially address the concerns of the comments, the Commission has determined to retain the long-standing 10 percent ownership standard that has worked effectively to date. In response to a point raised by Commissioner O'Malia in his dissent, the Commission clarifies that it will continue to use the 10 percent ownership standard and apply a 100 percent position aggregation standard, and therefore will not adopt Barclays' recommendation that ''only an entity's pro rata share of the position that are actually controlled by it or in which it has ownership interest'' be aggregated. *Id.* at 3. In the future, the Commission may reconsider whether to adopt Barclays' recommendation.

[246] *See e.g.,* CL–FIA I *supra* note 21 at 22–23; CL–CME I *supra* note 8 at 15; and CL–CMC *supra* note 21 at 4; CL–ISDA/SIFMA *supra* note 21 at 14–16; CL–Katten *supra* note 21 at 3; CL–MFA *supra* note 21 at 13; CL–Morgan Stanley *supra* note 21 at 7; CL–NYCBA *supra* note 243 at 2; Barclays Capital (''Barclays II'') on June 14, 2011 (''CL–Barclays II'') at 1; and U.S. Chamber of Commerce (''USCOC'') on March 28, 2011 (''CL–USCOC'') at 6.

[247] *See e.g.,* CL–CME I *supra* note 8 at 15; CL–ICI *supra* note 21 at 9; CL–BlackRock *supra* note 21 at 4, 9; CL–Katten *supra* note 21 at 3; CL–ISDA/SIFMA *supra* note 21 at 14; CL–AIMA *supra* note 35 at 5–6; DB Commodity Services LLC (''DBCS'') on March 28, 2011 (''CL–DBCS'') at 7; and CL–Barclays I *supra* note 164 at 2.

[248] CL–Morgan Stanley *supra* note 21 at 7. Morgan Stanley added that the resulting inability to disaggregate separately controlled accounts of its various affiliates will have ''[a] significantly adverse effect on Morgan Stanley's ability to provide risk

Continued

exemption, commenters further noted that otherwise independent trading operations would be required to communicate with each other as to their trading positions so as to avoid violating position limits, raising the risk for concerted trading.[249]

The Commission has carefully considered the views expressed by commenters and has determined to retain the IAC exemption largely as currently in effect, with clarifications to make explicit the Commission's long-standing position that the IAC exemption is limited to client positions, that is, only to the extent one trades professionally for others can one avail him or herself of this IAC exemption. Such a person has a fiduciary relationship to those clients for whom he or she trades.[250] Accordingly, eligible entities may continue to rely upon the IAC exemption to disaggregate client positions held by an IAC. This means that the IAC exemption does not extend to proprietary positions in accounts which a trader owns.

After reviewing the comments in connection with the terms of the proposal, the Commission believes that retaining the IAC exemption for independently managed client accounts is in accord with the purposes of the aggregation policy. The fundamental rationale for the aggregation of positions or accounts is the concern that a single trader, through common ownership or control of multiple accounts, may establish positions in excess of the position limits and thereby increase the risk of market manipulation or disruption. Such concern is mitigated in circumstances involving client accounts managed under the discretion and control of an independent trader and subject to effective information barriers. The Commission also recognizes the wide variety of commodity trading programs available for market participants. To the extent that such accounts and programs are traded independently and for different purposes, such trading may enhance market liquidity for bona fide hedgers and promote efficient price discovery.

Under the current IAC exemption provision, an eligible entity, which includes banks, CPOs, commodity trading advisors (''CTAs''), and insurance companies, may disaggregate customer positions or accounts managed by an IAC from its proprietary positions (outside of the spot months), subject to the conditions specified therein. Specifically, an IAC must trade independently of the eligible entity and of any other IAC trading for the eligible entity and have no knowledge of trading decisions by any other IAC.[251]

A central feature of the IAC exemption is the requirement that the IAC trades independently of the eligible entity and of any other IAC trading for the eligible entity. The determination of whether a trader exercises independent control over the trading decisions of the customer discretionary accounts or trading programs within the meaning of the IAC exemption must be decided case-by-case based on the particular underlying facts and circumstances. In this respect, the Commission will look to certain factors or indicia of control in determining whether a trader has control over certain positions or accounts for aggregation purposes.[252]

A non-exclusive list of such indicia of control includes existence of a proper firewall separating the trading functions of the IAC and the eligible entity. That is, the Commission will consider, in determining whether the IAC trades independently, the degree to which there is a functional separation between the proprietary trading desk of the eligible entity and the desk responsible for trading on behalf of the managed client accounts. Similarly, the Commission will consider the degree of separation between the research functions supporting a firm's proprietary trading desk and the client trading desk. For example, a firm's research information concerning fundamental demand and supply factors and other data may be available to an IAC who directs trading for a client account of the firm. However, specific trading recommendations of the firm contained in such information may not be substituted for independently derived trading decisions. If the person who directs trading in an account regularly follows the trading suggestions disseminated by the firm, such trading activity will be evidence that the account is controlled by the firm. In the absence of a proper firewall separating the trading or research functions, among other things, an eligible entity may not avail itself of the IAC exemption.

3. Exemptions From Aggregation

Several commenters expressed concern that forced aggregation of independently controlled and managed accounts would effectively require independent trading operations of commonly-owned entities to coordinate trading activities and commercial hedging opportunities, in potential violation of contractual and legal obligations, such as FERC affiliate rules,[253] bank regulatory restrictions, and antitrust provisions.[254] Some commenters also asserted that asset managers and advisers may be required to violate their fiduciary duty to clients by sharing confidential information with third parties, and which could also lead to anti-competitive activity if two unrelated entities, such as competitors in a joint-venture, are required to share such confidential information.[255] FIA also added that a company with an affiliate underwriter may not be aware that its affiliate has acquired a temporary, passive interest in another company trading commodities. Under the aggregation proposal, the first company would be required to share trading information with a temporary affiliate. In such instance, FIA concludes, the cost of aggregation ''greatly outweighs the unarticulated regulatory benefits.'' [256]

According to commenters, this problem is exacerbated if aggregate limits are applied intraday as it requires real-time sharing of information, and, when added to the attendant dismantling of information barriers and restructuring of information systems, would impose significant operational

management services to its clients and will reduce market liquidity.''

[249] *See e.g.,* CL–MFA *supra* note 21 at 13.

[250] *See e.g.,* 56 FR 14308, 14312 (Apr. 9, 1991) (clarifying, among other things, that the IAC exemption is limited to those who trade professionally for others, and who have a fiduciary relationship to those for whom they trade).

[251] If the IAC is affiliated with the eligible entity or another IAC trading on behalf of the eligible entity, each of the affiliated entities must, among other things, maintain written procedures to preclude them from having knowledge of, or gaining access to data about trades of the other, and each must trade such accounts pursuant to separately developed and independent trading systems. *See* § 150.3(a)(4)(i).

[252] 64 FR 33839, Jun. 13, 1979 (''1979 Aggregation Policy Statement''). In that release, the Commission provided certain indicia of independence, which included appropriate screening procedures, separate registration and marketing, and a separate trading system.

[253] *See e.g.,* CL–FIA I *supra* note 21 at 23–24; CL–EEI/ESPA *supra* note 21 at 20; CL–ISDA/SIFMA *supra* note 21 at 16; and CL–AGA *supra* note 124 at 9.

[254] *See e.g.,* CL–FIA I *supra* note 21 at 24; CL–API *supra* note 21 at 11; CL–DBCS *supra* note 247 at 3; CL–CME I *supra* note 8 at 17; CL–ISDA/SIFMA *supra* note 21 at 16; CL–MFA *supra* note 21 at 13; CL–Morgan Stanley *supra* note 21 at 8; CL–SIFMA AMG I *supra* note 21 at 11; and CL–Barclays I *supra* note 164 at 2. *See e.g.,* CL–Morgan Stanley *supra* note 21 at 8 (For example, advisors to private investment funds may not be able to permit certain investors to view position information unless the information is made available to all of the fund's investors on an equal basis).

[255] *See e.g.,* CL–CME I *supra* note 8 at 17; CL–Barclays II *supra* note 2468 at 2; CL–MFA *supra* note 21 at 13; CL–Morgan Stanley *supra* note 21 at 9; and CL–SIFMA AMG I *supra* note 21 at 11. *See also* CL–NYCBA *supra* note 243 at 4.

[256] CL–FIA I *supra* note 21 at 24.

challenges and massive costly infrastructure changes.[257]

In view of these considerations, and as discussed above, the Commission is reinstating the IAC exemption. The majority of the contentions from the commenters stemmed from the removal of the IAC exemption, and therefore, incorporating this exemption into the final rules should address these concerns. In response to comments,[258] and to further mitigate the impact of the aggregation requirements that apply to commonly-owned entities or accounts, the Commission is adopting new § 151.7(g), which will allow a person to disaggregate when ownership above the 10 percent threshold also is associated with the underwriting of securities. In addition to a limited exemption for the underwriting of securities, new § 151.7(i) will provide for disaggregation relief, subject to notice filing and opinion of counsel, in instances where aggregation across commonly-owned affiliates (*i.e.,* above the 10 percent ownership threshold) would require position information sharing that, in turn, would result in the violation of Federal law.[259] The Commission notes, however, when a trader has actual knowledge of the positions of an affiliate, that trader is required to aggregate all such positions.

4. Ownership in Commodity Pools Exemption

Under current § 150.4(b), a trader who is a limited partner or shareholder in a commodity pool (other than the pool's commodity pool operator (''CPO'')) generally need not aggregate so long as the trader does not control the pool's trading decisions. Under § 150.4(c)(2), if the trader is also a principal or affiliate of the pool's CPO, the trader need not aggregate provided that the trader does not control or supervise the pool's trading and the pool operator has proper informational barriers. In addition, mandatory aggregation based on a 25 percent ownership interest is only triggered with respect to a pool exempt from CPO registration under existing § 4.13.

The Commission's proposal would eliminate the disaggregation exemption for passive pool participants (*i.e.,* participants who are not principals or affiliates of the pool's CPO). Under the Commission's proposal, all passive pool participants (with a 10 percent or greater ownership or equity interest and regardless of whether they are a principal or affiliate) would be subject to the aggregation requirement unless they meet certain exemption criteria. These criteria include: (i) An inability to acquire knowledge of the pool's positions or trading due to informational barriers maintained by the CPO, and (ii) a lack of control over the pool's trading decisions. The proposal would also require aggregation for an investor with a 25 percent or greater ownership interest in any pool, without regard to whether the operator operates a small pool exempt from CPO registration.

Commenters objected to the changes to the disaggregation provision applicable to interests in commodity pools, arguing that forcing aggregation of independent traders would increase concentration, limit investment opportunities, and thus potentially reduce liquidity in the U.S. futures markets.[260] Morgan Stanley stated that the current disaggregation exemption for interests in commodity pools ''reflect the current reality of investing in commodity pools structured as private investment funds.''[261] It would be, Morgan Stanley explained, ''extraordinarily difficult to monitor and limit ownership thresholds given that an investor's stake in a fund may rise due to actions of third parties, *e.g.,* redemptions.''[262] MFA likewise noted that ''monitoring of ownership percentages of investors in a commodity pool is burdensome, difficult to manage, and creates a potential trap for investors who may unintentionally violate limits.''[263]

Upon further consideration, and in response to the comments, the Commission has determined to retain the current disaggregation exemption for interests in commodity pools. The exemption was originally intended in part to respond to the growth of professionally managed futures trading accounts and pooled futures investment. The Commission finds that disaggregation for ownership in commodity pools, subject to appropriate safeguards, may continue to provide the necessary flexibility to the markets, while at the same time protecting the markets from the undue accumulation of large speculative positions owned by a single person or entity.

5. Owned Non-Financial Entity Exemption

The Commission proposed a limited disaggregation exemption for an entity that owns 10 percent or more of a non-financial entity (generally, a non-financial, operating company) if the entity can demonstrate that the owned non-financial entity is independently controlled and managed.[264] The Commission explained that this limited exemption was intended to allow disaggregation primarily in the case of a conglomerate or holding company that ''merely has a passive ownership interest in one or more non-financial operating companies. In such cases, the operating companies may have complete trading and management independence and operate at such a distance from the holding company that it would not be appropriate to aggregate positions.''[265] Several commenters argued that the non-financial entity provision was too narrow to provide meaningful disaggregation relief and supported its extension to financial entities.[266] These commenters also asserted that the failure to extend the exemption was discriminatory against financial entities without a proper basis.[267] Other commenters asked for guidance from the Commission on whether business units of a company could qualify as owned non-financial

[257] *See e.g.,* CL–DBCS *supra* note 247 at 3; CL–CME I *supra* note 8 at 17; CL–FIA I *supra* note 21 at 24; CL–ICI *supra* note 21 at 8–9; CL–ISDA/SIFMA *supra* note 21 at 17; CL–Barclays II *supra* note 246 at 2; and CL–Morgan Stanley *supra* note 21 at 8.

[258] *See e.g.,* CL–FIA I *supra* note 21 at 24.

[259] Assume, for example, that Company A owns 10 percent of Company B. Company B may not share with Company A information regarding its positions unless it makes such data public. In this instance, Company A would file a notice with the Commission, along with opinion of counsel, that requiring the aggregation of such positions will require Company A to obtain information from Company B that would violate federal law.

[260] *See e.g.,* CL–MFA *supra* note 21 at 14–15; and CL–BlackRock *supra* note 21 at 6–7.

[261] CL–Morgan Stanley *supra* note 21 at 8.

[262] *Id.*

[263] CL–MFA *supra* note 21 at 14.

[264] The proposed regulations included a non-exclusive list of indicia of independence for purposes of this exemption, including that the two entities have no knowledge of each other's trading decisions, that the owned non-financial entity have written policies and procedures in place to preclude such knowledge, and that the entities have separate employees and risk management systems.

[265] 76 FR 4752, at 4762.

[266] *See e.g.,* CL–FIA I *supra* note 21 at 23–24; CL–DBCS *supra* note 238 at 6; CL–PIMCO *supra* note 21 at 3; National Rural Electric Cooperative (''NREC''), Association American Public Power (''AAPP''), and Association Large Public Power Council (''ALLPC'') on March 28, 2011 (''CL–NREC/AAPP/ALLPC'') at 20; CL–MFA *supra* note 21 at 14; CL–CME I *supra* note 8 at 16; CL–ISDA/SIFMA *supra* note 21 at 15; CL–BlackRock *supra* note 21 at 9; CL–Morgan Stanley *supra* note 21 at 9; and CL–NYCBA *supra* note 243 at 4.

[267] *See e.g.,* CL–FIA I *supra* note 21 at 22–23; CL–CME I *supra* note 8 at 16–17; CL–ISDA/SIFMA *supra* note 21 at 15; CL–Morgan Stanley *supra* note 21 at 9; CL–USCOC *supra* note 246 at 6; CL–DBCS *supra* note 247 at 6; CL–PIMCO *supra* note 21 at 5 (position limits are not high enough to offset elimination of IAC as explained in the proposed §); CL–MFA *supra* note 21 at 14; Akin Gump Strauss Hauer & Field LLP (''Akin Gump'') on March 25, 2011 (''CL–Akin Gump'') at 4; and CL–CMC *supra* note 21 at 4.

entities for aggregation purposes.[268] These commenters argued that functionally these business units operate the same as separately organized entities, and should not be forced to undergo the costs and inefficiencies of becoming separately organized for position limit purposes.[269]

In view of the Commission's determination to retain the IAC exemption and the aggregation policy in general (which the Commission believes has worked effectively to date), provide an exemption for Federal law information sharing restrictions in final § 151.7(i) and provide an exemption for underwriting in final § 151.7(g), the Commission believes that it would not be appropriate, at this time, to expand further the scope of disaggregation exemptions to owned non-financial or financial entities. As described above, the final rules include express disaggregation exemptions to mitigate the impact of the aggregation requirements that apply to commonly-owned entities or accounts. These disaggregation exemptions are appropriately limited to situations that do not present the same concerns as those underlying the aggregation policy, namely, the sharing of transaction or position information that may facilitate coordinated trading; as such, the Commission does not believe further expansion of the disaggregation exemptions is warranted at this time.

6. Funds With Identical Trading Strategies

The proposal would require aggregation for positions in accounts or pools with identical trading strategies (*e.g.,* long-only position in a given commodity), including passively-managed index funds. Under this provision, the general ownership threshold of 10 percent would not apply; rather, positions of any size in accounts or pools would require aggregation.

Several commenters objected to forcing aggregation on the basis of identical trading strategies because it did not, in their view, further the purpose of preventing unreasonable or unwarranted price fluctuations. [270] These commenters argued that the proposal would lead to a decrease in index fund participation, which will reduce market liquidity, especially in deferred months, as well as impact commodity price discovery. One commenter indicated support for extending the aggregation requirement to commodity index funds, and the swaps which are indexed to each individual index.[271] PMAA/NEFI opined that positions of passive long speculators should be aggregated to the extent that they follow the same trading strategies regardless of whether their positions are held or controlled by the same trader in order to shield the markets from the cumulative impact of multiple passive long speculators who follow the same trading strategies.[272]

The Commission is adopting this aggregation provision as proposed, with the clarification that a trader must aggregate positions controlled or held in one account with positions controlled or held in one pool with identical trading strategies. As the Commission stated in the NPRM, this aggregation provision is intended to prevent circumvention of the aggregation requirements. In absence of such aggregation requirement, a trader can, for example, acquire a large long-only position in a given commodity through positions in multiple pools, without exceeding the applicable position limits.

7. Process for Obtaining Disaggregation Exemption

In contrast to the existing practice, the proposed aggregation exemptions were not self-effectuating. A trader seeking to rely on any aggregation exemption would be required to file an application for relief with the Commission, and the trader could not rely on the exemption until the Commission approved the application.[273] Further, the trader would be subject to an annual renewal application and approval.

Several commenters objected to the proposed change from self-executing disaggregation exemptions to an application-based exemption on the basis that it would create an additional burden on traders without any benefits. Some of these commenters argued that the disaggregation exemptions for FCMs should continue to be self-effectuating because FCMs are subject to direct oversight by the Commission, and the Proposed Rule does not provide a sufficient explanation for the change in policy.[274] MFA recommended that instead of requiring an application for exemptive relief and annual renewals, IACs should be required to file a notice informing the Commission that they intend to rely on the exemption and a representation that they meet the relevant conditions.[275]

Some of the commenters, objecting to the application-based exemption, requested that the Commission make the necessary applications for an exemption conditionally effective, rather than effective after a Commission determination.[276] Other commenters argued that the Commission should only require that exemption applications be initially filed with material updates as opposed to an annual reapplication process.[277]

With regard to the specific conditions for applying for an aggregation exemption, several commenters requested that the Commission remove or clarify the condition that entities submit an independent assessment report.[278] Similarly, commenters opined that the Commission should not require applicants to designate an office and employees responsible for coordinating compliance with aggregation rules and position limits.[279]

The Commission is adopting the proposal with modifications to address the concerns expressed in the comments. Specifically, the Commission is eliminating the requirement that a trader seeking to rely on a disaggregation exemption file an application for exemptive relief and annual renewals. Instead, the trader must file a notice, effective upon filing, setting forth the circumstances that warrant disaggregation and a certification that they meet the relevant conditions.

The Commission believes that the new notice process (with its attendant certification requirement) for disaggregation relief represents a less burdensome, yet effective, alternative to the proposed application and pre-approval process. The notice procedure will allow market participants to rely on aggregation exemptions without the potential delay of Commission approval, thus lessening the burden on both market participants and the Commission to respond to such applications. In addition, the notice filings will give the Commission insight into the application

[268] *See e.g.,* CL–BGA *supra* note 35 at 21; and CL–Cargill *supra* note 76 at 7.

[269] *See e.g.,* CL–Cargill *supra* note 76 at 7.

[270] *See e.g.,* CL–CME I *supra* note 8 at 18; and CL–BlackRock *supra* note 21 at 14.

[271] *See e.g.,* CL–Better Markets *supra* note 37 at 69–70.

[272] CL–PMAA/NEFI *supra* note 6 at 14.

[273] *See e.g.,* CL–FIA I *supra* note 21 at 25; CL–CMC *supra* note 21 at 5; and CL–EEI/EPSA *supra* note 21 at 19–20.

[274] *See e.g.,* CL–Morgan Stanley *supra* note 21 at 7. *See also* Futures Industry Association (''FIA II'') on May 25, 2011 (''CL–FIA II'') at 6.

[275] *See* CL–MFA *supra* note 21 at 16.

[276] *See e.g.,* CL–FIA I *supra* note 21 at 25; Willkie Farr & Gallagher LLP (''Willkie'') on March 28, 2011 (''CL–Willkie'') at 7; CL–API *supra* note 21 at 12; Gavilon Group, LLC (''Gavilon'') on March 28, 2011(''CL–Gavilon'') at 8; and CL–CMC *supra* note 21 at 4. *See also* CL–BGA *supra* note 35 at 22.

[277] *See e.g.,* CL–Cargill *supra* note 76 at 9.

[278] *See e.g.,* CL–FIA I *supra* note 21 at 26–27; and CL–BGA *supra* note 35 at 22.

[279] *See e.g.,* CL–FIA I *supra* note 21 at 27.

of the various exemptions, which the Commission could not do under a self-certification regime.

Under the notice provisions, upon call by the Commission, any person claiming a disaggregation exemption must provide relevant information concerning the claim for exemption.[280] Thus, for example, if the Commission identifies potential concerns regarding the integrity of the information barrier supporting a trader's reliance on the IAC exemption, it can audit the subject trader for adequacy of such information barrier and related practices. To the extent the Commission finds that a trader is not appropriately following the conditions of the exemption, upon notice and opportunity for the affected person to respond, the Commission may amend, suspend, terminate, or otherwise modify a person's aggregation exemption.

In response to the concerns of commenters, the Commission has determined to remove the conditions that a person submit an independent assessment report and designate an office and employees responsible for coordinating compliance with aggregation rules and position limits as part of the notice filing for an exemption.

I. Preexisting Positions

The Commission proposed to apply the good-faith exemption under CEA section 4a(b) for pre-existing positions in both futures and swaps. This provided a limited exemption for pre-existing positions that are in excess of the proposed position limits, provided that they were established in good-faith prior to the effective date of a position limit set by rule, regulation, or order. However, ''[s]uch person would not be allowed to enter into new, additional contracts in the same direction but could take up offsetting positions and thus reduce their total combined net positions.'' [281] Thus, the Commission would calculate a person's pre-existing position for purposes of position limit compliance, but a person could not violate position limits based upon pre-existing positions alone.

The Commission also proposed a broader scope of the good-faith exemption for swaps entered before the effective date of the Dodd-Frank Act. Such swaps would not be subject to position limits, and the Commission would allow pre-effective date swaps to be netted with post-effective date swaps for the purpose of complying with position limits.

Finally, the Commission proposed to permit persons with risk-management exemptions under current Commission regulation 1.47 to continue to manage the risk of their swap portfolio that exists at the time of implementation of the legacy limits, and no new swaps would be covered.

The Working Group and BGA requested that the Commission grandfather any positions put on in good faith prior to the effective date of any final rule implementing position limits for Referenced Contracts.[282] CME and Blackrock urged that the Commission instead phase in position limits to minimize market disruption.[283]

Commenters addressing the pre-existing positions exemption in the context of index funds recommended that these funds be grandfathered in order that they may ''roll'' their futures positions after the effective date of any position limits rule.[284] Absent such grandfather treatment, commenters such as SIFMA opined that funds and accounts could be prevented from implementing rollovers in the most advantageous manner, and could conceivably be put in the anomalous positions of having to liquidate positions to return funds to investors if pre-existing positions cannot be replaced as necessary to meet stated investment goals.'' [285] CME also put forth that ''[i]ndex fund managers who do not or cannot roll-over positions would also be deviating from disclosed-to-investors trading strategies.[286]

With regard to the proposal to permit swap dealers to continue to manage the risk of a swap portfolio that exists at the time of implementation of the proposed regulations, CME requested that such relief be extended to swap dealers with swap portfolios in contracts that were not previously subject to position limits and therefore did not require exemptions.[287]

The Commission is finalizing the scope of the pre-existing position and grandfather exemption as proposed, subject to modifications below, in final § 151.9. The exemption for pre-existing positions implements the provisions of section 4a(b)(2) of the CEA, and is designed to phase in position limits without significant market disruption. In response to concerns over the scope of the pre-existing position exemption, the Commission clarifies that a person can rely on this exemption for futures, options and swaps entered in good faith prior to the effective date of the rules finalized herein for non-spot month-position limits.[288] Such pre-existing futures, options and swaps transactions that are in excess of the proposed position limits would not cause the trader to be in violation based solely on those positions. To the extent a trader's pre-existing futures, options or swaps positions would cause the trader to exceed the non-spot-month limit, the trader could not increase the directional position that caused the positions to exceed the limit until the trader reduces the positions to below the position limit.[289] As such, persons who established a net position below the speculative limit prior to the enactment of a regulation would be permitted to acquire new positions, but the Commission would calculate the combined position of a person based on pre-existing positions with any new position.[290]

Notwithstanding the combined calculation of pre-existing positions with new positions, the Commission is also retaining the broader exemption for swaps entered prior to the effective date of the Dodd-Frank Act and prior to the initial implementation of position limits under final § 151.4. The pre-effective date swaps would not be subject to the position limits adopted herein, and persons may, but need not, net swaps entered before the effective date of Dodd-Frank with swaps entered after the effective date.

With regard to comments addressing index funds that ''roll'' their pre-existing positions, the Commission

[280] *See* § 151.7(h)(2).

[281] 76 FR at 4752, 4763.

[282] *See* CL–BGA *supra* note 35 at 20; and CL–WGCEF *supra* note 35 at 20.

[283] CL–CME I *supra* note 8 at 19–20; CL–BlackRock *supra* note 21 at 17; and CL–SIFMA AMG I *supra* note 21 at 16.

[284] *See e.g.,* CL–CME I *supra* note 8 at 19–20; CL–SIFMA AMG I *supra* note 21 at 16; CL–BlackRock *supra* note 21 at 17; CL–MFA *supra* note 21 at 19. These commenters generally explained that these funds ''typically replace or 'roll over' their contracts in a staggered manner, before they reach their spot months, in order to maintain position allocations in as stable a manner as possible and without causing price impact.''

[285] CL–SIFMA AMG I *supra* note 21 at 16.

[286] CL–CME I *supra* note 8 at 19–20; and CL–BlackRock *supra* note 21 at 17.

[287] CL–CME I *supra* note 8 at 19.

[288] Notwithstanding the pre-existing exemption in non-spot months, a person must comply with spot-month limits. Any spot-month limit that is initially set or reset under Final § 151.4(a) will apply to all spot month periods. The Commission notes it will provide at least two months advance notice of changes to levels of such spot-month limits under Final § 151.4(e).

[289] For example, if the position limit in a particular reference contract is 1,000 and a trader's pre-existing position amounted to 1,005 long positions in a Referenced Contract, the trader would not be in violation of the position limit. However, the trader could not increase its long position with additional new long positions until its position decreased to below the position limit of 1,000. Once below the position limit of 1,000, this hypothetical trader would be subject to the position limit of 1,000.

[290] 76 FR at 4763.

notes that CEA section 4a(b)(2) only extends the exemption for pre-existing positions that were entered ''prior to the effective date of such rule, regulation, or order [establishing position limits].'' Given this statutory stricture, index funds that ''roll'' their pre-existing positions after the effective date of a position limit rule do not fall within the scope of the pre-existing position exemption.[291]

With regard to persons with existing exemptions under Commission regulation 1.47 to manage the risk of their existing swap portfolio, the Commission is adopting this provision as proposed. Specifically, the Commission is adopting a limited exemption to provide for transition into these position limit rules for persons with existing § 1.47 exemptions under final § 151.9(d). This limited exemption is also designed to limit market disruptions as market participants transition to these position limit rules. However, the Commission will only apply this relief to market participants with existing § 1.47 exemptions because the transitional nature of providing such relief dictates that the Commission should not extend a general exemption for persons to manage their existing swap book outside of § 1.47 exemptions. Further, since the proposed non-spot month class limits are not being adopted, such a person may net positions across futures and swaps in a Referenced Contract. This largely mitigates the need for a risk management exemption.

J. Commodity Index or Commodity-Based Funds

The definition of ''Referenced Contract'' in § 151.1 expressly excludes commodity index contracts. A commodity index contract is defined as a contract, agreement, or transaction ''that is not a basis or any type of spread contract, [and] based on an index comprised of prices of commodities that are not the same nor substantially the same.'' Thus, by the terms of this provision, contracts with diversified commodity reference prices are excluded from the proposed position limit regime. As a result, single commodity index contracts fall within the scope of the proposal. Further, under amended section 4a(a)(1) of the CEA, the Commission is empowered to establish position limits by ''group or class of traders,'' and new section 4a(a)(7) gives the Commission authority to provide exemptions from those position limits to any ''person or class of persons.''

A number of commenters argued that commodity index funds (''CIFs'') should be exempted from the final rulemaking for position limits.[292] DB Commodity Services argued that passive CIFs apply ''zero net buying pressure across the commodity term structure.''[293] Gresham Investments argued that ''unleveraged, solely exchange-traded, fully transparent, clearinghouse guaranteed'' CIFs that pose ''no systemic risk'' should be treated differently than highly leveraged futures traders, who pose a continuing systemic risk to the commodity markets.[294] Three commenters argued that CIFs increase market liquidity for bona fide hedgers.[295] Finally, BlackRock also argued that there is no empirical evidence supporting a causal connection between CIFs and commodity price volatility.[296] Senator Blanche Lincoln argued that position limits should not apply to diversified, unleveraged index funds because they provide ''necessary liquidity to assist in price discovery and hedging for commercial users * * * [and] are an effective way [for] investors to diversify their portfolios and hedge against inflation.''[297] Further, Senator Lincoln opined that that the Commission should distinguish between ''trading activity that is unleveraged or fully collateralized, solely exchange-traded, fully transparent, clearinghouse guaranteed, and poses no systemic risk and highly leveraged swaps trading in its implementation of position limits.''[298]

Commenters also submitted studies regarding index traders. In particular, several studies conducted by two agricultural economists were highlighted by commenters. The authors of the studies contended that there is no evidence that the influx of index fund trading unduly influences prices.[299] Commenters also cited the Commission's 2008 Staff Report on Commodity Index Traders and Swap Dealers, in which Commission staff provided an overview for the public regarding the participation of these types of traders in commodity derivatives markets.[300]

Other commenters, however, asserted that CIFs should be subject to special, more restrictive position limits.[301] Some of these commenters argued that the presence of CIFs upsets the price discovery function of the market because investors buy interests in CIFs without regard to the market fundamentals price.[302] The Air Transport Association of America recommended that the Commission undertake a study to analyze and determine the effect of such passive, long-only traders on the price discovery function of the markets.[303]

Some studies opined that the recent influx of CIF trading has caused an increase in prices that is not explained by market fundamentals alone.[304] For

[291] The Commission also notes that absent this limitation on pre-existing positions, any entity that rolls futures positions would in effect not be subject to position limits because the subsequent positions would be subject to exemption.

[292] CL–BlackRock *supra* note 21 at 15; CL–DB *supra* note 153 at 2–4; CL–PIMCO *supra* note 21 at 9; ETF Securities on March 28, 2011 (''CL–ETF Securities'') at 3–4; and CL–SIFMA AMG I *supra* note 21 at 13.

[293] CL–DBCS *supra* note 247 at 3.

[294] CL–Gresham *supra* note 153 at 2, 6–7.

[295] CL–BlackRock *supra* note 21 at 15; CL–PIMCO *supra* note 21 at 10 (citing Sen. Lincoln's remarks on index funds); and CL–DBCS *supra* note 247 at 3–4.

[296] CL–BlackRock *supra* note 21 at 15.

[297] *See* Senator Lincoln (''Sen. Lincoln'') on Dec. 16, 2010 (''CL–Sen. Lincoln'') at 1–2 (''I urge the CFTC not to unnecessarily disadvantage market participants that invest in diversified and unleveraged commodity indices.'')

[298] *Id.*

[299] Irwin, Scott and Dwight Sanders ''The Impact of Index and Swap Funds on Commodity Futures Markets'', OECD Food, Agriculture, and Fisheries Working Papers, (2010); Sanders, Dwight and Scott Irwin ''A Speculative Bubble in Commodity Futures Prices? Cross-Sectional Evidence'', Agricultural Economics, (2010); Sanders, Dwight, Scott Irwin, and Robert Merrin ''The Adequacy of Speculation in Agricultural Futures Markets: Too Much of a Good Thing?'' University of Illinois at Urbana-Champaign, (2008).

[300] U.S. Commodity Futures Trading Commission ''Staff Report on Commodity Swap Dealers and Index Traders with Commission Recommendations'' (2008). While the majority of the report is broad in scope and serves as a guide to the special calls issued to swap dealers and index traders by the Commission, there is a discussion of the impact of these types of participants (generally considered to be speculators in most markets). Specifically, the report looks at the vast increase in notional value of NYMEX crude oil futures contracts in relationship to the vast increase in commodity index investment from December 2007 to June 2008. Staff concluded that the increase in notional value is due to the appreciation of existing positions, and not the influx of new money into the market, citing the observation that the actual number of futures-equivalent contracts declined over the same period.

[301] CL–ABA *supra* note 150 at 4; CL–ATAA *supra* note 94 at 15; CL–ATA *supra* note 81 at 4,5; CL–PMAA/NEFI *supra* note 6 at 12–14; CL–ICPO *supra* note 20 at 1; CL–Better Markets *supra* note 37 at 71 (''limiting commodity index funds to 10 percent of total market open interest would likely have significant beneficial effects [on excessive speculation]''); and International Pizza Hut Franchise Holders Association (IPHFHA'') on March 24, 2011 (''CL–IPHFHA'') at 1. There were 6,074 form comment letters that urged the Commission to adopt ''lower speculative position limits for passive, long-only traders.''

[302] CL–PMAA/NEFI *supra* note 6 at 12–13; CL–Delta *supra* note 20 at 7–8; CL–Better Markets *supra* note 37 at 35–36; and Industrial Energy Consumer of America (''IECA'') on March 28, 2011 (''CL–IECA'') at 2.

[303] CL–ATAA *supra* note 94 at 15.

[304] Tang, Ke and Wei Xiong ''Index Investing and the Financialization of Commodities'', Working Paper, Department of Economics, Princeton

example, one study argued that index speculators have been at least partially responsible for the tripling of commodity futures prices over the last five years.[305]

Regardless of whether a CIF is non-diversified or diversified, the Commission did not propose to impose different position limits on CIFs or to exempt CIFs from position limits. In addition to considering comments regarding the role of CIFs in commodity derivatives markets, the Commission has reviewed and evaluated studies cited by commenters presenting conflicting views on the effect of certain groups of index traders.[306] Historically, the Commission has applied position limits to individual traders rather than a group or class of traders, and does not have a similar level of experience with respect to group or class limits as it has with position limits for individual traders. Therefore, the Commission believes more analysis is required before the Commission would impose a separate position limit regime, or establish an exemption, for a group or class of traders, including CIFs.[307] The Commission welcomes further submissions of studies to assist in subsequent rulemakings on the treatment of various groups or classes of speculative traders.

K. Exchange Traded Funds

CME commented that the Commission should coordinate its position limit policy with the Securities and Exchange Commission (''SEC'') in order to avoid encouraging market participants to replace their commodity derivatives exposures with physical commodity exchange-traded fund (''ETF'') exposures.[308] As previously stated, the Commission believes that the final rules will ensure sufficient market liquidity for bona fide hedgers in accordance with CEA section 4a(a)(3)(B)(iii). With respect to the potential increase in ETF exposures, the Commission notes that such products are not within the scope of this rulemaking.

L. Position Visibility

The Proposed Rule established an enhanced reporting regime for traders who hold or control positions in certain energy and metal Referenced Contracts above a specified number of net long or net short positions.[309] These ''position visibility levels'' are set below the proposed non-spot-month position limit levels. A trader's positions in all-months-combined for listed Referenced Contracts would be aggregated under the Proposed Rule, including bona fide hedge positions. Once a trader crosses a proposed position visibility level, the trader would have to file monthly reports with the Commission that generally capture the trader's physical and derivatives portfolio in the same commodity and substantially same commodity as that underlying the Referenced Contract.[310]

The general purpose behind the position visibility levels was to enhance the Commission's surveillance functions to better understand the largest traders for energy and metal Referenced Contracts, and to better enable the Commission to set and adjust subsequent position limits, as appropriate.[311]

Commenters were divided on the utility of position visibility levels. A number of commenters supported the proposed visibility levels, with some urging the Commission to expand their application to agricultural contracts.[312] Many of the supportive commenters stated that the Commission should extend the position visibility regime to agricultural Referenced Contracts.[313] At least one commenter specifically requested that the Commission expand the position visibility levels to metal-based ETFs as well as contracts traded on the London Metals Exchange as a method to deter excessive speculation and manipulation.[314]

Several commenters stated that the enhanced reporting requirements would be onerous to implement along with other Dodd-Frank Act requirements with little benefit to combating excessive speculation.[315] Certain commenters also asserted that the reporting requirements would disproportionately impact bona fide hedgers because such entities would have to produce reports surrounding their hedging activity whereas a speculative trader would not have to produce similar reports.[316] One commenter pointed out that the Commission could instead utilize its special call authority under § 18.05 to receive data similar to the data to be reported in the position visibility regime.[317] One commenter argued that the reporting frequency should be semi-annual as opposed to monthly because the Commission would not need to analyze this additional data on a monthly basis.[318] Another commenter assumed that the reporting requirements would be daily and therefore requested the Commission alter the requirement to monthly.[319] Some commenters opined that the scope of the position visibility reports was vague because it required reporting of uncleared swap positions in substantially the same commodity.[320]

Commenters also argued that the Commission should alter the position visibility levels to a position accountability regime similar to the rules on DCMs. However, among the commenters who supported converting position visibility levels to position accountability levels, there were two distinct approaches. Some commenters wanted the Commission to implement position accountability levels as an interim measure until the Commission

University, (2010).; Mou, EthanY. ''Limits to Arbitrage and Commodity Index Investment: Front-Running the Goldman Roll'', Working Paper, Columbia University, (2010).; Gilbert, Christopher L. ''Speculative Influences on Commodity Futures Prices, 2006–2008'', Working Paper, Department of Economics, University of Trento, Italy, (2009).; Gilbert, Christopher L. ''How to Understand High Food Prices'', Journal of Agricultural Economics, 61(2): 398–425. (2010).

[305] Masters, Michael and Adam White ''The Accidental Hunt Brothers: How Institutional Investors are Driving up Food and Energy Prices'', White Paper, (2008). ''As hundreds of billions of dollars have poured into the relatively small commodities futures markets, prices have risen dramatically. Index Speculators working through swaps dealers have been the single biggest source of new speculative money. This has driven prices far beyond the levels that supply and demand would indicate, and has done tremendous damage to our economy as a result.''

[306] In addition, the Commission has reviewed all other studies submitted by commenters; a detailed description can be found in Section III of this release.

[307] In this regard, the lack of consensus in the studies submitted demonstrates the need for additional analysis.

[308] CL–CME I *supra* note 8 at 20.

[309] *See* Proposed Rule 151.6. The position visibility levels did not apply to agricultural commodity contracts.

[310] While the proposed position visibility regime would only trigger reporting requirements, the preamble did note that trading at or near such levels was ''in no way intended to imply that positions at or near such levels cannot constitute excessive speculation or be used to manipulate prices or for other wrongful purposes.'' *See* Proposed Rule at 4759.

[311] 75 FR 4752, 4761–62, Jan. 26, 2011.

[312] *See e.g.,* CL–Prof. Greenberger *supra* note 6 at 18; CL–AFR *supra* note 17 at 8; and CL–AIMA *supra* note 35 at 4.

[313] *See e.g.,* CL–FWW *supra* note 81 at 15.

[314] *See e.g.,* Vandenberg & Feliu LLP (''Vandenberg'') on March 28, 2011 (''CL–Vandenberg'') at 2–3.

[315] *See e.g.,* CL–BGA *supra* note 35 at 20–21; CL–FIA I *supra* note 21 at 13; CL–EEI/EPSA *supra* note 21 at 6 (EEI alternatively argued that the Commission should raise the threshold levels for certain contracts if the Commission retained the visibility regime); CL–MFA *supra* note 21 at 3; CL–Utility Group *supra* note 21 at 13–14; CL–NREC/AAPP/ALLPC *supra* note 266 at 12; CL–USCF *supra* note 153 at 11; and CL–WGCEF *supra* note 35 at 23. Some commenters expressed concern that the Commission would not have sufficient resources to review the data, and therefore the cost of compliance would not produce a benefit. *See e.g.,* CL–MFA *supra* note 21 at 3.

[316] *See e.g.,* CL–EEI/EPSA *supra* note 21 at 6; and CL–WGCEF *supra* note 35 at 23.

[317] *See e.g.,* CL–BGA *supra* note 35 at 20–21.

[318] *See e.g.,* CL–USCF *supra* note 153 at 11.

[319] *See e.g.,* CL–NGFA *supra* note 72 at 5.

[320] *See e.g.,* CL–AGA *supra* note 124 at 12.

could fully implement hard position limits outside of the spot-month.[321] The second group requested that the Commission eliminate visibility levels and position limits, and in their place implement position accountability levels.[322]

The Commission is adopting the position visibility proposal with certain modifications in response to comments. The Commission continues to believe that position visibility levels represent an important surveillance tool in the metal and energy Referenced Contracts because the Commission does not anticipate that the number of traders with positions in excess of the limits for metal and energy Referenced Contracts will constitute a significant segment of the market. As such, the Commission would not receive a large number of bona fide hedging reports and other data for many traders in excess of the position limit, and the position visibility levels would improve the Commission's ability to monitor the positions of the largest traders in the markets. In this regard, the Commission anticipates that more traders in the agricultural Referenced Contracts will be above the anticipated position limits, and therefore, the Commission does not currently anticipate a similar need to apply the position visibility levels to agricultural Referenced Contracts.

To accommodate compliance cost concerns raised by some commenters the position visibility level will be raised to approximately 50 percent of the projected aggregate position limit (based on current futures and swaps open interest data), with the exception of NYMEX Light Sweet Crude Oil (CL) and NYMEX Henry Hub Natural Gas (NG) Referenced Contracts where the levels have been set lower to approximate the point where ten traders, on an annual basis, would be subject to position visibility reporting requirements. The Commission believes that this increase is appropriate in order to reduce the number of traders burdened by the associated reporting obligations. In addition, under § 151.6(b)(2)(ii), the Commission will require position visibility reports to include uncleared swaps in Referenced Contracts, but will not require reporting of swaps in substantially the same commodity.[323] The position visibility rule will become effective on the date that new Federal spot month limits become effective. Additionally, the Commission has eliminated the requirement to submit 404A filings under § 151.6 in order to further reduce the compliance burden for firms reporting under that provision. The Commission believes it will receive sufficient information on the cash market activity for general surveillance purposes through 404 filings under § 151.6(c).[324]

The Commission has eliminated the separate 402S filing and will gather information on uncleared swaps through the revised 401 filing. The revised 401 filing will provide information for general surveillance purposes in light of the data management issues discussed in II.C. of this release.

The Commission has also reduced the required frequency of reporting on the 401 and 404 filings. The Commission may request more specific data, either in terms of data granularity (*e.g.,* a break-out of data based on expirations) or with respect to a trader's position on a specific date or dates under its existing authority under Commission regulations 18.05 and 20.6. The Commission clarifies that 401 and 404 filings required under § 151.6 are to reflect the reporting person's relevant positions as of the first business Tuesday of a calendar quarter and on the date on which the person held the largest net position in excess of the level in all months. The Commission would require such a filing to be made within ten business days of the last day of the quarter in which the trader held a position exceeding position visibility levels.

M. International Regulatory Arbitrage

Section 4a(a)(2)(C) of the CEA, as amended by section 737 of the Dodd-Frank Act, requires the Commission to ''strive to ensure that trading on foreign boards of trade in the same commodity will be subject to comparable limits and that any limits to be imposed by the Commission will not cause price discovery in the commodity to shift to trading on the foreign boards of trade.'' The Commission received several comments expressing concerns regarding the regulatory arbitrage opportunities that might arise as a result of the imposition of position limits.[325]

The U.S. Chamber of Commerce stated that ''hasty and ill-conceived limits on the U.S. derivatives markets will undoubtedly lead to a significant migration of market participants to less-regulated overseas markets.'' [326] Similarly, ISDA/SIFMA stated that a permanent position limit regime should be postponed until the Commission has fully consulted with its counterparts around the globe about harmonizing limits and phasing them in simultaneously, so as to ensure that position limits imposed on U.S. markets do not shift business offshore.[327] Accordingly, ISDA/SIFMA strongly urged ''the CFTC to work with foreign regulators to ensure that foreign commodity market participants are subject to position limits that are comparable to those imposed on U.S. market participants.'' [328] Michael Greenberger, on the other hand, opined that the proposed position limits would result in minimal international regulatory arbitrage because (i) The Commission has extraterritorial jurisdiction reach under Dodd-Frank Act section 722, (ii) many swap dealers would be required to register under the Dodd-Frank Act thereby ensuring that the Commission would have jurisdiction over them, (iii) other authorities are working to harmonize their rules and have expressed a hostility to the financialization of commodity markets, and (iv) many other authorities have shown a willingness to impose additional requirements on expatriate U.S. banks.[329]

The Commission agrees that it should seek to avoid regulatory arbitrage and participate in efforts to raise regulatory standards internationally. The Commission has worked to achieve that general goal through its participation in the International Organization of Securities Commissions (''IOSCO'').

[321] *See e.g.,* CL–PMAA/NEFI *supra* note 6 at 15; CL–ATAA *supra* note 94 at 5, 16; CL–APGA *supra* note 17 at 8–9; and CL–Delta *supra* note 20 at 11.

[322] *See e.g.,* CL–BlackRock *supra* note 21 at 18–19; and CL–CME I *supra* note 8 at 6. *See also,* CL–FIA I *supra* note 21 at 13; and CL–EEI/EPSA *supra* note 21 at 10.

[323] Proposed § 151.6(c) required reporting of uncleared swaps in substantially the same commodity.

[324] The Commission has also amended § 151.6(b)(1) to require the reporting of the dates, instead of the total number of days, that a trader held a position exceeding visibility levels.

[325] *See e.g.,* CL–BlackRock *supra* note 21 at 18 (''The variability of position limits from year to year also will create uncertainty for market participants as to what limits will apply to their long-term trading strategies, causing some participants to shift their commodity-risk positions to markets with no limits at all or possibly even fixed limits.''); and CL–ISDA/SIFMA *supra* note 21 at 24–25 (''* * * we believe that the Proposed Rules will likely result in market participants, especially those that operate outside the U.S., shifting their trading activity to non- U.S. markets.'').

[326] CL–USCOC *supra* note 246 at 4.

[327] CL–ISDA/SIFMA *supra* note 21 at 24–25 (''* * * we believe that the Proposed Rules will likely result in market participants, especially those that operate outside the U.S., shifting their trading activity to non-U.S. markets.'')

[328] *Id.*

[329] CL–Prof. Greenberger *supra* note 6 at 20.

Most recently, the Commission assisted in the development of an international consensus on principles for the regulation and supervision of commodity derivatives markets, which included a requirement that market authorities should have the authority, among other things, to establish ex-ante position limits, at least in the delivery month.[330] The Commission intends, through its activities within IOSCO, to seek further elaboration on the degree to which commodity derivatives market authorities implement those principles, including the extent to which position limits are been imposed.

The Commission rejects the view, however, that section 4a(a)(2)(C) of the CEA prohibits Commission rulemaking unless and until there is uniformity in position limit policies in the United States and other major market jurisdictions. Such a view would subordinate the explicit statutory directive to impose position limits as a means to address excessive speculation in U.S. derivatives markets to a potentially lengthy period of policy negotiations with foreign regulators.

The Commission also rejects the view suggested in some of the comment letters that it is a foregone conclusion that the mere existence of differences in position limit policies will inevitably drive trading abroad. The Commission's prior experience in determining the competitive effects of regulatory policies reveals that it is difficult to attribute changes in the competitive position of U.S. exchanges to any one factor. For example, prior concerns with regard to the competitive effect on U.S. contract markets of alleged lighter regulation abroad led the CFTC to study those concerns both in 1994, pursuant to a congressional directive,[331] and again in 1999.[332] In both cases, the Commission's staff reports concluded that differences in regulatory regimes between various countries did not appear to have been a significant factor in the competitive position of the world's leading exchanges.[333]

Nonetheless, the Commission takes seriously the need to avoid disadvantaging U.S. futures exchanges and will monitor for any indication that trading is migrating away from the United States following the establishment of the position limit structure set forth in this rulemaking.[334]

N. Designated Contract Market and Swap Execution Facility Position Limits and Accountability Levels

For contracts subject to Federal position limits imposed under section 4a(a) of the CEA, sections 5(d)(5)(B) and 5h(f)(6)(B) require DCMs and SEFs that are trading facilities,[335] respectively, to set and enforce speculative position limits at a level no higher than those established by the Commission. Section 4a(a)(2) of the CEA, in turn, directs the Commission to set position limits on ''physical commodities other than excluded commodities.'' Section 5(d)(5)(A) of the CEA requires that DCMs set, ''as is necessary and appropriate, position limitations or position accountability for speculators'' for each contract executed pursuant to their rules. A similar duty is imposed on SEFs that are trading facilities under section 5h(f)(6)(A) of the CEA.

1. Required DCM and SEF Position Limits for Referenced Contracts

Proposed § 151.11(a) would have required DCMs and SEFs to set spot month, single month, and all-months position limits for all commodities, with exceptions for securities futures and some excluded commodities. Under proposed § 151.11(a)(1), DCMs and SEFs would be required to set additional, DCM or SEF spot-month and non-spot-month position limits for Referenced Contracts at a level no higher than the Federal position limits established pursuant to proposed § 151.4. For other contracts (including other physical commodity contracts), under proposed § 151.11(a)(2), DCMs and SEFs would be required to set position limits utilizing the Commission's historic approach to position limits.

Shell requested that if the Commission adopts Federal spot month limits, exchange-based position limits should be eliminated because these limits will be redundant, at best, and may cause unintended apportionment of trading across exchanges, at worst.[336] Several other commenters opined that the Commission should require exchanges to set spot month limits and to refrain from setting Federal position limits.[337]

The Commission has determined, consistent with the statute and the proposal, to require the establishment of position limits by DCMs and SEFs for Referenced Contracts.[338] As discussed above under II.A, the Commission has been directed under section 4a(a)(2) of the CEA to establish position limits on physical commodity DCM futures and options contracts and has been granted discretion to determine the specific levels. The Commission has exercised this discretion by imposing federally-administered position limits under § 151.4 for 28 ''Referenced Contract'' physical commodity derivatives markets and under § 151.11 by directing DCMs and SEFs to establish methodologically similar position limits for Referenced Contracts.[339] While DCM or SEF limits are not administered by the Commission, the Commission may nonetheless enforce trader compliance with such limits as violations of the Act.[340] The Commission did not propose federally-administered position limits over other physical commodity

[330] *See* Principles for the Regulation and Supervision of Commodity Derivatives Markets, IOSCO Technical Committee (2011).

[331] The Futures Trading Practices Act of 1992 (''FTPA'') required the CFTC to study the competitiveness of boards of trade over which it has jurisdiction compared with the boards of trade over which ''foreign futures authorities'' have jurisdiction. The Commission submitted its report on this issue, ''A Study of the Global Competitiveness of U. S. Futures Markets'' (''1994 Study''), to the Senate and House agriculture committees in April 1994.

[332] The Global Competitiveness of U.S. Futures Markets Revisited, CFTC Division of Economic Analysis (November 1999) *http://www.cftc.gov/dea/compete/deaglobal_competitiveness.htm.*

[333] CFTC press release #4333–99F (November 4, 1999) *http://www.cftc.gov/opa/press99/opa4333–99.htm* Among other things, the 1999 report concluded that the U.S. share of total worldwide futures and option trading activity appears to be stabilizing as the larger foreign markets have matured. As in 1994, the most actively traded foreign products tend to fill local or regional risk management needs and few products offered by foreign exchanges directly duplicate products offered by U.S. markets; and the increased competition among mature segments of the global futures industry, particularly in Europe, may reflect industry restructuring and the introduction of new technologies, particularly electronic trading.

[334] As discussed above in II.E., section 719(a) of the Dodd-Frank Act directs the Commission to study the ''effects (if any) of the positions limits imposed pursuant to [section 4a] on excessive speculation and on the movement of transactions'' from DCMs to foreign venues and to submit a report on these effects to Congress within 12 months after the imposition of position limits. This study will be conducted in consultation with DCMs. *See* Dodd-Frank Act, *supra* note 1, section 719(a).

[335] All references to ''SEFs'' below are to SEFs that are trading facilities.

[336] CL–Shell *supra* note 35 at 5–6.

[337] *See e.g.,* CL–ICE I *supra* note 69 at 6–8 (Cash-settled contract limits should apply to each exchange-traded contract separately and there should not be an aggregate spot-month limit.); CL–DB *supra* note 153 at 9–10; and CL–Centaurus *supra* note 21 at 4.

[338] As discussed below in II.M.3, the Commission has recognized an arbitrage exemption for registered entity limits for all but physical-delivery contracts in the spot month. This is consistent with the Commission's approach on non-spot month class limits as it ensures that registered entity limits do not create a marginal incentive to establish a position in a class of otherwise economically equivalent contracts outside of the spot month.

[339] The Commission notes that under Core Principle 1 for DCMs and SEFs, the Commission may ''by rule or regulation'' prescribe standards for compliance with Core Principles. Sections 5(d)(1)(B) and 5h(f)(1)(B) of the CEA, 7 U.S.C. 7(d)(1)(B), 7b–3(f)(1)(B).

[340] *See* section 4a(e) of the CEA, 7 U.S.C. 6a(e).

contracts and intends to do so as practicable in the future. In the interim, the Commission will rigorously enforce DCM and SEF compliance with Core Principles 5 and 6.

The Commission notes that section 4a(a)(2) of the CEA requires the Commission to establish speculative position limits on physical commodity DCM contracts. This requirement does not extend to SEF contracts. The Commission has determined that SEF limits for physical commodity contracts are ''necessary and appropriate'' because the policy purposes effectuated by establishing such limits on DCM contracts are equally present in SEF markets.[341] The Commission notes that the Proposed Rules would have required SEFs to establish limits for all physical commodity derivatives under proposed § 151.11(a).[342] Accordingly, the Commission has determined to establish essentially identical standards for establishing position limits (and accountability levels) for DCMs and SEFs.

Under § 151.11(a), the Commission requires DCMs and SEFs to establish spot-month limits for Referenced Contracts at levels no greater than 25 percent of estimated deliverable supply for the underlying commodity and no greater than the limits established under § 151.4(a)(1).

The requirement in proposed § 151.11(a)(2) for position limits for contracts at designation has been modified in § 151.11(b)(3) in three important ways. First, consistent with the congressional mandate to establish position limits on all DCM physical commodity contracts, the Commission is requiring that DCMs (and SEFs by extension) [343] establish position limits for all physical commodity contracts. Second, the Commission has clarified this provision to apply to new contracts offered by DCMs and SEFs. The Commission has further clarified that it will be an acceptable practice that the notional quantity of the contract subject to such limits corresponds to a notional quantity per contract that is no larger than a typical cash market transaction in the underlying commodity. For example, if a DCM or SEF offers a new physical commodity contract and sets the notional quantity per contract at 100,000 units while most transactions in the cash market for that commodity are for a quantity of between 1,000 and 10,000 units and exactly zero percent of cash market transactions are for 100,000 units or greater, then the notional quantity of the derivatives contract offered by the DCM or SEF would be atypical. This clarification is intended to deter DCMs and SEFs from setting non-spot-month position limits for new contracts at levels where they would constitute non-binding constraints on speculation through the use of an excessively large notional quantity per contract. This clarification is not expected to result in additional marginal cost because, among other things, it reflects current Commission custom in reviewing new contracts and is an acceptable practice for Core Principle compliance and not a requirement per se for DCMs or SEFs.

Finally, the Commission in the preamble to the Proposed Rule indicated that a DCM or SEF could elect to establish position accountability levels in lieu of position limits if the open interest in a contract was less than 5,000 contracts.[344] The Commission did not, however, provide for this in the Proposed Rule's text. One commenter specifically supported the position taken by the Commission in the Proposed Rule's preamble because it recognized that position accountability may be more appropriate for certain contracts with lower levels of open interest.[345]

The Commission clarifies that it is not adopting the preamble discussion for low open interest contracts. Rather, final § 151.11(b)(3) provides that it shall be an acceptable practice to provide for speculative limits for an individual single-month or in all-months-combined at no greater than 1,000 contracts for non-energy physical commodities and at no greater than 5,000 contracts for other commodities.[346]

2. DCM and SEF Accountability Levels for Non-Referenced and Excluded Commodities

Under proposed § 151.11(c), consistent with current DCM practice, DCMs and SEFs have the discretion to establish position accountability levels in lieu of position limits for excluded commodities.[347] DCMs and SEFs could impose position accountability rules in lieu of position limits only if the contract involves either a major currency or certain excluded commodities (such as measures of inflation) or an excluded commodity that: (1) Has an average daily open interest of 50,000 or more contracts, (2) has an average daily trading volume of 100,000 or more contracts, and (3) has a highly liquid cash market.

Under final § 151.11(c)(1), the Commission provides that the establishment of position accountability rules are an acceptable alternative to position limits outside of the spot month for physical commodity contracts when a contract has an average month-end open interest of 50,000 contracts and an average daily volume of 5,000 contracts and a liquid cash market, consistent with current acceptable practices for tangible commodity contracts. With respect to excluded commodities, consistent with the current DCM practice, DCMs and SEFs may provide for exemptions from their position limits for ''bona fide hedging.'' The term ''bona fide hedging,'' as used with respect to excluded commodities, would be defined in accordance with amended § 1.3(z).[348] Additionally, consistent with the current DCM practice, DCMs and SEFs could continue to provide exemptions for ''risk-reducing'' and ''risk-management'' transactions or positions consistent with existing Commission guidelines.[349] Finally, though the Commission is removing the procedure to apply to the Commission for bona fide hedge exemptions for non-enumerated transactions or positions under § 1.3(z)(3), the Commission will continue to recognize prior Commission determinations under that section, and DCMs and SEFs could recognize non-enumerated hedge transactions subject to Commission review.

3. DCM and SEF Hedge Exemptions and Aggregation Rules

Final §§ 151.11(e) and 151.11(f)(1)(i) require DCMs and SEFs to follow the same account aggregation and bona fide exemption standards set forth by §§ 151.5 and 151.7 with respect to exempt and agricultural commodities (collectively ''physical'' commodities). Section 151.11(f)(2) requires traders seeking a hedge exemption to ''comply with the procedures of the designated

[341] *See* Core Principle 6 for SEFs, section 5h(f)(6)(A) of the CEA, 7 U.S.C. 7b–3(f)(6)(A).

[342] The Commission further notes that it did not receive any comments on this specific proposed requirement for SEFs.

[343] As discussed above, the Commission has determined that SEF limits for physical commodity contracts are ''necessary and appropriate'' in order to effectuate the policy purposes underlying limits on DCM contracts.

[344] 76 FR at 4752, 4763.

[345] CL–AIMA *supra* note 35 at 6.

[346] Proposed § 151.11(a)(2) and Final § 151.11(b)(3).

[347] *See* Section 1a(19) of the Act, 7 U.S.C. 1a(19).

[348] *See* § 151.11(d)(1)(ii) of these proposed regulations. As explained in section G of this release, the definition of bona fide hedge transaction or position contained in § 4a(c)(2) of the Act, 7 U.S.C. 6a(c)(2), does not, by its terms, apply to excluded commodities.

[349] *See* Clarification of Certain Aspects of Hedging Definition, 52 FR 27195, Jul. 20, 1987; and Risk Management Exemptions From Speculative Position Limits Approved under Commission regulation 1.61, 52 FR 34633, Sept. 14, 1987.

contract market or swap execution facility for granting exemptions from its speculative position limit rules.''

MGEX commented on the role of DCMs and SEFs in administering bona fide hedge exemptions. MGEX noted that while § 151.5 contemplated a Commission-administered bona fide hedging regime, proposed § 151.11(e)(2) would require persons seeking to establish eligibility for an exemption to comply with the DCM's or SEF's procedures for granting exemptions. MGEX recommended that the Commission be the primary entity for administering bona fide hedge exemptions and that when necessary that information be shared with the necessary DCMs and SEFs.

With respect to a DCM's or SEF's duty to administer hedge exemptions, the Commission intended that DCMs and SEFs administer their own position limits under § 151.11. Accordingly, under its rulemaking, the Commission is requiring that DCMs and SEFs create rules and procedures to allow traders to claim a bona fide hedge exemption, consistent with § 151.5 for physical commodity derivatives and § 1.3(z) for excluded commodities. Section 151.11 contemplates that DCMs and SEFs would administer their own bona fide hedge exemption regime in parallel to the Commission's regime. Traders with a hedge position in a Referenced Contract subject to DCM or SEF limits will not be precluded from filing the same bona fide hedging documentation, provided that the hedge position would meet the criteria of Commission regulation 151.5 for both the purposes of Federal and DCM or SEF position limits.

Section 4a(a) of the CEA provides the Commission with authority to exempt from the position limits or to impose different limits on spread, straddle, or arbitrage trades. Current § 150.4(a)(3) recognizes these exemptions in the context of the single contract position limits set forth under § 150.2. MFA opined that the Commission should restore the arbitrage exemptions because they are central to managing risk and maintaining balanced portfolios.[350]

The Commission has determined to re-introduce a version of this exemption in the final rulemaking in response to commenters that opined directly on this issue [351] as well as those that argued against the imposition of the proposed class limits, as discussed above in II.D.5. The Commission has therefore introduced an arbitrage exemption for DCM or SEF limits under § 151.11(g)(2) that allows traders to claim as an offset to their positions on a DCM or SEF positions in the same Referenced Contracts or in an economically equivalent futures or swap position.[352] This arbitrage exemption does not, however, apply to physical-delivery contracts in the spot month. The Commission has reintroduced this exemption, available to those traders that demonstrate compliance with a DCM or SEF speculative limit through offsetting trades on different venues or through OTC swaps in economically equivalent contracts.

4. DCM and SEF Position Limits and Accountability Rules Effective Date

Section 151.11(i) provides that generally the effective date for the position limits or accountability levels described in § 151.11 shall be made effective sixty days after the term ''swap'' is further defined. The Commission has set this effective date to coincide with the effective date of the spot-month limits established under § 151.4. The one exception to this general rule is with respect to the acceptable guidance for DCMs and SEFs in establishing position limits or accountability rules for non-legacy Referenced Contracts executed pursuant to their rules prior to the implementation of Federal non-spot-month limits on such Referenced Contracts. Under § 151.11(j), the acceptable practice for these contracts during this transition phase will be either to retain existing non-spot-month position limits or accountability rules or to establish non-spot-month position limits pursuant to the acceptable practice described in § 151.11(b)(2) (*i.e.,* to impose limits based on ten percent of the average combined futures and delta-adjusted option month-end open interest for the most recent two calendar years up to 25,000 contracts with a marginal increase of 2.5 percent thereafter) based on open interest in the contract and economically equivalent contracts traded on the same DCM or SEF.

O. Delegation

Proposed § 151.12 would have delegated certain of the Commission's proposed part 151 authority to the Director of the Division of Market Oversight and to other employee or employees as designated by the Director. The delegated authority would extend to: (1) Determining open interest levels for the purpose of setting non-spot-month position limits; (2) granting an exemption relating to bona fide hedging transactions; and (3) providing instructions, determining the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under proposed part 151. The purpose of this delegation provision was to facilitate the ability of the Commission to respond to changing market and technological conditions and thus ensure timely and accurate data reporting.

The Commission requested comments on whether determinations of open interest or deliverable supply should be adopted through Commission orders. With respect to spot-month position limits, a few commenters contended that spot month limits should be set by rulemaking.[353] With respect to non-spot-month position limits, several commenters submitted that such limits should be calculated by rulemaking not by annual recalculation so that market participants can have sufficient advance notice and opportunity to comment on changes in position limit levels.[354] CME, for example, commented that the Commission should set initial limits through this rulemaking and make subsequent limit changes subject to notice and comment, unless the formula's automatic annual application would result in higher limits.[355] BlackRock commented that the Commission could mitigate the adverse effects of volatile limit levels by setting limits subject to notice and comment.[356]

The Commission has determined to adopt proposed § 151.12 substantially unchanged with some additional delegations provided for in the final rule text. Under § 151.4(b)(2)(i)(A), the Commission has addressed concerns about the volatility of non-spot-month position limit levels for non-legacy Referenced Contracts by providing for automatic adjustments based on the higher of 12 or 24 months of aggregate open interest data. As discussed earlier in this release, the Commission believes that adjustments to Referenced Contract spot month and non-legacy Referenced

[350] CL–MFA *supra* note 21 at 18.

[351] *See* the discussion of non-spot month class limits under II.D.5 and II.F.1 *supra* discussing comments expressing concern that arbitrage exemptions were not recognized in the proposal. *See e.g.,* CL–ISDA/SIFMA *supra* note 21 at 11; and CL–MFA *supra* note 21 at 18. *See also,* CL–Shell *supra* note 35 at 5–6.

[352] *See* section 4a(a)(1) of the CEA, 7 U.S.C. 6a(a)(1).

[353] *See e.g.,* CL–WGCEF *supra* note 35 at 19–20 (proposing a specific schedule for the setting of spot-month position limits by notice and comment); CL–BGA *supra* note 35 at 20. *See also,* CL–ISDA/SIFMA *supra* note 21 at 22.

[354] *See e.g.,* CL–BlackRock *supra* note 21 at 18; CL–CME I *supra* note 8 at 12; CL–NGFA *supra* note 72 at 3; CL–EEI/EPSA *supra* note 21 at 11; CL–KCBT I *supra* note 97 at 3; and CL–WGC *supra* note 21 at 5.

[355] CL–CME I *supra* note 8 at 12.

[356] CL–BlackRock *supra* note 21 at 18.

Contracts non-spot-month position limit levels on a scheduled basis by Commission order provide for a process that is responsive to the changing size of the underlying physical and financial market for the relevant Referenced Contracts respectively.

III. Related Matters

A. Consideration of Costs and Benefits

In this final rulemaking, the Commission is establishing position limits for 28 exempt and agricultural commodity derivatives, including futures and options contracts and the physical commodity swaps that are ''economically equivalent'' to such contracts. The Commission imposes two types of position limits: Limits in the spot-month and limits outside of the spot-month. Generally, this rulemaking is comprised of three main categories: (1) The position limits; (2) exemptions from the limits; and (3) the aggregation of accounts.

Section 15(a) of the CEA requires the Commission to ''consider the costs and benefits'' of its actions in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.[357] The Commission may, in its discretion, give greater weight to any one of the five enumerated areas and may determine that, notwithstanding costs, a particular rule protects the public interest.

In the Notice of Proposed Rulemaking, the Commission stated, ''[t[he proposed position limits and their concomitant limitation on trading activity could impose certain general but significant costs.'' [358] In particular, the Commission noted that ''[o]verly restrictive position limits could cause unintended consequences by decreasing speculative activity and therefore liquidity in the markets for Referenced Contracts, impairing the price discovery process in their markets, and encouraging the migration of speculative activity and perhaps price discovery to markets outside of the Commission's jurisdiction.'' [359] The Commission invited comments on its consideration of costs and benefits, including a specific invitation for commenters to ''submit any data or other information that they may have quantifying or qualifying the costs and benefits of proposed part 151.'' [360]

In consideration of the costs and benefits of the final rules, the Commission has, wherever feasible, endeavored to estimate or quantify the costs and benefits of the final rules; where estimation or quantification is not feasible, the Commission provides a qualitative assessment of such costs and benefits.[361] In this respect, the Commission notes that public comment letters provided little quantitative data regarding the costs and benefits associated with the Proposed Rules.

In the following discussion, the Commission addresses the costs and benefits of the final rules, considers comments regarding the costs and benefits of position limits, and subsequently considers the five broad areas of market and public concern under section 15(a) of the CEA within the context of the three broad areas of this rule: Position limits; exemptions; and account aggregation.

1. General Comments

A number of commenters argued that the Commission did not make the requisite finding that position limits are necessary to combat excessive speculation.[362] Specifically, one commenter argued that the Commission has ignored the wealth of empirical evidence supporting the view that the proposed position limits and related exemptions would actually be counterproductive by decreasing liquidity in the CFTC-regulated markets which, in turn, will increase both price volatility and the cost of hedging especially in deferred months.[363] Similarly, some commenters opposing position limits questioned the benefits that would be derived from speculative limits in all markets or in particular markets.[364] Several commenters denied or questioned that the Commission had demonstrated that excessive speculation exists or that the proposed speculative limits were necessary.[365] Other commenters suggested that speculative limits would be inappropriate because the U.S. derivatives markets must compete against exchanges elsewhere in the world that do not impose position limits.[366] Some commenters argued that even with the provisions concerning contracts on FBOTs, speculators could easily circumvent limits by migrating to FBOTs, and in fact the Proposed Rules could encourage such behavior.[367] Other commenters opined that certain physical commodities, such as gold, should not be subject to position limits due to considerations unique to those particular commodities.[368]

One commenter stated that the Commission's cost estimates did not accurately reflect the true cost to the market incurred as a result of the Proposed Rules because the wage estimates used were inaccurate; this commenter also stated that cost estimates in the PRA section were not addressed in the costs and benefits section of the Proposed Rule.[369]

As discussed above in sections II.A and II.C of this release, in section 4a(a)(1) Congress has determined that excessive speculation causing ''sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity.'' Further, Congress directed that for the purpose of ''diminishing, eliminating, or preventing such burden,'' the Commission ''shall * * * proclaim and fix such [position] limits * * * as the Commission finds are necessary to diminish, eliminate, or prevent such burden.'' [370] New sections 4a(a)(2) and 4a(a)(5) of the CEA contain an express congressional directive that the Commission ''shall'' establish position limits, as appropriate, within an expedited timeframe after the date of enactment of the Dodd-Frank Act. In requiring these position limits, Congress specified in section 4a(a)(3)(B) that in

[357] 7 U.S.C. 19(a).

[358] *See* 76 FR at 4764.

[359] *Id.*

[360] *Id.*

[361] Accordingly, to assist the Commission and the public to assess and understand the economic costs and benefits of the final rule, the Commission is supplementing its consideration of costs and benefits with wage rate estimates based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). The wage estimates the Commission uses are derived from an industry-wide survey of participants and thus reflect an average across entities; the Commission notes that the actual costs for any individual company or sector may vary from the average. In response to comments, the Commission has also addressed its PRA estimates in this Considerations of Costs and Benefits section.

[362] *See e.g.,* CL–CME I *supra* note 8 at 2; and CL–COPE *supra* note 21 at 2–5.

[363] CL–CME I *supra* note 8 at 2. *See also* CL–Blackrock *supra* note 21 at 3.

[364] *See e.g.,* CL–Utility Group *supra* note 21 at 2 (submitting that the compliance burden of the Commission's position limits proposal is not justified by any demonstrable benefits); and CL–COPE *supra* note 21 (stating that there is no predicate for finding federal position limits to be appropriate at this time; and the Position Limits NOPR is overly complex and creates significant and burdensome requirements on end-users).

[365] *See e.g.,* CL–Morgan Stanley *supra* note 21 at 4.

[366] *See e.g.,* CL–CME I *supra* note 8 at 2.

[367] *See e.g.,* CL–USCOC *supra* note 246 at 3; CL–PIMCO, *supra* note 21 at 8; and CL–ISDA/SIFMA, *supra* note 21 at 24.

[368] *See e.g.,* CL–WGC *supra* note 21 at 3.

[369] *See* CL–WGCEF *supra* note 34 at 25–26.

[370] Section 4a(a)(1) of the CEA, 7 U.S.C. 6a(a)(1).

addition to establishing limits on the number of positions that may be held by any person to diminish, eliminate, or prevent excessive speculation, the Commission should also, to the maximum extent practicable, set such limits at a level to ''deter and prevent market manipulation, squeezes and corners,'' ''ensure sufficient market liquidity for bona fide hedgers,'' and ''to ensure that the price discovery function of the underlying market is not disrupted.''

In light of the congressional mandate to impose position limits, the Commission disagrees with comments asserting that the Commission must first determine that excessive speculation exists or prove that position limits are an effective regulatory tool. Section 4a(a) expresses Congress's determination that excessive speculation may create an undue and unnecessary burden on interstate commerce and directs the Commission to establish such limits as are necessary to ''diminish, eliminate, or prevent such burden.'' Congress intended the Commission to act to prevent such burdens before they arise. The Commission does not believe it must first demonstrate the existence of excessive speculation or the resulting burdens in order to take preventive action through the imposition of position limits. Similarly, the Commission need not prove that such limits will in fact prevent such burdens.

In enacting the Dodd-Frank Act, Congress re-affirmed the findings regarding excessive speculation, first enacted in the Commodity Exchange Act of 1936, as well as the direction to the Commission to establish position limits.[371] In the Dodd-Frank Act, Congress also expressly required that the Commission impose limits, as appropriate, to prevent excessive speculation and market manipulation while ensuring the sufficiency of liquidity for bona fide hedgers and the integrity of price discovery function of the underlying market. Comments to the Commission regarding the efficacy of position limits fail to account for the mandate that the Commission shall impose position limits. By its terms, CEA Section 15(a) requires the Commission to consider and evaluate the prospective costs and benefits of regulations and orders of the Commission prior to their issuance; it does not require the Commission to evaluate the costs and benefits of the actions or mandates of Congress.

[371] *See* Commodity Exchange Act of 1936, Pub L. 74–675, 49 Stat. 1491 (1936).

2. Studies

A number of commenters submitted or cited studies to the Commission regarding excessive speculation.[372] Generally, the comments and studies discussed whether or not excessive speculation exists, the definition of excessive speculation, and/or whether excessive speculation has a negative impact on derivatives markets. Some of these studies did not explicitly address or focus on the issue of position limits as a means to prevent excessive speculation or otherwise, while some studies did generally opine on the effect of position limits on derivatives markets.

Thirty-eight of the studies were focused on the impact of speculative activity in futures markets, *i.e.,* how the behavior of non-commercial traders affected price levels.[373] These 38 studies did not provide a view on position limits in general or on the Commission's implementation of position limits in particular. While the Commission reviewed these studies in connection with this rulemaking, the Commission again notes that it is not required to make a finding on the impact of speculation on commodity markets. Congress mandated the imposition of position limits, and the Commission

[372] Twenty commenters cited over 52 studies by institutional, academic, and industry professionals.

[373] *See e.g.,* Anderson, David, Joe L. Outlaw, Henry L. Bryant, James W. Richardson, David P. Ernstes, J. Marc Raulston, J. Mark Welch, George M. Knapek, Brian K. Herbst, and Marc S. Allison, The Agricultural and Food Policy Center Texas A&M University, Research Report 08–1, The Effects of Ethanol on Texas Food and Feed (2008); Antoshin, Sergei, Elie Canetti, and Ken Miyajima, IMF, Global Financial Stability Report, Financial Stress and Deleveraging, Macrofinancial Implications and Policy: Annex 1.2. Financial Investment in Commodities Markets, at 62–66 (2008); Baffes, John, and Tasos Haniotos, World Bank, Washington DC, Policy Research Working Paper 5371, Placing the 2006/08 Commodity Boom into Perspective (2010); Brunetti, Celso, and Bahattin Buyuksahin, CFTC, Working Paper Series, Is Speculation Destabilizing? (2009); Buyuksahin, Bahattin, and Jeff Harris, The Energy Journal, The Role of Speculators in the Crude Oil Market (2011); Buyuksahin, Bahattin, and Michel Robe, CFTC, Working Paper, Speculators, Commodities, and Cross-Market Linkages (2010); Buyuksahin, Bahattin, Michael Haigh, Jeff Harris, James Overdahl, and Michel Robe, CFTC, Working Paper, Fundamentals, Trader Activity, and Derivative Pricing (2008); Eckaus, R.S., MIT Center for Energy and Environmental Policy Research, Working Paper 08–007WP, The Oil Price Really Is A Speculative Bubble (2008); Einloth, James T., Division of Insurance and Research, Federal Deposit Insurance Corporation, Washington, DC, Working Paper, Speculation and Recent Volatility in the Price of Oil (2009); Gilbert, Christopher L., Department of Economics, University of Trento, Italy, Working Paper, Speculative Influences on Commodity Futures Prices, 2006–2008 (2009); Gilbert, Christopher L., Journal of Agricultural Economics, How to Understand High Food Prices (2010); Government Accountability Office (GAO), Issues Involving the Use of the Futures Markets to Invest in Commodity Indexes (2009); Haigh, Michael, Jana Hranaiova, and James Overdahl, CFTC OCE, Staff Research Report, Price Dynamics, Price Discovery, and Large Futures Trader Interactions in the Energy Complex (2005); Haigh, Michael, Jeff Harris, James Overdahl, and Michel Robe, CFTC, Working Paper, Trader Participation and Pricing in Energy Futures Markets (2007); Hamilton, James, Brookings Paper on Economic Activity, The Causes and Consequences of the Oil Shock of 2007–2008 (2009); HM Treasury (UK), Global Commodities: A Long Term Vision for Stable, Secure, and Sustainable Global Markets (2008); Interagency Task Force on Commodity Markets, Interim Report on Crude Oil (2008); International Monetary Fund, World Economic Outlook, Is Inflation Back? Commodity Prices and Inflation, at 83–128 (2008); Irwin, Scott and Dwight Sanders, OECD Food, Agriculture, and Fisheries Working Papers, The Impact of Index and Swap Funds on Commodity Futures Markets (2010); Irwin, Scott, Dwight Sanders, and Robert Merrin, Journal of Agricultural and Applied Economics, Devil or Angel? The Role of Speculation in the Recent Commodity Price Boom (and Bust) (2009); Jacks, David, Explorations in Economic History, Populists vs Theorists: Futures Markets and the Volatility of Prices (2006); Kilian, Lutz, American Economic Review, Not All Oil Price Shocks Are Alike: Disentangling Demand and Supply Shocks in the Crude Oil Market (2009); Kilian, Lutz, and Dan Murphy, University of Michigan, Working Paper, The Role of Inventories and Speculative Trading in the Global Market for Crude Oil (2010); Korniotis, George, Federal Reserve Board of Governors, Finance and Economics Discussion Series, Does Speculation Affect Spot Price Levels? The Case of Metals With and Without Futures Markets (2009); Mou, Ethan Y., Columbia University, Working Paper, Limits to Arbitrage and Commodity Index Investment: Front-Running the Goldman Roll (2010); Nissanke, Machinko, University of London School of Oriental and African Studies, Commodity Markets and Excess Volatility: Sources and Strategies To Reduce Adverse Development Impacts (2010); Phillips, Peter C.B., and Jun Yu, Yale University, Cowles Foundation Discussion Paper No. 1770, Dating the Timeline of Financial Bubbles During the Subprime Crisis (2010); Plato, Gerald, and Linwood Hoffman, NCCC–134 Conference on Applied Commodity Price Analysis, Forecasting, and Market Risk Management, Measuring the Influence of Commodity Fund Trading on Soybean Price Discovery (2007); Robles, Miguel, Maximo Torero, and Joachim von Braun, International Food Policy Research Institute, IFPRI Issue Brief 57, When Speculation Matters (2009); Sanders, Dwight, and Scott Irwin, Agricultural Economics, A Speculative Bubble in Commodity Futures Prices? Cross-Sectional Evidence (2010); Sanders, Dwight, Scott Irwin, and Robert Merrin, University of Illinois at Urbana-Champaign, The Adequacy of Speculation in Agricultural Futures Markets: Too Much of a Good Thing? (2008); Smith, James, Journal of Economic Perspectives, World Oil: Market or Mayhem? (2009); Technical Committee of the International Organization of Securities Commission. IOSCO, Task Force on Commodity Futures Markets Final Report (2009); Stoll, Hans, and Robert Whaley, Vanderbilt University, Working Paper, Commodity Index Investing and Commodity Futures Prices (2009); Tang, Ke, and Wei Xiong, Department of Economics, Princeton University, Working Paper, Index Investing and the Financialization of Commodities (2010); Trostle, Ronald, ERS (USDA), Global Agricultural Supply and Demand: Factors Contributing to the Recent Increase in Food Commodity Prices (2008); U.S. Commodity Futures Trading Commission, Staff Report on Commodity Swap Dealers and Index Traders With Commission Recommendations (2008); Wright, Brian, World Bank, Policy Research Working Paper, International Grain Reserves and Other Instruments To Address Volatility in Grain Markets (2009).

does not have the discretion to alter an express mandate from Congress. As such, studies suggesting that there is insufficient evidence of excessive speculation in commodity markets fail to address that the Commission must impose position limits, and do not address issues that are material to this rulemaking.

The remaining studies did generally addresses the concept of position limits as part of their discussion of speculative activity. The authors of some of these studies and papers expressed views that speculative position limits were an important regulatory tool and that the CFTC should implement limits to control excessive speculation.[374] For example, one author opined that ''* * * strict position limits should be placed on individual holdings, such that they are not manipulative.'' [375] Another stated, ''[S]peculative position limits worked well for over 50 years and carry no unintended consequences. If Congress takes these actions, then the speculative money that flowed into these markets will be forced to flow out, and with that the price of commodities futures will come down substantially. Until speculative position limits are restored, investor money will continue to flow unimpeded into the commodities futures markets and the upward pressure on prices will remain.'' [376] The authors of one study claimed that ''Rules for speculative position limits were historically much stricter than they are today. Moreover, despite rhetoric that imposing stricter limits would harm market liquidity, there is no evidence to support such claims, especially in light of the fact that the market was functioning very well prior to 2000, when speculative limits were tighter.'' [377]

One study claimed that position limits will not restrain manipulation,[378] while another argued that position limits in the agricultural commodities have not significantly affected volatility.[379] Another study noted that while position limits are effective as an anti-manipulation measure, they will not prevent asset bubbles from forming or stop them from bursting.[380] One study cautioned that while limits may be effective in preventing manipulation, they should be set at an optimal level so as to not harm the affected markets.[381] One study claimed that position limits should be administered by DCMs, as those entities are closest to and most familiar with the intricacies of markets and thus can implement the most efficient position limits policy.[382] Finally, one commenter cited a study that notes the similar efforts under discussion in European markets.[383]

Although these studies generally discuss the impact of position limits, they do not address or provide analysis of how the Commission should specifically implement position limits under section 4a. As the Commission explained in the proposal, ''overly restrictive'' limits can negatively impact market liquidity and price discovery. These consequences are detailed in several of the studies criticizing the impact of position limits.[384] Similarly, limits that are set too high fail to address issues surrounding market manipulation and excessive speculation. Market manipulation and excessive speculation are also detailed in several of the studies claiming the need for position limits.[385] In section 4a(a)(3)(B) Congress sought to ensure that the Commission would ''to the maximum extent practicable'' ensure that position limits would be set at a

[374] Greenberger, Michael, The Relationship of Unregulated Excessive Speculation to Oil Market Price Volatility, at 11 (2010) (On position limits: ''The damage price volatility causes the economy by needlessly inflating energy and food prices worldwide far outweighs the concerns about the precise application of what for over 70 years has been the historic regulatory technique for controlling excessive speculation in risk-shifting derivative markets.''.); Khan, Mohsin S., Peterson Institute for International Economics, Washington, DC, Policy Brief PB09–19, The 2008 Oil Price 'Bubble', at 8 (2009) (''The policies being considered by the CFTC to put aggregate position limits on futures contracts and to increase the transparency of futures markets are moves in the right direction.''); U.S. Senate, Permanent Subcommittee on Investigations, Excessive Speculation in the Wheat Market, at 12 (2009) (''The activities of these index traders constitute the type of excessive speculation the CFTC should diminish or prevent through the imposition and enforcement of position limits as intended by the Commodity Exchange Act.''); U.S. Senate, Permanent Subcommittee on Investigations, Excessive Speculation in the Natural Gas Market at 8'' (2007) (The Subcommittee recommended that Congress give the CFTC authority over ECMs, noting that ''[to] ensure fair energy pricing, it is time to put the cop back on the beat in all U.S. energy commodity markets.''); UNCTAD, The Global Economic Crisis: Systemic Failures and Multilateral Remedies: Report by the UNCTAD Secretariat Task Force on Systemic Issues and Economic Cooperation, at 14, (2009) (The UNCTAD recommends that ''* * * regulators should be enabled to intervene when swap dealer positions exceed speculative position limits and may represent 'excessive speculation.'); UNCTAD, United Nations, Trade and Development Report, 2009: Chapter II: The Financialization of Commodity Markets, at 26 (2009) (The report recommends tighter restrictions, notably closing loopholes that allow potentially harmful speculative activity to surpass position limits.).

[375] De Schutter, O., United Nations Special Report on the Right to Food: Briefing Note 02, Food Commodities Speculation and Food Price Crises at 8 (2010).

[376] Masters, Michael, and Adam White, White Paper: The Accidental Hunt Brothers: How Institutional Investors Are Driving up Food and Energy Prices at 3 (2008).

[377] Medlock, Kenneth, and Amy Myers Jaffe, Rice University: Who Is in the Oil Futures Market and How Has It Changed?'' at 8 (2009).

[378] Ebrahim, Muhammed: Working Paper, Can Position Limits Restrain Rogue Traders?'' at 27 (2011) (''* * * binding constraints have an unintentional effect. That is, they lead to a degradation of the equilibria and augmenting market power of Speculator in addition to other agents. We therefore conclude that position limits are not helpful in curbing market manipulation. Instead of curtailing price swings, they could exacerbate them.''

[379] Irwin, Scott, Philip Garcia, and Darrel L. Good: Working Paper, The Performance of Chicago Board of Trade Corn, Soybean, and Wheat Futures Contracts After Recent Changes in Speculative Limits at 16 (2007) (''The analysis of price volatility revealed no large change in measures of volatility after the change in speculative limits. A relatively small number of observations are available since the change was made, but there is little to suggest that the change in speculative limits has had a meaningful overall impact on price volatility to date.'').

[380] Parsons, John: Economia, Vol. 10, Black Gold and Fools Gold: Speculation in the Oil Futures Market at 30 (2010) (''Restoring position limits on all nonhedgers, including swap dealers, is a useful reform that gives regulators the powers necessary to ensure the integrity of the market. Although this reform is useful, it will not prevent another speculative bubble in oil. The general purpose of speculative limits is to constrain manipulation . * * * Position limits, while useful, will not be useful against an asset bubble. That is really more of a macroeconomic problem, and it is not readily managed with microeconomic levers at the individual exchange level.'').

[381] Wray, Randall, The Levy Economics Institute of Bard College: The Commodities Market Bubble: Money Manager Capitalism and the Financialization of Commodities at 41, 43 (2008) ''('While the participation of traditional speculators offers clear benefits, position limits must be carefully administered to ensure that their activities do not ''demoralize'' markets. * * *The CFTC must re-establish and enforce position limits.'').

[382] CME Group, Inc.: CME Group White Paper, Excessive Speculation and Position Limits in Energy Derivatives Markets at 6 (''Indeed, as the Commission has previously noted, the exchanges have the expertise and are in the best position to fix position limits for their contracts. In fact, this determination led the Commission to delegate to the exchanges authority to set position limits in non-enumerated commodities, in the first instances, almost 30 years ago.'').

[383] European Commission, Review of the Markets in Financial Instruments Directive (2010), note 282:

European Parliament resolution of 15 June 2010 on derivatives markets: future policy actions (A7–0187/2010) calls on the Commission to develop measures to ensure that regulators are able to set position limits to counter disproportionate price movements and speculative bubbles, as well as to investigate the use of position limits as a dynamic tool to combat market manipulation, most particularly at the point when a contract is approaching expiry. It also requests the Commission to consider rules relating to the banning of purely speculative trading in commodities and agricultural products, and the imposition of strict position limits especially with regard to their possible impact on the price of essential food commodities in developing countries and greenhouse gas emission allowances.

Id. at 82.

[384] *See e.g.,* Wray, Randall, *supra.*

[385] *See e.g.,* Medlock, Kenneth and Amy Myers Jaffe, *supra.*

level that would ''diminish, eliminate, or prevent excessive speculation'' and deter or prevent market manipulation, while at the same time ensure there is sufficient market liquidity for bona fide hedgers and the price discovery function of the market would be preserved. The Commission historically has recognized the potential impact of both overly restrictive and unrestrictive limits, and through the consideration of the statutory objectives in section 4a(a)(3)(B) as well as the costs and benefits, has determined to finalize these rules.

3. General Costs and Benefits

As stated in the Proposed Rule, the Commission anticipates that the final rules establishing position limits and related provisions will result in costs to market participants. Generally, market participants will incur costs associated with developing, implementing and maintaining a method to ensure compliance with the position limits and its attendant requirements (*e.g.,* bona fide hedging exemptions and aggregation standards). Such costs will include those related to the monitoring of positions in the relevant Referenced Contracts, related filing, reporting, and recordkeeping requirements, and the costs (if any) of changes to information technology systems. It is expected that market participants whose positions are exclusively in swaps (and hence currently not subject to any position limits regime) will incur larger initial costs relative to those participants in the futures markets, as the latter should be accustomed to operating under DCM and/or Commission position limit regimes.

The final rules are also expected to result in costs to market participants whose market participation and trading strategies will need to take into account and be limited by the new position limits rule. For example, a swap dealer that makes a market in a particular class of swaps may have to ensure that any further positions taken in that class of swaps are hedged or offset in order to avoid increasing that trader's position. Similarly, a trader that is seeking to adopt a large speculative position in a particular commodity and that is constrained by the limits would have to either diversify or refrain from taking on additional positions.[386]

The Commission does not believe it is reasonably feasible to quantify or estimate the costs from such changes in trading strategies. Quantifying the consequences or costs of market participation or trading strategies would necessitate having access to and understanding of an entity's business model, operating model, and hedging strategies, including an evaluation of the potential alternative hedging or business strategies that would be adopted if such limits were imposed. Because the economic consequences to any particular firm will vary depending on that firm's business model and strategy, the Commission believes it is impractical to develop any type of generic or representative calculation of these economic consequences.[387]

The Commission believes that many of the costs that arise from the application of the final rules are a consequence of the congressional mandate that the Commission impose position limits. As described more fully below, the Commission has considered these costs in adopting these final rules, and has, where appropriate, attempted to mitigate costs while observing the express direction of Congress in section 4a of the CEA.

In the discussions below as well as in the Paperwork Reduction Act (''PRA'') section of this release, the Commission estimates or quantifies the implementing costs wherever reasonably feasible, and where infeasible provides a qualitative assessment of the costs and benefits of the final rule. In many instances, the Commission finds that it is not feasible to estimate or quantify the costs with reliable precision, primarily due to the fact that the final rules apply to a heretofore unregulated swaps markets and, as previously noted, the Commission does not have the resources or information to determine how market participants may adjust their trading strategies in response to the rules.[388]

At present, the Commission has limited data concerning swaps transactions in Referenced Contracts (and market participants engaged in such transactions).[389] In light of these data limitations, to inform its consideration of costs and benefits the Commission has relied on: (1) Its experience in the futures markets and information gathered through public comment letters, its hearing, and meetings with the industry; and (2) relevant data from the Commission's Large Trader Reporting System and other relevant data concerning cleared swaps and SPDCs traded on ECMs.[390]

4. Position Limits

To implement the Congressional mandate under Dodd-Frank, the proposal identified 28 core physical delivery futures contracts in proposed Regulation 151.2 (''Core Referenced Futures Contracts''),[391] and would apply aggregate limits on a futures equivalent basis across all derivatives that are (i) directly or indirectly linked to the price of a Core Referenced Futures Contracts, or (ii) based on the price of the same underlying commodity for delivery at the same delivery location as that of a Core Referenced Futures Contracts, or another delivery location having substantially the same supply and demand fundamentals (''economically equivalent contracts'') (collectively with Core Referenced Futures Contracts, ''Referenced Contracts'').[392]

As explained in the proposal, the 28 Core Referenced Futures Contracts were selected on the basis that (i) they have high levels of open interest and significant notional value or (ii) they serve as a reference price for a significant number of cash market transactions. The Commission believes that contracts that meet these criteria are of particular significance to interstate commerce, and therefore warrant the imposition of federally administered limits. The remaining physical commodity contracts traded on a DCM or SEF that is a trading facility will be subject to limits set by those facilities.[393]

[386] In this respect, the costs of these limits may not in fact be additional expenditures or outlays but rather foregone benefits that would have accrued to the firm had it been permitted to hold positions in excess of the limits. For ease of reference, the term ''costs'' as used in this context also refers to foregone benefits.

[387] Further, the Commission also believes it would be impractical to require all potentially affected firms to provide the Commission with the information necessary for the Commission to make this determination or assessment for each firm. In this regard, the Commission notes that none of the commenters provided or offered to provide any such analysis to the Commission.

[388] Further, as previously noted, market participants did not provide the Commission with specific information regarding how they may alter their trading strategies if the limits were adopted.

[389] The Commission should be able to obtain an expanded set of swaps data through its swaps large trader reporting and SDR regulations. *See* Large Trader Reporting for Physical Commodity Swaps, 76 FR 43851, Jul. 22, 2011; and Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538, Sept. 1, 2011.

[390] Prior to the Dodd-Frank Act and at least until the Commission can begin regularly collecting swaps data under the Large Trader Reporting for Physical Commodity Swaps regulations (76 FR 43851, Jul. 22, 2011), the Commission's authority to collect data on the swaps market was generally limited to Commission regulation 18.05 regarding Special Calls, and Part 36 of the Commission's regulations.

[391] This is discussed in greater detail in II.B. of this release. These Core Referenced Futures Contracts are listed in regulation 151.2 of these final rules.

[392] 76 FR at 4753.

[393] The Commission further considers registered entity limits in section III.A.3.e.

With regard to the scope of ''economically equivalent'' contracts that are subject to limits concurrently with the 28 Core Referenced Futures Contract limits, this definition incorporates contracts that price the same commodity at the same delivery location or that utilize the same cash settlement price series of the Core Referenced Futures Contracts (*i.e.,* ''look-alikes'' as discussed above in II.B.).[394] The Commission continues to believe, as mentioned in the proposal, that

> ''[t]he proliferation of economically equivalent instruments trading in multiple trading venues, * * * warrants extension of Commission-set position limits beyond agricultural products to metals and energy commodities. The Commission anticipates this market trend will continue as, consistent with the regulatory structure established by the Dodd-Frank Act, economically equivalent derivatives based on exempt and agricultural commodities are executed pursuant to the rules of multiple DCMs and SEFs and other Commission registrants. Under these circumstances, uniform position limits should be established across such venues to prevent regulatory arbitrage and ensure a level playing field for all trading venues.'' [395]

In addition, by imposing position limits on contracts that are based on an identical commodity reference price (directly or indirectly) or the price of the same commodity at the same delivery location, the final rules help to prevent manipulative behavior. Absent such limits on related markets, a trader would have a significant incentive to attempt to manipulate the physical-delivery market to benefit a large position in the cash-settled market.

The final rule should provide for lower costs than the proposal with respect to determining whether a contract is a Referenced Contract because the final rule provides an objective test for determining Referenced Contracts and does not require case by case analysis of the correlation between contracts. In response to comments, the Commission eliminated the category of Referenced Contracts regarding contracts that have substantially the same supply and demand fundamentals of the Core Referenced Futures Contracts because this category did not establish objective criteria and would be difficult to administer when the correlation between two contracts change over time.

The final categories of economically equivalent Referenced Contracts should also limit the costs of determining whether a contract is a Referenced Contract because the scope is objectively defined and does not require case by case analysis of the correlation between contracts. In this regard, the Commission eliminated the category of Referenced Contracts regarding contracts that have substantially the same supply and demand fundamentals of the Core Referenced Futures Contracts because this category did not establish objective criteria and would be difficult to administer when the correlation between two contracts change over time.

The definitional criteria for the core physical delivery futures contracts, together with the criteria for ''economic equivalent'' derivatives, are intended to ensure that those contracts that are of major significance to interstate commerce and show a sufficient nexus to create a single market across multiple venues are subject to Federal position limits.[396] Nevertheless, the Commission recognizes that the criteria informing the scope of Referenced Contracts may need to evolve given the Commission's limited data and changes in market structure over time. As the Commission gains further experience in the swaps market, it may determine to expand, restrict, or otherwise modify through rulemaking the 28 Core Referenced Futures Contracts and the related definition of ''economically equivalent'' contracts.

The Commission anticipates that the additional cost of monitoring positions in Referenced Contracts should be minimal for market participants that currently monitor their positions throughout the day for purposes such as compliance with existing DCM or Commission position limits, to meet their fiduciary obligations to shareholders, to anticipate margin requirements, *etc.* The Commission estimates that trading firms that currently track compliance with DCM or Commission position limits will incur an additional implementation cost of two or three labor weeks in order to adjust their monitoring systems to track the position limits for Referenced Contracts. Assuming an hourly wage of $78.61,[397] multiplied by 120 hours, this implementation cost would amount to approximately $12,300 per firm, for a total across all estimated participants affected by such limits (as described in subsequent sections) of $4.2 million.[398] These costs are generally associated with adjusting systems for monitoring futures and swaps Referenced Contracts to track compliance with position limits.[399]

Participants currently without reportable futures positions (*i.e.,* those who trade solely or mostly in the swaps marketplaces, or ''swaps-only'' traders), and traders with certain positions outside of the spot month in Referenced Contracts that do not currently have position limits or position accountability levels, would likely incur an initial cost in excess of those traders that do monitor their positions for the purpose of compliance with position limits. Because firms with positions in the futures markets should already have systems and procedures in place for monitoring compliance with position limits, the Commission believes that firms with positions mostly or only in the swaps markets would be representative of the highest incremental costs of the rules. Specifically, swaps-only traders may incur larger start-up costs to develop a compliance system to monitor their

[394] The Commission notes economically equivalent contracts are a subset of ''Referenced Contracts.''

[395] *See* 75 FR 4755.

[396] One commenter (CL–WGC *supra* note 21 at 3) opined that gold should not be subject to position limits because ''gold is not consumed in a normal sense, as virtually all the gold that has ever been mined still exists'' and given the ''beneficial qualities of gold to the international monetary and financial systems.'' Section 4a requires the Commission to impose limits on all *physical-delivery* contracts and relevant ''economically equivalent'' contracts. The Commission notes that Congress directed the Commission to impose limits on physical commodities, including exempt and agricultural commodities. The scope of such commodities includes metal commodities.

[397] The Commission staff's estimates concerning the wage rates are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). The $78.61 per hour is derived from figures from a weighted average of salaries and bonuses across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2010, modified to account for an 1800-hour work-year and multiplied by 1.3 to account for overhead and other benefits. The wage rate is a weighted national average of salary and bonuses for professionals with the following titles (and their relative weight): ''programmer (senior)'' (30 percent); ''programmer'' (30 percent); ''compliance advisor'' (intermediate) (20 percent); ''systems analyst'' (10 percent); and ''assistant/associate general counsel'' (10 percent).

[398] Although one commenter provided a wage estimate of $120 per hour, the Commission believes that the SIFMA industry average properly accounts for the differing entities that would be subject to these limits. *See* CL–WGCEF supra note 35 at 26, ''Internal data collected and analyzed by members of the Working Group suggest that the average cost per hour is approximately $120, much higher than SIFMA's $78.61, as relied upon by the Commission.'' In any event, even using the Working Group's higher estimated wage cost, the resulting cost per firm of approximately $18,000 per firm would not materially change the Commission's consideration of these costs in relation to the benefits from the limits, and in light of the factors in CEA section 15(a), 7 U.S.C. 19(a).

[399] Among other things, a market participant will be required to identify which swap positions are subject to position limits (*i.e.,* swaps that are Referenced Contracts) and allocate these positions to the appropriate compliance categories (*e.g.,* the spot month, all months, or a single month of a Referenced Contract).

positions in Referenced Contracts and to comply with an applicable position limit. The Commission estimates that approximately 100 swaps-only firms would be subject to position limits for the first time.

The Commission believes that many swaps-only market participants potentially affected by the spot month limits are likely to have developed business processes to control the size of swap positions for a variety of business reasons, including (i) managing counterparty credit risk exposure, (ii) limiting the value at risk to such swap positions, and (iii) ensuring desired accounting treatment (*e.g.,* hedge accounting under Generally Accepted Accounting Principles (''GAAP'')). These processes are more likely to be well developed by people with a larger exposure to swaps, particularly those persons with position sizes with a notional value close to a spot-month position limit. For example, traders with positions in Referenced Contracts at the spot-month limit in the final rule would have a notional value of approximately $8.2 million to a maximum of $544.3 million, depending on the underlying physical commodity.[400] The minimum value in this range represents a significant exposure in a single payment period for swaps; therefore, the Commission expects that traders with positions at the spot-month limit will have already developed some system to control the size of their positions on an intraday basis. The Commission also anticipates, based on current swap market data, comment letters, and trade interviews, that very few swaps-only traders would have positions close to the non-spot-month position limits imposed by the final rules, given that the notional value of a position at an all-months-combined limit will be much larger than that of a position at a spot-month limit.

As explained above, the Commission expects that traders with positions at the spot-month limit will have already developed some system to control the size of their positions on an intraday basis. However, the Commission recognizes that there may be a variety of ways to monitor positions for compliance with Federal position limits. While specific cost information regarding such swaps-only entities was not provided to the Commission in comment letters, the Commission anticipates that a firm could implement a monitoring regime amid a wide range of compliance systems based on the specific, individual needs of the firm. For example, a firm may elect to utilize an automatic software system, which may include high initial costs but lower long-term operational and labor costs. Conversely, a firm may decide to use a less capital-intensive system that requires more human labor to monitor positions. Thus, taking this range into account, the Commission anticipates, on average, labor costs per entity ranging from 40 to 1,000 annual labor hours, $5,000 to $100,000 in total annualized capital/start-up costs, and $1,000 to $20,000 in annual operating and maintenance costs.[401]

During the initial period of implementation, a large number of traders are expected to be able to avail themselves of the pre-existing position exemption as defined in § 151.9. As preexisting positions are replaced with new positions, traders will be able to incorporate an understanding of the new regime into existing and new trading strategies. The Commission has also incorporated a broader exclusion for swaps entered into before the effective date of the Dodd-Frank Act in addition to the general application of position limits to pre-existing futures and swaps positions entered into before the effective date of this rulemaking, which should allow swaps market participants to gradually transition their trading activity into compliance with the position limits set forth in part 151.

The final position limit rules impose the costs outlined above on traders who hold or control Referenced Contracts to monitor their futures and swaps positions on both an end-of-day and on an intraday basis to ensure compliance with the limit.[402] Commenters raised concerns regarding the ability for their current compliance systems to conduct the requisite tracking and monitoring necessary to comply with the Proposed Rules, citing the additional contracts and markets needing monitoring in real-time.[403]

The Commission and DCMs have historically applied position limits to both intraday and end-of-day positions; the regulations do not represent a departure from this practice.[404] In this regard, the costs necessary to monitor positions in Referenced Contracts on an intraday basis outlined above do not constitute a significant additional cost on market participants.[405] Positions above the limit levels, at any time of day, provide opportunity and incentive to trade such large quantities as to unduly influence market prices. The absence of position limits during the trading day would make it impossible for the Commission to detect and prevent market manipulation and excessive speculation as long as positions were below the limit at the end of the day.

Further, as discussed above, the Commission anticipates that the cost of monitoring positions on an intraday basis should be marginal for market participants that are already required to monitor their positions throughout the day for compliance purposes. For those entities whose positions historically have been only in the swaps or OTC markets, the costs of monitoring intraday positions have been calculated as part of the costs to create and monitor compliance systems for position limits in general, discussed above in further detail.

As the Commission gains further experience and data regarding the swaps market and market participants trading

[400] These notional values were determined based on notional values determined as of September 7, 2011 closing prices. The computation used was a position at the size of the spot-month limit in appendix A to part 151 (*e.g.,* 600 contracts in wheat) times the unit of trading (*e.g.,* 5,000 bushels per contract) times the closing price per quantity of commodity (*e.g.,* dollars per bushel).

[401] These costs would likely be lower for firms with swaps-only positions far below the speculative limit, as those firms may not need comprehensive, real-time analysis of their swaps positions for position limit compliance to observe whether they are at or near the limit. Costs may be higher for firms with very large or very complex positions, as those firms may need comprehensive, real-time analysis for compliance purposes. Due to the variation in both number of positions held and degree of sophistication in existing risk management systems, it is not feasible for the Commission to provide a greater degree of specificity as to the particularized costs for firms in the swaps market.

[402] The Commission notes that generally, entities have not previously tracked their swaps positions for purposes of position limit compliance. With regard to implementing systems to monitor positions for this rule, the Commission also notes that some entities that engage in only a small amount of swaps activity significantly below the applicable position limit may determine, based on their own assessment, not to track their position on an intraday basis because their positions do not raise concerns about a limit.

[403] CL–COPE *supra* note 21 at 5; and CL–Utility Group *supra* note 21 at 6. *See also* CL–Barclays I *supra* note 164 at 5; CL–API *supra* note 21 at 14; and CL–Shell *supra* note 35 at 6–7.

[404] *See* section II.F of this release. *See also* Commodity Futures Trading Commission Division of Market Oversight, Advisory Regarding Compliance with Speculative Position Limits (May 7, 2010), *available at http://www.cftc.gov/ucm/groups/public/@industryoversight/documents/file/specpositionlimitsadvisory0510.pdf. See e.g.,* CME Rulebook, Rule 443, *quoted at http://www.cmegroup.com/rulebook/files/CME_Group_RA0909-5.pdf''*) (amended Sept. 14, 2009); ICE OTC Advisory, Updated Notice Regarding Position Limit Exemption Request Form for Significant Price Discovery Contracts, *available at https://www.theice.com/publicdocs/otc/advisory_notices/ICE_OTC_Advisory_0110001.pdf* (Jan. 4, 2010).

[405] The Commission notes that the CEA mandates DCMs and SEFs to have methods for conducting real-time monitoring of trading. Sections 5(d)(4)(A) and 5h(f)(4)(B) of the CEA, 7 U.S.C. 7(d)(4)(A), 7b–3(f)(4)(B).

therein, it may reevaluate the scope of the Core Referenced Futures Contracts, including the definition of economically equivalent contracts.

a. Spot-Month Limits for Physical Delivery Contracts

The Commission is establishing position limits during the spot-month for physically delivered Core Referenced Futures Contracts. For non-enumerated agricultural, as well as energy and metal Referenced Contracts, the Commission initially will impose spot-month position limits for physical-delivery contracts at the levels currently imposed by the DCMs. Thereafter, the Commission will establish the levels based on the 25 percent of estimated deliverable supply formula with DCMs submitting estimates of deliverable supply to the Commission to assist in establishing the limit. For legacy agricultural Reference Contracts, the Commission will impose the spot-month limits currently imposed by the Commission.

Pursuant to Core Principles 3 and 5 under the CEA, DCMs generally are required to fix spot-month position limits to reduce the potential for manipulation and the threat of congestion, particularly in the spot month.[406] Pursuant to these Core Principles and the Commission's implementing guidance,[407] DCMs have generally set the spot-month position limits for physical-delivery futures contracts based on the deliverable supply of the commodity in the spot month. These spot-month limits under current DCM rules are generally within the levels that would be established using the 25 percent of deliverable supply formula described in these final rules. The Commission received several comments regarding costs of position limits in the spot month.

One commenter noted the definition of deliverable supply was vague and could increase costs to market participants.[408] One commenter suggested that the Commission instead base spot-month limits on ''available deliverable supply,'' a broader measure of physical supply.[409] Commenters also raised an issue with the schedule for resetting limits, explaining that resetting the limits on an annual basis would introduce uncertainty into the market, increase the burden on DCMs, and increase costs for the Commission.[410]

In addition to the costs associated with generally monitoring positions in Referenced Contracts, the Commission anticipates some costs associated with the level of this spot-month position limit for physical-delivery contracts. The Commission estimates,[411] on an annual basis, 84 traders in legacy agricultural Core Referenced Futures Contracts, approximately 50 traders in non-legacy agricultural Referenced Contracts, 12 traders in metal Referenced Contract, and 85 traders in energy Referenced Contracts would hold or control positions that could exceed the spot-month position limits in § 151.4(a).[412] For the majority of participants, the 25 percent of deliverable supply formula is estimated to impose limits that are sufficiently high, so as not to affect their hedging or speculative activity; thus, the number of participants potentially in excess of these limits is expected to be small in proportion to the market as a whole.[413]

To estimate the number of traders potentially affected by the spot-month position limits in physically delivered contracts, the Commission looked to the number of traders currently relying on hedging and other exemptions from DCM position limits.[414] While the Commission believes that the statutory definition of bona fide hedging will to a certain extent overlap with the bona fide hedging exemptions applied at the various DCMs, the definitions are not completely co-extensive. As such, the costs of adjusting hedging strategies or reducing the size of positions both within and outside of the spot-month are difficult to determine. For example, some of the traders relying on a current DCM hedging exemption may be eligible for bona fide hedging or other exemptions from the limits adopted herein, and thus incur the costs associated with filing exemption paperwork. However, other traders may incur the costs associated with the reduction of positions to ensure compliance. Absent data on the application of a bona fide hedge exemption, the Commission cannot determine at this time the number of entities who will be eligible for an exemption under the revised statute, and thus cannot determine the number of participants who may realize the benefits of being exempt from position limits and would incur a filing cost for the exemption, compared to those who may need to reduce their positions.[415] The estimated monetary costs associated with claiming a bona fide hedge exemption are discussed below in consideration of the costs and benefits for bona fide hedging as well as in the PRA section of this final rule.

Regarding costs related to market participation and trading strategies that need to take into account the new position limits rule, as mentioned above, the Commission is currently unable to estimate these costs associated with the spot-month position limit. Market participants who are the primary source of such information did not provide the Commission with any such information in their comments on the proposal. Additionally, the Commission believes it would not be feasible to require market participants to share such strategies with the Commission, or for the Commission to attempt its own

[406] Core Principle 3 specifies that a board of trade shall list only contracts that are not readily susceptible to manipulation, while Core Principle 5 obligates a DCM to establish position limits and position accountability provisions where necessary and appropriate ''to reduce the threat of market manipulation or congestion, especially during the delivery month.''

[407] *See* appendix B, part 38, Commission regulations.

[408] *See e.g.,* CL–API *supra* note 21 at 5.

[409] ''Available deliverable supply'' includes (i) all available local supply (including supply committed to long-term commitments), (ii) all deliverable non-local supply, and (iii) all comparable supply (based on factors such as product and location). *See* CL–ISDA/SIFMA *supra* note 21 at 21. Another commenter, AIMA, similarly advocated a more expansive definition of deliverable supply. CL–AIMA *supra* note 35 at 3 (''This may include all supplies available in the market at all prices and at all locations, as if a party were seeking to buy a commodity in the market these factors would be relevant to the price.'').

[410] *See e.g.,* CL–MGEX *supra* note 74 at 2–4; and CL–BGA *supra* note 35 at 20.

[411] The Commission's estimates of the number of affected participants for both spot-month and non-spot-month limits are based on the data it currently has on futures, options, and the limited set of data it has on cleared swaps. As such, the actual number of affected participants may vary from these estimates.

[412] These estimates are based on the number of unique traders holding hedge exemptions for existing DCM, ECM, or FBOT spot-month position limits for Referenced Contracts.

[413] To illustrate this, the Commission selected examples from each category of Core Referenced Futures Contracts. In the CBOT Corn contract (a legacy agricultural Referenced Contract), only approximately 4.8 percent of reportable traders are estimated to be impacted using the methods explained above. Using the ICE Futures Coffee contract as an example of a non-legacy agricultural Referenced Contract, COMEX Gold as an example of a metal Referenced Contracts, and NYMEX Crude Oil as an example of an energy Referenced Contract, the Commission estimates only 1.7 percent, 1.2 percent, and 8 percent (respectively) of all reportable traders in those markets would be impacted by the spot-month limit for physical-delivery contracts. These estimates indicate that the number of affected entities is expected to be small in comparison to the rest of the market.

[414] Currently, DCMs report to the Commission which participants receive hedging and other exemptions that allow those participants to exceed position limit levels in the spot month.

[415] The Commission notes that under the pre-existing positions exemption, a trader would not be in violation of a position limit based solely upon the trader's pre-existing positions in Referenced Contracts. Further, swaps entered into before the effective date of the Dodd-Frank Act will not count toward a speculative limit, unless the trader elects to net such swaps positions to reduce its aggregate position.

assessment of the costs of potential business strategies of market participants. While the Commission does anticipate some cost for certain firms to adjust their trading and hedging strategy to account for position limits, the Commission does not believe such costs to be overly burdensome. All of the 28 Core Referenced Futures Contracts have some form of spot-month position limits currently in place by their respective DCMs, and thus market participants with very large positions (at least those whose primary activity is in futures and options markets) should be currently incurring costs (or foregoing benefits) associated with those limits. Further, the Commission notes that CEA section 4a(a) mandates the imposition of a spot-month position limit, and therefore, a certain level of costs is already necessary to comply with the Congressional mandate.

The Commission further notes that the spot limits continue current market practice of establishing spot-month position limits at 25 percent of deliverable supply. This continuity in the regulatory scheme should reduce the number of strategy changes that participants may need to make as a result of the promulgation of the final rule, particularly for current futures market participants who already must comply with this limit under the current position limits regimes.

With regard to the use of deliverable supply to set spot-month position limits, in the Commission's experience of overseeing the position limits established at the exchanges as well as federally-set position limits, ''spot-month speculative position limits levels are 'based most appropriately on an analysis of current deliverable supplies and the history of various spot-month expirations.' ''[416] The comments received provide no compelling reason for changing that view. The Commission continues to believe that deliverable supply represents the best estimate of how much of a commodity is actually available in the cash market, and is thus the best basis for determining the proper level to deter manipulation and excessive speculation while retaining liquidity and protecting price discovery. In this regard, the Commission and exchanges have historically applied the formula of 25 percent of deliverable supply to set the spot-month position limit, and in the Commission's experience, this formula is effective in diminishing the potential for manipulative behavior and excessive speculation without unduly restricting liquidity for bona fide hedgers or negatively impacting the price discovery process. Further, the definition of deliverable supply adopted in these final rules is consistent with the current DCM practice in setting spot-month limits. The Commission believes that this consistent approach facilitates an orderly transition to Federal limits.

The final rules require DCMs to submit estimates of deliverable supply to the Commission every other year for each non-legacy Referenced Contract. The Commission will use this information to estimate deliverable supply for a particular commodity in resetting position limits. The Commission does not anticipate a significant additional burden on DCMs to submit estimates of deliverable supply because DCMs currently monitor deliverable supply to comply with Core Principles 3 and 5 and they must, as part of their self-regulatory responsibilities, make such calculations to justify initial limits for newly listed contracts or to justify changes to position limits for listed contracts. Given that DCMs that list Core Referenced Futures Contracts have considerable experience in estimating deliverable supply for purposes of position limits, this expertise will be of significant benefit to the Commission in its determination of the level of deliverable supply for the purpose of resetting spot-month position limits. The additional data provided by DCMs will help the Commission to accurately determine the amounts of deliverable supply, and therefore the proper level of spot-month position limits.

Moreover, the Commission has staggered the resetting of position limits for agricultural contracts, energy contracts, and metal contracts as outlined in II.D.5. and II.E.3. of this release in order to further reduce the burden of calculating and submitting estimates of deliverable supply to the Commission. As explained in the PRA section, the Commission estimates the cost to DCMs to submit deliverable supply data to be a total marginal burden, across the six affected entities, of 5,000 annual labor hours for a total of $511,000 in labor costs and $50,000 in annualized capital and start-up costs and annual total operating and maintenance costs.

b. Spot-Month Limits for Cash-Settled Contracts

A spot-month limit is also being implemented for cash-settled contract markets, including cash-settled futures and swaps. Under the final rules, with the exception of natural gas contracts, a market participant could hold positions in cash-settled Referenced Contracts equal to twenty-five percent of deliverable supply underlying the relevant Core Referenced Futures Contracts. With regard to cash-settled natural gas contracts, a market participant could hold positions in cash-settled Referenced Contracts that are up to five times the limit applicable to the relevant physical-delivery Core Referenced Futures Contracts. The final rules also impose an aggregate spot-month limit across physical-delivery and cash-settled natural gas contracts at a level of five times the spot month limit for physical-delivery contracts. The Commission has determined not to adopt the proposed conditional spot-month limit, under which a trader could maintain a position of five times the position limit in the Core Referenced Futures Contract only if the participant did not hold positions in physical-delivery Core Referenced Futures Contracts and did not hold 25 percent or more of the deliverable supply of the underlying cash commodity.

Several commenters questioned the application of proposed spot-month position limits to cash-settled contracts.[417] Some of these commenters suggested that cash-settled contracts should not be subject to spot-month limits based on estimated deliverable supply, and should be subject to relatively less restrictive spot-month position limits, if subject to any limits at all.[418]

BGA, for example, argued that position limits on swaps should be set based on the size of the open interest in the swaps market because swap contracts do not provide for physical delivery.[419] Further, certain commenters argued that imposing an aggregate speculative limit on all cash-settled contracts will reduce substantially the cash-settled positions that a trader can

[416] 64 FR 24038, 24039, May 5, 1999.

[417] CL–ISDA/SIFMA *supra* note 21 at 6–7, 19; CL–Goldman *supra* note 90 at 5; CL–ICI *supra* note 21 at 10; CL–MGEX *supra* note 74 at 4 (particularly current MGEX Index Contracts that do not settle to a Referenced Contract should be considered exempt from position limits because cash-settled index contracts are not subject to potential market manipulation or creation of market disruption in the way that physical-delivery contracts might be); CL–WGCEF *supra* note 35 at 20 (''the Commission should reconsider setting a limit on cash-settled contracts as a function of deliverable supply and establish a much higher, more appropriate spot-month limit, if any, on cash-settled contracts''); CL–MFA *supra* note 21 at 16–17; and CL–SIFMA AMG I *supra* note 21 at 7.

[418] CL–BGA *supra* note 35 at 19; CL–ICI *supra* note 21 at 10; CL–MFA *supra* note 21 at 16–17; CL–WGCEF *supra* note 35 at 20; CL–Cargill *supra* note 76 at 13; CL–EEI/EPSA *supra* note 21 at 9; and CL–AIMA *supra* note 35 at 2. *See also* CL–NGSA/NCGA *supra* note 124 at 4–5 (cash-settled contracts should have no limits, or at least limits much greater than the proposed limit, given the different economic functions of the two classes of contracts).

[419] CL–BGA *supra* note 35 at 10.

hold because, currently, each cash-settled contract is subject to a separate, individual limit, and there is no aggregate limit.[420] Other commenters urged the Commission to eliminate class limits and allow for netting across futures and swaps contracts so as not to impact liquidity.[421]

A number of commenters objected to limiting the availability of a higher limit in the cash-settled contract to traders not holding any physical-delivery contract.[422] For example, CME argued that the proposed conditional limits would encourage price discovery to migrate to the cash-settled contracts, rendering the physical-delivery contract ''more susceptible to sudden price movements during the critical expiration period.'' [423] AIMA commented that the prohibition against holding positions in the physical-delivery Core Referenced Futures Contract will cause investors to trade in the physical commodity markets themselves, resulting in greater price pressure in the physical commodity.[424]

Some of these commenters, including the CME Group and KCBT, recommended that cash-settled Referenced Contracts and physical-delivery contracts be subject to the same position limits.[425] Two commenters opined that if the conditional limits are adopted, they should be greater than five times the 25 percent of deliverable supply formula.[426] ICE recommended that they be increased to at least ten times the 25 percent of deliverable supply.[427]

Several commenters expressed concern that the conditional spot-month limits would ''restrict the physically-delivered contract market's ability to compete for spot-month speculative trading interest,'' thereby restricting liquidity for bona fide hedgers in those contracts.[428] Another noted that the limit may be detrimental to the physically settled contracts because it restricts the ability of a trader to be in both the physical-delivery and cash-settled markets.[429] Conversely, one commenter expressed concern that the anti-manipulation goal of spot-month position limits would not be met because the structure of the conditional limit in the Proposed Rule allowed a trader to be active in both the physical commodity and cash-settled contracts, and so could use its position in the cash commodity to manipulate the price of a physically settled contract to benefit a leveraged cash-settled position.[430]

With regard to the application of position limits to cash-settled contracts, the Commission notes that Congress specifically directed the Commission to impose aggregate spot-month limits on DCM futures contracts and swaps that are economically equivalent to such contracts. Therefore, the Commission is required to impose limits on such contracts. As explained in the proposal, the Commission believes that ''limiting a trader's position at expiration of cash-settled contracts diminishes the incentive to exert market power to manipulate the cash-settlement price or index to advantage a trader's position in the cash-settlement contract.'' Further, absent such limits on related markets, a trader would have a significant incentive to attempt to manipulate the physical-delivery market to benefit a large position in the cash-settled economically equivalent contract.

The Commission is adopting, on an interim final rule basis, spot-month limits for cash-settled contract, other than natural gas contracts, at 25 percent of the estimated deliverable supply. These limits will be in parity with the spot-month limits set for the related physical-delivery contracts. As discussed in section II.D.3. of this release, the Commission has determined that the one-to-one ratio for commodities other than natural gas between the level of spot-month limits on physical-delivery contracts and the level on cash-settled contracts maximizes the objectives enumerated in section 4a(a)(3) of the CEA by ensuring market liquidity for bona fide hedgers, while deterring the potential for market manipulation, squeezes, and corners. The Commission further notes that this formula is consistent with the level the Commission staff has historically deemed acceptable for cash-settled contracts, as well as the formula for physical-delivery contracts under Acceptable Practices for Core Principle 5 set forth in part 38 of the Commission's regulations.

At this time, the Commission's data set does not allow the Commission to estimate the specific number of traders that could potentially be impacted by the limits on cash-settled contracts in the spot-month for agricultural, metals and energy commodities (other than natural gas). However, given the Commission's understanding of the overall size of the swaps market in these commodities, the Commission believes that a one-to-one ratio of position limits for physical-delivery and cash-settled Referenced Contracts maximizes the four statutory factors in section 4a(a)(3)(B) of the CEA.

The Commission is also adopting, on an interim final rule basis, an aggregate spot-month limit for physical-delivery and cash-settled natural gas contracts, as well as a class limit for cash-settled natural gas contracts, both set at a level of five times the level of the spot-month limit in the relevant Core Referenced physical-delivery natural gas contract.

As discussed in section II.D.3. of this release, the Commission has determined that the one-to-five ratio between the level of spot-month limits on physical-delivery natural gas contracts and the level of spot-month limits on cash-settled natural gas contracts maximizes the objectives enumerated in section 4a(a)(3) of the CEA by ensuring market liquidity for bona fide hedgers, while deterring the potential for market manipulation, squeezes, and corners. The Commission notes that this formula is consistent with the administrative experience with conditional limits in DCM and exempt commercial market natural gas contracts.

As described in section II.D.3. of the release, this aggregate limit for natural gas contracts responds to commenters'

[420] *See e.g.,* CL–FIA I *supra* note 21 at 10; and CL–ICE I *supra* note 69 at 6.

[421] *See e.g.,* CL–ISDA/SIFMA *supra* note 21 at 8.

[422] CL–AFIA *supra* note 94 at 3; CL–AFR *supra* note 17 at 6; CL–ATAA *supra* note 94 at 7; CL–BGA *supra* note 35 at 11–12; CL–Centaurus Energy *supra* note 21 at 3; CL–CME I *supra* note 8 at 10; CL–WGCEF *supra* note 35 at 21–22; and CL–PMAA/NEFI *supra* note 6 at 14.

[423] CL–CME I *supra* note 8 at 10. Similarly, BGA argued that conditional limits incentivize the migration of price discovery from the physical contracts to the financial contracts and have the unintended effect of driving participants from the market, thereby increasing the potential for market manipulation with a very small volume of trades. CL–BGA *supra* note 35 at 12.

[424] CL–AIMA *supra* note 35 at 2.

[425] CL–CME I *supra* note 8 at 10; CL–KCBT I *supra* note 97 at 4; and CL–APGA *supra* note 17 at 6, 8. Specifically, the KCBT argued that parity should exist in all position limits (including spot-month limits) between physical-delivery and cash-settled Referenced Contracts; otherwise, these limits would unfairly advantage the look-alike cash-settled contracts and result in the cash-settled contract unduly influencing price discovery. Moreover, the higher spot-month limit for the financial contract unduly restricts the physical market's ability to compete for spot-month trading, which provides additional liquidity to commercial market participants that roll their positions forward. CL–KCBT I *supra* note 97 at 4.

[426] CL–AIMA *supra* note 35 at 2; and CL–ICE I *supra* note 69 at 8.

[427] CL–ICE I *supra* note 69 at 8. ICE also recommended that the Commission remove the prohibition on holding a position in the physical-delivery contract or the duration to a narrower window of trading than the final three days of trading.

[428] *See e.g.,* CL–KCBT I *supra* note 97 at 4 ''[T]he higher spot-month limit for the financial contract unduly restricts the physical market's ability to compete for spot month speculative trading interests, which provide additional liquidity to commercial market participants (bona fide hedgers) as they unwind or roll their positions forward.'')

[429] *See e.g.,* CL–Centaurus Energy *supra* note 21 at 3.

[430] *See e.g.,* CL–Prof. Pirrong *supra* note 124.

concerns regarding potentially negative impacts on liquidity and the price discovery function of the physical-delivery contract if traders are not permitted to hold any positions in the physical-delivery contract when they hold contracts in the cash-settled Referenced Contract (which are subject to higher limits than the physical-delivery contracts).

The Commission is also no longer restricting the higher limit for cash-settled natural gas contracts to entities that hold or control less than 25 percent of the deliverable supply in the cash commodity. As pointed out by certain commenters,[431] this provision would create significant compliance costs for entities to track whether they meet such a condition. The Commission believes at this time that the class and aggregate limits in the spot month for natural gas contracts should adequately account for market manipulation concerns with regard to entities with large cash-market positions; however, the Commission will continue to monitor developments in the market to determine whether to incorporate a cash-market restriction in the higher cash-settled contract limit, and the extent of the benefit provided through restricting cash-market positions.

The Commission expects that its estimate as to the number of traders affected by the limits in cash-settled contracts will change as swap positions are reported to the Commission through its Large Swaps Trader Reporting and SDR regulations. Given the Commission's limited data with regard to swaps, the Commission looked to exemptions from position limits granted by DCMs and ECMs to estimate the number of traders that may be affected by the finalized limits for cash-settled contracts. At this time, the only data available pertains to energy commodities. The Commission estimates that approximately 70 to 75 traders hold exemptions from DCM and ECM limits and therefore at least this number of traders may be impacted by the spot-month limit for cash-settled contracts. Until the Commission has accurate information on the size and composition of off-exchange cash-settled Referenced Contracts for agricultural, metal, and energy contracts, it is unable more precisely to determine the number of traders potentially impacted by the aggregate limit.[432] As discussed above, by implementing the one-to-one and one-to-five ratios on an interim basis, the Commission can further gather and analyze the ratio and its impact on the market.

The Commission also notes that swap dealers and commercial firms enter into a significant number of swap transactions that are not submitted to clearing.[433] Based on the nature of the commercial counterparty to such transactions, the Commission anticipates that many of these transactions involving commercial firm counterparties would likely be entitled to bona fide hedging exemptions as provided for in § 151.5, which should limit the number of persons affected by the spot-month limit in cash-settled contracts without an applicable exemption.

The Commission also notes that swaps and other over-the-counter market participants may face additional costs (including foregone benefits) in terms of adjusting position levels and trading strategies to the position limits on cash-settled contracts. While current data precludes estimating the extent of the financial impact to swap market participants, these costs are inherent in establishing limits that reach swaps that are economically equivalent to DCM futures contracts, as required under section 4a(a)(5).

c. Non-Spot-Month Limits

Section 151.4(b) provides that the non-spot-month position limits for non-legacy Referenced Contracts shall be fixed at a number determined as a function of the level of open interest in the relevant Referenced Contract. This formula is defined as 10 percent of the open interest up to the first 25,000 contracts plus 2.5 percent of open interest thereafter (''10–2.5 percent formula''). This is the same formula that has been historically used to set position limits on futures exchanges.[434] With regard to the nine legacy agricultural Core Referenced Futures Contracts, which are currently subject to Commission imposed non-spot-month position limits, as described in section II.E.4. of this release, the Commission is raising those existing position limits to the levels described in the CME petition.

Commenters expressed concern that non-spot-month limits could be harmful, potentially distorting price discovery or liquidity and damaging long term hedging strategies.[435] Others argued that there should be no limits outside the spot-month or that the Commission had not adequately justified non-spot-month limits.[436] One commenter argued that the proposed non-spot-month class limits would increase costs for hedgers and harm market liquidity.[437] Several commenters opined that the Commission should increase the open interest multipliers used in determining the non-spot-month position limits,[438] while some commenters explained that the Commission should decrease the open interest multipliers to 5 percent of open interest for first 25,000 contracts and 2.5 percent thereafter.[439] Other commenters suggested significantly different methodologies for setting limits that would result in relatively more restrictive limits on speculators.[440]

Several commenters recommended that the Commission should keep the legacy limits for legacy agricultural Referenced Contracts.[441] One commenter argued that raising these limits would increase hedging margins and increase volatility which would ultimately undermine commodity producers' ability to sell their product to consumers.[442] Another opined that the Commission need not proceed with phased implementation for the legacy agricultural markets because it could set

[431] CL–ISDA/SIFMA *supra* note 21 at 7.

[432] The Commission notes that it is currently unable to determine the applicability of bona fide hedge exemptions because of differences in the revised statutory definition compared to the current definition applied by DCMs and ECMs. In addition, traders may net cash-settled contracts for purposes of the class limit in the spot month. Thus, absent complete data on swaps positions, the Commission cannot accurately estimate a trader's position for the purposes of compliance with spot-month limits for cash-settled contracts.

[433] This observation is based upon Commission staff discussions with members of industry. *See https://www.cftc.gov/LawRegulation/.*

[434] *See* 17 CFR part 150 (2010).

[435] *See e.g.,* CL–Teucrium *supra* note 124 at 2; and CL–ICE I *supra* note 69 at 6.

[436] *See e.g.,* CL–WGCEF *supra* note 35 at 5; and CL–Goldman *supra* note 89 at 2.

[437] *See e.g.,* CL–DBCS *supra* note 247 at 8–9.

[438] CL–AIMA *supra* note at 35 pg. 3; CL–CME I *supra* note 8 at 12 (for energy and metals); CL–FIA I *supra* note 21 at 12 (10% of open interest for first 25,000 contracts and then 5%); CL–ICI *supra note 21* at 10 (10% of open interest until requisite market data is available); CL–ISDA/SIFMA *supra* note 21 at 20; CL–NGSA/NCGA *supra* note 124 at 5 (25% of open interest); and CL–PIMCO *supra* note 21 at 11.

[439] CL–Greenberger *supra* note 6 at 13; and CL–FWW *supra* note 81 at 12.

[440] *See e.g.,* CL–ATA *supra* note 81 at 4–5; CL–AFR *supra* note 17 at 5–6; CL–ATAA *supra* note 94 at 3, 6, 9–10, 12; CL–Better Markets *supra* note 37 at 70–71 (recommending the Commission to limit non-commodity index and commodity index speculative participation in the market to 30% and 10% of open interest respectively); CL–Delta *supra* note 20 atpg.5; and CL–PMAA/NEFI *supra* note 6 at 7.

[441] CL–ABA *supra* note 150 at 3–4; CL–AFIA *supra* note 94 at 3; CL–Amcot *supra* note 150 at 2; CL–FWW *supra* note 81 at 13; CL–IATP *supra* note 113 at 5; and CL–NGFA *supra* note 72 at 1–2.

[442] CL–ABA *supra* note 150 at 3–4.

their limits based on existing legacy limits.[443]

Several other commenters recommended that the Commission abandon the legacy limits.[444] One commenter argued that the Commission offered no justification for treating legacy agricultural contracts differently than other Referenced Contract commodities.[445] Some of these commenters endorsed the limits proposed by CME.[446] Other commenters recommended the use of the open interest formula proposed by the Commission in determining the position limits applicable to the legacy agricultural Referenced Contract markets.[447] Finally, four commenters expressed their preference that non-spot position limits be kept consistent for the wheat Referenced Contracts.[448]

In addition to the costs associated with generally monitoring positions in Referenced Contracts on an intraday basis, the Commission anticipates some costs to result from the establishment of the non-spot-month position limit, though the Commission expects the resulting costs should be minimal for most market participants. To determine the number of potentially affected entities, the Commission took existing data and calculated the number of traders whose positions would be over the final non-spot-month limits.[449] For the majority of participants, the non-spot-month levels are estimated to impose limits that are sufficiently high so as to not affect their hedging or speculative activity; thus, the Commission projects that relatively few market participants will have to adjust their activities to ensure that their positions are not in excess of the limits.[450] According to these estimates, the position limits in § 151.4(d) would affect, on an annual basis, eighty traders in agricultural Referenced Contracts, twenty-five traders in metal Referenced Contracts, and ten traders in energy Referenced Contracts.[451]

As noted above, the Commission's data on uncleared swaps is limited. The information currently available to the Commission indicates that the uncleared swaps market is primarily comprised of transactions between swap dealers and commercial entities. As such, some of the above entities that may hold positions in excess of the non-spot-month limits may be entitled to bona fide hedging exemptions as provided for in § 150.5. Moreover, the Commission understands that swap dealers, who constitute a large percentage of those anticipated to be near or above the position limits set forth in § 151.4, generally use futures contracts to offset the residual portfolio market risk of their uncleared swaps positions.[452] Under these final rules, market participants can net their physical delivery and cash-settled futures contracts with their swaps transactions for purposes of complying with the non-spot-month limit. In this regard, the netting of futures and swaps positions for such swap dealers would reduce their exposure to an applicable position limit.

Taking these considerations into account, the Commission anticipates that for the majority of participants, the non-spot month levels are estimated to impose limits that are sufficiently high so as to not affect their hedging or speculative activity as these participants could either rely on a bona fide hedge exemption or hold a net position that is under the limit. Thus, the Commission projects that relatively few market participants will have to adjust their activities to ensure that their positions are not in excess of the limits.

The economic costs (or foregone benefits) of the level of position limits is difficult to determine accurately or quantify because, for example, some participants may be eligible for *bona fide* hedging or other exemptions from limits, and thus incur the costs associated with filing exemption paperwork, while others may incur the costs associated with altering their business strategies to ensure that their aggregate positions do not exceed the limits. In the absence of data on the extent to which the bona fide hedge exemption will apply to swaps transactions, at this time the Commission cannot determine or estimate the number of entities that will be eligible for such an exemption. Accordingly, the Commission cannot determine or estimate the total costs industry-wide of filing for the exemption.[453]

Similarly, the Commission is unable to determine or estimate the number of entities that may need to alter their business strategies.[454] Commenters did not provide any quantitative data as to such potential impacts from the proposed limits, and the Commission cannot independently evaluate the potential costs to market participants of such changes in strategies, which would necessarily be based on the underlying business models and strategies of the various market participants.

While the Commission is unable to quantify the resulting costs to the relatively few number of market participants that the Commission estimates may be affected by these limits; to a certain extent costs associated with a change in business or trading strategies to comply with the non-spot-month position limits imposed by the Commission are a consequence of the Congressionally-imposed mandate for the Commission to establish such limits. Commenters suggesting that the Commission should not adopt non-spot-month position limits fail to address the mandate of Congress in CEA section 4a(a)(3)(A) that the Commission impose non-spot-month limits. Based on the Commission's long-standing experience with the application of the 10—2.5 percent formula to establish non-spot-month limits in the futures market as

[443] CL–Amcot *supra* note 150 at 3.

[444] CL–AIMA *supra* note 35 at 4; CL–Bunge *supra* note 153 at 1–2; CL–DB *supra* note 153 at 6; CL–Gresham *supra* note 153 at 4–5; CL–FIA I *supra* note 21 at 12; CL–MGEX *supra* note 74 at 2; CL–MFA *supra* note 21 at 18–19; and USCF *supra* note 153 at 10–11.

[445] CL–USCF *supra* note 153 at 10–11.

[446] CL–Bunge *supra* note 153 at 1–2; CL–FIA I *supra* note 21 at 12; and CL–Gresham *supra* note 153 at 5. *See* CME Petition for Amendment of Commodity Futures Trading Commission Regulation 150.2 (April 6, 2010), *available at http//www.cftc.gov/LawRegulation/DoddFrankAct/Rulemaking/DF_26_PosLimits/index.htm.*

[447] CL–CMC *supra* note 21 at 3; CL–DB *supra* note 153 at 10; and CL–MFA *supra* note 21 at 19.

[448] CL–CMC *supra* note 21 at 3; CL–KCBT I *supra* note 97 at 1–2; CL–MGEX *supra* note 74 at 2; and CL–NGFA *supra* note 72 at 4.

[449] The data was based on the Commission's large trader reporting data for futures contracts and limited swaps data covering certain cleared swap transactions.

[450] To illustrate this, the Commission selected examples from each category of Core Referenced Futures Contracts. In the CBOT Corn contract (an agricultural Referenced Contract), only approximately 4.8% of reportable traders are estimated to be impacted using the methods explained above. Using the COMEX Gold contract as an example of a metal Referenced Contracts, and NYMEX Crude Oil as an example of an energy Referenced Contract, the Commission estimates only 1.4% and .2% (respectively) of all reportable traders in those markets would be impacted by the non-spot-month limit. These estimates indicate that the number of affected entities is expected to be small in comparison to the rest of the market.

[451] These estimates do not take into account open interests from a significant number of swap transactions, and therefore, the Commission believes that the size of the non-spot position limit will increase over this estimate as the Commission is able to analyse additional data.

[452] The estimated monetary costs associated with claiming a bona fide hedge exemption are discussed below in consideration of the costs and benefits for bona fide hedging as well as in the Paperwork Reduction Act section of this final rule.

[453] As previously noted, the costs to an individual firm of filing an exemption are estimated at section III.A.3.

[454] The Commission notes that under the pre-existing positions exemption, a trader would not be in violation of a position limits based solely upon the trader's pre-existing positions in Referenced Contracts. Further, swaps entered before the effective date of the Dodd-Frank Act will not count toward a speculative limit, unless the trader elects to net such swaps positions to reduce their aggregate position.

well as the Commission's limited swaps data, the Commission anticipates that the application of this similar formula to both the futures and swaps market will appropriately maximize the statutory objectives in section 4a(a)(3). The data regarding the swaps market that is currently available to the Commission indicates that a limited number of market participants will be at or near the speculative position limits and that the imposition of these limits should not result in a significant decrease in liquidity in these markets. Accordingly, the Commission believes that non-spot-month limits imposed as a result of these final rules will ensure there continues to be sufficient liquidity for bona fide hedgers and the price discovery of the underlying market will not be disrupted.

The Commission has determined to adopt the position limit levels proposed by the CME for the legacy Referenced Contracts. Such levels would be effective 60 days after the publication date of this rulemaking and those levels would be subject to the existing provisions of current part 150 until the compliance date of these rules, which is 60 days after the Commission further defines the term ''swap'' under the Dodd-Frank Act. At that point, the relevant provisions of this part 151, including those relating to bona-fide hedging and account aggregation, would also apply. In the Commission's judgment, the CME proposal represents a measured approach to increasing legacy limits, similar to that previously implemented.[455] The Commission will use the CME's all-months-combined petition levels as the basis to increase the levels of the non-spot-month limits for legacy Referenced Contracts. The petition levels were based on 2009 average month-end open interest. Adoption of the petition levels results in increases in limit levels that range from 23 to 85 percent higher than the levels in existing § 150.2.

The Commission has determined to maintain the current approach to setting and resetting legacy limits because it is consistent with the Commission's historical approach to setting such limits and ensures the continuation of maintaining a parity of limit levels for the major wheat contracts at DCMs. In response to comments supporting this approach, the Commission will also increase the levels of the limits on wheat at the MGEX and the KCBT to the level for the wheat contract at the CBOT.[456]

d. Position Visibility

As discussed in II.L. of this release, the Commission is adopting position visibility levels as a supplement to position limits. These levels will provide the Commission with the ability to conduct surveillance of market participants with large positions in the energy and metal Reference Contracts.[457] As discussed in the Paperwork Reduction Act section of these final rules, the Commission increased the position visibility levels and reduced the reporting requirements in order to decrease the compliance costs associated with position visibility levels.

Commenters generally stated that the position visibility requirements are unnecessary, redundant, burdensome, and overly restrictive.[458] While some commenters acknowledged the usefulness of the data collected through position visibility requirements, they maintained the burden associated with complying with these requirements was too great.[459] One commenter noted that it is too costly to require monthly visibility reporting; another suggested these compliance costs would most affect bona fide hedgers because of the extra information required of those claiming a bona fide hedging exemption.[460] Another commenter noted that position visibility requirements may prove duplicative once the Commission can evaluate data received from swaps dealers and major swaps participants, DCOs, SEFs and SDRs.[461]

The comments that suggested semi-annual reporting or no reporting at all, instead of monthly reporting, have not been adopted because of the surveillance utility afforded by the visibility reporting. The Commission notes that once an affected person adopts processes to comply with the standard reporting format, visibility reporting may result in a lesser burden when compared to the alternative of frequent production of books and records under special calls. With regard to frequency, reporting that is too infrequent may undermine the effectiveness of the Commission's surveillance efforts, as one goal of reporting under position visibility levels is to provide the Commission with timely and accurate data regarding the current positions of a market's largest traders in order to detect and deter manipulative behavior. The Commission notes that until SDRs are operational and the Commission's large trader reporting for physical commodity swaps are fully implemented, the Commission would not have access to the data necessary to have a holistic view of the marketplace and to set appropriate position limit levels.

To further mitigate costs on reporting entities, the Commission has determined to reduce the filing burden associated with position visibility to one filing per trader per calendar quarter, as opposed to a monthly filing. This reduced reporting is not anticipated to significantly impact the overall surveillance benefit provided through the position visibility reporting. However, if the large position holders subject to position visibility reporting requirements were to submit reports any less often, then the reports would not provide sufficiently regular information for the Commission to be able to determine the nature (hedging or speculative) of the largest positions in the market. This data should assist the Commission in its required report to Congress regarding implementation of position limits,[462] and in ongoing assessment of the appropriateness of the levels of such limits.

The Commission has also raised the visibility levels to approximately 50 to 60 percent of the projected aggregate position limits for the Reference Contract (from 10 to 30 percent of the limit in the Proposed Rule), with the exception of the Light, Sweet Crude Oil (CL) and Henry Hub Natural Gas (NG) Referenced Contracts, for which these levels have been raised from the proposal but are still lower than 50 to 60 percent of projected aggregate position limits in order to capture a target number of traders.[463] Based on the Commission's current data regarding futures and certain cleared swap transactions, the higher visibility levels as compared to the Proposed Rule will reduce the number of traders (including bona fide hedgers) subject to the reporting requirements, while still providing the Commission sufficient data on the positions of the largest traders in the respective Referenced Contract.

The Commission estimates that, on an annual basis, at most 73 traders would

[455] 58 FR 18057, April 7, 1993.

[456] For a discussion of the historical approach, *see* 64 FR 24038, 24039, May 5, 1999.

[457] As discussed in section II.L of this release, the Commission is not extending position visibility reporting to agricultural contracts because the Commission believes that reporting related to bona fide hedging and other exemptions should provide the Commission with sufficient data on the largest traders in agricultural Referenced Contracts.

[458] *See e.g.,* CL–BGA *supra* note 35 at 19–20; CL–CME I *supra* note 8 at 6; CL–WGCEF *supra* note 35 at 23; and CL–MFA *supra* note 21 at 3.

[459] *See e.g.,* CL–USCF *supra* note 153 at 11.

[460] *See e.g.,* CL–USCF *supra* note 153 at 11; and CL–WGCEF *supra* note 35 at 22–23.

[461] CL–FIA I *supra* note 21, at 13.

[462] *See* section 719 of the Dodd-Frank Act.

[463] *See* § 151.6.

be subject to position visibility reporting requirements. As discussed in the PRA section of this release, the Commission estimates the costs of compliance to be a total burden, across all of these entities, of 7,760 annual labor hours resulting in a total of $611,000 in annual labor costs and $7 million in annualized capital and start-up costs and annual total operating and maintenance costs.

The Commission estimates that 25 of the traders affected by position visibility regulations would be bona fide hedgers. Specifically with regard to bona fide hedgers, the Commission estimates compliance costs for position visibility reporting to be a total burden, across all bona fide hedgers, of 2,000 total annual labor hours resulting in a total of $157,200 in annual labor costs and $1.625 million in annualized capital and start-up costs and annual total operating and maintenance costs. The Commission notes that these estimated costs for bona fide hedgers are a subset of, and not in addition to, the costs for all participants combined enumerated above.

The information gained from position visibility levels provides essential transparency to the Commission as a means of preventing potentially manipulative behavior. In the Commission's judgment, such data is a critical component of an effective position limit regime as it will help to maximize to the extent practicable the statutory objectives of preventing excessive speculation and manipulation, while ensuring sufficient liquidity for bona fide hedgers and protecting the price discovery function of the underlying market. It allows the Commission to monitor the positions of the largest traders and the effects of those positions in the affected markets. While the extent of these benefits is not readily quantifiable, the ability to better understand the balance in the market between speculative and non-speculative positions is critical to the Commission's ability to monitor the effectiveness of position limits and potentially recalibrate the levels in order to ensure the limits sufficiently address the statutory objectives that the Commission must consider and maximize in establishing appropriate position limits. In this way, position visibility levels are not unlike position accountability levels that are currently utilized for many DCM contracts. Finally, as discussed under section II.C.2. of this release, position visibility reporting will enable the Commission to address data gaps that will exist prior to the availability of comprehensive data from SDRs.

e. DCMs and SEFs

Pursuant to Core Principle 5(B) for DCMs and Core Principle 6(B) for SEFs that are trading facilities, such registered entities are required to establish position limits ''[f]or any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a).'' The core principles require that these levels be set ''at a level not higher than the position limitation established by the Commission.'' As such, the final rules require DCMs and SEFs to set position limits on the 28 physical commodity Referenced Contracts traded or executed on such DCMs and SEFs.

Under the proposal, DCMs and SEFs would have been required to implement a position limit regime for all physical commodity contracts executed on their facility. This proposal would effectively create a class limit for the trading facility's contracts. Because the Commission determined to eliminate class limits outside of the spot-month for the 28 contracts subject to Commission limits, the Commission has determined not to adopt the proposed requirements that would have effectively created class limits for a particular trading venue. Accordingly, the final rules permit the trading facility to grant spread or arbitrage exemptions regardless of the trading facility or market in which such positions are held. To remain consistent with the Commission's class limits within the spot-month, DCMs and SEFs cannot grant spread or arbitrage exemptions with regard to physical-delivery commodity contracts. These provisions allow DCMs and SEFs to comply with the core principles for contracts subject to Commission position limits without creating an incentive for traders to migrate their speculative positions off of the trading facility to avoid the SEF or DCM limit.[464]

The Commission notes that the establishment of Federal limits on the 28 Core Referenced Futures Contracts should not significantly affect the compliance costs for DCMs because they currently impose spot-month limits for physical commodity contracts in compliance with existing Core Principle 5.[465] DCMs in particular have long enforced spot-month limits, and the Commission notes that such spot-month position limits are currently in place for all physical-delivery physical commodity futures under Core Principle 5 of section 5(d) of the CEA. The final rule on physical-delivery spot-month limits should impose minimal, if any, additional compliance costs on DCMs.

As outlined above in this section III.A.3, the Commission believes that the position limits finalized herein will likely cause relevant DCMs, SEFs, and market participants to incur various additional costs (or forego benefits). At this time, the Commission is unable to quantify the cost of such changes because the effect of this determination will vary per market and because the requirements applicable to SEFs extend to swaps, which heretofore were generally not subject to federally-set position limits. The Commission also notes that to a certain extent these costs are a consequence of the statutory requirement for DCMs and SEFs to set and administer position limits on contracts that have Federal position limits in accordance with the Core Principles applicable to such facilities.

For the remaining physical commodity contracts executed on a DCM or SEF that is a trading facility, *i.e.,* those contracts which are not Referenced Contracts, DCMs and SEFs are required to comply with new Core Principle 5 for DCMs and Core Principle 6 for SEFs in establishing position limitations or position accountability levels. The costs resulting from this requirement also are a consequence of the statutory provision requiring DCMs and SEFs to set and administer position limits or accountability levels.

f. CEA Section 15(a) Considerations: Position Limits

As stated above, section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

i. Protection of Market Participants and the Public

Congress has determined that excessive speculation causing ''sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity.'' Further, Congress directed that for the purpose of ''diminishing, eliminating, or preventing such burden,'' the

[464] For example, traders could utilize swaps not traded on a DCM or SEF.

[465] The Commission has further provided for acceptable practices for DCMs and SEFs seeking compliance with their respective position limit and accountability-related Core Principles in other commodity contracts.

Commission ''shall * * * proclaim and fix such [position] limits * * * as the Commission finds are necessary to diminish, eliminate, or prevent such burden.'' [466] This rulemaking responds to the Congressional mandate for the Commission to impose position limits both within and outside of the spot-month on DCM futures and economically equivalent swaps.

The Congressional mandate also directed that the Commission set limits, to the maximum extent practicable, in its discretion, to diminish, eliminate or prevent excessive speculation, deter or prevent market manipulation, ensure sufficient liquidity for bona fide hedgers, and ensure that the price discovery function of the underlying market is not disrupted.[467] To that end, the Commission evaluated its historical experience setting limits and overseeing DCMs that administer limits, reviewed available futures and swaps data, and considered comments from the public in order to establish limits that address, to the maximum extent practicable within the Commission's discretion, the above mentioned statutory objectives.

The spot-month limit, set at 25% of deliverable supply, retains current practice in setting spot-month position limits, and in the Commission's experience this formula is effective in diminishing the potential for manipulative behavior and excessive speculation within the spot-month. As evidenced by the limited number of traders that may need to adjust their trading strategies to account for the limits, the Commission does not believe that this formula will impose an overly stringent constraint on speculative activity; and therefore, should ensure sufficient liquidity for bona fide hedgers and that the price discovery function of the underlying market is not disrupted. In addition, continuing the practice of registered entity spot-month position limits should serve to more effectively monitor trading to prevent manipulation and in turn protect market participants and the price discovery process.

With regard to the interim final rules for cash-settled contracts in the spot-month, as previously explained the Commission believes that the level of five times the applicable limit for the physical-delivery natural gas contracts should protect market participants through maximizing, to the extent practicable, the objectives set forth by Congress in CEA section 4a(a)(3)(B). In addition, based upon the Commission's limited swaps data, the limits on cash-settled agricultural, metals, and energy (other than natural gas) contracts should ensure sufficient liquidity for bona fide hedgers and avoid disruption to price discovery in the underlying market due to the overall size of the swap market in those commodities. Nevertheless, the Commission intends to monitor trading activity under the new limits to determine the effect on market liquidity of these limits and whether the limits should be modified to further maximize the four statutory objectives set forth in CEA section 4a(a)(3)(B). The Commission also invites public comment as to these determinations.

With regard to the non-spot-month position limits, which are set at a percentage of open interest, the Commission believes such limits will also protect market participants and the public through maximization, to the extent practicable, the four objectives set forth in CEA section 4a(a)(3)(B). The Commission selected the general 10–2.5% formula for calculating position limits as a percentage of market open interest based on the Commission's longstanding experience overseeing DCM position limits outside of the spot-month, which are based on the same formula. Further, as evidenced by the relatively few traders that the Commission estimates would hold positions in excess of such levels, the relatively small percentage of total open interest these traders would hold in excess of these limits, and that many large traders are expected to be bona fide hedgers; the Commission concludes that these limits should protect the public through ensuring sufficient liquidity for bona fide hedgers and protecting the price discovery function of the underlying market.

Finally, the position visibility levels established in these final rules should protect market participants by giving the Commission data to monitor the largest traders in Referenced metal and energy contracts. The data reported under position visibility levels will help the Commission in considering whether to reset position limits to maximize further the four statutory objectives in section 4a(a)(3(B) of the CEA. Further, monitoring the largest traders in these markets should provide the Commission with data that may help prevent or detect potentially manipulative behavior.

ii. Efficiency, Competiveness, and Financial Integrity of Futures Markets

The Federal spot-month and non-spot-month formulas adopted under the final rules are designed, in accordance with CEA section 4a(a)(3)(B),to deter and prevent manipulative behavior and excessive speculation, while also maintaining sufficient liquidity for hedging and protecting the price discovery process. To the extent that the position limit formulas achieve these objectives, the final rules should protect the efficiency, competitiveness, and financial integrity of futures markets.

iii. Price Discovery

Based on its historical experience, the Commission believes that adopting formulas for position limits that are based on formulas that have historically been used by the Commission and DCMs to establish position limits maximizes the extent practicable, at this time, the four statutory objectives set forth by Congress in CEA section 4a(a)(3). Based on its prior experience with these limits, the Commission believes that the price discovery function of the underlying market will not be disrupted. Similarly, as effective price discovery relies on the accuracy of prices in futures markets, and to the extent that the position limits described herein protect prices from market manipulation and excessive speculation, the final rules should protect the price discovery function of futures markets.

iv. Sound Risk Management Practices

To the extent that these position limits prevent any market participant from holding large positions that could cause unwarranted price fluctuations in a particular market, facilitate manipulation, or disrupt the price discovery process, such limits serve to prevent market participants from holding positions that present risks to the overall market and the particular market participant as well. To this extent, requiring market participants to ensure that they do not accumulate positions that, when traded, could be disruptive to the overall market—and hence themselves as well—promotes sound risk management practices by market participants.

v. Public Interest Considerations

The Commission has not identified any other public interest considerations related to the costs and benefits of the rules establishing limits on positions.

5. Exemptions: Bona Fide Hedging

As discussed section II.G. of this release, the Dodd-Frank Act provided a definition of bona fide hedging for futures contracts that is more narrow than the Commission's existing definition under regulation § 1.3(z). Pursuant to sections 4a(c)(1) and (2) of the CEA, the Commission incorporated the narrowed definition of bona fide

[466] Section 4a(a)(1) of the CEA, 7 U.S.C. 6a(a)(1).

[467] *See* section 4a(a)(3)(B) of the CEA, 7 U.S.C. 6a(a)(3)(B).

hedging into the Proposed Rules, and incorporates this definition into these final rules. The Commission also limited bona fide hedging transactions to those specifically enumerated transactions and pass-through swap transactions set forth in final § 151.5. In response to commenters' inquiries over whether certain transactions qualified as an enumerated hedge transaction, the Commission expanded the list of enumerated hedge transactions eligible for the bona fide hedging exemption, and also gave examples of enumerated hedge transactions in appendix B to this release.[468]

Pursuant to CEA section 4a(c)(1), the Commission also proposed to extend the definition of bona fide hedging transactions to all referenced contracts, including swaps transactions. The Commission is adopting the definition of bona fide hedging as proposed. The Commission believes that applying the statutory definition of bona fide hedging to swaps is consistent with congressional intent as embodied in the expansion of the Commission's authority to swaps (*i.e.,* those that are economically-equivalent and SPDFs). In granting the Commission authority over such swaps, Congress recognized that such swaps warrant similar treatment to their economically equivalent futures for purposes of position limits and therefore, intended that statutory definition of bona fide hedging also be extended to swaps.[469]

The Commission also established a reporting and recordkeeping regime for bona fide hedge exemptions. Under the proposal, a trader with positions in excess of the applicable position limit would be required to file daily reports to the Commission regarding any claimed bona fide hedge transactions. In addition, all traders would be required to maintain records related to bona fide hedging exemptions, including the exemption for ''pass-through'' swaps. In response to comments, the Commission has reduced the reporting frequency from daily to monthly, and streamlined the recordkeeping requirements for pass-through swap counterparties. These modifications should permit the Commission to retain its surveillance capabilities to ensure the proper application of the bona fide hedge exemption as defined in the statute, while addressing commenters' concerns regarding costs.

Commenters argued that the definition of bona fide hedging, as proposed, was too narrow and, if applied, would reduce liquidity in affected markets.[470] These commenters suggested that the list of enumerated transactions did not adequately take into account all possible hedging transactions.[471] The lack of a broad risk management exemption also caused concerns among some commenters, who noted that the cost of reclassifying transactions would be significant and could induce companies to do business in other markets.[472] Other commenters expressed concerns regarding the pass-through exemption for swap dealers whose counterparties are bona fide hedgers, suggesting that the provision implied bona fide hedgers must manage the hedging status of their transactions and report them to the swap dealer, thus burdening the hedger in favor of the swap dealer.[473] Some commenters suggested that the Commission develop a method for exempting liquidity providers in order to retain the valuable services such participants provide.[474] One commenter urged the Commission to remove limit exemptions for index fund investors in agricultural markets in order to decrease volatility and allow for true price discovery.[475] Another commenter requested that the Commission allow categorical exemptions for trade associations to reduce the burden on smaller entities.[476]

Many commenters argued that the reporting requirements were overly burdensome and requested monthly reporting of bona fide hedging activity as opposed to the daily reporting that would be required by the Proposed Rule.[477] The commenters also criticized proposed restrictions on holding a hedge into the last five days of trading.[478] Some commenters on anticipatory hedging exemptions noted the proposed one year limitation on anticipatory hedging was biased toward agricultural products and did not take into account the different structure of other markets.[479] One commenter noted that the requirement to obtain approval for anticipatory hedge exemptions at a time close to when the position may exceed the limit is burdensome.[480]

The Commission is implementing the statutory directive to define bona fide hedging for futures contracts as provided in CEA section 4a(c)(2). In this respect, the Commission does not have the discretion to disregard a directive from Congress concerning the narrowed scope of the definition of bona fide hedging transactions.[481] Thus, for example, as discussed in section II.G. of this release, the final rules do not provide for risk management exemptions, given that the statutory definition of bona fide hedging generally excludes the application of a risk management exemption for entities that generally manage the exposure of their swap portfolio.[482] As discussed above, the Commission is authorized to define bona fide hedging for swaps and in this regard, may construe bona fide hedging to include risk management transactions. The Commission, however, does not believe that including a risk management provision is necessary or appropriate given that the elimination of the class limits outside of the spot-month will allow entities, including swap dealers, to net Referenced Contracts whether futures or economically equivalent swaps.[483] As such, under the final rules, positions in

[468] This appendix provides examples of transactions that would qualify as an enumerated hedge transaction; the enumerated examples do not represent the only transactions that could qualify.

[469] The Commission notes that the impact of the definition of bona fide hedging for both futures and swaps will vary depending of the positions of each entity. Due to this variability among potentially affected entities, the specifics of which are not known to the Commission, and cannot be reasonably ascertained, the Commission cannot reasonably quantify the impact of applying the same definition of bona fide hedging for swaps and futures transactions.

[470] *See e.g.,* CL–Gavilon *supra* note 276 at 6; CL–FIA I *supra* note 21 at 14–15.

[471] *See e.g.,* CL–Commercial Alliance I *supra* note 42 at 2; CL–FIA I *supra* note 21 at 14; and CL–Economists Inc. *supra* note 172 at 19.

[472] *See e.g.,* CL–Gavilon *supra* note 276 at 6.

[473] CL–BGA *supra* note 35 at 17.

[474] *See e.g.,* CL–FIA I *supra* note 21 at 17–18; and CL–Katten *supra* note 21 at 2–3.

[475] CL–ABA *supra* note 150 at 6.

[476] CL–NREC/AAPP/ALLPC *supra* note 266 at 27.

[477] *See e.g.,* CL–API *supra* note 21 at 10; CL–Encana *supra* note 145 at 3; CL–FIA I *supra* note 21 at 21; CL–WGCEF *supra* note 35 at 14–15; CL–ICE I *supra* note 69 at 11–12; CL–COPE *supra* note 21 at 12; CL–EEI/ESPA *supra* note 21 at 6–7.

[478] *See e.g.,* CL–FIA I *supra* note 21 at 16; and CL–ISDA/SIFMA *supra* note 21 at 11.

[479] *See e.g.,* CL–Economists, Inc. *supra* note 172 at 20–21.

[480] *See e.g.,* CL–AGA *supra* note 124 at 7.

[481] Some commenters suggested that the Commission should use its exemptive authority in section 4a(a)(7) of the CEA, 7 U.S.C. 6a(a)(7), to expand the definition of bona fide hedging to include certain transactions; however, the Commission cannot use its exemptive authority to reshape the statutory definition provided in section 4a(c)(2) of the CEA, 7 U.S.C. 6a(c)(2).

[482] As discussed in II.G.1, the plain text of the new statutory definition directs the Commission to define bona fide hedging for futures contracts to include hedging for physical commodities (other than excluded commodities derivatives) only if such transactions or positions represent substitutes for cash market transactions and offset cash market risks. This definition excludes hedges of general swap position risk (*i.e.,* a risk-management exemption), but does include a limited exception for pass-through swaps.

[483] The removal of class limits should also generally mitigate the impact of not having a risk management exemption across futures and swaps because affected traders can net risk-reducing positions in the same Referenced Contract outside of the spot-month.

Referenced Contracts entered to reduce the general risk of a swap portfolio will be netted with the positions in the portfolio outside of the spot-month.[484]

The Commission estimates that there may be significant costs (or foregone benefits) associated with the implementation of the new statutory definition of bona fide hedging to the extent that the restricted definition of bona fide hedging may require traders to potentially adjust their trading strategies. Additionally, there may be costs associated with the application of the narrowed bona fide hedging definition to swaps. The Commission anticipates that certain firms may need to adjust their trading and hedging strategies to ensure that their aggregate positions do not exceed position limits. As previously noted, however, the Commission is unable to estimate the costs to market participants from such adjustments in trading and hedging strategies. Commenters did not provide any quantitative data as to such potential impacts from the proposed limits and the Commission does not have access to any such business strategies of market participants; thus, the Commission cannot independently evaluate the potential costs to market participants of such changes in strategies.

In light of the requests from commenters for clarity on whether specific transactions qualified as bona fide hedge transactions, the Commission developed Appendix B to these Final Rules to detail certain examples of bona fide hedge transactions provided by commenters that the Commission believes represent legitimate hedging activity as defined by the revised statute.[485]

As described further in the PRA section, the Commission estimates the costs of bona fide hedging-related reporting requirements will affect approximately 200 entities annually and result in a total burden of approximately $29.8 million across all of these entities, including 29,700 annual labor hours resulting in a total of $2.3 million in annual labor costs and $27.5 million in annualized capital and start-up costs and annual total operating and maintenance costs. These estimated costs amount to approximately $149,000 per entity. The reduction in the frequency of reporting from daily in the proposal to monthly in the final rule will decrease the burden on bona fide hedgers while still providing the Commission with adequate data to ensure the proper application of the statutory definition of bona fide hedging transaction. Further, the advance application required for an anticipatory exemption has also been changed to a notice filing, which should also decrease costs for bona fide hedgers as such entities can rely on the exemption and implement hedging strategies upon filing the notice as opposed to incurring a delay while awaiting the Commission to respond to the application.

The Commission has also eliminated restrictions on maintaining certain types of bona fide hedges (*e.g.,* anticipatory hedges) in the last five days of trading for all cash-settled Referenced Contracts. The Commission will maintain this general restriction for physically-delivered Referenced Contracts. However, the Commission is clarifying the time period for these restrictions in the physical delivery contracts, distinguishing the agricultural physical-delivery contacts from the non-agricultural physical delivery contracts. The Commission will retain the proposed restrictions for the last five days of trading in agricultural physical-delivery Referenced Contracts, while non-agricultural physical delivery Referenced Contracts will be subject to a prohibition that applies to holding the hedge into the spot month. The Commission has removed these restrictions in cash settled contracts in order to avoid, for example, requiring a trader with an anticipatory hedge exemption either to apply for a hedge exemption based on newly produced inventories (*i.e.,* the hedge no longer being anticipatory) or to roll before the spot period restriction. The restriction on holding an anticipatory hedge into the last days of trading on a physical-delivery contract mitigates concerns that liquidation of a very large bona fide hedging position would have a negative impact on a physical-delivery contract during the last few days since such an anticipatory hedger neither intended to make nor take delivery and, thus, would liquidate a large position at a time of reduced trading activity, impacting orderly trading in the contracts. Such concerns generally are not present in cash-settled contracts, since a trader has no need to liquidate to avoid delivery. The Commission believes that permitting the maintenance of such hedges in cash settled contracts will not negatively affect the integrity of these markets.

Also in response to commenters, the one-year limitation on anticipatory hedging has been amended in the final rules to apply only to agricultural markets; the limitation has been lifted on energy and metal markets, in recognition of the differences in the characteristics of the markets for different commodities, such as the annual crop cycle for agricultural commodities, that are not present in energy and metal commodities.

a. CEA Section 15(a) Considerations: Bona Fide Hedging

Congress established the definition of bona fide hedge transaction for contracts of future delivery in CEA section 4a(c)(2), and the Commission incorporated this definition into the final rules. As described in section II.G. of this release and in the consideration of costs and benefits, Congress limited the scope of bona fide hedging transactions to those tied to a physical marketing channel.[486] The Commission believes the enumerated hedges provide an appropriate scope of exemptions for market participants, consistent with the statutory directive for the Commission to define bona fide hedging transactions and positions.

i. Protection of Market Participants and the Public

The Commission's filing and recordkeeping requirements for bona fide hedging activity are intended to enhance the Commission's ability to monitor bona fide hedging activities, and in particular, to ascertain whether large positions in excess of an applicable position limit reflect bona fide hedging and thus are exempt from position limits. The Commission anticipates that the filing and recordkeeping provisions will impose costs on entities. However, the Commission believes that these costs provide the benefit of ensuring that the Commission has access to information to determine whether positions in excess of a position limit relate to bona fide hedging or speculative activity. To reduce the compliance burden on bona fide hedgers, the Commission has reduced the reporting frequency from daily to monthly. As a necessary

[484] The statutory definition of bona fide hedging does not include a risk management exemption for futures contracts. The impact of not having a risk-management exemption will vary depending on the positions of each entity, and the extent of mitigation through netting futures and swaps outside of the spot-month will also vary depending on the positions of each entity. Due to this variability among potentially affected entities, the specifics of which are not known to the Commission, and cannot be reasonably ascertained, the Commission cannot reasonably quantify the impact of not incorporating a risk-management exemption within the definition of bona fide hedging. Further, as noted above, the Commission is currently unable to quantify the cost that a firm may incur as a result of position limits impacting trading strategies.

[485] *See* II.G.1. of this release.

[486] For the reasons discussed above in this section III.A.4., the Commission is defining bona fide hedging for swaps to replicate the statutory definition for futures contracts.

component of an effective position limits regime, the Commission believes that the requirements related to bona fide hedging will protect participants and the public.

ii. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

In CEA section 4a, as amended by the Dodd-Frank Act, Congress explicitly exempted those market participants with legitimate bona fide hedge positions from position limits. In implementing this definition, the final rules' position limits will not constrict the ability for hedgers to mitigate risk—a fundamental function of futures markets. In addition, as previously noted, the Commission has set these position limits at levels that will, in the Commission's judgment, to the maximum extent practicable at this time, meet the objectives set forth in CEA section 4a(a)(3)(B), which includes ensuring sufficient liquidity for bona fide hedgers. In maximizing these objectives, the Commission believes that such limits will preserve the efficiency, competitiveness, and financial integrity of futures markets. Similarly, the filing and recordkeeping requirements should help to ensure the proper application of the bona fide hedge exemption.

However, Congress also narrowed the definition of what the Commission could consider to be a bona fide hedge for contracts as compared to the Commission's definition in regulation 1.3(z). The Commission has attempted to mitigate concerns regarding any potential negative impact to the efficiency of futures markets based upon the new statutory definition. For instance, the Commission has expanded the list of enumerated hedging transactions to clarify the application of the statutory definition.[487] In addition, the Commission has removed the application of class limits outside of the spot-month, which should mitigate the impact of narrowing the bona fide hedge exemption, since positions taken in the futures market to hedge the risk from a position established in the swaps market (or vice versa) can be netted for the purpose of calculating whether such positions are in excess of any applicable position limits. In light of these considerations, the Commission anticipates that the Commission's implementation of the statutory definition of bona fide hedging will not negatively affect the competitiveness or efficiency of the futures markets.

iii. Price Discovery

As discussed above, the Commission is implementing the new statutory definition of bona fide hedging. Based on its historical experience with position limits at the levels similar to those established in the final rules, and in light of the measures taken to mitigate the effects of the narrowed statutory definition of bona fide hedging, the Commission does not anticipate the rules relating to the bona fide hedge exemption will disrupt the price discovery process.

iv. Sound Risk Management Practices

While the bona fide hedging requirements will cause market participants to monitor their physical commodity positions to track compliance with limits, the bona fide hedging requirements do not necessarily affect how a firm establishes and implements sound risk management practices.

v. Public Interest Considerations

The Commission has not identified any other public interest considerations related to the costs and benefits of the rules with respect to bona fide hedging.

6. Aggregation of Accounts

The final regulations, as adopted, largely clarify existing Commission aggregation standards under part 150 of the Commission's regulations. As discussed in section II.H. of this release, the Commission proposed to significantly alter the current aggregation rules and exemptions. Specifically, proposed part 151 would eliminate the independent account controller (IAC) exemption under current § 150.3(a)(4), restrict many of the disaggregation provisions currently available under § 150.4 and create a new owned-financial entity exemption. The proposal would also require a trader to aggregate positions in multiple accounts or pools, including passively managed index funds, if those accounts or pools have identical trading strategies. Lastly, disaggregation exemptions would no longer be available on a self-executing basis; rather, an entity seeking an exemption from aggregation would need to apply to the Commission, with the relief being effective only upon Commission approval.[488]

Commenters asserted that the elimination of the longstanding IAC exemption would lead to a variety of negative effects, including reduced liquidity and distorted price signals, among many other things.[489] One commenter mentioned that without the IAC exemption, multi-advisor commodity pools may become impossible.[490] Commenters also expressed concerns that the proposed owned non-financial entity exemption lacked a rational basis for drawing a distinction between financial and non-financial entities; and the absence of the IAC exemption could force a firm to violate other Federal laws by sharing of position information across otherwise separate entities.[491] Other commenters criticized the costs of the aggregation exemption applications, stating that the process would be burdensome for participants.[492]

In addition, commenters objected to the changes to the disaggregation exemption as it applies to interests in commodity pools, arguing that forcing aggregation of independent traders would increase concentration, limit investment opportunities, and thus potentially reduce liquidity in the U.S. futures markets.[493] Commenters also objected to the Commission's proposal to aggregate on the basis of identical trading strategies, arguing that it would decrease index fund participation and reduce liquidity.[494]

The primary rationale for the aggregation of positions or accounts is the concern that a single trader, through common ownership or control of multiple accounts, may establish positions in excess of the position limits—or otherwise attain large concentrated positions—and thereby increase the risk of market manipulation or disruption. Consistent with this goal, the Commission, in its design of the aggregation policy, has strived to ensure the participation of a minimum number of traders that are independent of each

[487] As described in earlier sections and as found in Appendix B of these rules.

[488] The Commission did not propose any substantive changes to existing § 150.4(d), which allows an FCM to disaggregate positions in discretionary accounts participating in its customer trading programs provided that the FCM does not, among other things, control trading of such accounts and the trading decisions are made independently of the trading for the FCM's other accounts. As further described below, however, the FCM disaggregation exemption would no longer be self-executing; rather, such relief would be contingent upon the FCM applying to the Commission for relief.

[489] *See e.g.* CL–DBCS *supra* note 247 at 6; CL–Morgan Stanley *supra* note 21 at 8–9; and CL–PIMCO *supra* note 21 at 4.

[490] CL–Willkie *supra* note 276 at 3–4.

[491] *See e.g.* CL–PIMCO *supra* note 21 at 4–5; CL–BGA *supra* note 35 at 22; CL–FIA I *supra* note 21 at 24; CL–ICE I *supra* note 69 at 6; and CL–CME I *supra* note 8 at 16.

[492] *See e.g.* CL–ICE I *supra* note 69 at 13; CL–CME I *supra* note 8 at 17; CL–FIA I *supra* note 21 at 26–27; and CL–Cargill *supra* note 76 at 9.

[493] *See e.g.* CL–MFA *supra* note 21 at 14–15; and CL–Blackrock *supra* note 21 at 6–7.

[494] *See e.g.* CL–CME I *supra* note 8 at 18; and CL–Blackrock *supra* note 21 at 14.

other and have different trading objectives and strategies.

Upon further consideration, and in response to commenters, the Commission is retaining the IAC exemption in existing § 150.4, recognizing that to the extent that an eligible entity's client accounts are traded by independent account controllers,[495] with appropriate safeguards, such trading may enhance market liquidity and promote efficient price discovery without increasing the risk of market manipulation or disruption.[496]

The final rules expressly provide that the Commission's aggregation policy will apply to swaps and futures. The extension of the aggregation requirement to swaps may force a trader to adjust its business model or trading strategies to avoid exceeding the limits. The Commission is unable to provide a reliable estimation or quantification of the costs (including foregone benefits) of such changes because, among other things, the effect of this determination will vary per entity and would require information concerning the subject entity's underlying business models and strategies, to which the Commission does not have access.[497]

To further respond to concerns from commenters, the Commission is establishing an exemption from the aggregation standards in circumstances where the aggregation of an account would result in the violation of other Federal laws or regulations, and an exemption for the temporary ownership or control of accounts related to underwriting securities. In addition, in response to commenters' concerns regarding potential negative market impacts on liquidity and competitiveness, the Commission is not adopting the proposed changes to the standards for commodity pool aggregation and is instead retaining the existing standards. However, the Commission is retaining the provision that requires aggregation for identical trading strategies in order to prevent the evasion of speculative position limits.[498]

In light of the importance of the aggregation standards in an effective position limits regime, it is critical that the Commission effectively and efficiently monitor the extent to which traders rely on any of the disaggregation exemptions. During the period of time that the exemptions from aggregation were self-certified, the Commission did not have an adequate ability to monitor whether entities were properly interpreting the scope of an exemption or whether entities followed the conditions applicable for exemptive relief. Accordingly, traders seeking to rely on any disaggregation exemption will be required to file a notice with the Commission; the disaggregation exemption is no longer self-executing. As discussed in the PRA section, the Commission estimates costs associated with reporting regulations will affect approximately ninety entities resulting in a total burden, across all of these entities, of 225,000 annual labor hours and $5.9 million in annualized capital and start-up costs and annual total operating and maintenance costs.

a. CEA Section 15(a) Considerations: Aggregation

The aggregation standards finalized herein largely track the Commission's longstanding policy on aggregation, which will now apply to futures and swaps transactions. The Commission has added certain additional safeguards to ensure the proper aggregation of accounts for position limit purposes.

i. Protection of Market Participants and the Public

The Commission's general policy on aggregation is derived from CEA section 4a(a)(1), which directs the Commission to aggregate based on the positions held as well as the trading done by any persons directly or indirectly controlled by such person.[499] The Commission has historically interpreted this provision to require aggregation based upon ownership or control. The commenters largely supported the existing aggregation standards, and as noted above, the Commission has largely retained the aggregation policy from part 150 and extended its application to positions in swaps.

As discussed above, the Commission anticipates that the aggregation standards will impose additional costs to various market participants, including the monitoring of positions and filing for an applicable exemption. However, the benefits derived from a notice filing, which ensure proper application of aggregation exemptions, and the general monitoring of positions, which are a necessary cost to the imposition of position limits, warrant adoption of the final aggregation rules. The continued use of existing aggregation standards, which are followed at the Commission and DCM level, may mitigate costs for entities to continue to aggregate their positions. In addition, the new aggregation provision related to identical trading strategies furthers the Commission policy on aggregation by preventing evasion of the limits through the use of positions in funds that follow the same trading strategy. Accordingly, as a necessary component of an effective position limit regime, and based on its experience with the current aggregation rules, the Commission believes that the provisions relating to aggregation in the final rules will promote the protection of market participants and the public.

ii. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

For reasons discussed above, an effective position limits regime must include a robust aggregation policy that is designed to prevent a trader from attaining market power through ownership or control over multiple accounts. To the extent that the aggregation policy under the final rules prevent any market participant from holding large positions that could cause unwarranted price fluctuations in a particular market, facilitate manipulation, or disrupt the price discovery process, the aggregation standards finalized herein operate to help ensure the efficiency, competitiveness and financial integrity of futures markets. In addition to the existing exemptions under part 150, to address commenter concerns over forced information sharing in violation of Federal law and regarding the underwriting of securities, the Commission is providing for limited exemptions to cover such circumstances.

iii. Price Discovery

For similar reasons, the Commission believes that the aggregation requirements will further the price discovery process. An effective

[495] The Commission has long recognized that concerns regarding large concentrated positions are mitigated in circumstances involving client accounts managed under the discretion and control of an independent trader, and subject to effective information barriers.

[496] In retaining the IAC exemption, the Commission has decided not to adopt the proposed exemption for owned non-financial entities, which addresses commenters' concern that the proposal would have resulted in unfair over discriminatory treatment of financial entities.

[497] The Commission notes that this cost is directly attributable to the congressional mandate that the Commission impose limits on economically equivalent swaps. That is to say, unless the aggregation policy is extended to swaps on equal basis, the express congressional mandate to impose limits on futures (options) and economically equivalent swaps would be undermined.

[498] The cost to monitor positions in identical trading strategies is reflected in the Commission's general estimates to track positions on a real-time basis.

[499] Section 4a(a)(1) also directs that the Commission aggregate ''trading done by, two or more persons acting pursuant to an express or implied agreement or understanding, the same as if the positions were held by, or trading were done by, a single person.'' 7 U.S.C. 6a(a)(1).

aggregation policy has been a longstanding component of the Commission's position limit regime. As a necessary component of an effective position limit regime, and based on its experience with the current aggregation rules, the Commission believes that the provisions relating to aggregation in the final rules will also help protect the price discovery process.

iv. Sound Risk Management

As a necessary component of an effective position limits regime, and based on its experience with the current aggregation rules, the Commission believes that the provisions relating to aggregation in the final rules will promote sound risk management.

v. Public Interest Considerations

The Commission has not identified any other public interest considerations related to the costs and benefits of the rules with respect to aggregation.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires Federal agencies to consider the impact of its rules on ''small entities.'' [500] A regulatory flexibility analysis or certification typically is required for ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[501] In its proposal, the Commission explained that ''[t]he requirements related to the proposed amendments fall mainly on [DCMs and SEFs], futures commission merchants, swap dealers, clearing members, foreign brokers, and large traders.'' [502]

In response to the Proposed Rules, the Not-For-Profit Electric End User Coalition (''Coalition'') submitted a comment generally criticizing the Commission's ''rule-makings [as] an accumulation of interrelated regulatory burdens and costs on non-financial small entities like the NFP Electric End Users, who seek to transact in Energy Commodity Swaps and ''Referenced Contracts'' only to hedge the commercial risks of their not-for-profit public service activities.'' [503] In addition, the Coalition requested ''that the Commission streamline the use of the bona fide hedging exemption for non-financial entities, especially for those that engage in CFTC-regulated transactions as 'end user only/bona fide hedger only' market participants.'' [504] However, such persons necessarily would be large traders.

The Commission has determined that this position limits rule will not have a significant economic impact on a substantial number of small businesses. With regard to the position limits and position visibility levels, these would only impact large traders, which the Commission has previously determined not to be small entities for RFA purposes.[505] The Commission would impose filing requirements under final §§ 151.5(c) and (d) associated with bona fide hedging if a person exceeds or anticipates exceeding a position limit. Although regulation § 151.5(h) of these rules requires counterparties to pass-through swaps to keep records supporting the transaction's qualification for an enumerated hedge, the marginal burden of this requirement is mitigated through overlapping recordkeeping requirements for reportable futures traders (Commission regulation 18.05) and reportable swap traders (Commission regulation 20.6(b)). Further, the Commission understands that entities subject to the recordkeeping requirements for their swaps transactions maintain records of these contracts, as they would other documents evidencing material financial relationships, in the ordinary course of their businesses. Therefore, these rules would not impose a significant economic impact even if applied to small entities.

The remaining requirements in this final rule generally apply to DCMs, SEFs, futures commission merchants, swap dealers, clearing members, and foreign brokers. The Commission previously has determined that DCMs, futures commission merchants, and foreign brokers are not small entities for purposes of the RFA.[506] Similarly, swap dealers, clearing members, and traders would be subject to the regulations only if carrying large positions.

The Commission has proposed, but not yet determined, that SEFs should not be considered to be small entities for purposes of the RFA for essentially the same reasons that DCMs have previously been determined not to be small entities.[507] Similarly, the Commission has proposed, but not yet determined, that swap dealers should not be considered ''small entities'' for essentially the same reasons that FCMs have previously been determined not to be small entities.[508] For all of the reasons stated in those previous releases, the Commission has determined that SEFs and swap dealers are not ''small entities'' for purposes of the RFA.

The Commission notes that it has not previously determined whether clearing members should be considered small entities for purposes of the RFA. The Commission does not believe that clearing members who will be subject to the requirements of this rulemaking will constitute small entities for RFA purposes. First, most clearing members will also be registered as FCMs, who as a category have been previously determined to not be small entities. Second, any clearing member effected by this rule will also, of necessity be a large trader, who as a category has also been determined to not be small entities. For all of these reasons, the Commission has determined that clearing members are not ''small entities'' for purposes of the RFA.

Accordingly, the Chairman, on behalf of the Commission, certifies, pursuant to 5 U.S.C. 605(b), that the actions to be taken herein will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

1. Overview

The Paperwork Reduction Act (''PRA'') [509] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of the regulations will result in new collection of information requirements within the meaning of the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Commission submitted the proposing release to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission requested that OMB approve and assign a new control number for the collections of information covered by the proposing release.

The Commission invited the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the

[500] 5 U.S.C. 601 *et seq.*

[501] 5 U.S.C. sections 601(2), 603, 604 and 605.

[502] 76 FR 4765.

[503] Not-For-Profit Electric End User Coalition (''EEUC'') on March 28, 2011 (''CL–EEUC'') at 29.

[504] *Id.* at 15.

[505] Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, Apr. 30, 1982 (FCM, DCM and large trader determinations).

[506] *See* 47 FR at 18618; 72 FR 34417, Jun. 22, 2007 (foreign broker determination).

[507] *See* 75 FR 63745, Oct. 18, 2010.

[508] *See* 76 FR 6715, Feb. 8, 2011.

[509] 44 U.S.C. 3501 *et seq.*

Commission solicited comments in order to (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility, (ii) evaluate the accuracy of the Commission'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.

The Commission received three comments on the burden estimates and information collection requirements contained in its proposing release. The World Gold Council stated that the recordkeeping and reporting costs were not addressed.[510] MGEX argued that the Commission's estimated burden for DCMs to determine deliverable supply levels was too low.[511] Specifically, it commented that the Commission's estimate of ''6,000 hours per year for all DCMs at a combined annual cost of $50,000 among all DCMs'' would result ''in an hourly wage of less than $10'' to comply with the rules.[512] The combined annual cost estimate cited by MGEX appears to be the amount the Commission estimated for annualized capital and start-up costs and annual total operating and maintenance costs;[513] this estimate is separate from any calculation of labor costs. The Working Group commented that it could not meaningfully respond to the costs until it had a complete view of all the Dodd-Frank Act rulemakings, that the Commission did not provide sufficient explanation for its estimates of the number of market participants affected by the final regulations, and that the Commission underestimated wage and personnel estimates.[514] As further discussed below, the Commission has carefully reviewed its burden analysis and estimates, and it has determined its estimates to be reasonable.

Responses to the collections of information contained within these final rules are mandatory, and the Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, headed ''Commission Records and Information.'' In addition, the Commission emphasizes that section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.''[515] The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974.[516]

The title for this collection of information is ''Part 151—Position Limit Framework for Referenced Contracts.'' OMB has approved and assigned OMB control number 3038–[____] to this collection of information.

2. Information Provided and Recordkeeping Duties

Proposed § 151.4(a)(2) provided for a special conditional spot-month limit for traders under certain conditions, including the submission of a certification that the trader met the required conditions, to be filed within a day after the trader exceeded a conditional spot-month limit. The Commission anticipated that approximately one hundred traders per year would submit conditional spot-month limit certifications and estimated that these one hundred entities would incur a total burden of 2,400 annual labor hours, resulting in a total of $189,000 in annual labor costs[517] and $1 million in annualized capital, start-up,[518] total operating, and maintenance costs. As described above, the Commission has eliminated the conditional spot-month limit as described in the Proposed Rules. These final rules now provide for a limit on cash-settled Referenced Contracts of five times the limit on the physical-delivery Referenced Contract. The cash-settled and physical-delivery contracts would also be subject to separate class limits, and the Commission would impose an aggregate limit set at five times the level of the spot-month limit in the relevant Core Referenced Futures Contract that is physically delivered. As such, traders need not file a certification to avail themselves of the conditional limit for cash-settled contracts. Therefore, these capital and labor cost estimates do not apply to the final regulations.

Section 151.4(c) requires that DCMs submit an estimate of deliverable supply for each Referenced Contract that is subject to a spot-month position limit and listed or executed pursuant to the rules of the DCM. Under the Proposed Rules, the Commission estimated that the reporting would affect approximately six entities annually, resulting in a total marginal burden, across all of these entities, of 6,000 annual labor hours and $55,000 in annualized capital, start-up, total operating, and maintenance costs. As discussed above, in response to comments concerning the process for determining deliverable supply, the Commission has determined to update spot-month limits biennially (every two years) instead of annually in the case of energy and metal contracts, and to stagger the dates on which estimates of deliverable supply shall be submitted by DCMs. As a result of these changes, the Commission estimates that this reporting will result in a total marginal burden, across the six affected entities, of 5,000 annual labor hours for a total of $511,000 in annual labor costs and $50,000 in annualized capital, start-up, total operating, and maintenance costs.

Section 151.5 sets forth the application procedure for bona fide hedgers and counterparties to bona fide hedging swap transactions that seek an exemption from the Commission-set Federal position limits for Referenced Contracts. If a bona fide hedger seeks to claim an exemption from position limits because of cash market activities, then the hedger would submit a 404 filing pursuant to § 151.5(b). The 404 filing would be submitted when the bona fide hedger exceeds the applicable position limit and claims an exemption or when its hedging needs increase. Similarly, parties to bona fide hedging swap transactions would be required to submit a 404S filing to qualify for a hedging exemption, which would also be submitted when the bona fide hedger exceeds the applicable position limit and claims an exemption or when its

[510] CL–WGC *supra* note 21 at 5.

[511] CL–MGEX *supra* note 74 at 4.

[512] *Id.*

[513] In this regard the Commission notes that the cost estimate for annualized capital and start-up costs and annual total operating and maintenance costs was $55,000.

[514] CL–WGCEF supra note 35 at 25–26.

[515] 7 U.S.C. 12(a)(1).

[516] 5 U.S.C. 552a.

[517] The Commission staff's estimates concerning the wage rates are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). The $78.61 per hour is derived from figures from a weighted average of salaries and bonuses across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2010, modified to account for an 1800-hour work-year and multiplied by 1.3 to account for overhead and other benefits. The wage rate is a weighted national average of salary and bonuses for professionals with the following titles (and their relative weight): ''programmer (senior)'' (30 percent); ''programmer'' (30 percent); ''compliance advisor (intermediate)'' (20 percent); ''systems analyst'' (10 percent); and ''assistant/associate general counsel'' (10 percent).

[518] The capital/start-up cost component of ''annualized capital/start-up, operating, and maintenance costs'' is based on an initial capital/start-up cost that is straight-line depreciated over five years.

hedging needs increase. If a bona fide hedger seeks an exemption for anticipated commercial production or anticipatory commercial requirements, then the hedger would submit a 404A filing pursuant to § 151.5(c).

Under the Proposed Rules, 404 and 404S filings would have been required on a daily basis. In light of comments concerning the burden of daily filings to both market participants and the Commission, the final regulations require only monthly reporting of 404 and 404S filings. These monthly reports would provide information on daily positions for the month reporting period.

The Commission estimated in the Proposed Rules that these bona fide hedging-related reporting requirements would affect approximately two hundred entities annually and result in a total burden of approximately $37.6 million across all of these entities, 168,000 annual labor hours, resulting in a total of $13.2 million in annual labor costs and $25.4 million in annualized capital, start-up, total operating, and maintenance costs. As a result of modifications made to the Proposed Rules, under the final regulations these bona fide hedging-related reporting requirements will affect approximately two hundred entities annually and result in a total burden of approximately $28.6 million across all of these entities, 29,700 annual labor hours, resulting in a total of $2.3 million in annual labor costs and $26.3 million in annualized capital, start-up, total operating, and maintenance costs.

With regard to 404 filings, under the Proposed Rules, the Commission estimated that 404 filing requirements would affect approximately ninety entities annually, resulting in a total burden, across all of these entities, of 108,000 total annual labor hours and $11.7 million in annualized capital, start-up, total operating, and maintenance costs. Under the final regulations, 404 filing requirements will affect approximately ninety entities annually, resulting in a total burden, across all of these entities, of 108,000 total annual labor hours and $11.7 million in annualized capital, start-up, total operating, and maintenance costs.

With regard to 404A filings, under the Proposed Rules, the Commission estimated that 404A filing requirements would affect approximately sixty entities annually, resulting in a total burden, across all of these entities, of 6,000 total annual labor hours and $4.2 million in annualized capital, start-up, total operating, and maintenance costs. In addition to adjustments in these estimates stemming from the change in the frequency of filings, the estimate of entities affected by 404A filing requirements has been modified to reflect the fact that the final regulations include certain anticipatory hedging exemptions that were absent from the Proposed Rules. Thus, under the final regulations, 404A filing requirements will affect approximately ninety entities annually, resulting in a total burden, across all of these entities, of 2,700 total annual labor hours and $6.3 million in annualized capital, start-up, total operating, and maintenance costs.

With regard to 404S filings, under the Proposed Rules the Commission estimated that 404S filing requirements would affect approximately forty-five entities annually, resulting in a total burden, across all of these entities, of 54,000 total annual labor hours and $9.5 million in annualized capital, start-up, total operating, and maintenance costs. Under the final regulations, 404S filing requirements will affect approximately forty-five entities annually, resulting in a total burden, across all of these entities, of 16,200 total annual labor hours and $9.5 million in annualized capital, start-up, total operating, and maintenance costs.

Section 151.5(e) specifies recordkeeping requirements for traders who claim bona fide hedge exemptions. These recordkeeping requirements include complete books and records concerning all of their related cash, futures, and swap positions and transactions and make such books and records, along with a list of swap counterparties to the Commission. Regulations 151.5(g) and 151.5(h) provide procedural documentation requirements for those availing themselves of a bona fide hedging transaction exemption. These firms would be required to document a representation and confirmation by at least one party that the swap counterparty is relying on a bona fide hedge exemption, along with a confirmation of receipt by the other party to the swap. Paragraph (h) of § 151.5 also requires that the written representation and confirmation be retained by the parties and available to the Commission upon request.[519] The marginal impact of this requirement is limited because of its overlap with existing recordkeeping requirements under § 15.03. The Commission estimates, as it did under the Proposed Rules, that bona fide hedging-related recordkeeping regulations will affect approximately one hundred sixty entities, resulting in a total burden, across all of these entities, of 40,000 total annual labor hours and $10.4 million in annualized capital, start-up, total operating, and maintenance costs.

Section 151.6 requires traders with positions exceeding visibility levels in Referenced Contracts in metal and energy commodities to submit additional information about cash market and derivatives activity in substantially the same commodity. Section 151.6(b) requires the submission of a 401 filing which would provide basic position information on the position exceeding the visibility level. Section151.6(c) requires additional information, through a 402S filing, on a trader's uncleared swaps in substantially the same commodity. The Commission has determined to increase the visibility levels from the proposed levels, meaning fewer market participants will be affected by the relevant reporting requirements. In addition, the Proposed Rules included a requirement to submit 404A filings under proposed § 151.6, but the Commission has eliminated this requirement in order to reduce the compliance burden for firms reporting under § 151.6.

Requirements under 401 filing reporting regulations in the Proposed Rules would have affected approximately one hundred forty entities annually, resulting in a total burden, across all of these entities, of 16,800 total annual labor hours and $15.4 million in annualized capital, start-up, total operating, and maintenance costs. In the final regulations, these requirements will affect approximately seventy entities annually, resulting in a total burden, across all of these entities, of 8,400 total annual labor hours and $5.3 million in annualized capital, start-up, total operating, and maintenance costs.

Requirements under 402S filing reporting regulations in the Proposed Rules would have affected approximately seventy entities annually, resulting in a total burden, across all of these entities, of 5,600 total annual labor hours and $4.9 million in annualized capital, start-up, total operating, and maintenance costs. In the final regulations, the Commission has eliminated the 402S filing, thus eliminating any burden stemming from such reports.

Requirements under visibility level-related 404 filing reporting regulations[520] in the Proposed Rules

[519] The Commission notes that entities would have to retain such books and records in compliance with § 1.31.

[520] For the visibility level-related 404 filing requirements, the estimated burden is based on reporting duties not already accounted for in the

would have affected approximately sixty entities annually, resulting in a total burden, across all of these entities, of 4,800 total annual labor hours and $4.2 million in annualized capital, start-up, total operating, and maintenance costs. In the final regulations, these requirements will affect approximately thirty entities annually, resulting in a total burden, across all of these entities, of 2,400 total annual labor hours and $2.1 million in annualized capital, start-up, total operating, and maintenance costs.

As noted above, 404A filing requirements under § 151.6 have been eliminated in the final regulations. Therefore, the burden estimates for this requirement under the Proposed Rules (approximately forty entities affected annually, resulting in a total burden, across all of these entities, of 3,200 total annual labor hours and $2.8 million in annualized capital, start-up, total operating, and maintenance costs) do not apply to the final regulations.

As a result of this modification and higher visibility levels, estimates for the overall burden of visibility level-related reporting regulations have been modified. In the Proposed Rules, the Commission estimated that visibility level-related reporting regulations would affect approximately one hundred forty entities annually, resulting in a total burden, across all of these entities, of 30,400 annual labor hours, resulting, a total of $2.4 million in annual labor costs, and $27.3 million in annualized capital, start-up, total operating, and maintenance costs. Under the final regulations, visibility level-related reporting regulations will affect approximately seventy entities annually, resulting in a total burden, across all of these entities, of 8,160 annual labor hours, resulting in a total of $642,000 in annual labor costs and $7.4 million in annualized capital, start-up, total operating, and maintenance costs.

Section 151.7 concerns the aggregation of trader accounts. Proposed § 151.7(g) provided for a disaggregation exemption for certain limited partners in a pool, futures commission merchants that met certain independent trading requirements, and independently controlled and managed non-financial entities in which another entity had an ownership or equity interest of 10 percent or greater. In all three cases, the exemption would become effective upon the Commission's approval of an application described in proposed § 151.7(g), and renewal was required for each year following the initial application for exemption.

As discussed in greater detail above, in the final regulations the Commission has made several modifications to account aggregation rules and exemptions. The modifications include reinstatement of the IAC exemption and exemption for certain interests in commodity pools (both of which are part of current Commission account aggregation policy but were absent from the Proposed Rules), an exemption from aggregation related to the underwriting of securities, and an exemption for situations in which aggregation across commonly owned affiliates would require the sharing of position information that would result in the violation of Federal law. In addition, the final regulations contain a modified procedure for exemptive relief under § 151.7. The Commission has eliminated the provision in the Proposed Rules requiring a trader seeking a disaggregation exemption to file an application for exemptive relief as well as annual renewals. Instead, under the final regulations the trader must file a notice, effective upon filing, setting forth the circumstances that warrant disaggregation and a certification that they meet the relevant conditions.

As a result of these modifications, estimates for the burden of reporting regulations related to account aggregation have been modified. Under the Proposed Rules, the Commission estimated that these reporting regulations would affect approximately sixty entities, resulting in a total burden, across all of these entities, of 300,000 annual labor hours and $9.9 million in annualized capital, start-up, total operating, and maintenance costs. Under the final regulations, these reporting regulations will affect approximately ninety entities, resulting in a total burden, across all of these entities, of 225,000 annual labor hours and $5.9 million in annualized capital, start-up, total operating, and maintenance costs.

List of Subjects

17 CFR Part 1

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

17 CFR Part 150

Commodity futures, Cotton, Grains.

17 CFR Part 151

Position limits, Bona fide hedging, Referenced Contracts.

In consideration of the foregoing, pursuant to the authority contained in the Commodity Exchange Act, the Commission hereby amends chapter I of title 17 of the Code of Federal Regulations 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, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

§ 1.3 [Revised]

■ 2. Revise § 1.3 (z) to read as follows:

(z) *Bona fide hedging transactions and positions for excluded commodities.* (1) *General definition.* Bona fide hedging transactions and positions shall mean any agreement, contract or transaction in an excluded commodity on a designated contract market or swap execution facility that is a trading facility, where such transactions or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel, and where they are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, and where they arise from:

(i) The potential change in the value of assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising,

(ii) The potential change in the value of liabilities which a person owns or anticipates incurring, or

(iii) The potential change in the value of services which a person provides, purchases, or anticipates providing or purchasing.

(iv) Notwithstanding the foregoing, no transactions or positions shall be classified as bona fide hedging unless their purpose is to offset price risks incidental to commercial cash or spot operations and such positions are established and liquidated in an orderly manner in accordance with sound commercial practices and, for transactions or positions on contract markets subject to trading and position limits in effect pursuant to section 4a of

burden estimate for those submitting 404 filings pursuant to proposed § 151.5. For many of these firms, the experience and infrastructure developed submitting or preparing to submit a 404 filing under § 151.5 would reduce the marginal burden imposed by having to submit filings under § 151.6.

the Act, unless the provisions of paragraphs (z)(2) and (3) of this section have been satisfied.

(2) *Enumerated hedging transactions.* The definitions of bona fide hedging transactions and positions in paragraph (z)(1) of this section includes, but is not limited to, the following specific transactions and positions:

(i) Sales of any agreement, contract, or transaction in an excluded commodity on a designated contract market or swap execution facility that is a trading facility which do not exceed in quantity:

(A) Ownership or fixed-price purchase of the same cash commodity by the same person; and

(B) Twelve months' unsold anticipated production of the same commodity by the same person provided that no such position is maintained in any agreement, contract or transaction during the five last trading days.

(ii) Purchases of any agreement, contract or transaction in an excluded commodity on a designated contract market or swap execution facility that is a trading facility which do not exceed in quantity:

(A) The fixed-price sale of the same cash commodity by the same person;

(B) The quantity equivalent of fixed-price sales of the cash products and by-products of such commodity by the same person; and

(C) Twelve months' unfilled anticipated requirements of the same cash commodity for processing, manufacturing, or feeding by the same person, provided that such transactions and positions in the five last trading days of any agreement, contract or transaction do not exceed the person's unfilled anticipated requirements of the same cash commodity for that month and for the next succeeding month.

(iii) Offsetting sales and purchases in any agreement, contract or transaction in an excluded commodity on a designated contract market or swap execution facility that is a trading facility which do not exceed in quantity that amount of the same cash commodity which has been bought and sold by the same person at unfixed prices basis different delivery months of the contract market, provided that no such position is maintained in any agreement, contract or transaction during the five last trading days.

(iv) Purchases or sales by an agent who does not own or has not contracted to sell or purchase the offsetting cash commodity at a fixed price, provided that the agent is responsible for the merchandising of the cash position that is being offset, and the agent has a contractual arrangement with the person who owns the commodity or has the cash market commitment being offset.

(v) Sales and purchases described in paragraphs (z)(2)(i) through (iv) of this section may also be offset other than by the same quantity of the same cash commodity, provided that the fluctuations in value of the position for in any agreement, contract or transaction are substantially related to the fluctuations in value of the actual or anticipated cash position, and provided that the positions in any agreement, contract or transaction shall not be maintained during the five last trading days.

(3) *Non-Enumerated cases.* A designated contract market or swap execution facility that is a trading facility may recognize, consistent with the purposes of this section, transactions and positions other than those enumerated in paragraph (2) of this section as bona fide hedging. Prior to recognizing such non-enumerated transactions and positions, the designated contract market or swap execution facility that is a trading facility shall submit such rules for Commission review under section 5c of the Act and part 40 of this chapter.

* * * * *

§ 1.47 [Removed and Reserved]

■ 3. Remove and reserve § 1.47.

§ 1.48 [Removed and Reserved]

■ 4. Remove and reserve § 1.48.

PART 150—LIMITS ON POSITIONS

■ 5. Revise § 150.2 to read as follows:

§ 150.2 Position limits.

No person may hold or control positions, separately or in combination, net long or net short, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon, in excess of the following:

SPECULATIVE POSITION LIMITS

Contract	Limits by number of contracts		
	Spot month	Single month	All months
Chicago Board of Trade			
Corn and Mini-Corn [1]	600	33,000	33,000
Oats	600	2,000	2,000
Soybeans and Mini-Soybeans [1]	600	15,000	15,000
Wheat and Mini-Wheat [1]	600	12,000	12,000
Soybean Oil	540	8,000	8,000
Soybean Meal	720	6,500	6,500
Minneapolis Grain Exchange			
Hard Red Spring Wheat	600	12,000	12,000
ICE Futures U.S.			
Cotton No. 2	300	5,000	5,000
Kansas City Board of Trade			
Hard Winter Wheat	600	12,000	12,000

[1] For purposes of compliance with these limits, positions in the regular sized and mini-sized contracts shall be aggregated.

■ 6. Add part 151 to read as follows:

PART 151—POSITION LIMITS FOR FUTURES AND SWAPS

Sec.
151.1 Definitions.
151.2 Core Referenced Futures Contracts.
151.3 Spot months for Referenced Contracts.
151.4 Position limits for Referenced Contracts.
151.5 Bona fide hedging and other exemptions for Referenced Contracts.
151.6 Position visibility.
151.7 Aggregation of positions.
151.8 Foreign boards of trade.
151.9 Pre-existing positions.
151.10 Form and manner of reporting and submitting information or filings.
151.11 Designated contract market and swap execution facility position limits and accountability rules.
151.12 Delegation of authority to the Director of the Division of Market Oversight.
151.13 Severability.
Appendix A to Part 151—Spot-Month Position Limits
Appendix B to Part 151—Examples of Bona Fide Hedging Transactions and Positions

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6c, 6f, 6g, 6t, 12a, 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

§ 151.1 Definitions.

As used in this part—

Basis contract means an agreement, contract or transaction that is cash-settled based on the difference in price of the same commodity (or substantially the same commodity) at different delivery locations;

Calendar spread contract means a cash-settled agreement, contract, or transaction that represents the difference between the settlement price in one or a series of contract months of an agreement, contract or transaction and the settlement price of another contract month or another series of contract months' settlement prices for the same agreement, contract or transaction.

Commodity index contract means an agreement, contract, or transaction that is not a basis or any type of spread contract, based on an index comprised of prices of commodities that are not the same or substantially the same; *provided that,* a commodity index contract used to circumvent speculative position limits shall be considered to be a Referenced Contract for the purpose of applying the position limits of § 151.4.

Core Referenced Futures Contract means a futures contract that is listed in § 151.2.

Eligible Entity means a commodity pool operator; the operator of a trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term ''pool'' or ''commodity pool operator,'' respectively, under § 4.5 of this chapter the limited partner or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities:

(1) Which authorizes an independent account controller independently to control all trading decisions with respect to the eligible entity's client positions and accounts that the independent account controller holds directly or indirectly, or on the eligible entity's behalf, but without the eligible entity's day-to-day direction; and

(2) Which maintains:

(i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities to the managed positions and accounts, and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or

(ii) If a limited partner or shareholder of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter, only such limited control as is consistent with its status.

Entity means a ''person'' as defined in section 1a of the Act.

Excluded commodity means an ''excluded commodity'' as defined in section 1a of the Act.

Independent Account Controller means a person:

(1) Who specifically is authorized by an eligible entity independently to control trading decisions on behalf of, but without the day-to-day direction of, the eligible entity;

(2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities for managed positions and accounts to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;

(3) Who trades independently of the eligible entity and of any other independent account controller trading for the eligible entity;

(4) Who has no knowledge of trading decisions by any other independent account controller; and

(5) Who is registered as a futures commission merchant, an introducing broker, a commodity trading advisor, or an associated person of any such registrant, or is a general partner of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter.

Intercommodity spread contract means a cash-settled agreement, contract or transaction that represents the difference between the settlement price of a Referenced Contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.

Referenced Contract means, on a futures equivalent basis with respect to a particular Core Referenced Futures Contract, a Core Referenced Futures Contract listed in § 151.2, or a futures contract, options contract, swap or swaption, other than a basis contract or commodity index contract, that is:

(1) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular Core Referenced Futures Contract; or

(2) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular Core Referenced Futures Contract for delivery at the same location or locations as specified in that particular Core Referenced Futures Contract.

Spot month means, for Referenced Contracts, the spot month defined in § 151.3.

Spot-month, single-month, and all-months-combined position limits mean, for Referenced Contracts based on a commodity identified in § 151.2, the maximum number of contracts a trader may hold as set forth in § 151.4.

Spread contract means either a calendar spread contract or an intercommodity spread contract.

Swap means ''swap'' as defined in section 1a of the Act and as further defined by the Commission.

Swap dealer means ''swap dealer'' as that term is defined in section 1a of the Act and as further defined by the Commission.

Swaption means an option to enter into a swap or a physical commodity option.

Trader means a person that, for its own account or for an account that it controls, makes transactions in Referenced Contracts or has such transactions made.

§ 151.2 Core Referenced Futures Contracts.

(a) *Agricultural commodities.* Core Referenced Futures Contracts in agricultural commodities include the following futures contracts and options thereon:

(1) Core Referenced Futures Contracts in legacy agricultural commodities:

(i) *Chicago Board of Trade Corn* (C);
(ii) *Chicago Board of Trade Oats* (O);
(iii) *Chicago Board of Trade Soybeans* (S);
(iv) *Chicago Board of Trade Soybean Meal* (SM);
(v) *Chicago Board of Trade Soybean Oil* (BO);
(vi) *Chicago Board of Trade Wheat* (W);
(vii) *ICE Futures U.S. Cotton No. 2* (CT);
(viii) *Kansas City Board of Trade Hard Winter Wheat (KW);* and
(ix) *Minneapolis Grain Exchange Hard Red Spring Wheat* (MWE).

(2) Core Referenced Futures Contracts in non-legacy agricultural commodities:
(i) *Chicago Mercantile Exchange Class III Milk (DA);*
(ii) *Chicago Mercantile Exchange Feeder Cattle* (FC);
(iii) *Chicago Mercantile Exchange Lean Hog* (LH);
(iv) *Chicago Mercantile Exchange Live Cattle* (LC);
(v) *Chicago Board of Trade Rough Rice* (RR);
(vi) *ICE Futures U.S. Cocoa (CC);*
(vii) *ICE Futures U.S. Coffee C (KC);*
(viii) *ICE Futures U.S. FCOJ–A(OJ);*
(ix) *ICE Futures U.S. Sugar No. 11* (SB); and
(x) *ICE Futures U.S. Sugar No. 16* (SF).

(b) *Metal commodities.* Core Referenced Futures Contracts in metal commodities include the following futures contracts and options thereon:
(1) *Commodity Exchange, Inc. Copper* (HG);
(2) *Commodity Exchange, Inc. Gold* (GC);
(3) *Commodity Exchange, Inc. Silver* (SI);
(4) *New York Mercantile Exchange Palladium* (PA); and
(5) *New York Mercantile Exchange Platinum* (PL).

(c) *Energy commodities.* The Core Referenced Futures Contracts in energy commodities include the following futures contracts and options thereon:
(1) *New York Mercantile Exchange Henry Hub Natural Gas* (NG);
(2) New York Mercantile Exchange Light Sweet Crude Oil (CL);
(3) *New York Mercantile Exchange New York Harbor Gasoline Blendstock* (RB); and
(4) *New York Mercantile Exchange New York Harbor Heating Oil* (HO).

§ 151.3 Spot months for Referenced Contracts.

(a) *Agricultural commodities.* For Referenced Contracts based on agricultural commodities, the spot month shall be the period of time commencing:

(1) At the close of business on the business day prior to the first notice day for any delivery month and terminating at the end of the delivery period in the underlying Core Referenced Futures Contract for the following Referenced Contracts:
(i) *ICE Futures U.S. Cocoa* (CC) contract;
(ii) *ICE Futures U.S. Coffee C* (KC) contract;
(iii) *ICE Futures U.S. Cotton No. 2* (CT) contract;
(iv) *ICE Futures U.S. FCOJ–A* (OJ) contract;
(v) *Chicago Board of Trade Corn* (C) contract;
(vi) *Chicago Board of Trade Oats* (O) contract;
(vii) *Chicago Board of Trade Rough Rice* (RR) contract;
(viii) *Chicago Board of Trade Soybeans* (S) contract;
(ix) *Chicago Board of Trade Soybean Meal* (SM) contract;
(x) *Chicago Board of Trade Soybean Oil* (BO) contract;
(xi) *Chicago Board of Trade Wheat* (W) contract;
(xii) *Minneapolis Grain Exchange Hard Red Spring Wheat* (MW) contract; and
(xiii) *Kansas City Board of Trade Hard Winter Wheat* (KW) contract;

(2) At the close of business of the first business day after the fifteenth calendar day of the calendar month preceding the delivery month if the fifteenth calendar day is a business day, or at the close of business of the second business day after the fifteenth day if the fifteenth day is a non-business day and terminating at the end of the delivery period in the underlying Core Referenced Futures Contract for the *ICE Futures U.S. Sugar No. 11* (SB) Referenced Contract;

(3) At the close of business on the sixth business day prior to the last trading day and terminating at the end of the delivery period in the underlying Core Referenced Futures Contract for the *ICE Futures U.S. Sugar No. 16* (SF) Referenced Contract;

(4) At the close of business on the business day immediately preceding the last five business days of the contract month and terminating at the end of the delivery period in the underlying Core Referenced Futures Contract for the *Chicago Mercantile Exchange Live Cattle* (LC) Referenced Contract;

(5) On the ninth trading day prior to the last trading day and terminating on the last trading day for *Chicago Mercantile Exchange Feeder Cattle* (FC) contract;

(6) On the first trading day of the contract month and terminating on the last trading day for the *Chicago Mercantile Exchange Class III Milk* (DA) contract; and

(7) At the close of business on the fifth business day prior to the last trading day and terminating on the last trading day for the *Chicago Mercantile Exchange Lean Hog* (LH) contract.

(b) *Metal commodities.* The spot month shall be the period of time commencing at the close of business on the business day prior to the first notice day for any delivery month and terminating at the end of the delivery period in the underlying Core Referenced Futures Contract for the following Referenced Contracts:
(1) *Commodity Exchange, Inc. Gold* (GC) contract;
(2) *Commodity Exchange, Inc. Silver* (SI) contract;
(3) *Commodity Exchange, Inc. Copper* (HG) contract;
(4) *New York Mercantile Exchange Palladium* (PA) contract; and
(5) *New York Mercantile Exchange Platinum* (PL) contract.

(c) *Energy commodities.* The spot month shall be the period of time commencing at the close of business of the third business day prior to the last day of trading in the underlying Core Referenced Futures Contract and terminating at the end of the delivery period for the following Referenced Contracts:
(1) *New York Mercantile Exchange Light Sweet Crude Oil* (CL) contract;
(2) *New York Mercantile Exchange New York Harbor No. 2 Heating Oil* (HO) contract;
(3) *New York Mercantile Exchange New York Harbor Gasoline Blendstock* (RB) contract; and
(4) *New York Mercantile Exchange Henry Hub Natural Gas* (NG) contract.

§ 151.4 Position limits for Referenced Contracts.

(a) *Spot-month position limits.* In accordance with the procedure in paragraph (d) of this section, and except as provided or as otherwise authorized by § 151.5, no trader may hold or control a position, separately or in combination, net long or net short, in Referenced Contracts in the same commodity when such position is in excess of:

(1) For physical-delivery Referenced Contracts, a spot-month position limit that shall be based on one-quarter of the estimated spot-month deliverable supply as established by the Commission pursuant to paragraphs (d)(1) and (d)(2) of this section; and

(2) For cash-settled Referenced Contracts:

(i) A spot-month position limit that shall be based on one-quarter of the

estimated spot-month deliverable supply as established by the Commission pursuant to paragraphs (d)(1) and (d)(2) of this section. *Provided, however,*

(ii) For New York Mercantile Exchange Henry Hub Natural Gas Referenced Contracts:

(A) A spot-month position limit equal to five times the spot-month position limit established by the Commission for the physical-delivery New York Mercantile Exchange Henry Hub Natural Gas Referenced Contract pursuant to paragraph (a)(1); and

(B) An aggregate spot-month position limit for physical-delivery and cash-settled New York Mercantile Exchange Henry Hub Natural Gas Referenced Contracts equal to five times the spot-month position limit established by the Commission for the physical-delivery New York Mercantile Exchange Henry Hub Natural Gas Referenced Contract pursuant to paragraph (a)(1).

(b) *Non-spot-month position limits.* In accordance with the procedure in paragraph (d) of this section, and except as otherwise authorized in § 151.5, no person may hold or control positions, separately or in combination, net long or net short, in the same commodity when such positions, in all months combined (including the spot month) or in a single month, are in excess of:

(1) *Non-legacy Referenced Contract position limits.* All-months-combined aggregate and single-month position limits, fixed by the Commission based on 10 percent of the first 25,000 contracts of average all-months-combined aggregated open interest with a marginal increase of 2.5 percent thereafter as established by the Commission pursuant to paragraph (d)(3) of this section;

(2) *Aggregate open interest calculations for non-spot-month position limits for non-legacy Referenced Contracts.* (i) For the purpose of fixing the speculative position limits for non-legacy Referenced Contracts in paragraph (b)(1) of this section, the Commission shall determine:

(A) The average all-months-combined aggregate open interest, which shall be equal to the sum, for 12 or 24 months of values obtained under paragraph (B) and (C) of this section for a period of 12 or 24 months prior to the fixing date divided by 12 or 24 respectively as of the last day of each calendar month;

(B) The all-months-combined futures open interest of a Referenced Contract is equal to the sum of the month-end open interest for all of the Referenced Contract's open contract months in futures and option contracts (on a delta adjusted basis) across all designated contract markets; and

(C) The all-months-combined swaps open interest is equal to the sum of all of a Referenced Contract's month-end open swaps positions, considering open positions attributed to both cleared and uncleared swaps, where the uncleared all-months-combined swaps open positions shall be the absolute sum of swap dealers' net uncleared open swaps positions by counterparty and by single Referenced Contract month as reported to the Commission pursuant to part 20 of this chapter, provided that, other than for the purpose of determining initial non-spot-month position limits, open swaps positions attributed to swaps with two swap dealer counterparties shall be counted once for the purpose of determining uncleared all-months-combined swaps open positions, provided further that, upon entry of an order under § 20.9 of this chapter determining that operating swap data repositories are processing positional data that will enable the Commission effectively to conduct surveillance in swaps, the Commission shall rely on data from such swap data repositories to compute the all-months-combined swaps open interest;

(ii) Notwithstanding the provisions of this section, for the purpose of determining initial non-spot-month position limits for non-legacy Referenced Contracts, the Commission may estimate uncleared all-months-combined swaps open positions based on uncleared open swaps positions reported to the Commission pursuant to part 20 of this chapter by clearing organizations or clearing members that are swap dealers; and

(3) *Legacy agricultural Referenced Contract position limits.* All-months-combined aggregate and single-month position limits, fixed by the Commission at the levels provided below as established by the Commission pursuant to paragraph (d)(4) of this section:

Referenced contract	Position limits
(i) Chicago Board of Trade Corn (C) contract	33,000
(ii) Chicago Board of Trade Oats (O) contract	2,000
(iii) Chicago Board of Trade Soybeans (S) contract	15,000
(iv) Chicago Board of Trade Wheat (W) contract	12,000
(v) Chicago Board of Trade Soybean Oil (BO) contract	8,000
(vi) Chicago Board of Trade Soybean Meal (SM) contract	6,500
(vii) Minneapolis Grain Exchange Hard Red Spring Wheat (MW) contract	12,000
(viii) ICE Futures U.S. Cotton No. 2 (CT) contract	5,000
(ix) Kansas City Board of Trade Hard Winter Wheat (KW) contract	12,000

(c) *Netting of positions.* (1) *For Referenced Contracts in the spot month.* (i) For the spot-month position limit in paragraph (a) of this section, a trader's positions in the physical-delivery Referenced Contract and cash-settled Referenced Contract are calculated separately. A trader cannot net any physical-delivery Referenced Contract with cash-settled Referenced Contracts towards determining the trader's positions in each of the physical-delivery Referenced Contract and cash-settled Referenced Contracts in paragraph (a) of this section. However, a trader can net positions in cash-settled Referenced Contracts in the same commodity.

(ii) Notwithstanding the netting provision in paragraph (c)(1)(i) of this section, for the aggregate spot-month position limit in New York Mercantile Exchange Henry Hub Natural Gas Referenced Contracts in paragraph (a)(2)(ii) of this section, a trader's positions shall be combined and the net resulting position in the physical-delivery Referenced Contract and cash-settled Referenced Contracts shall be applied towards determining the trader's aggregate position.

(2) For the purpose of applying non-spot-month position limits, a trader's position in a Referenced Contract shall be combined and the net resulting position shall be applied towards determining the trader's aggregate single-month and all-months-combined position.

(d) *Establishing and effective dates of position limits.* (1) *Initial spot-month position limits for Referenced Contracts.* (i) Sixty days after the term ''swap'' is

further defined under the Wall Street Transparency and Accountability Act of 2010, the spot-month position limits for Referenced Contracts referred to in Appendix A shall apply to all the provisions of this part.

(2) *Subsequent spot-month position limits for Referenced Contracts.* (i) Commencing January 1st of the second calendar year after the term ''swap'' is further defined under the Wall Street Transparency and Accountability Act of 2010, the Commission shall fix position limits by Commission order that shall supersede the initial limits established under paragraph (d)(1) of this section.

(ii) In fixing spot-month position limits for Referenced Contracts, the Commission shall utilize the estimates of deliverable supply provided by a designated contract market under paragraph (d)(2)(iii) of this section unless the Commission determines to rely on its own estimate of deliverable supply.

(iii) Each designated contract market shall submit to the Commission an estimate of deliverable supply for each Core Referenced Futures Contract that is subject to a spot-month position limit and listed or executed pursuant to the rules of the designated contract market according to the following schedule commencing January 1st of the second calendar year after the term ''swap'' is further defined under the Wall Street Transparency and Accountability Act of 2010:

(A) For metal Core Referenced Futures Contracts listed in § 151.2(b), by the 31st of December and biennially thereafter;

(B) For energy Core Referenced Futures Contracts listed in § 151.2(c), by the 31st of March and biennially thereafter;

(C) For corn, wheat, oat, rough rice, soybean and soybean products, livestock, milk, cotton, and frozen concentrated orange juice Core Referenced Futures Contracts, by the 31st of July, and annually thereafter;

(D) For coffee, sugar, and cocoa Core Referenced Futures Contracts, by the 30th of September, and annually thereafter.

(iv) For purposes of estimating deliverable supply, a designated contract market may use any guidance adopted in the Acceptable Practices for Compliance with Core Principle 3 found in part 38 of the Commission's regulations.

(v) The estimate submitted under paragraph (d)(2)(iii) of this section shall be accompanied by a description of the methodology used to derive the estimate along with any statistical data supporting the designated contract market's estimate of deliverable supply.

(vi) The Commission shall fix and publish pursuant to paragraph (e) of this section, the spot-month limits by Commission order, no later than:

(A) For metal Referenced Contracts listed in § 151.2(b), by the 28th of February following the submission of estimates of deliverable supply provided to the Commission under paragraph (d)(2)(iii)(A) of this section and biennially thereafter;

(B) For energy Referenced Contracts listed in § 151.2(c), by the 31st of May following the submission of estimates of deliverable supply provided to the Commission under paragraph (d)(2)(iii)(B) of this section and biennially thereafter;

(C) For corn, wheat, oat, rough rice, soybean and soybean products, livestock, milk, cotton, and frozen concentrated orange juice Referenced Contracts, by the 30th of September following the submission of estimates of deliverable supply provided to the Commission under paragraph (d)(2)(iii)(C) of this section and annually thereafter;

(D) For coffee, sugar, and cocoa Referenced Contracts, by the 30th of November following the submission of estimates of deliverable supply provided to the Commission under paragraph (d)(2)(iii)(D) of this section and annually thereafter.

(3) *Non-spot-month position limits for non-legacy Referenced Contract.* (i) Initial non-spot-month limits for non-legacy Referenced Contracts shall be fixed and published within one month after the Commission has obtained or estimated 12 months of values pursuant to paragraphs (b)(2)(i)(B), (b)(2)(i)(C), and (b)(2)(ii) of this section, and shall be fixed and made effective as provided in paragraph (b)(2) and (e) of this section.

(ii) Subsequent non-spot-month limits for non-legacy Referenced Contracts shall be fixed and published within one month after two years following the fixing and publication of initial non-spot-month position limits and shall be based on the higher of 12 months average all-months-combined aggregate open interest, or 24 months average all-months-combined aggregate open interest, as provided for in paragraphs (b)(2) and (e) of this section.

(iii) Initial non-spot-month limits for non-legacy Referenced Contracts shall be made effective by Commission order.

(4) *Non-spot-month legacy limits for legacy agricultural Referenced Contracts.* The non-spot-month position limits for legacy agricultural Referenced Contracts shall be effective sixty days after the term ''swap'' is further defined under the Wall Street Transparency and Accountability Act of 2010, and shall apply to all the provisions of this part.

(e) *Publication.* The Commission shall publish position limits on the Commission's Web site at *http://www.cftc.gov* prior to making such limits effective, other than those limits specified under paragraph (b)(3) of this section and appendix A to this part.

(1) Spot-month position limits shall be effective:

(i) For metal Referenced Contracts listed in § 151.2(b), on the 1st of May after the Commission has fixed and published such limits under paragraph (d)(2)(vi)(A) of this section;

(ii) For energy Referenced Contracts listed in § 151.2(c), on the 1st of August after the Commission has fixed and published such limits under paragraph (d)(2)(vi)(B) of this section;

(iii) For corn, wheat, oat, rough rice, soybean and soybean products, livestock, milk, cotton, and frozen concentrated orange juice Referenced Contracts, on the 1st of December after the Commission has fixed and published such limits under paragraph (d)(2)(vi)(C) of this section; and

(iv) For coffee, sugar, and cocoa Referenced Contracts, on the 1st of February after the Commission has fixed and published such limits under paragraph (d)(2)(vi)(D) of this section.

(2) The Commission shall publish month-end all-months-combined futures open interest and all-months-combined swaps open interest figures within one month, as practicable, after such data is submitted to the Commission.

(3) Non-spot-month position limits established under paragraph (b)(2) of this section shall be effective on the 1st calendar day of the third calendar month immediately following publication on the Commission's Web site under paragraph (d)(3) of this section.

(f) *Rounding.* In determining or calculating all levels and limits under this section, a resulting number shall be rounded up to the nearest hundred contracts.

§ 151.5 Bona fide hedging and other exemptions for Referenced Contracts.

(a) *Bona fide hedging transactions or positions.* (1) Any person that complies with the requirements of this section may exceed the position limits set forth in § 151.4 to the extent that a transaction or position in a Referenced Contract:

(i) Represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel;

(ii) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise; and

(iii) Arises from the potential change in the value of one or several—

(A) Assets that a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(B) Liabilities that a person owns or anticipates incurring; or

(C) Services that a person provides, purchases, or anticipates providing or purchasing; or

(iv) Reduces risks attendant to a position resulting from a swap that—

(A) Was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction pursuant to paragraph (a)(1)(i) through (iii) of this section; or

(B) Meets the requirements of paragraphs (a)(1)(i) through (iii) of this section.

(v) Notwithstanding the foregoing, no transactions or positions shall be classified as bona fide hedging for purposes of § 151.4 unless such transactions or positions are established and liquidated in an orderly manner in accordance with sound commercial practices and the provisions of paragraph (a)(2) of this section regarding enumerated hedging transactions and positions or paragraphs (a)(3) or (4) of this section regarding pass-through swaps of this section have been satisfied.

(2) *Enumerated hedging transactions and positions.* Bona fide hedging transactions and positions for the purposes of this paragraph mean any of the following specific transactions and positions:

(i) Sales of Referenced Contracts that do not exceed in quantity:

(A) Ownership or fixed-price purchase of the contract's underlying cash commodity by the same person; and

(B) Unsold anticipated production of the same commodity, which may not exceed one year of production for an agricultural commodity, by the same person *provided that* no such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(ii) Purchases of Referenced Contracts that do not exceed in quantity:

(A) The fixed-price sale of the contract's underlying cash commodity by the same person;

(B) The quantity equivalent of fixed-price sales of the cash products and by-products of such commodity by the same person; and

(C) Unfilled anticipated requirements of the same cash commodity, which may not exceed one year for agricultural Referenced Contracts, for processing, manufacturing, or use by the same person, provided that no such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(iii) Offsetting sales and purchases in Referenced Contracts that do not exceed in quantity that amount of the same cash commodity that has been bought and sold by the same person at unfixed prices basis different delivery months, *provided that* no such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(iv) Purchases or sales by an agent who does not own or has not contracted to sell or purchase the offsetting cash commodity at a fixed price, *provided that* the agent is responsible for the merchandising of the cash positions that is being offset in Referenced Contracts and the agent has a contractual arrangement with the person who owns the commodity or holds the cash market commitment being offset.

(v) *Anticipated merchandising hedges.* Offsetting sales and purchases in Referenced Contracts that do not exceed in quantity the amount of the same cash commodity that is anticipated to be merchandised, provided that:

(A) The quantity of offsetting sales and purchases is not larger than the current or anticipated unfilled storage capacity owned or leased by the same person during the period of anticipated merchandising activity, which may not exceed one year;

(B) The offsetting sales and purchases in Referenced Contracts are in different contract months, which settle in not more than one year; and

(C) No such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(vi) *Anticipated royalty hedges.* Sales or purchases in Referenced Contracts offset by the anticipated change in value of royalty rights that are owned by the same person *provided that:*

(A) The royalty rights arise out of the production, manufacturing, processing, use, or transportation of the commodity underlying the Referenced Contract, which may not exceed one year for agricultural Referenced Contracts; and

(B) No such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(vii) *Service hedges.* Sales or purchases in Referenced Contracts offset by the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services held by the same person *provided that:*

(A) The contract for services arises out of the production, manufacturing, processing, use, or transportation of the commodity underlying the Referenced Contract, which may not exceed one year for agricultural Referenced Contracts;

(B) The fluctuations in the value of the position in Referenced Contracts are substantially related to the fluctuations in value of receipts or payments due or expected to be due under a contract for services; and

(C) No such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(viii) *Cross-commodity hedges.* Sales or purchases in Referenced Contracts described in paragraphs (a)(2)(i) through (vii) of this section may also be offset other than by the same quantity of the same cash commodity, *provided that:*

(A) The fluctuations in value of the position in Referenced Contracts are substantially related to the fluctuations in value of the actual or anticipated cash position; and

(B) No such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(3) *Pass-through swaps.* Bona fide hedging transactions and positions for the purposes of this paragraph include the purchase or sales of Referenced Contracts that reduce the risks attendant to a position resulting from a swap that was executed opposite a counterparty for whom the swap transaction would qualify as a bona fide hedging transaction pursuant to paragraph (a)(2) of this section (''pass-through swaps''),

provided that no such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts *unless* such pass-through swap position continues to offset the cash market commodity price risk of the bona fide hedging counterparty.

(4) *Pass-through swap offsets.* For swaps executed opposite a counterparty for whom the swap transaction would qualify as a bona fide hedging transaction pursuant to paragraph (a)(2) of this section (pass-through swaps), such pass-through swaps shall also be classified as a bona fide hedging transaction for the counterparty for whom the swap would not otherwise qualify as a bona fide hedging transaction pursuant to paragraph (a)(2) of this section (''non-hedging counterparty''), *provided that* the non-hedging counterparty purchases or sells Referenced Contracts that reduce the risks attendant to such pass-through swaps. *Provided further,* that the pass-through swap shall constitute a bona fide hedging transaction only to the extent the non-hedging counterparty purchases or sells Referenced Contracts that reduce the risks attendant to the pass-through swap.

(5) Any person engaging in other risk-reducing practices commonly used in the market which they believe may not be specifically enumerated in § 151.5(a)(2) may request relief from Commission staff under § 140.99 of this chapter or the Commission under section 4a(a)(7) of the Act concerning the applicability of the bona fide hedging transaction exemption.

(b) *Aggregation of accounts.* Entities required to aggregate accounts or positions under § 151.7 shall be considered the same person for the purpose of determining whether a person or persons are eligible for a bona fide hedge exemption under § 151.5(a).

(c) *Information on cash market commodity activities.* Any person with a position that exceeds the position limits set forth in § 151.4 pursuant to paragraphs (a)(2)(i)(A), (a)(2)(ii)(A), (a)(2)(ii)(B), (a)(2)(iii), or (a)(2)(iv) of this section shall submit to the Commission a 404 filing, in the form and manner provided for in § 151.10.

(1) The 404 filing shall contain the following information with respect to such position for each business day the same person exceeds the limits set forth in § 151.4, up to and through the day the person's position first falls below the position limits:

(i) The date of the bona fide hedging position, an indication of under which enumerated hedge exemption or exemptions the position qualifies for bona fide hedging, the corresponding Core Referenced Futures Contract, the cash market commodity hedged, and the units in which the cash market commodity is measured;

(ii) The entire quantity of stocks owned of the cash market commodity that is being hedged;

(iii) The entire quantity of fixed-price purchase commitments of the cash market commodity that is being hedged;

(iv) The sum of the entire quantity of stocks owned of the cash market commodity and the entire quantity of fixed-price purchase commitments of the cash market commodity that is being hedged;

(v) The entire quantity of fixed-price sale commitments of the cash commodity that is being hedged;

(vi) The quantity of long and short Referenced Contracts, measured on a futures-equivalent basis to the applicable Core Referenced Futures Contract, in the nearby contract month that are being used to hedge the long and short cash market positions;

(viii) The total number of long and short Referenced Contracts, measured on a futures equivalent basis to the applicable Core Referenced Futures Contract, that are being used to hedge the long and short cash market positions; and

(viii) Cross-commodity hedging information as required under paragraph (g) of this section.

(2) *Notice filing.* Persons seeking an exemption under this paragraph shall file a notice with the Commission, which shall be effective upon the date of the submission of the notice.

(d) *Information on anticipated cash market commodity activities.* (1) *Initial statement.* Any person who intends to exceed the position limits set forth in § 151.4 pursuant to paragraph (a)(2)(i)(B), (a)(2)(ii)(C), (a)(2)(v), (a)(2)(vi), or (a)(2)(vii) of this section in order to hedge anticipated production, requirements, merchandising, royalties, or services connected to a commodity underlying a Referenced Contract, shall submit to the Commission a 404A filing in the form and manner provided in § 151.10. The 404A filing shall contain the following information with respect to such activities, by Referenced Contract:

(i) A description of the type of anticipated cash market activity to be hedged; how the purchases or sales of Referenced Contracts are consistent with the provisions of (a)(1) of this section; and the units in which the cash commodity is measured;

(ii) The time period for which the person claims the anticipatory hedge exemption is required, which may not exceed one year for agricultural commodities or one year for anticipated merchandising activity;

(iii) The actual use, production, processing, merchandising (bought and sold), royalties and service payments and receipts of that cash market commodity during each of the three complete fiscal years preceding the current fiscal year;

(iv) The anticipated use production, or commercial or merchandising requirements (purchases and sales), anticipated royalties, or service contract receipts or payments of that cash market commodity which are applicable to the anticipated activity to be hedged for the period specified in (d)(1)(ii) of this section;

(v) The unsold anticipated production or unfilled anticipated commercial or merchandising requirements of that cash market commodity which are applicable to the anticipated activity to be hedged for the period specified in (d)(1)(ii) of this section;

(vi) The maximum number of Referenced Contracts long and short (on an all-months-combined basis) that are expected to be used for each anticipatory hedging activity for the period specified in (d)(1)(ii) of this section on a futures equivalent basis;

(vii) If the hedge exemption sought is for anticipated merchandising pursuant to (a)(2)(v) of this section, a description of the storage capacity related to the anticipated merchandising transactions, including:

(A) The anticipated total storage capacity, the anticipated merchandising quantity, and purchase and sales commitments for the period specified in (d)(1)(ii) of this section;

(B) Current inventory; and

(C) The total storage capacity and quantity of commodity moved through the storage capacity for each of the three complete fiscal years preceding the current fiscal year; and

(viii) Cross-commodity hedging information as required under paragraph (g) of this section.

(2) *Notice filing.* Persons seeking an exemption under this paragraph shall file a notice with the Commission. Such a notice shall be filed at least ten days in advance of a date the person expects to exceed the position limits established under this part, and shall be effective after that ten day period unless otherwise notified by the Commission.

(3) *Supplemental reports for 404A filings.* Whenever a person intends to

exceed the amounts determined by the Commission to constitute a bona fide hedge for anticipated activity in the most recent statement or filing, such person shall file with the Commission a statement that updates the information provided in the person's most recent filing at least ten days in advance of the date that person wishes to exceed those amounts.

(e) *Review of notice filings.* (1) The Commission may require persons submitting notice filings provided for under paragraphs (c)(2) and (d)(2) of this section to submit such other information, before or after the effective date of a notice, which is necessary to enable the Commission to make a determination whether the transactions or positions under the notice filing fall within the scope of bona fide hedging transactions or positions described under paragraph (a) of this section.

(2) The transactions and positions described in the notice filing shall not be considered, in part or in whole, as bona fide hedging transactions or positions if such person is so notified by the Commission.

(f) *Additional information from swap counterparties to bona fide hedging transactions.* All persons that maintain positions in excess of the limits set forth in § 151.4 in reliance upon the exemptions set forth in paragraphs (a)(3) and (4) of this section shall submit to the Commission a 404S filing, in the form and manner provided for in § 151.10. Such 404S filing shall contain the following information with respect to such position for each business day that the same person exceeds the limits set forth in § 151.4, up to and through the day the person's position first falls below the position limit that was exceeded:

(1) By Referenced Contract;

(2) By commodity reference price and units of measurement used for the swaps that would qualify as a bona fide hedging transaction or position gross long and gross short positions; and

(3) Cross-commodity hedging information as required under paragraph (g) of this section.

(g) *Conversion methodology for cross-commodity hedges.* In addition to the information required under this section, persons who avail themselves of cross-commodity hedges pursuant to (a)(2)(viii) of this section shall submit to the Commission a form 404, 404A, or 404S filing, as appropriate. The first time such a form is filed where a cross-commodity hedge is claimed, it should contain a description of the conversion methodology. That description should explain the conversion from the actual commodity used in the person's normal course of business to the Referenced Contract that is being used for hedging, including an explanation of the methodology used for determining the ratio of conversion between the actual or anticipated cash positions and the person's positions in the Referenced Contract.

(h) *Recordkeeping.* Persons who avail themselves of bona fide hedge exemptions shall keep and maintain complete books and records concerning all of their related cash, futures, and swap positions and transactions and make such books and records, along with a list of pass-through swap counterparties for pass-through swap exemptions under (a)(3) of this section, available to the Commission upon request.

(i) *Additional requirements for pass-through swap counterparties.* A party seeking to rely upon § 151.5(a)(3) to exceed the position limits of § 151.4 with respect to such a swap may only do so if its counterparty provides a written representation (*e.g.,* in the form of a field or other representation contained in a mutually executed trade confirmation) that, as to such counterparty, the swap qualifies in good faith as a bona fide hedging transaction under paragraph (a)(3) of this section at the time the swap was executed. That written representation shall be retained by the parties to the swap for a period of at least two years following the expiration of the swap and furnished to the Commission upon request. Any person that represents to another person that the swap qualifies as a pass-through swap under paragraph (a)(3) of this section shall keep and make available to the Commission upon request all relevant books and records supporting such a representation for a period of at least two years following the expiration of the swap.

(j) *Financial distress exemption.* Upon specific request made to the Commission, the Commission may exempt a person or related persons under financial distress circumstances for a time certain from any of the requirements of this part. Financial distress circumstances are situations involving the potential default or bankruptcy of a customer of the requesting person or persons, affiliate of the requesting person or persons, or potential acquisition target of the requesting person or persons. Such exemptions shall be granted by Commission order.

§ 151.6 Position visibility.

(a) *Visibility levels.* A person holding or controlling positions, separately or in combination, net long or net short, in Referenced Contracts that equal or exceed the following levels in all months or in any single month (including the spot month), shall comply with the reporting requirements of paragraphs (b) and (c) of this section:

(1) Visibility Levels for Metal Referenced Contracts	
(i) Commodity Exchange, Inc. Copper (HG)	8,500
(ii) Commodity Exchange, Inc. Gold (GC)	30,000
(iv) Commodity Exchange, Inc. Silver (SI)	8,500
(v) New York Mercantile Exchange Palladium (PA)	1,500
(vi) New York Mercantile Exchange Platinum (PL)	2,000
(2) Visibility Levels for Energy Referenced Contracts	
(i) New York Mercantile Exchange Light Sweet Crude Oil (CL)	50,000
(ii) New York Mercantile Exchange Henry Hub Natural Gas (NG)	50,000
(iii) New York Mercantile Exchange New York Harbor Gasoline Blendstock (RB)	10,000
(iv) New York Mercantile Exchange New York Harbor No. 2 Heating Oil (HO)	16,000

(b) *Statement of person exceeding visibility level.* Persons meeting the provisions of paragraph (a) of this section, shall submit to the Commission a 401 filing in the form and manner provided for in § 151.10. The 401 filing shall contain the following information, by Referenced Contract:

(1) A list of dates, within the applicable calendar quarter, on which the person held or controlled a position

that equaled or exceeded such visibility levels; and

(2) As of the first business Tuesday following the applicable calendar quarter and as of the day, within the applicable calendar quarter, in which the person held the largest net position (on an all months combined basis) in excess of the level in paragraph (a) of this section:

(i) Separately by futures, options and swaps, gross long and gross short futures equivalent positions in all months in the applicable Referenced Contract(s) (using economically reasonable and analytically supported deltas) on a futures-equivalent basis; and

(ii) If applicable, by commodity referenced price, gross long and gross short uncleared swap positions in all months basis in the applicable Referenced Contract(s) futures-equivalent basis (using economically reasonable and analytically supported deltas).

(c) *404 filing.* A person that holds a position in a Referenced Contract that equals or exceeds a visibility level in a calendar quarter shall submit to the Commission a 404 filing in the form and manner provided for in § 151.10, and it shall contain the information regarding such positions as described in § 151.5(c) as of the first business Tuesday following the applicable calendar quarter and as of the day, within the applicable calendar quarter, in which the person held the largest net position in excess of the level in all months.

(d) *Alternative filing.* With the express written permission of the Commission or its designees, the submission of a swaps or physical commodity portfolio summary statement spreadsheet in digital format, only insofar as the spreadsheet provides at least the same data as that required by paragraphs (b) or (c) of this section respectively may be substituted for the 401 or 404 filing respectively.

(e) *Precedence of other reporting obligations.* Reporting obligations imposed by regulations other than those contained in this section shall supersede the reporting requirements of paragraphs (b) and (c) of this section but only insofar as other reporting obligations provide at least the same data and are submitted to the Commission or its designees at least as often as the reporting requirements of paragraphs (b) and (c) of this section.

(f) *Compliance date.* The compliance date of this section shall be sixty days after the term ''swap'' is further defined under the Wall Street Transparency and Accountability Act of 2010. A document will be published in the **Federal Register** establishing the compliance date.

§ 151.7 Aggregation of positions.

(a) *Positions to be aggregated.* The position limits set forth in § 151.4 shall apply to all positions in accounts for which any person by power of attorney or otherwise directly or indirectly holds positions or controls trading and to positions held by two or more persons acting pursuant to an expressed or implied agreement or understanding the same as if the positions were held by, or the trading of the position were done by, a single individual.

(b) *Ownership of accounts generally.* For the purpose of applying the position limits set forth in § 151.4, except for the ownership interest of limited partners, shareholders, members of a limited liability company, beneficiaries of a trust or similar type of pool participant in a commodity pool subject to the provisos set forth in paragraph (c) of this section or in accounts or positions in multiple pools as set forth in paragraph (d) of this section, any person holding positions in more than one account, or holding accounts or positions in which the person by power of attorney or otherwise directly or indirectly has a 10 percent or greater ownership or equity interest, must aggregate all such accounts or positions.

(c) *Ownership by limited partners, shareholders or other pool participants.* (1) Except as provided in paragraphs (c)(2) and (3) of this section, a person that is a limited partner, shareholder or other similar type of pool participant with an ownership or equity interest of 10 percent or greater in a pooled account or positions who is also a principal or affiliate of the operator of the pooled account must aggregate the pooled account or positions with all other accounts or positions owned or controlled by that person, unless:

(i) The pool operator has, and enforces, written procedures to preclude the person from having knowledge of, gaining access to, or receiving data about the trading or positions of the pool;

(ii) The person does not have direct, day-to-day supervisory authority or control over the pool's trading decisions; and

(iii) The pool operator has complied with the requirements of paragraph (h) of this section on behalf of the person or class of persons.

(2) A commodity pool operator having ownership or equity interest of 10 percent or greater in an account or positions as a limited partner, shareholder or other similar type of pool participant must aggregate those accounts or positions with all other accounts or positions owned or controlled by the commodity pool operator.

(3) Each limited partner, shareholder, or other similar type of pool participant having an ownership or equity interest of 25 percent or greater in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter must aggregate the pooled account or positions with all other accounts or positions owned or controlled by that person.

(d) *Identical trading.* Notwithstanding any other provision of this section, for the purpose of applying the position limits set forth in § 151.4, any person that holds or controls the trading of positions, by power of attorney or otherwise, in more than one account, or that holds or controls trading of accounts or positions in multiple pools with identical trading strategies must aggregate all such accounts or positions that a person holds or controls.

(e) *Trading control by futures commission merchants.* The position limits set forth in § 151.4 shall be construed to apply to all positions held by a futures commission merchant or its separately organized affiliates in a discretionary account, or in an account which is part of, or participates in, or receives trading advice from a customer trading program of a futures commission merchant or any of the officers, partners, or employees of such futures commission merchant or its separately organized affiliates, unless:

(1) A trader other than the futures commission merchant or the affiliate directs trading in such an account;

(2) The futures commission merchant or the affiliate maintains only such minimum control over the trading in such an account as is necessary to fulfill its duty to supervise diligently trading in the account; and

(3) Each trading decision of the discretionary account or the customer trading program is determined independently of all trading decisions in other accounts which the futures commission merchant or the affiliate holds, has a financial interest of 10 percent or more in, or controls.

(f) *Independent Account Controller.* An eligible entity need not aggregate its positions with the eligible entity's client positions or accounts carried by an authorized independent account controller, as defined in § 151.1, except for the spot month provided in physical-delivery Referenced Contracts, provided, however, that the eligible entity has complied with the requirements of paragraph (h) of this section, and that the overall positions

held or controlled by such independent account controller may not exceed the limits specified in § 151.4.

(1) Additional requirements for exemption of Affiliated Entities. If the independent account controller is affiliated with the eligible entity or another independent account controller, each of the affiliated entities must:

(i) Have, and enforce, written procedures to preclude the affiliated entities from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities; provided, however, that such procedures may provide for the disclosure of information which is reasonably necessary for an eligible entity to maintain the level of control consistent with its fiduciary responsibilities and necessary to fulfill its duty to supervise diligently the trading done on its behalf;

(ii) Trade such accounts pursuant to separately developed and independent trading systems;

(iii) Market such trading systems separately; and

(iv) Solicit funds for such trading by separate disclosure documents that meet the standards of § 4.24 or § 4.34 of this chapter, as applicable where such disclosure documents are required under part 4 of this chapter.

(g) *Exemption for underwriting.* Notwithstanding any of the provisions of this section, a person need not aggregate the positions or accounts of an owned entity if the ownership interest is based on the ownership of securities constituting the whole or a part of an unsold allotment to or subscription by such person as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(h) *Notice filing for exemption.* (1) Persons seeking an aggregation exemption under paragraph (c), (e), (f), or (i) of this section shall file a notice with the Commission, which shall be effective upon submission of the notice, and shall include:

(i) A description of the relevant circumstances that warrant disaggregation; and

(ii) A statement certifying that the conditions set forth in the applicable aggregation exemption provision has been met.

(2) Upon call by the Commission, any person claiming an aggregation exemption under this section shall provide to the Commission such information concerning the person's claim for exemption. Upon notice and opportunity for the affected person to respond, the Commission may amend, suspend, terminate, or otherwise modify a person's aggregation exemption for failure to comply with the provisions of this section.

(3) In the event of a material change to the information provided in the notice filed under this paragraph, an updated or amended notice shall promptly be filed detailing the material change.

(4) A notice shall be submitted in the form and manner provided for in § 151.10.

(i) *Exemption for federal law information sharing restriction.* Notwithstanding any provision of this section, a person is not subject to the aggregation requirements of this section if the sharing of information associated with such aggregation would cause either person to violate Federal law or regulations adopted thereunder and provided that such a person does not have actual knowledge of information associated with such aggregation. Provided, however, that such person file a prior notice with the Commission detailing the circumstances of the exemption and an opinion of counsel that the sharing of information would cause a violation of Federal law or regulations adopted thereunder.

§ 151.8 Foreign boards of trade.

The aggregate position limits in § 151.4 shall apply to a trader with positions in Referenced Contracts executed on, or pursuant to the rules of a foreign board of trade, provided that:

(a) Such Referenced Contracts settle against any price (including the daily or final settlement price) of one or more contracts listed for trading on a designated contract market or swap execution facility that is a trading facility; and

(b) The foreign board of trade makes available such Referenced Contracts to its members or other participants located in the United States through direct access to its electronic trading and order matching system.

§ 151.9 Pre-existing positions.

(a) *Non-spot-month position limits.* The position limits set forth in § 151.4(b) of this chapter may be exceeded to the extent that positions in Referenced Contracts remain open and were entered into in good faith prior to the effective date of any rule, regulation, or order that specifies a position limit under this part.

(b) *Spot-month position limits.* Notwithstanding the pre-existing exemption in non-spot months, a person must comply with spot month limits.

(c) *Pre-Dodd-Frank and transition period swaps.* The initial position limits established under § 151.4 shall not apply to any swap positions entered into in good faith prior to the effective date of such initial limits. Swap positions in Referenced Contracts entered into in good faith prior to the effective date of such initial limits may be netted with post-effective date swap and swaptions for the purpose of applying any position limit.

(d) *Exemptions.* Exemptions granted by the Commission under § 1.47 for swap risk management shall not apply to swap positions entered into after the effective date of initial position limits established under § 151.4.

§ 151.10 Form and manner of reporting and submitting information or filings.

Unless otherwise instructed by the Commission or its designees, any person submitting reports under this section shall submit the corresponding required filings and any other information required under this part to the Commission as follows:

(a) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission; and

(b) Not later than 9 a.m. Eastern Time on the next business day following the reporting or filing obligation is incurred *unless:*

(1) A 404A filing is submitted pursuant § 151.5(d), in which case the filing must be submitted at least ten business days in advance of the date that transactions and positions would be established that would exceed a position limit set forth in § 151.4;

(2) A 404 filing is submitted pursuant to § 151.5(c) or a 404S is submitted pursuant to § 151.5(f), the filing must be submitted not later than 9 a.m. on the third business day after a position has exceeded the level in a Referenced Contract for the first time and not later than the third business day following each calendar month in which the person exceeded such levels;

(3) The filing is submitted pursuant to § 151.6, then the 401 or 404, or their respective alternatives as provided for under § 151.6(d), shall be submitted within ten business days following the quarter in which the person holds a position in excess in the visibility levels provided in § 151.6(a); or

(4) A notice of disaggregation is filed pursuant to § 151.7(h), in which case the notice shall be submitted within five business days of when the person claims a disaggregation exemption.

(e) When the reporting entity discovers errors or omissions to past reports, the entity so notifies the Commission and files corrected information in a form and manner and at a time as may be instructed by the Commission or its designee.

§ 151.11 Designated contract market and swap execution facility position limits and accountability rules.

(a) *Spot-month limits.* (1) For all Referenced Contracts executed pursuant to their rules, swap execution facilities that are trading facilities and designated contract markets shall adopt, enforce, and, establish rules and procedures for monitoring and enforcing spot-month position limits set at levels no greater than those established by the Commission under § 151.4.

(2) For all agreements, contracts, or transactions executed pursuant to their rules that are not subject to the limits set forth in paragraph (a)(1) of this section, it shall be an acceptable practice for swap execution facilities that are trading facilities and designated contract markets to adopt, enforce, and establish rules and procedures for monitoring and enforcing spot-month position limits set at levels no greater than 25 percent of estimated deliverable supply, consistent with Commission guidance set forth in this title.

(b) *Non-spot-month limits.* (1) *Referenced Contracts.* For Referenced Contracts executed pursuant to their rules, swap execution facilities that are trading facilities and designated contract markets shall adopt enforce, and establish rules and procedures for monitoring and enforcing single month and all-months limits at levels no greater than the position limits established by the Commission under § 151.4(d)(3) or (4).

(2) *Non-referenced contracts.* For all other agreements, contracts, or transactions executed pursuant to their rules that are not subject to the limits set forth in § 151.4, except as provided in § 151.11(b)(3) and (c), it shall be an acceptable practice for swap execution facilities that are trading facilities and designated contract markets to adopt, enforce, and establish rules and procedures for monitoring and enforcing single-month and all-months-combined position limits at levels no greater than ten percent of the average delta-adjusted futures, swaps, and options month-end all months open interest in the same contract or economically equivalent contracts executed pursuant to the rules of the designated contract market or swap execution facility that is a trading facility for the greater of the most recent one or two calendar years up to 25,000 contracts with a marginal increase of 2.5 percent thereafter.

(3) *Levels at designation or initial listing.* Other than in Referenced Contracts, at the time of its initial designation or upon offering a new contract, agreement, or transaction to be executed pursuant to its rules, it shall be an acceptable practice for a designated contract market or swap execution facility that is a trading facility to provide for speculative limits for an individual single-month or in all-months-combined at no greater than 1,000 contracts for physical commodities other than energy commodities and 5,000 contracts for other commodities, *provided that* the notional quantity for such contracts, agreements, or transactions, corresponds to a notional quantity per contract that is no larger than a typical cash market transaction in the underlying commodity.

(4) For purposes of this paragraph, it shall be an acceptable practice for open interest to be calculated by combining the all months month-end open interest in the same contract or economically equivalent contracts executed pursuant to the rules of the designated contract market or swap execution facility that is a trading facility (on a delta-adjusted basis, as appropriate) for all months listed during the most recent one or two calendar years.

(c) *Alternatives.* In lieu of the limits provided for under § 151.11(a)(2) or (b)(2), it shall be an acceptable practice for swap execution facilities that are trading facilities and designated contract markets to adopt, enforce, and establish rules and procedures for monitoring and enforcing position accountability rules with respect to any agreement, contract, or transaction executed pursuant to their rules requiring traders to provide information about their position upon request by the exchange and to consent to halt increasing further a trader's position upon request by the exchange as follows:

(1) On an agricultural or exempt commodity that is not subject to the limits set forth in § 151.4, having an average month-end open interest of 50,000 contracts and an average daily volume of 5,000 contracts and a liquid cash market, *provided, however,* such swap execution facilities that are trading facilities and designated contract markets are not exempt from the requirement set forth in paragraph (a)(2) that they adopt a spot-month position limit with a level no greater than 25 percent of estimated deliverable supply; or

(2) On a major foreign currency, for which there is no legal impediment to delivery and for which there exists a highly liquid cash market; or

(3) On an excluded commodity that is an index or measure of inflation, or other macroeconomic index or measure; or

(4) On an excluded commodity that meets the definition of section 1a(19)(ii), (iii), or (iv) of the Act.

(d) *Securities futures products.* Position limits for securities futures products are specified in 17 CFR part 41.

(e) *Aggregation.* Position limits or accountability rules established under this section shall be subject to the aggregation standards of § 151.7.

(f) *Exemptions.* (1) *Hedge exemptions.* (i) For purposes of exempt and agricultural commodities, no designated contract market or swap execution facility that is a trading facility bylaw, rule, regulation, or resolution adopted pursuant to this section shall apply to any position that would otherwise be exempt from the applicable Federal speculative position limits as determined by § 151.5; *provided, however,* that the designated contract market or swap execution facility that is a trading facility may limit bona fide hedging positions or any other positions which have been exempted pursuant to § 151.5 which it determines are not in accord with sound commercial practices or exceed an amount which may be established and liquidated in an orderly fashion.

(ii) For purposes of excluded commodities, no designated contract market or swap execution facility that is a trading facility by law, rule, regulation, or resolution adopted pursuant to this section shall apply to any transaction or position defined under § 1.3(z) of this chapter; *provided, however,* that the designated contract market or swap execution facility that is a trading facility may limit bona fide hedging positions that it determines are not in accord with sound commercial practices or exceed an amount which may be established and liquidated in an orderly fashion.

(2) *Procedure.* Persons seeking to establish eligibility for an exemption must comply with the procedures of the designated contract market or swap execution facility that is a trading facility for granting exemptions from its speculative position limit rules. In considering whether to permit or grant an exemption, a designated contract market or swap execution facility that is a trading facility must take into account sound commercial practices and

paragraph (d)(1) of this section and apply principles consistent with § 151.5.

(g) *Other exemptions.* Speculative position limits adopted pursuant to this section shall not apply to:

(1) Any position acquired in good faith prior to the effective date of any bylaw, rule, regulation, or resolution which specifies such limit;

(2) Spread or arbitrage positions either in positions in related Referenced Contracts or, for contracts that are not Referenced Contracts, economically equivalent contracts *provided that* such positions are outside of the spot month for physical-delivery contracts; or

(3) Any person that is registered as a futures commission merchant or floor broker under authority of the Act, except to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person.

(h) *Ongoing responsibilities.* Nothing in this part shall be construed to affect any provisions of the Act relating to manipulation or corners or to relieve any designated contract market, swap execution facility that is a trading facility, or governing board of a designated contract market or swap execution facility that is a trading facility from its responsibility under other provisions of the Act and regulations.

(i) *Compliance date.* The compliance date of this section shall be 60 days after the term ''swap'' is further defined under the Wall Street Transparency and Accountability Act of 2010. A document will be published in the **Federal Register** establishing the compliance date.

(j) Notwithstanding paragraph (i) of this section, the compliance date of provisions of paragraph (b)(1) of this section as it applies to non-legacy Referenced Contracts shall be upon the establishment of any non-spot-month position limits pursuant to § 151.4(d)(3). In the period prior to the establishment of any non-spot-month position limits pursuant to § 151.4(d)(3) it shall be an acceptable practice for a designated contract market or swap execution facility to either:

(1) Retain existing non-spot-month position limits or accountability rules; or

(2) Establish non-spot-month position limits or accountability levels pursuant to the acceptable practice described in § 151.11(b)(2) and (c)(1) based on open interest in the same contract or economically equivalent contracts executed pursuant to the rules of the designated contract market or swap execution facility that is a trading facility.

§ 151.12 Delegation of authority to the Director of the Division of Market Oversight.

(a) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(1) In § 151.4(b) for determining levels of open interest, in § 151.4(d)(2)(ii) to estimate deliverable supply, in § 151.4(d)(3)(ii) to fix non-spot-month limits, and in § 151.4(e) to publish position limit levels.

(2) In § 151.5 requesting additional information or determining whether a filing should not be considered as bona fide hedging;

(3) In § 151.6 for accepting alternative position visibility filings under paragraphs (c)(2) and (d) therein;

(4) In § 151.7(h)(2) to call for additional information from a trader claiming an aggregation exemption;

(5) In § 151.10 for providing instructions or determining the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part.

(b) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(c) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§ 151.13 Severability.

If any provision of this part, or the application thereof to any person or circumstances, is held invalid, such invalidity shall not affect other provisions or application of such provision to other persons or circumstances which can be given effect without the invalid provision or application.

Appendix A to Part 151—Spot-Month Position Limits

Contract	Referenced contract spot-month limit
Agricultural Referenced Contracts	
ICE Futures U.S. Cocoa	1,000
ICE Futures U.S. Coffee C	500
Chicago Board of Trade Corn	600
ICE Futures U.S. Cotton No. 2	300
ICE Futures U.S. FCOJ–A	300
Chicago Mercantile Exchange Class III Milk	1,500
Chicago Mercantile Exchange Feeder Cattle	300
Chicago Mercantile Exchange Lean Hog	950
Chicago Mercantile Exchange Live Cattle	450
Chicago Board of Trade Oats	600
Chicago Board of Trade Rough Rice	600
Chicago Board of Trade Soybeans	600
Chicago Board of Trade Soybean Meal	720
Chicago Board of Trade Soybean Oil	540
ICE Futures U.S. Sugar No. 11	5,000
ICE Futures U.S. Sugar No. 16	1,000
Chicago Board of Trade Wheat	600
Minneapolis Grain Exchange Hard Red Spring Wheat	600
Kansas City Board of Trade Hard Winter Wheat	600
Metal Referenced Contracts	
Commodity Exchange, Inc. Copper	1,200
New York Mercantile Exchange Palladium	650

Contract	Referenced contract spot-month limit
New York Mercantile Exchange Platinum	500
Commodity Exchange, Inc. Gold	3,000
Commodity Exchange, Inc. Silver	1,500
Energy Referenced Contracts	
New York Mercantile Exchange Light Sweet Crude Oil	3,000
New York Mercantile Exchange New York Harbor Gasoline Blendstock	1,000
New York Mercantile Exchange Henry Hub Natural Gas	1,000
New York Mercantile Exchange New York Harbor Heating Oil	1,000

Appendix B to Part 151—Examples of Bona Fide Hedging Transactions and Positions

A non-exhaustive list of examples of bona fide hedging transactions or positions under § 151.5 is presented below. A transaction or position qualifies as a bona fide hedging transaction or position when it meets the requirements under § 151.5(a)(1) and one of the enumerated provisions under § 151.5(a)(2). With respect to a transaction or position that does not fall within an example in this Appendix, a person seeking to rely on a bona fide hedging exemption under § 151.5 may seek guidance from the Division of Market Oversight.

1. Royalty Payments

a. *Fact Pattern:* In order to develop an oil field, Company A approaches Bank B for financing. To facilitate the loan, Bank B first establishes an independent legal entity commonly known as a special purpose vehicle (SPV). Bank B then provides a loan to the SPV. Payments of principal and interest from the SPV to the Bank are based on a fixed price for crude oil. The SPV in turn makes a production loan to Company A. The terms of the production loan require Company A to provide the SPV with volumetric production payments (VPPs) based on the SPV's share of the production and the prevailing price of crude oil. Because the price of crude may fall, the SPV reduces that risk by entering into a NYMEX Light Sweet Crude Oil crude oil swap with Swap Dealer C. The swap requires the SPV to pay Swap Dealer C the floating price of crude oil and for Swap Dealer C to pay a fixed price. The notional quantity for the swap is equal to the expected production underlying the VPPs to the SPV.

Analysis: The swap between Swap Dealer C and the SPV meets the general requirements for bona fide hedging transactions (§ 151.5(a)(1)(i)–(iii)) and the specific requirements for royalty payments (§ 151.5(a)(2)(vi)). The VPPs that the SPV receives represent anticipated royalty payments from the oil field's production. The swap represents a substitute for transactions to be made in the physical marketing channel. The SPV's swap position qualifies as a hedge because it is economically appropriate to the reduction of risk. The SPV is reasonably certain that the notional quantity of the swap is equal to the expected production underlying the VPPs. The swap reduces the risk associated with a change in value of a royalty asset. The fluctuations in value of the SPV's anticipated royalties are substantially related to the fluctuations in value of the NYMEX Light Sweet Crude Oil Referenced Contract swap with Swap Dealer C. The risk-reducing position will not qualify as a bona fide hedge in a physical-delivery Referenced Contract during the spot month.

b. *Continuation of Fact Pattern:* Swap Dealer C offsets the risk associated with the swap to the SPV by selling Referenced Contracts. The notional quantity of the Referenced Contracts sold by Swap Dealer C exactly matches the notional quantity of the swap with the SPV.

Analysis: Because the SPV enters the swap as a bona fide hedger under § 151.5(a)(2)(vi), the offset of the risk of the swap in a Referenced Contract by Swap Dealer C qualifies as a bona fide hedging transaction under § 151.5(a)(3). As provided in § 151.5(a)(3), the risk reducing position of Swap Dealer C does not qualify as a bona fide hedge in a physical-delivery Referenced Contract during the spot month.

2. Sovereigns

a. *Fact Pattern:* A Sovereign induces a farmer to sell his anticipated production of 100,000 bushels of corn forward to User A at a fixed price for delivery during the expected harvest. In return for the farmer entering into the fixed-price forward sale, the Sovereign agrees to pay the farmer the difference between the market price at the time of harvest and the price of the fixed-price forward, in the event that the market price is above the price of the forward. The fixed-price forward sale of 100,000 bushels of corn reduces the farmer's downside price risk associated with his anticipated agricultural production. The Sovereign faces commodity price risk as it stands ready to pay the farmer the difference between the market price and the price of the fixed-price contract. To reduce that risk, the Sovereign purchases 100,000 bushels of Chicago Board of Trade (''CBOT'') Corn Referenced Contract call options.

Analysis: Because the Sovereign and the farmer are acting together pursuant to an express agreement, the aggregation provisions of § 151.7 and § 151.5(b) apply and they are treated as a single person. Taking the positions of the Sovereign and farmer jointly, the risk profile of the combination of the forward sale and the long call is approximately equivalent to the risk profile of a synthetic long put.[521] A synthetic long put may be a bona fide hedge for anticipated production. Thus, that single person satisfies the general requirements for bona fide hedging transactions (§ 151.5(a)(1)(i)–(iii)) and specific requirements for anticipated agricultural production (§ 151.5(a)(2)(i)(B)). The synthetic long put is a substitute for transactions that the farmer will make at a later time in the physical marketing channel after the crop is harvested. The synthetic long put reduces the price risk associated with anticipated agricultural production. The size of the hedge is equivalent to the size of the Sovereign's risk exposure. As provided under § 151.5(a)(2)(i)(B), the Sovereign's risk-reducing position will not qualify as a bona fide hedge in a physical-delivery Referenced Contract during the last five trading days.

3. Services

a. *Fact Pattern:* Company A enters into a risk service agreement to drill an oil well with Company B. The risk service agreement provides that a portion of the revenue receipts to Company A depends on the value of the oil produced. Company A is concerned that the price of oil may fall resulting in lower anticipated revenues from the risk service agreement. To reduce that risk, Company A sells 5,000 NYMEX Light Sweet Crude Oil Referenced Contracts, which is equivalent to the firm's anticipated share of the oil produced.

Analysis: Company A's hedge of a portion of its revenue stream from the risk service agreement meets the general requirements for bona fide hedging (§ 151.5(a)(1)(i)–(iii)) and the specific provisions for services (§ 151.5(a)(2)(vii)). Selling NYMEX Light Sweet Crude Oil Referenced Contracts is a substitute for transactions to be taken at a later time in the physical marketing channel once the oil is produced. The Referenced Contracts sold by Company A are economically appropriate to the reduction of risk because the total notional quantity of the Referenced Contracts sold by Company A equals its share of the expected quantity of future production under the risk service agreement. Because the price of oil may fall, the transactions in Referenced Contracts arise from a potential reduction in the value of the service that Company A is providing to Company B. The contract for services

[521] Put-call parity describes the mathematical relationship between price of a put and call with identical strike prices and expiry.

involves the production of a commodity underlying the NYMEX Exchange Light Sweet Crude Oil Referenced Contract. As provided under § 151.5(a)(2)(vii), the risk reducing position will not qualify as a bona fide hedge during the spot month of the physical-delivery Referenced Contract.

b. *Fact Pattern:* A City contracts with Firm A to provide waste management services. The contract requires that the trucks used to transport the solid waste use natural gas as a power source. According to the contract, the City will pay for the cost of the natural gas used to transport the solid waste by Firm A. In the event that natural gas prices rise, the City's waste transport expenses rise. To mitigate this risk, the City establishes a long position in NYMEX Natural Gas Referenced Contracts that is equivalent to the expected use of natural gas over the life of the service contract.

Analysis: This transaction meets the general requirements for bona fide hedging transaction (§ 151.5(a)(1)(i)–(iii)) and the specific provisions for services (§ 151.5(a)(2)(vii)). Because the City is responsible for paying the cash price for the natural gas used to power the trucks that transport the solid waste under the services agreement, the long hedge is a substitute for transactions to be taken at a later time in the physical marketing channel. The transaction is economically appropriate to the reduction of risk because the total notional quantity of the positions Referenced Contracts purchased equals the expected use of natural gas over the life of the contract. The positions in Referenced Contracts reduce the risk associated with an increase in anticipated liabilities that the City may incur in the event that the price of natural gas increases. The service contract involves the use of a commodity underlying a Referenced Contract. As provided under § 151.5(a)(2)(vii), the risk reducing position will not qualify as a bona fide hedge during the spot month of the physical-delivery Referenced Contract.

c. *Fact Pattern:* Natural Gas Producer A induces Pipeline Operator B to build a pipeline between Producer A's natural gas wells and the Henry Hub pipeline interconnection by entering into a fixed-price contract for natural gas transportation that guarantees a specified quantity of gas to be transported over the pipeline. With the construction of the new pipeline, Producer A plans to deliver natural gas to Henry Hub at a price differential between his gas wells and Henry Hub that is higher than its transportation cost. Producer A is concerned, however, that the price differential may decline. To lock in the price differential, Producer A decides to sell outright NYMEX Henry Hub Natural Gas Referenced Contract cash-settled futures contracts and buy an outright swap that NYMEX Henry Hub Natural Gas at his gas wells.

Analysis: This transaction satisfies the general requirements for a bona fide hedge exemption (§§ 151.5(a)(1)(i)–(iii)) and specific provisions for services (§ 151.5(a)(2)(vii)).[522] The hedge represents a substitute for transactions to be taken in the future (*e.g.,* selling natural gas at Henry Hub). The hedge is economically appropriate to the reduction of risk that the location differential will decline, provided the hedge is not larger than the quantity equivalent of the cash market commodity to be produced and transported. As provided under § 151.5(a)(2)(vii), the risk reducing position will not qualify as a bona fide hedge during the spot month of the physical-delivery Referenced Contract.

4. Lending a Commodity

a. *Fact Pattern:* Bank B lends 1,000 ounces of gold to Jewelry Fabricator J at LIBOR plus a differential. Under the terms of the loan, Jewelry Fabricator J may later purchase the gold at a differential to the prevailing price of Commodity Exchange, Inc. (''COMEX'') Gold (*i.e.,* an open-price purchase agreement embedded in the terms of the loan). Jewelry Fabricator J intends to use the gold to make jewelry and reimburse Bank B for the loan using the proceeds from jewelry sales. Because Bank B is concerned about its potential loss if the price of gold drops, it reduces the risk of a potential loss in the value of the gold by selling COMEX Gold Referenced Contracts with an equivalent notional quantity of 1,000 ounces of gold.

Analysis: This transaction meets the general bona fide hedge exemption requirements (§§ 151.5(a)(1)(i)–(iii)) and the specific requirements associated with owing a cash commodity (§ 151.5(a)(2)(i)). Bank B's short hedge of the gold represents a substitute for a transaction to be made in the physical marketing channel. Because the total notional quantity of the amount of gold contracts sold is equal to the amount of gold that Bank B owns, the hedge is economically appropriate to the reduction of risk. Finally, the transactions in Referenced Contracts arise from a potential change in the value of the gold owned by Bank B.

b. *Fact Pattern:* Silver Processor A agrees to purchase scrap metal from a Scrap Yard that will be processed into 5,000 ounces of silver. To finance the purchase, Silver Processor A borrows 5,000 ounces of silver from Bank B and sells the silver in the cash market. Using the proceeds from the sale of silver in the cash market, Silver Processor A pays the Scrap Yard for the scrap metal containing 5,000 ounces of silver at a negotiated discount from the current spot price. To repay Bank B, Silver Processor A may either: Provide Bank B with 5,000 ounces of silver and an interest payment based on a differential to LIBOR; or repay the Bank at the current COMEX Silver settlement price plus an interest payment based on a differential to LIBOR (*i.e.,* an open-price purchase agreement). Silver Processor A processes and refines the scrap to repay Bank B. Although Bank B has lent the silver, it is still exposed to a reduction in value if the price of silver falls. Bank B reduces the risk of a possible decline in the value of their silver asset over the loan period by selling COMEX Silver Referenced Contracts with a total notional quantity equal to 5,000 ounces.

Analysis: This transaction meets the general requirements for a bona fide hedging transaction (§§ 151.5(a)(1)(i)–(iii)) and specific provisions for owning a commodity (§ 151.5(a)(2)(i)). Bank B's hedge of the silver that it owns represents a substitute for a transaction in the physical marketing channel. The hedge is economically appropriate to the reduction of risk because the bank owns 5,000 ounces of silver. The hedge reduces the risk of a potential change in the value of the silver that it owns.

5. Processor Margins

a. *Fact Pattern:* Soybean Processor A has a total throughput capacity of 100 million tons of soybeans per year. Soybean Processor A ''crushes'' soybeans into products (soybean oil and meal). It currently has 20 million tons of soybeans in storage and has offset that risk through fixed-price forward sales of the amount of products expected to be produced from crushing 20 million tons of soybeans, thus locking in the crushing margin on 20 million tons of soybeans. Because it has consistently operated its plant at full capacity over the last three years, it anticipates purchasing another 80 million tons of soybeans over the next year. It has not sold the crushed products forward. Processor A faces the risk that the difference in price between soybeans and the crushed products could change such that crush products (*i.e.,* the crush spread) will be insufficient to cover its operating margins. To lock in the crush spread, Processor A purchases 80 million tons of CBOT Soybean Referenced Contracts and sells CBOT Soybean Meal and Soybean Oil Referenced Contracts, such that the total notional quantity of soybean meal and oil Referenced Contracts equals the expected production from crushing soybeans into soybean meal and oil respectively.

Analysis: These hedging transactions meet the general requirements for bona fide hedging transactions (§§ 151.5(a)(1)(i)–(iii)) and the specific provisions for unfilled anticipated requirements and unsold anticipated agricultural production (§§ 151.5(a)(2)(i)–(ii)). Purchases of soybean Referenced Contracts qualify as bona fide hedging transaction provided they do not exceed the unfilled anticipated requirements of the cash commodity for one year (in this case 80 million tons). Such transactions are a substitute for purchases to be made at a later time in the physical marketing channel and are economically appropriate to the reduction of risk. The transactions in Referenced Contracts arise from a potential change in the value of soybeans that the processor anticipates owning. The size of the permissible hedge position in soybeans must be reduced by any inventories and fixed-price purchases because they are no longer unfilled requirements. As provided under § 151.5(a)(2)(ii)(C), the risk reduction position that is not in excess of the anticipated requirements for soybeans for that month and the next succeeding month qualifies as a bona fide hedge during the last five trading days provided it is not in a physical-delivery Referenced Contract.

Given that Soybean Processor A has purchased 80 million tons worth of CBOT Soybean Referenced Contracts, it can reduce

[522] Note that in addition to the use of Referenced Contracts, Producer A could have hedged this risk by using a basis contract, which is excluded from the definition of Referenced Contracts.

its processing risk by selling soybean meal and oil Referenced Contracts equivalent to the expected production. The sale of CBOT Soybean, Soybean Meal, and Soybean Oil contracts represents a substitute for transactions to be taken at a later time in the physical marketing channel by the soybean processor. Because the amount of soybean meal and oil Referenced Contracts sold forward by the soybean processor corresponds to expected production from 80 million tons of soybeans, the hedging transactions are economically appropriate to the reduction of risk in the conduct and management of the commercial enterprise. These transactions arise from a potential change in the value of soybean meal and oil that is expected to be produced. The size of the permissible hedge position in the products must be reduced by any fixed-price sales because they are no longer *unsold* production. As provided under § 151.5(a)(2)(i)(B), the risk reducing position does not qualify as a bona fide hedge in a physical-delivery Referenced Contract during the last five trading days in the event the anticipated crushed products have not been produced.

6. Portfolio Hedging

a. *Fact Pattern:* It is currently January and Participant A owns five million bushels of corn located in its warehouses. Participant A has entered into fixed-price forward sale contracts with several processors for a total of five million bushels of corn that will be delivered in May of this year. Participant A has separately entered into fixed-price purchase contracts with several merchandisers for a total of two million bushels of corn to be delivered in March of this year. Participant A's gross long cash position is equal to seven million bushels of corn. Because Participant A has sold forward five million bushels of corn, its net cash position is equal to long two million bushels of corn. To reduce its price risk, Participant A chooses to sell the quantity equivalent of two million bushels of CBOT Corn Referenced Contracts.

Analysis: The cash position and the fixed-price forward sale and purchases are all in the same crop year. Participant A currently owns five million bushels of corn and has effectively sold that amount forward. The firm is concerned that the remaining amount—two million bushels worth of fixed-price purchase contracts—will fall in value. Because the firm's net cash position is equal to long two million bushels of corn, the firm is exposed to price risk. Selling the quantity equivalent of two million bushels of CBOT Corn Referenced Contracts satisfies the general requirements for bona fide hedging transactions (§§ 151.5(a)(1)(i)–(iii)) and the specific provisions associated with owning a commodity (§ 151.5(a)(2)(i)).[523] Participant A's hedge of the two million bushels represents a substitute to a fixed-price forward sale at a later time in the physical marketing channel. The transaction is economically appropriate to the reduction of risk because the amount of Referenced Contracts sold does not exceed the quantity equivalent risk exposure (on a net basis) in the cash commodity in the current crop year. Lastly, the hedge arises from a potential change in the value of corn owned by Participant A.

7. Anticipated Merchandising

a. *Fact Pattern:* Elevator A, a grain merchandiser, owns a 31 million bushel storage facility. The facility currently has 1 million bushels of corn in storage. Based upon its historical purchasing and selling patterns for the last three years, Elevator A expects that in September it will enter into fixed-price forward purchase contracts for 30 million bushels of corn that it expects to sell in December. Currently the December corn futures price is substantially higher than the September corn futures price. In order to reduce the risk that its unfilled storage capacity will not be utilized over this period and in turn reduce Elevator A's profitability, Elevator A purchases the quantity equivalent of 30 million bushels of September CBOT Corn Referenced Contracts and sells 30 million bushels of December CBOT Corn Referenced Contracts.

Analysis: This hedging transaction meets the general requirements for bona fide hedging transactions (§§ 151.5(a)(1)(i)–(iii)) and specific provisions associated with anticipated merchandising (§ 151.5(a)(2)(v)). The hedging transaction is a substitute for transactions to be taken at a later time in the physical marketing channel. The hedge is economically appropriate to the reduction of risk associated with the firm's unfilled storage capacity because: (1) The December CBOT Corn futures price is substantially above the September CBOT Corn futures price; and (2) Elevator A reasonably expects to engage in the anticipated merchandising activity based on a review of its historical purchasing and selling patterns at that time of the year. The risk arises from a change in the value of an asset that the firm owns. As provided by § 151.5(a)(2)(v), the size of the hedge is equal to the firm's unfilled storage capacity relating to its anticipated merchandising activity. The purchase and sale of offsetting Referenced Contracts are in different months, which settle in not more than twelve months. As provided under § 151.5(a)(2)(v), the risk reducing position will not qualify as a bona fide hedge in a physical-delivery Referenced Contract during the last 5 trading days of the September contract.

8. Aggregation of Persons

a. *Fact Pattern:* Company A owns 100 percent of Company B. Company B buys and sells a variety of agricultural products, such as wheat and cotton. Company B currently owns 1 million bushels of wheat. To reduce some of its price risk, Company B decides to sell the quantity equivalent of 600,000 bushels of CBOT Wheat Referenced Contracts. After communicating with Company B, Company A decides to sell the quantity equivalent of 400,000 bushels of CBOT Wheat Referenced Contracts.

Analysis: Because Company A owns more than 10 percent of Company B, Company A and B are aggregated together as one person under § 151.7. Under § 151.5(b), entities required to aggregate accounts or positions under § 151.7 shall be considered the same person for the purpose of determining whether a person or persons are eligible for a bona fide hedge exemption under paragraph § 151.5(a). The sale of wheat Referenced Contracts by Company A and B meets the general requirements for bona fide hedging transactions (§§ 151.5(a)(1)(i)–(iii)) and the specific provisions for owning a cash commodity (§ 151.5(a)(2)(i)). The transactions in Referenced Contracts by Company A and B represent a substitute for transactions to be taken at a later time in the physical marketing channel. The transactions in Referenced Contracts by Company A and B are economically appropriate to the reduction of risk because the combined total of 1,000,000 bushels of CBOT Wheat Referenced Contracts sold by Company A and Company B does not exceed the 1,000,000 bushels of wheat that is owned by Company A. The risk exposure for Company A and B results from a potential change in the value of wheat.

9. Repurchase Agreements

a. *Fact Pattern:* When Elevator A purchased 500,000 bushels of wheat in April it decided to reduce its price risk by selling the quantity equivalent of 500,000 bushels of CBOT Wheat Referenced Contracts. Because the price of wheat has steadily risen since April, Elevator A has had to make substantial maintenance margin payments. To alleviate its concern about further margin payments, Elevator A decides to enter into a repurchase agreement with Bank B. The repurchase agreement involves two separate contracts: A fixed-price sale from Elevator A to Bank B at today's spot price; and an open-priced purchase agreement that will allow Elevator A to repurchase the wheat from Bank B at the prevailing spot price three months from now. Because Bank B obtains title to the wheat under the fixed-price purchase agreement, it is exposed to price risk should the price of wheat drop. It therefore decides to sell the quantity equivalent of 500,000 bushels of CBOT Wheat Referenced Contracts.

Analysis: Bank B's hedging transaction meets the general requirements for bona fide hedging transactions (§§ 151.5(a)(1)(i)–(iii)) and the specific provisions for owning the cash commodity (§ 151.5(a)(2)(i)). The sale of Referenced Contracts by Bank B is a substitute for a transaction to be taken at a later time in the physical marketing channel either to Elevator A or to another commercial party. The transaction is economically appropriate to the reduction of risk in the conduct and management of the commercial enterprise of Bank B because the notional quantity of Referenced Contracts sold by Bank B is not larger than the quantity of cash wheat purchased by Bank B. Finally, the purchase of CBOT Wheat Referenced Contracts reduces the risk associated with owning cash wheat.

10. Inventory

a. *Fact Pattern:* Copper Wire Fabricator A is concerned about possible reductions in the

[523] Participant A could also choose to hedge on a gross basis. In that event, Participant A would sell the quantity equivalent of seven million bushels of March Chicago Board of Trade Corn Referenced Contracts, and separately purchase the quantity equivalent of five million bushels of May Chicago Board of Trade Corn Referenced Contracts.

price of copper. Currently it is November and it owns inventory of 100,000 pounds of copper and 50,000 pounds of finished copper wire. Currently, deferred futures prices are lower than the nearby futures price. Copper Wire Fabricator A expects to sell 150,000 pounds of finished copper wire in February. To reduce its price risk, Copper Wire Fabricator A sells 150,000 pounds of February COMEX Copper Referenced Contracts.

Analysis: The Copper Wire Fabricator A's hedging transaction meets the general requirements for bona fide hedging transactions (§§ 151.5(a)(1)(i)–(iii)) and the provisions for owning a commodity (§ 151.5(a)(2)(i)(A)). The sale of Referenced Contracts represents a substitute for transactions to be taken at a later time. The transactions are economically appropriate to the reduction of risk in the conduct and management of the commercial enterprise because the price of copper could drop further. The transactions in Referenced Contracts arise from a possible reduction in the value of the inventory that it owns.

Issued by the Commission this 18th day of October 2011, in Washington, DC.

David Stawick,

Secretary of the Commission.

Appendices to Position Limits for Futures and Swaps—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn and Chilton voted in the affirmative; Commissioners Sommers and O'Malia voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rulemaking to establish position limits for physical commodity derivatives. The CFTC does not set or regulate prices. Rather, the Commission is charged with a significant responsibility to ensure the fair, open and efficient functioning of derivatives markets. Our duty is to protect both market participants and the American public from fraud, manipulation and other abuses.

Position limits have served since the Commodity Exchange Act passed in 1936 as a tool to curb or prevent excessive speculation that may burden interstate commerce. When the CFTC set position limits in the past, the agency sought to ensure that the markets were made up of a broad group of market participants with no one speculator having an outsize position. At the core of our obligations is promoting market integrity, which the agency has historically interpreted to include ensuring that markets do not become too concentrated. Position limits help to protect the markets both in times of clear skies and when there is a storm on the horizon. In 1981, the Commission said that ''the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, i.e., the capacity of the market is not unlimited.''

In the Dodd-Frank Act, Congress mandated that the CFTC set aggregate position limits for certain physical commodity derivatives. The Dodd-Frank Act broadened the CFTC's position limits authority to include aggregate position limits on certain swaps and certain linked contracts traded on foreign boards of trade in addition to U.S. futures and options on futures. Congress also narrowed the exemptions traditionally available from position limits by modifying the definition of bona fide hedge transaction, which particularly would affect swap dealers.

Today's final rule implements these important new provisions. The final rule fulfills the Congressional mandate that we set aggregate position limits that, for the first time, apply to both futures and economically equivalent swaps, as well as linked contracts on foreign boards of trade. The final rule establishes federal position limits in 28 referenced commodities in agricultural, energy and metals markets.

Per Congress's direction, the rule implements one position limits regime for the spot month and another for single-month and all-months combined limits. It implements spot-month limits, which are currently set in agriculture, energy and metals markets, sooner than the single-month or all-months-combined limits. Spot-month limits are set for futures contracts that can by physically settled as well as those swaps and futures that can only be cash-settled. We are seeking additional comment as part of an interim final rule on these spot month limits with regard to cash-settled contracts.

Single-month and all-months-combined limits, which currently are only set for certain agricultural contracts, will be re-established in the energy and metals markets and be extended to certain swaps. These limits will be set using a formula that is consistent with that which the CFTC has used to set position limits for decades. The limits will be set by a Commission order based upon data on the total size of the swaps and futures market collected through the position reporting rule the Commission finalized in July. It is only with the passage and implementation of the Dodd-Frank Act that the Commission now has broad authority to collect data in the swaps market.

The final rule also implements Congress's direction to narrow exemptions while also ensuring that bona fide hedge exemptions are available for producers and merchants. The final position limits rulemaking builds on more than two years of significant public input. The Commission benefited from more than 15,100 comments received in response to the January 2011proposal. We first held three public meetings on this issue in the summer of 2009 and got a great deal of input from market participants and the broader public. We also benefited from the more than 8,200 comments we received in response to the January 2010 proposed rulemaking to re-establish position limits in the energy markets. We further benefited from input received from the public after a March 2010 meeting on the metals markets.

Appendix 3—Statement of Commissioner Jill Sommers

I respectfully dissent from the action taken today by the Commission to issue final rules establishing position limits for futures and swaps.

It has been nearly two years since the Commission issued its January 2010 proposal to impose position limits on a small group of energy contracts. Since then, Commission staff and the Commission have spent an enormous amount of time and energy on the issue of imposing speculative position limits, time that could have been much better spent implementing the specific Dodd-Frank regulatory reforms that will actually reduce systemic risk and prevent another financial crisis.

This vote today on position limits is no doubt the single most significant vote I have taken since becoming a Commissioner. It is not because imposing position limits will fundamentally change the way the U.S. markets operate, but because I believe this agency is setting itself up for an enormous failure.

As I have said in the past, position limits can be an important tool for regulators. I have been clear that I am not philosophically opposed to limits. After all, this agency has set limits in certain markets for many years. However, I have had concerns all along about the particular application of the limits in this rule, compounded by the unnecessary narrowing of the bona-fide hedging exemptions, beyond what was required by the Dodd-Frank Act.

Over the last four years, many have argued for position limits with such fervor and zeal, believing them to be a panacea for everything. Just this past week, the Commission has been bombarded by a letter-writing campaign suggesting that the five of us have the power to end world hunger by imposing position limits on agricultural commodities. This latest campaign exemplifies my ongoing concern and may result in damaging the credibility of this agency. I do not believe position limits will control prices or market volatility, and I fear that this Commission will be blamed when this final rule does not lower food and energy costs. I am disappointed at this unfortunate circumstance because, while the Commission's mission is to protect market users and the public from fraud, manipulation, abusive practices and systemic risk related to derivatives that are subject to the Commodity Exchange Act, and to foster open, competitive, and financially sound markets, nowhere in our mission is the responsibility or mandate to control prices.

When analyzing the potential impact this final rule will have on market participants, I am most concerned that rules designed to ''reign in speculators'' have the real potential to inflict the greatest harm on bona fide hedgers—that is, the producers, processers, manufacturers, handlers and users of physical commodities. This rule will make hedging more difficult, more costly, and less efficient, all of which, ironically, can result in increased food and energy costs for consumers.

Currently, the Commission sets and administers position limits and exemptions for contracts on nine agricultural commodities. For contracts of the remaining commodities, the exchanges set and administer position limits and exemptions. Pursuant to the final rule the Commission issued today, the Commission will set and administer position limits and exemptions for 28 reference contracts. This will amount to a substantial transfer of responsibility from the exchanges to the Commission. As a result of taking on this responsibility for 19 new reference contracts, the Commission is significantly increasing its front-line oversight of the granting and monitoring of bona-fide hedging exemptions for the transactions of massive, global corporate conglomerates that on a daily basis produce, process, handle, store, transport, and use physical commodities in their extremely complex logistical operations.

At the very time the Commission is taking on this new responsibility, the Commission is eliminating a valuable source of flexibility that has been a part of regulation 1.3(z) for decades—that is, the ability to recognize non-enumerated hedge transactions and positions. This final rule abandons important and long-standing Commission precedent without justification or reasoned explanation, by merely stating ''the Commission has * * * expanded the list of enumerated hedges.'' The Commission also seems to be saying that we no longer need the flexibility to allow for non-enumerated hedge transactions and positions because one can seek interpretative guidance pursuant to Commission Regulation 140.99 on whether a transaction or class of transactions qualifies as a bona-fide hedge, or can petition the Commission to amend the list of enumerated transactions. The Commission also recognizes that CEA Section 4a(a)(7) grants it the broad exemptive authority is issue an order, rule, or regulation, but offers no guidance on when it may do so, and what factors it may consider or criteria it may use to make a determination.

These processes are cold comfort. There is no way to tell how long interpretative guidance or a Commission Order will take. Moreover, if a market participant petitions the Commission to amend the list of enumerated transactions, if the Commission chooses to do so, it must formally propose the amendment pursuant to APA notice and comment. As we know all too well, issuing new rules and regulations is a time consuming process fraught with delay and uncertainty. In the end, none of these processes is flexible or useful to the needs of hedgers in a complex global marketplace.

When the Commission first recognized the need to allow for non-enumerated hedges in 1977, the Commission stated ''The purpose of the proposed provision was to provide flexibility in application of the general definition and to avoid an extensive specialized listing of enumerated bona fide hedging transactions and positions. * * *'' Today the global marketplace and commercial firms' hedging strategies are much more complex than in 1977. Yet, we are content to abandon decades of precedent that provided flexibility in favor of specifying a specialized list of enumerated bona fide hedging transactions and positions. I am not comfortable with notion that a list of eight bona-fide hedging transactions in this rule is sufficiently extensive and specialized to cover the complex needs of today's bona-fide hedgers. Repealing the ability to recognize non-enumerated hedge transactions and positions is a mistake and the statute does not require it. The Commission should have remained true to its precedent and utilized the broad authority contained in CEA Section 4a(a)(7) to include within Regulation 151.5(a)(2) a ninth enumerated hedging transaction and position, with the same conditions as the previous eight, as follows: ''Other risk-reducing practices commonly used in the market that are not enumerated above, upon specific request made in accordance with Regulation section 1.47.''

In addition to abandoning decades of flexibility to recognize non-enumerated hedging transactions and positions, the final rules today do not fully effect the authority the Commission has had for decades to define bona-fide hedging transactions and positions ''to permit producers, purchasers, sellers, middlemen, and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs. * * *'' This authority is found in CEA Section 4a(c)(1). In addition, Section 4a(c)(2) clearly recognizes the need for anticipatory hedging by using the word ''anticipates'' in three places. Nonetheless, without defining what constitutes ''merchandising'' the Commission has limited ''Anticipated Merchandising Hedging'' in Regulation 151.5(a)(2)(v) to transactions not larger than ''current or anticipated unfilled storage capacity.'' It appears then that merchandising does not include the varying activities of ''producers, purchasers, sellers, middlemen, and users of a commodity'' as contemplated by Section 4a(c)(1), but merely consists of storing a commodity. This limited approach is needlessly at odds with the statute and with the legitimate needs of hedgers.

I have always believed that there was a right way and a wrong way for us to move forward on position limits. Unfortunately I believe we have chosen to go way beyond what is in the statute and have created a very complicated regulation that has the potential to irreparably harm these vital markets.

Appendix 4—Statement of Commissioner Scott O'Malia

I respectfully dissent from the action taken today by the Commission to issue final rules relating to position limits for futures and swaps. While I have a number of serious concerns with this final rule, my principal disagreement is with the Commission's restrictive interpretation of the statutory mandate under Section 4a of the Commodity Exchange Act (''CEA'' or ''Act'') to establish position limits without making a determination that such limits are necessary and effective in relation to the identifiable burdens of excessive speculation on interstate commerce.

While I agree that the Commission has been directed to establish position limits applicable to futures, options, and swaps that are economically equivalent to such futures and options (for exempt and agricultural commodities as defined by the Act), I disagree that our mandate provides for so little discretion in the manner of its execution. Throughout the preamble, the Commission uses, ''Congress did not give the Commission a choice'' [524] as a rationale in adopting burdensome and unmanageable rules of questionable effectiveness. This statement, in all of its iterations in this rule, is nothing more than hyperbole used tactfully to support a politically-driven overstatement as to the threat of ''excessive speculation'' in our commodity markets. In aggrandizing a market condition that it has never defined through quantitative or qualitative criteria in order to justify draconian rules, the Commission not only fails to comply with Congressional intent, but misses an opportunity to determine and define the type and extent of speculation that is likely to cause sudden, unreasonable and/or unwarranted commodity price movements so that it can respond with rules that are reasonable and appropriate.

In relevant part, section 4a(a)(1) of the Act states: ''Excessive speculation in any commodity under contracts of sale of such commodity for future delivery * * * or swaps * * * causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity.'' Section 4a(a)(1) further defines the Commission's duties with regard to preventing such price fluctuations through position limits, clearly stating: ''For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits * * * as the Commission finds are necessary to diminish, eliminate, or prevent such burden.'' Congress could not be more clear in its directive to the Commission to utilize not only its expertise, but the public rulemaking process, each and every time it determines to establish position limits to ensure that such limits are essential and suitable to combat the actual or potential threats to commodity prices due to excessive speculation.

An Ambiguously Worded Mandate Does Not Relieve the Commission of Its Duties Under the Act

Historically, the Commission has taken a much more disciplined and fact-based approach in considering the question of position limits; a process that is lacking from the current proposal. The general authority for the Commission to establish ''limits on the amounts of trading which may be done or positions which may be held * * * as the Commission finds are necessary to diminish, eliminate, or prevent'' the ''undue burdens'' associated with excessive speculation found in section 4a of the Act has remained unchanged since its original enactment in 1936 and through subsequent amendments,

[524] Position Limits for Futures and Swaps (to be codified at 17 CFR pts. 1, 150 and 151) at 11, *available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister101811c.pdf* (hereafter, ''Position Limits for Futures and Swaps'').

including the Dodd-Frank Act.[525] Over thirty years ago, on December 2, 1980, the Commission, pursuant in part to its authority under section 4a (1) of the Act, issued a proposal to implement rules requiring exchanges to impose position limits on contracts that were not currently subject to Commission imposed limits.[526]

In support of its proposal, the Commission relied on a June 1977 report on speculative limits prepared by the Office of the Chief Economist (the ''Staff Report''). The Staff Report addressed three major policy questions: (1) whether there should be limits and for what groups of commodities; (2) what guidelines are appropriate in setting the level of limits; and (3) whether the Commission or the exchange should set the limits.[527] [528] In considering these questions, the Staff Report noted, ''Although the Commission is authorized to establish speculative limits, it is not required to do so.'' [529] In its Interpretation of the above language in section 4a, the Staff Report at the outset provided the legal context for its study as follows:

[T]he Commission need not establish speculative limits if it does not find that excessive speculation exists in the trading of a particular commodity. Furthermore, apparently, the Commission does not have to establish limits if it finds that such limits will not effectively curb excessive speculation.[530]

While not directly linked to the statutory language of section 4a or an interpretation of such language, the Staff Report utilized its findings to formulate a policy for the Commission to move forward, which, based on comments to the Commission's January 2011 proposal,[531] is clearly embodied in the purpose and spirit of the Act:

Perhaps the most important feature brought out in the study is that, prior to the adoption of speculative position limits for any commodity in which limits are not now imposed by CFTC, the Commission should carefully consider the need for and effectiveness of such limits for that commodity and the resources necessary to enforce such limits.[532]

In its final rule, published in the **Federal Register** on October 16, 1981—almost exactly thirty years ago today—the Commission chose to base its determination on Congressional findings embodied in section 4a(1) of the Act that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure. The Commission did not do so because it found that more specific determinations regarding the necessity and effectiveness of position limits were not required. Rather, the Commission was fashioning a rule ''to assure that the exchanges would have an opportunity to employ their knowledge of their individual contract markets to propose the position limits they believe most appropriate.'' [533] Moreover, none of the commenters opposing the adoption of limits for all markets demonstrated to the Commission that its findings as to the prophylactic nature of the proposal before them were unsubstantiated.[534] Therefore, the Commission did not eschew a requirement to demonstrate whether position limits were necessary and would be effective—it delegated these determinations to the exchanges.

Today, the Commission reaffirms its proposed interpretation of amended section 4a that in setting position limits pursuant to directives in sections 4a(a)(2)(A), 4a(a)(3) and 4a(a)(5), it need not first determine that position limits are necessary before imposing them or that it may set limits only after conducting a complete study of the swaps market.[535] Relying on the various directives following ''shall,'' the Commission has bluntly stated that ''Congress did not give the Commission a choice.'' [536] This interpretation ignores the plain language in the statute that the ''shalls'' in sections 4a(a)(2)(A), 4a(a)(3) and 4a(a)(5) are connected to the modifying phrase, ''as appropriate.'' Although the Commission correctly construes the ''as appropriate'' language in the context of the provisions as a whole to direct the Commission to exercise its discretion in determining the extent of the limits that Congress ''required'' it to impose, the Commission ignores the fact that in the context of the Act, such discretion is broad enough to permit the Commission to not impose limits if they are not appropriate. Though a permissible interpretation, the Commission's narrow view of its authority permeates the final rules today and provides a convenient rationale for many otherwise unsustainable conclusions, especially with regard to the cost-benefit analysis of the rule.

Section 4a(a)(2)(A), in relevant part, states that the Commission ''shall by rule, regulation, or order establish limits on the amount of positions, as appropriate'' that may be held by any person in physical commodity futures and options contracts traded on a designated contract market (DCM). In section 4a(a)(5), Congress directed that the Commission ''shall establish limits on the amount of positions, including aggregate position limits, as appropriate'' that may be held by any person with respect to swaps. Section 4a(a)(3) qualifies the Commission's authority by directing it so set such limits ''required'' by section 4a(a)(2), ''as appropriate * * * [and] to the maximum extent practicable, in its discretion'' (1) to diminish, eliminate, or prevent excessive speculation as described under this section (section 4a of the Act), (2) to deter and prevent market manipulation, squeezes, and corners, (3) to ensure sufficient market liquidity for bona fide hedgers, and (4) to ensure that the price discovery function of the underlying market is not disrupted.[537]

Congress, in repeatedly qualifying its mandates with the phrase ''as appropriate'' and by specifically referring back to the Commission's authority to set position limits as proscribed in section 4a(a)(1), clearly did not relieve the Commission of any requirement to exercise its expertise and set position limits only to the extent that it can provide factual support that such limits will diminish, eliminate or prevent excessive speculation.[538] Instead, by directing the Commission to establish limits ''as appropriate,'' [539] Congress intended to

[525] Position Limits for Futures and Swaps, *supra* note 1, at 5.

[526] Speculative Position Limits, 45 FR 79831 (proposed Dec. 2, 1980) (to be codified at 17 CFR pt. 1).

[527] *Id.* at 79832; Speculative Limits: a staff paper prepared for Commission discussion by the Office of the Chief Economist at 1, June 24, 1977.

[528] The Staff Report ultimately made four general recommendations. First, the Commission ought to adopt a policy of establishing speculative limits only in those markets where the characteristics of the commodity, its marketing system, and the contract lend themselves to undue influence from large scale speculative positions. Second, that in markets where limits are deemed to be necessary, such limits should only be established to curtail extraordinary speculative positions which are not offset by comparable commercial positions. Third, there ought to be no limits on daily trading except to the extent that the limits would prevent the accumulation of large intraday positions. Fourth, in markets where limits are deemed necessary, the exchange should set and review the limits subject to Commission approval. Office of Chief Economist, *supra* note 4, at 5–6.

[529] Office of Chief Economist, *supra* note 4, at 7.

[530] *Id.* at 7–8.

[531] *See, e.g.,* Comment letter from Futures Industry Association on Position Limits for Derivatives (RIN 2028–AD15 and 3038–AD16) at 6–7 (Mar. 25, 2011), *available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=34054&SearchText=futures%20industry%20association*; Comment letter from CME Group on Position Limits for Derivatives at 1–7 (Mar. 28, 2011), available at *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=33920&SearchText=cme*; and Comment Letter of International Swaps and Derivatives Association, Inc. and Securities Industry and Financial Markets Association on Notice of Proposed Rulemaking—Position Limits for Derivatives (RIN 3038–AD15 and 3038–AD16) at 3–6 (Mar. 28, 2011), *available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=33568&SearchText=isda.*

[532] Office of Chief Economist, *supra* note 7, at 5.

[533] 46 FR at 50938, 50940.

[534] *Id.*

[535] Position Limits for Futures and Swaps, *supra* note 1, at 10–11.

[536] *Id.*

[537] See section 4a(a)(3)(B) of the CEA.

[538] *See, e.g.,* Comment letter from BG Americas & Global LNG on Proposed Rule Regarding Position Limits for Derivatives (RIN 2028–AD15 and 3038–AD16) at 4 (Mar. 28, 2011), available at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=965* (''Notwithstanding the Commission's argument that it has authority to use position limits absent a specific finding that an undue burden on interstate commerce had actually resulted, the language and intent of CEA Section 4a(a)(1) remains unchanged by the Dodd-Frank Act. As a consequence, the Commission has not been relieved of the obligation under Section 4a(a)(1) to show that the proposed position limits for the Referenced Contracts are necessary to prevent excessive speculation.'').

[539] *See La Union Del Pueblo Entero* v. *FEMA,* No. B–08–487, slip op., 2009 WL 1346030 at *4 (S.D. Tex. May 13, 2009) (''[W]hen 'shall' is modified by a discretionary phrase such as 'as may be necessary' or 'as appropriate' an agency has some discretion when complying with the mandate.'' (*citing Consumer Fed'n of America* v. *U.S. Dep't of Health and Human Servs.,* 83 F.3d 1497, 1503 (DC Cir. 1996) (indicating that where Congress in mandating administrative action modifies the word ''shall'' with the phrase ''as appropriate'' an agency has discretion to evaluate the circumstances and determine when and how to act)).

provide the Commission with the discretion necessary to establish a position limit regime in a manner that will not only protect the markets from undue burdens due to excessive speculation and manipulation, but that will also provide for market liquidity and price discovery in a level playing field while preventing regulatory arbitrage.[540]

I agree with commenters who argued that the Commission is directed under its new authority to set position limits ''as appropriate,'' or in other words meaning that whatever limits the Commission sets are supported by empirical evidence demonstrating that those would diminish, eliminate, or prevent excessive speculation.[541] In the absence of such evidence, I also agree with commenters that we are unable, at this time, to fulfill the mandate and assure Congress and market participants that any such limits we do establish will comply with the statutory objectives of section 4a(a)(3). And, to be clear, without empirical data, we cannot assure Congress that the limits we set will not adversely affect the liquidity and price discovery functions of affected markets. The Commission will have significant additional data about the over-the-counter (OTC) swaps markets in the next year, and at a minimum, I believe it would be appropriate for the Commission to defer any decisions about the nature and extent of position limits for months outside of the spot-month, including any determinations as to appropriate formulas, until such time as we have had a meaningful opportunity to review and assess the new data and its relevance to any determinations regarding excessive speculation. At a future date, when the Commission applies the second phase of the position limits regime and sets the non-spot-month limits (single and all-months combined limits), I will work to ensure that the position formulas and applicable limits are validated by Commission data to be both appropriate and effective so that those limits truly ''diminish, eliminate, or prevent excessive speculation.''

An Absence of Justification

Today the Commission voted to move forward on a rule that (1) establishes hard federal position limits and position limit formulas for 28 physical commodity futures and options contracts and physical commodity swaps that are economically equivalent to such contracts in the spot-month, for single months, and for all-months combined; (2) establishes aggregate position limits that apply across different trading venues to contracts based on the same underlying commodity; (3) implements a new, more limited statutory definition of bona fide hedging transactions; (4) revises account aggregation standards; (5) establishes federal position visibility reporting requirements; and (6) establishes standards for position limits and position accountability rules for registered entities. The Commission voted on this multifaceted rule package without the benefit of performing an objective factual analysis based on the necessary data to determine whether these particular limits and limit formulas will effectively prevent or deter excessive speculation. The Commission did not even provide for public comment a determination as to what criteria it utilized to determine whether or not excessive speculation is present or will potentially threaten prices in any of the commodity markets affected by the new position limits.

Moreover, while it engaged in a public rulemaking, the Commission's Notice of Proposed Rulemaking,[542] in its complexity and lack of empirical data and legal rationale for several new mandates and changes to existing policies—in spite of the fact that we largely rely on our historical experiences in setting such limits—tainted the entire process. By failing to put forward data evidencing that commodity prices are threatened by the negative influence of a defined level of speculation that we can define as ''excessive speculation,'' and that today's measures are appropriate (i.e. necessary and effective) in light of such findings, I believe that we have failed under the Administrative Procedure Act to provide a meaningful and informed opportunity for public comment.[543]

Substantive comment letters, of which there were approximately 100,[544] devoted at times substantial text to expressions of confusion and requests for clarification of vague descriptions and processes. In more than one instance, preamble text did not reflect proposed rule text and vice versa.[545] Indeed, the entire rulemaking process has been plagued by internal and public debates as to what the Commission's motives are and to what extent they are based on empirical evidence, in policy, or are simply without reason.

Implementing an Appropriate Program for Position Management

This rule, like several proposed before it, fails to make a compelling argument that the proposed position limits, which only target large concentrated positions,[546] will dampen price distortions or curb excessive speculation—especially when those position limits are identified by the overall participation of speculators as an increased percentage of the market. What the rule argues is that there is a Congressional mandate to set position limits, and therefore, there is no duty on the Commission to determine that excessive speculation exists (and is causing price distortions), or to ''prove that position limits are an effective regulatory tool.'' [547] This argument is incredibly convenient given that the proposed position limits are modeled on the agricultural commodities position limits, and despite those federal position limits, contracts such as wheat, corn, soybeans, and cotton contracts were not spared record-setting price increases in 2007 and 2008. Indeed, the cotton No. 2 futures contract has hit sixteen ''record-setting'' prices since December 1, 2010. The most recent high was set on March 4, 2011 when the March 2011 future traded at a price of $215.15.

To be clear, I am not opposed to position or other trading limits in all circumstances. I remain convinced that position limits, whether enforced at the exchange level or by the Commission, are effective only to the extent that they mitigate potential congestion during delivery periods and trigger reporting obligations that provide regulators with the complete picture of an entity's trading. I therefore believe that accountability levels and visibility levels provide a more refined regulatory tool to identify, deter, and respond in advance to threats of manipulation and other non-legitimate price movements and distortions. I would have supported a rule that would impose position limits in the spot-month for physical commodities, i.e. the referenced contracts,[548] and would establish an accountability level. The Commission's ability to monitor such accountability levels

[540] Section 4a(a)(6) mandates through an unqualified ''shall,'' that the Commission set aggregate limits across trading venues including foreign boards of trade.

[541] *See, e.g.,* Comment letter from Futures Industry Association on Position Limits for Derivatives (RIN 2028–AD15 and 3038–AD16) at 6–8; Comment Letter of International Swaps and Derivatives Association, Inc. and Securities Industry and Financial Markets Association on Notice of Proposed Rulemaking—Position Limits for Derivatives (RIN 3038–AD15 and 3038–AD16) at 3–4.

[542] Position Limits for Derivatives, 76 FR 4752 (proposed Jan. 26, 2011) (to be codified at 17 CFR pts. 1, 150 and 151).

[543] *See Am. Med. Ass'n* v. *Reno,* 57 F.3d 1129, 1132–3 (DC Cir. 1995) (''Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment: 'the Administrative Procedure Act requires the agency to make available to the public in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.'''') (*quoting Engine Mfrs. Ass'n* v. *EPA,* 20 F.3d 1177, 1181 (DC Cir. 1994)).

[544] Position Limits for Futures and Swaps, *supra* note 1, at 4.

[545] *See, e.g.,* 76 FR at 4752, 4763 and 4775 (In its discussion of registered entity position limits, the preamble makes no mention of proposed § 151.11(a)(2) which would remove a registered entity's discretion under CEA § 5(d)(5)(A) for designated contract markets (DCMs) and under CEA § 5h(f)(6)(A) for swap execution facilities (SEFs) that are trading facilities to set position accountability in lieu of position limits for physical commodity contracts for which the Commission has not set Federal limits.).

[546] Today's final rule does not hide the fact that the position limits regime is aimed at ''prevent[ing] a large trader from acquiring excessively large positions and thereby would help prevent excessive speculation and deter and prevent market manipulations, squeezes, and corners.'' *See* Position Limits for Futures and Swaps, *supra* note 1, at 47. *See also* Comment letter from Better Markets on Position Limits for Derivatives (RIN 2028–AD15 and 3038–AD16) at 62 (Mar. 28, 2011) available at *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=34010&SearchText=better%20markets* (''[T]here are critical differences between a commodities market position limit regime focused just on manipulation, and one focusing on a very different concept of excessive speculation.'').

[547] Position Limits for Futures and Swaps, *supra* note 1, at 137 (''In light of the congressional mandate to impose position limits, the Commission disagrees with comments asserting that the Commission must first determine that excessive speculation exists or prove that position limits are an effective tool.'').

[548] As defined in new § 151.1.

would rely on a technology based, real-time surveillance program that the Commission must be committed to deploying if it is to take its market oversight mission seriously.

And to be absolutely clear, ''speculation'' in the world of commodities is a technical term ascribed to any trading that does not qualify as ''bona fide hedging.'' Congress has not outlawed speculation, even when that speculation reaches some unspecified tipping point where it becomes ''excessive.'' What Congress has stated, for over seventy years until the passage of the Dodd-Frank Act, is that excessive speculation that causes sudden or unreasonable fluctuations or unwarranted changes in the price of a commodity is a burden on interstate commerce, and the Commission has authority to utilize its expertise to establish limits on trading or positions that will be effective in diminishing, eliminating, or preventing such burden.[549] The Commission, however, is not, and has never been, without other tools to detect and deter those who engage in abusive practices.[550] What the Dodd-Frank Act did do is direct the Commission to exercise its authority at a time when there is simply a lack of empirical data to support doing so, in a universe of legal uncertainty. However, the Dodd-Frank Act did not leave us without a choice, as contended by today's rule. Rather, against the current backdrop of market uncertainty, and Congress's longstanding deference to the expertise of the Commission, the most reasonable interpretation of Dodd-Frank's mandate is that while we must take action and establish position limits, we must only do so to the extent they are appropriate.

Today I write to not only reiterate my concerns with regard to the effectiveness of position limits generally, but to highlight some of the regulatory provisions that I believe pose the greatest fundamental problems and/or challenges to the implementation of the rule passed today. In addition to disagreeing with the Commission's interpretation of its statutory mandate, I believe the Commission has so severely restricted the permitted activities allowed under the bona fide hedging rules that the pursuit by industry of legitimate and appropriate risk management is now made unduly onerous. These limitations, including a veritable ban on anticipatory hedging for merchandisers, are inconsistent with the statutory directive and the very purpose of the markets to, among other things, provide for a means for managing and assuming price risks. I also believe that the rules put into place overly broad aggregation standards, fail to substantiate claims that they adequately protect against international regulatory arbitrage, and do not include an adequate cost-benefit analysis.

Bona Fide Hedging: Guilty Until Proven Innocent

The Commission's regulatory definition of bona fide hedging transactions in § 151.5 of the rules, as directed by new section 4a(c)(1) of the Act, generally restricts bona fide hedge exemptions from the application of federally-set position limits to those transactions or positions which represent a substitute for an actual cash market transaction taken or to be taken later, or those trading as the counterparty to an entity that it engaged in such transaction. This definition is narrower than current Commission regulation 1.3(z)(1), which allows for an exemption for transactions or positions that normally represent a substitute for a physical market transaction.

When combined with the remaining provisions of § 151.5, which provide for a closed universe of enumerated hedges and ultimately re-characterize longstanding acceptable bona fide hedging practices as speculative, it is evident that the Commission has used its authority to further narrow the availability of bona fide hedging transactions in a manner that will negatively impact the cash commodity markets and the physical commodity marketplace by eliminating certain legitimate derivatives risk management strategies, most notably anticipatory hedging. Among other things, I believe the Commission should have defined bona fide hedging transactions and positions more broadly so that they encompass long-standing risk management practices and should have preserved a process by which bona fide hedgers could expeditiously seek exemptions for non-enumerated hedging transactions.

In this instance, Congress was particularly clear in its mandate under section 4a(c)(2) that the Commission must limit the definition of bona fide hedging transactions/positions to those that represent actual substitutes for cash market transactions, but Congress did not so limit the Commission in any other manner with regard to the new regulatory provisions addressing anticipatory hedging and the availability of non-enumerated hedges.[551] Moreover, inasmuch as the bona fide hedging definition is restrictive, section 4a(a)(7) provides the Commission broad exemptive authority which it could have utilized to create a process for expeditious adjudication of petitions from entities relying on a broader set of legitimate trading strategies than those that fit the confines of section 4a(c)(1). In addition, given the complex, multi-faceted nature of hedging for commodity-related risks, the Commission could have, as suggested by one commenter, engaged in a separate and distinct informal rulemaking process to develop a workable, commercially practicable definition of bona fide hedging.[552] Given the commercial interests at stake, this would have been a welcome approach. Instead, the Commission chose form over function so that it could ''check the box'' on its mandate.

In order to qualify as a bona fide hedging transaction or position, a transaction must meet both the requirements under § 151.5(a)(1) and qualify as one of eight specific and enumerated hedging transactions described in § 151.5(a)(2). While the list of enumerated hedging transactions is an improvement from the proposed rules, and responds to several comments, especially with regard to the addition of an Appendix B to the final rule describing examples of bona fide hedging transactions, it remains inflexible. In response to commenters, the Commission has decided—at the last minute—to permit entities engaging in practices that reduce risk but that may not qualify as one of the enumerated hedging transactions under § 151.5(a)(2) to seek relief from Commission staff under § 140.99 or the Commission under section 4a(a)(7) of the CEA. Whereas this change to the preamble and the rule text is helpful, neither of these alternatives provides for an expeditious determination, nor do they provide for a predictable or certain outcome. In its refusal to accommodate traders seeking legitimate bona fide hedging exemptions in compliance with the Act with an expeditious and straightforward process, the Commission is being short-sighted in light of the dynamic (and in the case of the OTC markets, uncertain) nature of the commodity markets and with respect to the appropriate use of Commission resources.

One particularly glaring example of the Commission's decision to pursue form over function is found in the enumerated exemption for anticipated merchandising found at § 151.5(2)(v). The new statutory provision in section 4a(c)(d)(A)(ii) is included to assuage unsubstantiated concerns about unintended consequences such as creating a potential loophole for clearly speculative activity.[553] The Commission has so narrowly defined the anticipated merchandising that only the most elementary operations will be able to utilize it.

For example, in order to qualify an anticipatory merchandising transaction as a bona fide hedge, a hedger must (i) own or lease storage capacity and demonstrate that the hedge is no greater than the amount of current or anticipated unfilled storage capacity owned or leased by the same person during the period of anticipated merchandising activity, which may not exceed one year, (ii) execute the hedge in the form of a calendar spread that meets the ''appropriateness'' test found in § 151.5(a)(1), and (iii) exit the position prior to the last five days of trading if the Core Referenced Futures Contract is for agricultural or metal contracts or the spot month for other physical-delivery commodities. In addition,

[549] See section 4a(a)(1) of the CEA.

[550] See Establishment of Speculative Position Limits, 46 FR 50938, 50939 (Oct. 16, 1981) (to be codified at 17 CFR pt. 1) (''The Commission wishes to emphasize, that while Congress gave the Commission discretionary authority to impose federal speculative limits in section 4a(1), the development of an alternate procedure was not foreclosed, and section 4a(1) should not be read in a vacuum.'').

[551] To the contrary, Congress specifically indicated that in defining bona fide hedging transactions or positions, the Commission may do so in such a manner as ''to permit producers, sellers, middlemen, and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs for that period of time into the future for which an appropriate futures contract is open and available on an exchange.'' See section 4a(c)(1) of the CEA.

[552] *See, e.g.,* Comment letter from BG Americas & Global LNG on Proposed Rule Regarding Position Limits for Derivatives (RIN 2028–AD15 and 3038–AD16) at 13.

[553] Position Limits for Futures and Swaps, *supra* note 1, at 75.

(iv) an anticipatory merchandiser must meet specific filing requirements under § 151.5(d), which among other things, (v) requires that the person who intends on exceeding position limits complete the filing at least ten days prior to the date of expected overage.

Putting the burdens associated with the § 151.5(d) filings aside, the anticipatory merchandising exemption and its limitations on capacity, the requirement to ''own or lease'' such capacity, and one-year limitation for agricultural commodities does not comport with the economic realities of commercial operations. In recent testimony, Todd Thul, Risk Manager for Cargill AgHorizons, commented on its understanding of this provision. He said that by limiting the exemption to unfilled storage capacities through calendar spread positions for one year, the CFTC will reduce the industry's ability to continue offering the same suite of marketing tools to farmers that they are accustomed to using.[554] Mr. Thul offered a more reasonable and appropriate limitation on anticipatory hedging based on annual throughput actually handled on a historic basis by the company in question. It is unclear from today's rule as to whether the Commission considered such an alternative, but according to Mr. Thul, by going forward with the exemption as-is, we will ''severely limit the ability of grain handlers to participate in the market and impede the ability to offer competitive bids to farmers, manage risk, provide liquidity and move agriculture products from origin to destination.'' [555] [556] Limiting commercial participation, Mr. Thul points out, increases volatility—and that is clearly not what Congress intended. I agree. I cannot help but think that the Commission is waging war on commercial hedging by employing a ''government knows best'' mandate to direct companies to employ only those hedging strategies that we give our blessing to and can conceive of at this point in time. Imagine the absurdity that we could prevent a company such as a cotton merchandiser from hedging forward a portion of his expected cotton purchase. Or, if they meet the complicated prerequisites, the commercial firm must get approval from the Commission before deploying a legitimate commercial strategy that exchanges have allowed for years.

Aggregation Disparity

In another attack on commercial hedging the Commission has developed a flawed aggregation rule that singles out owned-non financial firms for unique and unfair treatment under the rule. These commercial firms, which, among others, could be energy producers or merchandisers, are not provided the same protections under the independent controller rules as financial entities such as hedge funds or index funds. I believe that the aggregation provisions of the final rule would have benefited from a more thorough consideration of additional options and possible re-proposal of at least two provisions: the general aggregation provision found in § 151.7(b) and the proposed aggregation for exemption found in § 151.7(f) of the proposed rule,[557] now commonly referred to at the Commission as the owned non-financial exemption or ''ONF.''

Under § 151.7(b), absent the applicability of a specific exemption found elsewhere in § 151.7, a direct or indirect ownership interest of ten percent or greater by any entity in another entity triggers a 100% aggregation of the ''owned'' entity's positions with that of the owner. While commenters agreed that an ownership interest of ten percent or greater has been the historical basis for requiring aggregation of positions under Commission regulation § 150.5(b), absent applicable exemptions, historically, aggregation has not been required in the absence of indicia of control over the ''owned'' entity's trading activities, consistent with the independent account controller exemption (the ''IAC'') under Commission regulation § 150.3(a)(4). While the final rule preserves the IAC exemption, it only does so in response to overwhelming comments arguing against its proposed elimination, which was without any legal rationale.[558] And, to be clear, the IAC is only available to ''eligible entities'' defined in § 151.1, namely financial entities, and only with respect to client positions.

The practical effect of this requirement is that non-eligible entities, such as holding companies who do not meet any of the other limited specified exemptions will be forced to aggregate on a 100% basis the positions of any operating company in which it holds a ten percent or greater equity interest in order to determine compliance with position limits. While the Commission concedes that the holding company could conceivably enter into bona fide hedging transactions relating to the operating company's cash market activities, provided that the operating company itself has not entered into such hedges,[559] this is an inadequate, operationally-impracticable solution to the problem of imparting ownership absent control. Moreover, by requiring 100% aggregation based on a ten percent ownership interest, the Commission has determined that it would prefer to risk double-counting of positions over a rational disaggregation provision based on a concept of ownership that does not clearly attach to actual control of trading of the positions in question.

Exemptions like those found in §§ 151.7(g) and (i) that provide for disaggregation when ownership above the ten percent threshold is specifically associated with the underwriting of securities or where aggregation across commonly-owned affiliates would require information sharing that would result in a violation of federal law, are useful and no doubt appreciated. However, the Commission has failed to apply a consistent standard supporting the principles of ownership and control across all entities in this rulemaking.

Tiered Aggregation—A Viable and Fair Solution

Also, the Commission did not address in the final rules a proposal put forth by Barclays Capital for the Commission to clarify that when aggregation is triggered, and no exemption is available, only an entity's pro rata share of the position that is actually controlled by it, or in which it has an ownership interest will be aggregated. This proposal included a suggestion that the Commission consider positions in tiers of ownership, attributing a percentage of the positions to each tier. While Barclays acknowledged that the monitoring would still be imperfect, the measures would be more accurate than an attribution of a full 100% ownership and would decrease the percentage of duplicative counting of positions.[560]

I believe that a tiered approach to aggregation should have been considered in these rules, and not be entirely removed from consideration as we move forward with these final rules. Barclays (and perhaps others) has made a compelling case and staff has not persuaded me that there is any legal rationale for not further exploring this option. While I understand that it may be more administratively burdensome for the Commission to monitor tiered aggregation, I would presume that we could engage in a cost-benefit analysis to more fully explore such burdens in light of the potential costs to industry associated with the implementation of 100% aggregation.

Owned Non-Financial—No Justification

The best example of the Commission's imbalanced treatment of market participants is manifest in the aggregation rules applied to owned non-financial firms. The Commission has shifted its aggregation proposal from the draft proposal to this final version. The final rule does not ultimately adopt the proposed owned-non-financial entity exemption which was proposed in lieu of the IAC to allow disaggregation primarily in the case of a conglomerate or holding company that ''merely has a passive ownership interest in one or more non-financial companies.'' [561] The rationale was that, in such cases, operating companies would likely have complete trading and management independence and operate at such a distance that is would simply be inappropriate to aggregate positions.[562] While several commenters argued that the ONF was too narrow and discriminated against financial entities without a proper basis, the Commission provided no

[554] Testimony of Todd Thul, Risk Manager, Cargill AgHorizons before the House Committee on Agriculture, Oct. 12, 2011, *available at http://agriculture.house.gov/pdf/hearings/Thul111012.pdf.*

[555] *Id.*

[556] Though I rely upon the example of agricultural operations to illustrate my point, the limitations on the anticipated merchandising hedge are equally harmful to other industries that operate in relatively volatile environments that are subject to unpredictable supply and demand swings due to economic factors, most notably energy. *See, e.g.,* Comment letter from ISDA on Notice of Proposed Rulemaking—Position Limits for Derivatives at 3–5 (Oct. 3, 2011).

[557] *See* 76 FR at 4752, 4762 and 4774.

[558] *See* 76 FR at 4752, 4762.

[559] Position Limits for Futures and Swaps, *supra* note 1, at 83–84.

[560] Comment letter from Barclays Capital on Position Limits for Derivatives (RIN 3038–AD15 and 3038–AD16) at 3 (Mar. 28, 2011), *available at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=965.*

[561] 76 FR at 4752, 4762.

[562] *Id.*

substantive rationale for its decision to fully drop the ONF exemption from consideration. Instead, the Commission relied upon its determination to retain the IAC exemption and add the additional exemptions under §§ 151.7(g) and (i) described above to find that it ''may not be appropriate, at this time, to expand further the scope of disaggregation exemptions to owned-non financial entities.''

In failing to articulate a basis for its decision to drop outright from consideration the ONF exemption, the Commission places itself in the same improvident position it was in when it proposed eliminating the IAC exemption, and now has given no reasoned explanation for discriminating against non-financial entities. This is especially disconcerting since at least one commenter has pointed out that baseless decision-making of this kind creates a risk that a court will strike down our action as arbitrary and capricious.[563]

Since I first learned of the Commission's change of course, I have requested that the Commission re-propose the ONF exemption in a manner that establishes an appropriate legal basis and provides for additional public comment pursuant to the Administrative Procedure Act. The Commission has outright refused to entertain my request to even include in the preamble of the final rules a commitment to further consider a version of the ONF exemption that would be more appropriate in terms of its breadth. The Commission's decision puts the rule at risk of being overturned by the courts and exemplifies the pains at which this rule has been drafted to put form over function.

The Great Unknown: International Regulatory Arbitrage

In addressing concerns relating to the opportunities for regulatory arbitrage that may arise as a result of the Commission imposing these position limits, the Commission points out that is has worked to achieve the goal of avoiding such regulatory arbitrage through participation in the International Organization of Securities Commissions (''IOSCO'') and summarily rejects commenters who believe it is a foregone conclusion that the existence of international differences in position limit policies will result in such arbitrage in reliance on prior experience. While I don't disagree that the Commission's work within IOSCO is beneficial in that it increases the likelihood that we will reach international consensus with regard to the use of position limits, the Commission ought to be more forthcoming as to principles as a whole.

In particular, while the IOSCO Final Report on Principles for the Regulation and Supervision of Commodity Derivatives Markets[564] does, for the first time, call on market authorities to make use of intervention powers, including the power to set ex-ante position limits, this is only one of many such recommendations that international market authorities are not required to implement. The IOSCO Report includes the power to set position limits, including less restrictive measures under the more general term ''position management.'' Position Management encompasses the retention of various discretionary powers to respond to identified large concentrations. It would have been preferable for the Commission to have explored some of these other discretionary powers as options in this rulemaking, thereby putting us in the right place to put our findings into more of a practice.

As to the Commission's stance that today's rules will not, by their very passage, drive trading abroad, I am concerned that the Commission's prior experience in determining the competitive effects of regulatory policies is inadequate. Today's rules by far represent the most expansive exercise of the Commission's authority both with regard to the setting of position limits and with regard to its jurisdiction in the OTC markets. The Commission's past studies regarding the effects of having a different regulatory regime than our international counterparts, conducted in 1994 and 1999, cannot possibly provide even a baseline comparison. Since 2000, the volume of actively traded futures and option contracts on U.S. exchanges alone has increased almost tenfold. Electronic trading now represents 83% of that volume, and it is not too difficult to imagine how easy it would be to take that volume global.

I recognize that we cannot dictate how our fellow market authorities choose to structure their rules and that in any action we take, we must do so with the knowledge that as with any rules, we risk triggering a regulatory race to the bottom. However, I believe that we ought not to deliver to Congress, or the public, an unsubstantiated sense of security in these rules.

Cost-Benefit Analysis: Hedgers Bear the Brunt of an Undue and Unknown Burden

With every final rule, the Commission has attempted to conduct a more rigorous cost-benefit analysis. There is most certainly an uncertainty as to what the Commission must do in order to justify proposals aimed at regulating the heretofore unregulated. These analyses demonstrate that the Commission is taking great pains to provide quantifiable justifications for its actions, but only when reasonably feasible. The baseline for reasonability was especially low in this case because, in spite of the availability of enough data to determine that this rule will have an annual effect on the economy of more than $100 million, and the citation of at least fifty-two empirical studies in the official comment record debating all sides of the excessive speculation debate, the Commission is not convinced that it must ''determine that excessive speculation exists or prove that position limits are an effective regulatory tool.''[565] I suppose this also means that the Commission did not have to consider the costs of alternative means by which it could have complied with the statutory mandates. It is utterly astounding that the Commission has designed a rule to combat the unknown threat of ''excessive speculation'' that will likely cost market participants $100 million dollars annually and yet, ''[T]he Commission need not prove that such limits will in fact prevent such burdens.''[566] A flip remark such as this undermines the entire rule, and invites legal challenge.

I respect that the Commission has been forthcoming in that the overall costs of this final rule will be widespread throughout the markets and that swap dealers and traditional hedgers alike will be forced to change their trading strategies in order to comply with the position limits. However, I am unimpressed by the Commission's glib rationale for not fully quantifying them. The Commission does not believe it is reasonably feasible to quantify or even estimate the costs from changes in trading strategies because doing so would necessitate having access to and an understanding of entities' business models, operating models, hedging strategies, and evaluations of potential alternative hedging or business strategies that would be adopted in light of such position limits.[567] The Commission believed it impractical to develop a generic or representative calculation of the economic consequences of a firm altering its trading strategies.[568] It seems that the numerous swap dealers and commercial entities who provided comments as to what kind of choices they would be forced to make if they were to find themselves faced with hard position limits, the loss of exchange-granted bona fide hedge exemptions for risk management and anticipatory hedging, and forced aggregation of trading accounts over which they may not even have current access to trading strategies or position information, more likely than not thought they were being pretty clear as to the economic costs.

In choosing to make hardline judgments with regard to setting position limits, limiting bona fide hedging, and picking clear winners and losers with regard to account aggregation, the Commission was perhaps attempting to limit the universe of trading strategies. Indeed, as one runs through the examples in the preamble and the new Appendix B to the final rules, one cannot help but conclude that how you choose to get your exposure will affect the application of position limits. And the Commission will help you make that choice even if you aren't asking for it.

I have numerous lingering questions and concerns with the cost-benefit analysis, but I will focus on the impact of these rules on the costs of claiming a bona fide hedge exemption.

[563] *See* Comment letter from CME Group on Position Limits for Derivatives at 16 (Mar. 28, 2011), *available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=33920&SearchText=CME* (''Where agencies do not articulate a basis for treating similarly situated entities differently, as the Commission fails to do here, courts will strike down their actions as arbitrary and capricious. *See, e.g., Indep. Petroleum Ass'n of America v. Babbitt,* 92 F.3d 1248 (D.D. Cir. 1996) (''An Agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.'' (*citing Nat'l Ass'n of Broadcasters v. FCC,* 740 F.2d 1190, 1201 (DC Cir. 1984))).

[564] Principles for Regulation and Supervision of Commodity Derivatives Markets, IOSCO Technical Committee (Sept. 2011), *available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf.*

[565] Position Limits for Futures and Swaps, *supra* note 1, at 137.

[566] *Id.*

[567] *Id.* at 144.

[568] *Id.*

In addition to incorporating the new, narrower statutory definition of bona fide hedging for futures contracts into the final rules, the Commission also extended the definition of bona fide hedging transactions to swaps and established a reporting and recordkeeping regime for bona fide hedging exemptions. In the section of the cost-benefit analysis dedicated to a discussion of the bona fide hedging exemptions, the Commission ''estimates that there may be significant costs (or foregone benefits)'' and that firms ''may need to adjust their trading and hedging strategies'' (emphasis added).[569] Based on the comments of record and public contention over these rules, that may be the understatement of the year. To be clear, however, there is no quantification or even qualification of this potentially tectonic shift in how commercial firms and liquidity providers conduct their business because the Commission is unable to estimate these kinds of costs, and the commenters did not provide any quantitative data for them to work with.[570] I think this part of the cost-benefit analysis may be susceptible to legal challenge.

The Commission does attempt a strong comeback in estimating the costs of bona fide hedging-related reporting requirements. The Commission estimates that these requirements, even after all of the commenter-friendly changes to the final rule, will affect approximately 200 entities annually and result in a total burden of approximately $29.8 million. These costs, it argues, are necessary in that they provide the benefit of ensuring that the Commission has access to information to determine whether positions in excess of a position limit relate to bona fide hedging or speculative activity.[571] This $29.8 million represents almost thirty percent of the overall estimated costs at this time, and it only covers reporting for entities seeking to hedge their legitimate commercial risk. I find it difficult to believe that the Commission cannot come up with a more cost-effective and less burdensome alternative, especially in light of the current reporting regimes and development of universal entity, commodity, and transaction identifiers. I was not presented with any other options. I will, however, continue to encourage the rulemaking teams to communicate with one another in regard to progress in these areas and ensure that the Commission's new Office of Data and Technology is tasked with the permanent objective of exploring better, less burdensome, and more cost-efficient ways of ensuring that the Commission receives the data it needs.

We Have Done What Congress Asked—But, What Have We Actually Done?

The consequence is that in its final iteration, the position limits rule represents the Commission's desire to ''check the box'' as to position limits. Unfortunately, in its exuberance and attempt to justify doing so, the Commission has overreached in interpreting its statutory mandate to set position limits. While I do not disagree that the Commission has been directed to impose position limits, *as appropriate,* this rule fails to provide a legally sound, comprehensible rationale based on empirical evidence. I cannot support passing our responsibilities on to the judicial system to pick apart this rule in a multitude of legal challenges, especially when our action could negatively affect the liquidity and price discovery function of our markets, or cause them to shift to foreign markets. I also have serious reservations regarding the excessive regulatory burden imposed on commercial firms seeking completely legitimate and historically provided relief under the bona fide hedge exemption. These firms will spend excessive amounts to remain within the strict limitations set by this rule. Congress clearly conceived of a much more workable and flexible solution that this Commission has ignored.

In its comment letter of March 25, 2011, the Futures Industry Association (FIA) stated, ''The price discovery and risk-shifting functions of the U.S. derivatives markets are too important to U.S. and international commerce to be the subject of a position limits experiment based on unsupported claims about price volatility caused by excessive speculative positions.''[572] Their summation of our proposal as an experiment is apt. Today's final rule is based on a hypothesis that historical practice and approach, which has not been proven effective in recognized markets, will be appropriate for this new integrated futures and swaps market that is facing uncertainty from all directions largely due to the other rules we are in the process of promulgating. I do not believe the Commission has done its research and assessed the impacts of testing this hypothesis, and that is why I cannot support the rule. As the Commission begins to analyze the results of its experiment, it remains my sincerest hope that our miscalculations ultimately do not lead to more harm than good. I will take no comfort if being proven correct means that the agency has failed in its mission.

[FR Doc. 2011–28809 Filed 11–10–11; 11:15 am]

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[569] Position Limits for Futures and Swaps, *supra* note 1, at 166.

[570] *Id.* at 171.

[571] *Id.*

[572] Comment letter from Futures Industry Association on Position Limits for Derivatives (RIN 2028–AD15 and 3038–AD16) at 3 (Mar. 25, 2011), *available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=34054&SearchText=futures%20industry%20association.*

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Part III

Environmental Protection Agency

40 CFR Parts 280 and 281

Revising Underground Storage Tank Regulations—Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 280 and 281

[EPA–HQ–UST–2011–0301; FRL–9485–5]

RIN 2050–AG46

Revising Underground Storage Tank Regulations—Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to make certain revisions to the 1988 underground storage tank (UST) technical, financial responsibility, and state program approval regulations. These changes establish federal requirements that are similar to key portions of the Energy Policy Act of 2005; they also update certain 1988 UST regulations. Proposed changes include: Adding secondary containment requirements for new and replaced tanks and piping; adding operator training requirements; adding periodic operation and maintenance requirements for UST systems; removing certain deferrals; adding new release prevention and detection technologies; updating codes of practice; making editorial and technical corrections; and updating state program approval requirements to incorporate these new changes. These changes will likely protect human health and the environment by increasing the number of prevented UST releases and quickly detecting them, if they occur.

DATES: Comments must be received on or before February 16, 2012. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before December 19, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–UST–2011–0301, by one of the following methods:

- *http://www.regulations.gov;* Follow the online instructions for submitting comments.
- *Email: mcdermott.elizabeth@epa.gov.*
- *Mail:* EPA Docket Center (EPA/DC), Docket ID No. EPA–HQ–UST–2011–0301, Mail Code 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.
- *Hand Delivery:* EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. Attention Docket ID No. EPA–HQ–UST–2011–0301. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–UST–2011–0301. 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 email. 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 email comment directly to EPA without going through *http://www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center (EPA/DC) is (202) 566–0276.

FOR FURTHER INFORMATION CONTACT: Elizabeth McDermott, OSWER/OUST (5401P), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (703) 603–7175; email address: *mcdermott.elizabeth@epa.gov.*

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I. General Information

Does this action apply to me?

In the table below, EPA is providing a list of potentially affected entities. However, this proposed action may affect other entities not listed below. The Agency's goal with this section is to provide a guide for readers to consider regarding entities that potentially could be affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section titled **FOR FURTHER INFORMATION CONTACT**.

INDUSTRY SECTORS POTENTIALLY AFFECTED BY THE PROPOSED RULE

Industry sector	NAICS code
Retail Motor Fuel Sales	447.
Commercial (wholesale trade, retail trade, accommodation, and food services)	42, 44–45, 72 (excluding 447).
Institutional (hospitals only)	622.
Manufacturing	31–33.
Transportation (air, water, truck, transit, pipeline, and airport operations)	481, 483–486, 48811.
Communications and Utilities (wired telecommunications carriers; and electric power generation, transmission, and distribution).	5171, 2211.
Agriculture (crop and animal production)	111, 112.

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

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or email. 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).
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Authority

EPA is proposing these regulations under the authority of sections 2002, 9001, 9002, 9003, 9004, 9005, 9006, 9007, and 9009 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976, as amended [42 U.S.C. 6912, 6991, 6991(a), 6991(b), 6991(c), 6991(d), 6991(e), 6991(f), 6991(h), 6991(i), and 6991(k)].

III. Background

EPA is proposing certain changes to the 1988 underground storage tank (UST) regulations in 40 CFR part 280. In addition, EPA is planning to implement the delivery prohibition provision of the Energy Policy Act of 2005 (hereafter called Energy Policy Act) for EPA-led inspections, but will address that independent of today's proposal. Finally, EPA is proposing to revise its state program approval (SPA) requirements in 40 CFR part 281 to incorporate the changes in 40 CFR part 280. While EPA's proposed changes to the 1988 UST regulations will improve environmental protection, we are sensitive to future costs for UST owners and operators and, as a result, minimized required retrofits.

This proposal strengthens the 1988 UST regulation by increasing the emphasis on properly operating and maintaining equipment. The 1988 UST regulation required owners and operators have spill, overfill, and release detection equipment in place, but did not require proper operation and maintenance for some of that equipment. For example, EPA required spill prevention equipment to capture drips and spills when the delivery hose is disconnected from the fill pipe but did not require periodic testing of that equipment. Today's proposed revisions will require that UST equipment is operated and maintained properly, which will improve environmental protection. These changes also acknowledge improvements in technology over the last 20 years, including the ability to detect releases from deferred UST systems.

Why is EPA changing the UST regulations?

EPA is proposing to revise the 1988 UST regulations to:

- Establish federal requirements that are similar to certain key provisions of the Energy Policy Act;
- Ensure owners and operators properly operate and maintain their UST systems;
- Include updates to current technology and codes of practices;
- Make technical and editorial corrections; and
- Update SPA regulation to address the proposed changes listed above.

In 1988, EPA first promulgated the UST regulations (40 CFR part 280) to prevent, detect, and clean up petroleum releases into the environment. The 1988 UST regulations required new UST systems to be designed, constructed, and installed to prevent releases; existing UST systems had to be upgraded to prevent releases. In addition, owners and operators were required to perform release detection, demonstrate financial responsibility, and clean up releases.

The Energy Policy Act amended Subtitle I of the Solid Waste Disposal Act (SWDA), the statute that authorized the UST program. Key Energy Policy Act provisions (such as secondary containment and operator training) apply to all states receiving federal Subtitle I money under SWDA, regardless of their state program approval status, but do not apply in Indian country (or in states and U.S. territories that do not meet EPA's operator training or secondary containment grant guidelines). The U.S. has a unique legal relationship with federally recognized Indian Tribes. This government to government relationship includes recognizing the rights of Tribes as sovereign governments to self-determination and acknowledging the federal government's trust responsibility to Tribes. As a result, EPA directly implements the UST program in Indian country.

In order to establish federal UST requirements that are similar to the UST secondary containment and operator training requirements of the Energy Policy Act, EPA decided to revise the 1988 UST regulations. EPA also decided to revise the 1988 UST regulations in order to achieve better release prevention and compliance results (see section IV.B. Additional Requirements for Operation and Maintenance for additional information). Today's proposed revisions also fulfill objectives in EPA's UST Tribal Strategy (August 2006), where both EPA and Tribes recognized the importance of requirements that ensure parity in program implementation among states and in Indian country. Requiring secondary containment will reduce releases to the environment by containing them within a secondary area and detecting them before they reach the environment. Operator training will educate UST system operators and help them prevent releases by complying with the regulation and performing better operation and maintenance of their UST systems.

Since the beginning of the UST program, preventing petroleum and hazardous substance releases from UST systems into the environment has been one of the primary goals of the program. Although EPA and our partners have made significant progress in reducing the number of new releases, approximately 7,000 releases are discovered each year as of FY 2009.[1] Lack of proper operation and maintenance of UST systems is a main cause of new releases. Information on sources and causes of releases shows that releases from tanks are less common than they once were. However, releases from piping and spills and overfills associated with deliveries have emerged as more common problems. In addition, releases at the dispenser are one of the leading sources of releases. Finally, data show that release detection equipment is only detecting approximately 50 percent of releases it is designed to detect. These problems are partly due to improper operation and maintenance (see section IV.B. Additional Requirements for Operation and Maintenance for a more detailed discussion of problems).[2] [3]

EPA relies on two draft causes of release studies to help support this proposed rule. *Petroleum Releases at Underground Storage Tank Facilities in Florida* contains release data on 512 releases from new and upgraded tanks in Florida.[4] The second draft study, *Evaluation of Releases from New and Upgraded Underground Storage Tank Systems,* contains release data on 580 releases from new and upgraded tanks in 23 states across the Northeast, South, and Central parts of the United States.[5] Taken together, these draft studies provide information about 1092 releases in 24 of the 50 states. The data in the two studies, when taken as a whole, generally provide a representative sampling of releases across the United States because nearly half of the states contributed to the studies. Both drafts were peer reviewed but never finalized because the passage of Energy Policy Act of 2005 required a reallocation of personnel and resources. Even though these studies were never finalized, the underlying data and calculations can be used to support this proposed rule because that information did not change as a result of the peer review process.

Many USTs currently in the ground were upgraded to meet the spill, overfill, corrosion protection, and release detection requirements in the 1988 UST regulation. As these USTs continue to age, it is vital that we improve UST operation and maintenance and test components to ensure they are still working as intended. Today's proposed revisions to the 1988 UST regulation focus on ensuring equipment is working, rather than requiring UST owners and operators to replace or upgrade equipment already in place. The 1988 UST regulation require owners and operators to use equipment that could help prevent releases; today's proposed revisions highlight the importance of operating and maintaining UST equipment so releases are prevented and detected early in order to avoid or minimize potential soil and groundwater contamination.

EPA is proposing changes to the SPA regulation (40 CFR part 281) to address today's proposed changes to 40 CFR part 280. By doing so, EPA will require states to generally adopt the 40 CFR part 280 changes proposed today in order to obtain or retain SPA.

What is the history of the UST laws and regulations?

In 1984, Congress responded to the increasing threat to groundwater posed from leaking USTs by adding Subtitle I to the Solid Waste Disposal Act (SWDA). Subtitle I of SWDA required EPA to develop a comprehensive regulatory program for USTs storing petroleum or certain hazardous substances, ensuring that the environment and human health are protected from UST releases. In 1986, Congress amended Subtitle I of SWDA and created the Leaking Underground

[1] Semi-Annual Report Of UST Performance Measures, End Of Fiscal Year 2009, *http://epa.gov/oust/cat/camarchv.htm.*

[2] Petroleum Releases At Underground Storage Tank Facilities In Florida, Peer Review Draft, U.S. EPA/OUST, March 2005.

[3] Evaluation Of Releases From New And Upgraded Underground Storage Tanks, Peer Review Draft, U.S. EPA/OUST, August 2004.

[4] Petroleum Releases At Underground Storage Tank Facilities In Florida, Peer Review Draft, U.S. EPA/OUST, March 2005.

[5] Evaluation Of Releases From New And Upgraded Underground Storage Tanks, Peer Review Draft, U.S. EPA/OUST, August 2004.

Storage Tank Trust Fund to implement a cleanup program and pay for cleanups at sites where the owner or operator is unknown, unwilling, or unable to respond, or which require emergency action.

In 1988, EPA promulgated the UST regulation (40 CFR part 280), which set minimum standards for new tanks and required owners and operators of existing tanks to upgrade, replace, or close them. In addition, after 1988 owners and operators were required to report and clean up releases from their USTs. The 1988 UST regulation set deadlines for owners and operators to meet those requirements by December 22, 1998. Owners and operators who chose to upgrade or replace had to ensure their UST systems included spill and overfill prevention equipment and were protected from corrosion. In addition, owners and operators were required to monitor their UST systems for releases using release detection (phased in during the 1990s, depending on when their UST systems were installed). Finally, owners and operators were required to have financial responsibility (phased in through 1998), which ensured they have financial resources to pay for cleaning up releases. EPA has not significantly changed the UST regulation since 1988.

In 1988, EPA also promulgated a regulation for state program approval (40 CFR part 281). Since states are the primary implementers of the UST program, EPA established a process where state programs could operate in lieu of the federal program if states met certain requirements and obtained state program approval from EPA. The state program approval regulation describes minimum requirements states must meet so their programs can be approved and operate in lieu of the federal program.

In 2005, the Energy Policy Act further amended Subtitle I of SWDA. The Energy Policy Act required states receiving Subtitle I money from EPA meet certain requirements. EPA developed grant guidelines for states regarding operator training, inspections, delivery prohibition, secondary containment, financial responsibility for manufacturers and installers, public record, and state compliance reports on government USTs. The operator training and secondary containment requirements are two major pieces of the Energy Policy Act that currently do not apply in Indian country, but will apply when EPA finalizes today's proposed regulation.

What is the impact of this proposal?

This proposal will ensure parity in program implementation among states and in Indian country. This proposal will achieve parity by adding certain requirements to the federal UST regulation (that would apply in Indian country) that are similar to the operator training and secondary containment requirements in the Energy Policy Act. This action will also further strengthen protection of human health and the environment from UST releases by increasing the emphasis on proper operation and maintenance of release prevention and detection equipment. Today's proposed revisions also reflect improvements in technology that allow for the ability to prevent and quickly detect releases for many tank systems that are currently deferred. The regulatory changes proposed today impose costs to owners and operators of existing regulated UST systems, owners and operators of certain deferred USTs, as well as costs associated with state review of the regulatory changes. EPA prepared an analysis of the potential incremental costs and benefits associated with this action. This analysis is contained in the regulatory impact analysis (RIA) titled *Assessment Of The Potential Costs, Benefits, And Other Impacts Of The Proposed Revisions To EPA's Underground Storage Tank Regulations,* which is available in the docket for this proposal. A summary of these impacts is provided under the Statutory Review section of this preamble and in the table below.

COSTS AND BENEFITS OF THE PROPOSED RULE

[2008$ millions]

	7% Discount rate	3% Discount rate
Total Annual Compliance Costs	$210	$210
Total Annual Avoided Costs	$300–$740	$330–$770
Net Cost (Savings) to Society	($530–$90)	($560–$120)

EPA also prepared a risk assessment titled *Risk Analysis to Support Potential Revisions to Underground Storage Tank (UST) Regulations,* associated with the regulatory changes. The risk assessment examines potential impacts to groundwater and subsequent chemical transport, exposure and risk. It is available for review in the docket for this proposal.

What was EPA's process in deciding which changes to incorporate in the regulations?

After the Energy Policy Act became law, EPA recognized a need to revise the 1988 UST regulations. The Energy Policy Act required additional measures to protect groundwater (either with secondary containment or financial responsibility for manufacturers and installers) and operator training requirements in states receiving federal Subtitle I money from EPA. However, no similar requirements would apply in Indian country until EPA promulgates a regulation. Both EPA and Tribes are committed to ensuring program parity between states and in Indian country, and today's proposed regulation, when final, will achieve this parity.

For over 20 years, the 1988 UST regulations worked well. However, two decades of experience implementing the UST program have shown there are a number of areas where EPA can improve the UST program and increase environmental protection. For example, updating the regulation to reflect current technologies and ensuring release prevention and release detection equipment are properly operated and maintained have surfaced as important regulatory changes.

From the start, EPA embraced an open, inclusive, and transparent process so all UST stakeholders had an opportunity to share their ideas and concerns. EPA recognizes concerns about costs to owners and operators and the importance of limiting requirements for retrofits. In developing this rule, we reached out to stakeholders involved in all aspects of the tank program, provided multiple opportunities for sharing ideas, and kept stakeholders informed of progress.

Using information from our extensive outreach, EPA compiled potential proposed changes to the 1988 UST regulations. We added or deleted items to the list of changes based on data, analysis, costs and benefits resulting from the proposed changes, and EPA discretion. Ultimately, EPA identified

the items in today's proposal as most appropriate.

IV. Proposed Revisions to the Requirements for Owners and Operators of Underground Storage Tanks

The following sections describe EPA's proposal, starting with requirements for operator training and secondary containment. The next four sections address changes to the existing regulation in 40 CFR part 280, organized by topic: Additional requirements for operation and maintenance; proposed approach for currently deferred tanks; other changes to improve release prevention and release detection; and general updates to the 1988 UST regulation. Finally, there is a section describing alternative options considered.

After each proposed regulatory change, EPA poses some questions to which readers may wish to respond. In addition to these specific questions, readers may provide comments to any other area of the proposal on which they wish to comment.

A. Changes To Establish Federal Requirements for Operator Training and Secondary Containment

1. Operator Training

What is EPA proposing?

EPA is proposing to add a new subpart, subpart J—Operator Training, to 40 CFR part 280. Through subpart J, EPA is proposing the following training requirements for three UST system operator classes.

New Definitions

EPA is proposing the following new terms and definitions:

- Class A operator—individual with primary responsibility for operating and maintaining an UST system according to applicable requirements established by the implementing agency. The Class A operator typically manages resources and personnel, such as establishing work assignments, to achieve and maintain compliance with regulatory requirements.
- Class B operator—individual with day-to-day responsibility for implementing applicable regulatory requirements established by the implementing agency. The Class B operator typically implements in the field aspects of operation, maintenance, and associated recordkeeping for an UST system.
- Class C operator—employee responsible for initially addressing emergencies presented by a spill or release from an UST system. The Class C operator typically controls or monitors dispensing or sale of regulated substances.
- Training program—any program established by the implementing agency that provides information to and evaluates the knowledge of a Class A, Class B, or Class C operator regarding requirements for UST systems.

Training Requirements

- How operators are designated—UST owners and operators must designate individuals for each of the three operator classes. UST owners and operators must designate at least one Class A and one Class B operator for each UST or group of USTs at a facility. UST owners and operators must designate all of their employees who meet the Class C operator definition as Class C operators.
- Who must be trained—This proposed training requirement covers all UST systems storing regulated substances. UST owners and operators must ensure designated individuals meet specific training requirements according to the operator class in which they are designated.
- Requirements for operator training—UST owners and operators must ensure operators in each class successfully complete training programs or comparable examinations that, at a minimum, cover these areas:
  - Class A operator—spill and overfill prevention; release detection; corrosion protection; emergency response; product and equipment compatibility; financial responsibility; notification and storage tank registration; temporary and permanent closure; related reporting and recordkeeping; environmental and regulatory consequences of releases; and training requirements for Class B and C operators. Training for Class A operators is general on all listed areas.
  - Class B operator—operation and maintenance; spill and overfill prevention; release detection and related reporting; corrosion protection and related testing; emergency response; product and equipment compatibility; reporting and recordkeeping; environmental and regulatory consequences of releases; and training requirements for Class C operator. Training for Class B operators may be general or specific to a Class B operator's site.
  - Class C operator—appropriate action to take in response to emergencies (including situations posing an immediate danger or threat to the public or environment and that require immediate action) or alarms caused by spills or releases from an UST system. Training for Class C operators may be general or specific to a Class C operator's site.
- Training programs for Class A and B operators must, at a minimum, teach and evaluate their knowledge on the purpose, methods, and functions of items listed in the minimum training areas above. Training programs for Class C operators must teach and evaluate their knowledge of the items listed in the minimum training areas above.
- A training program must meet the minimum requirements discussed above and evaluate knowledge through a test, practical demonstration, or another approach acceptable to the implementing agency. In lieu of a training program, all three operator classes must pass comparable examinations that assess their knowledge in the minimum training areas above.
- The evaluation component of training programs and comparable examinations must be developed and administered by an independent organization, the implementing agency, or delegated authority.
- When designated operators must complete operator training—UST owners and operators must ensure all designated Class A, B, and C operators are trained or successfully complete a comparable examination according to criteria and within time frames in the schedule below. Phase in is based on when USTs were installed because newer UST systems tend to have fewer releases than older UST systems.[6]

[6] Evaluation Of Releases From New And Upgraded Underground Storage Tanks, Peer Review Draft, U.S. EPA/OUST, August 2004.

PHASE-IN SCHEDULE FOR OPERATOR TRAINING

Criteria	Date when operator training or comparable examination is required
One or more USTs at the facility were installed on or before 12/22/1988	One year after effective date of rule.
No USTs at the facility were installed on or before 12/22/1988 and at least one UST at the facility was installed on or before 12/22/1998.	Two years after effective date of rule.
All USTs at the facility were installed after 12/22/1998	Three years after effective date of rule.

After the last date in the table above, UST owners and operators must ensure designated Class A and B operators are trained within 30 days of assuming duties. Designated Class C operators must be trained before assuming their duties.

• Retraining—Class A and B operators of UST systems determined by the implementing agency to be out of compliance must complete a training program or comparable examination in accordance with requirements in § 280.242. At a minimum, training must cover the area(s) determined to be out of compliance. Retraining must occur within 30 days from the date an implementing agency determines an UST system is out of compliance. Retraining is not required if:

○ Class A and B operators take annual refresher training which covers all applicable training requirements for their operator class; or

○ The implementing agency, at its discretion, grants a waiver relinquishing the Class A and B operators from meeting the retraining requirement.

• Documentation—UST owners and operators must maintain documents that identify all operators by class and demonstrate that training or retraining, if necessary, was completed. These documents must contain:

○ A list of designated Class A, B, and C operators for each UST facility—Include names, operator class trained, date assumed duties, date completed initial training, and date of any retraining. These records must be maintained for all Class A, B, and C operators at the facility for the previous three years.

○ Proof of training or retraining—A paper or electronic record that, at a minimum, includes name of trainee, date trained, and operator class. In addition, records from classroom or field training programs or a comparable examination, must be signed by the trainer or examiner and include the printed name of the trainer or examiner, company name, address, and phone number. Records from computer-based training, at a minimum, must include the name of the training program and web address, if Internet-based. Records of retraining must include those areas on which the Class A or B operator was retrained. Records of training or retraining must be maintained as long as the Class A, Class B, and Class C operators are designated at the facility.

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing operator training requirements to ensure that all regulated UST systems are operated by properly trained individuals. The operator training provision of the Energy Policy Act requires state implementing agencies, as a condition of receiving federal Subtitle I money, develop state-specific training requirements for three classes of UST system operators. EPA issued grant guidelines that provide minimum requirements state operator training programs must include in order for states to continue receiving federal Subtitle I money.[7] The operator training grant guidelines apply to most UST systems in the United States; however, not all are covered. UST systems not covered include those in Indian country where EPA is the primary implementing agency, and in states and territories that do not meet the requirements of EPA's operator training grant guidelines.

Through today's proposal, EPA is closing the gap in coverage and ensuring all operators are trained according to their level of responsibility, as designated as Class A, B, or C. Sufficiently training UST operators will increase compliance with regulatory requirements. In addition, operator training may decrease UST system releases by educating Class A, B, and C operators about their UST system requirements, and may result in greater protection of human health and the environment.

Today's proposed operator training regulation for UST owners and operators is consistent with the requirements in EPA's operator training grant guidelines for states. In both, EPA establishes minimum operator training requirements, yet allows flexibility to tailor training programs for specific needs. This means that although there may be variations among operator training programs, all Class A, B, and C operators will be trained to meet minimum requirements.

Definitions—EPA is proposing specific definitions of the three operator classes to distinguish them from the term operator defined in the 1988 UST regulation. Only if a Class A, B, or C operator meets the definition of operator in the 1988 UST regulation will he or she then be subject to the same responsibilities and liabilities as an operator. EPA's proposed definitions of Class A, B, and C operators do not relieve owners and operators, as defined in the 1988 UST regulation, from any legal responsibility. EPA based the proposed three operator class definitions on duties each typically performs at UST facilities.

EPA is proposing a definition for training program. It is important that training programs for Class A, B, and C operators include both sharing information and evaluating knowledge.

How operators are designated—EPA is proposing how UST owners and operators designate the three operator classes for their facilities. EPA is taking the position that designating at least one Class A and B operator at each facility is sufficient. Class A and B operators can provide adequate training to Class C operators, which should ease UST owners' and operators' ability to comply with this requirement. Because a Class C operator's duties typically place him or her in a position of providing initial response to an emergency, any UST owner's and operator's employee who meets the Class C operator definition must be designated as such and trained in emergency response.

EPA will allow UST owners and operators to designate contractors as their Class A and B operators as long as they are responsible for all areas required in the training for the class of operator designated. UST owners and operators must maintain documentation containing individual names of Class A and B contractors who complete operator training. It will be easier for implementing agencies to verify training, retraining, and refresher training using individual names rather

[7] Grant Guidelines To States For Implementing The Operator Training Provision Of The Energy Policy Act Of 2005: *http://www.epa.gov/oust/fedlaws/optraing.htm.*

than company names. All Class C operators must be employees of the UST system owner and operator.

EPA wants to ensure Class A and B operator training addresses all components and encompasses the entire UST system. If an UST system is out of compliance and the implementing agency determines retraining is required, Class A or B operators must either be retrained or take annual refresher training. EPA cautions UST owners and operators to consider whether contractors serving as Class A or B operators can be designated. Because some contractors specialize in UST services, they might not be eligible to be Class A or B operators. For example, if a contractor is only responsible for release detection compliance, that contractor would not be eligible to be a Class A or B operator because he or she is not responsible for all required training areas.

EPA realizes many UST owners and operators may want to designate one person at an UST facility as responsible for all Class A, B, and C operator duties. EPA will allow one person to serve in multiple operator classes; however, that person must be trained for each class designated.

Who must be trained—When final, today's proposal will require training for designated Class A, B, and C operators at UST systems regulated under Subtitle I. This includes UST systems of all attended and unattended facilities. An unattended UST facility means a Class A, B, or C operator may not be present during times when a facility is operating. Nonetheless, even at unattended UST facilities, designated Class A, B, and C operators must still meet the operator training requirement.

Requirements for operator training—EPA based the three operator classes on duties each typically performs at UST facilities. Building on that, EPA is proposing each person designated in an operator class pass an examination comparable to the training program, or meet a specific training program, which will:

- For Class A operator, teach and evaluate his or her knowledge to make informed decisions regarding compliance and determine whether appropriate people are fulfilling the operation, maintenance, and recordkeeping requirements for UST systems.
- For Class B operator, teach and evaluate his or her knowledge and skills to implement UST regulatory requirements on typical UST system components or site-specific equipment at the UST facility.
- For Class C operator, teach and evaluate his or her knowledge to take appropriate action in response to emergencies (including situations posing an immediate danger or threat to the public or environment and that require immediate action) or alarms caused by spills or releases from an UST system.

For each class of operator, EPA considered developing specific training curricula that would prescribe length of training, areas to cover, and trainer qualifications. EPA decided that providing the general criteria requirements presented in today's proposal is the best approach because they provide flexibility while being comparable to EPA's operator training grant guidelines for states and ensuring each class of operator is trained.

EPA proposes not to restrict who may develop and administer the training component of a training program. However, to avoid potential conflicts of interest, EPA proposes to only allow independent organizations to develop and administer the evaluation component training programs and comparable examinations, as long as they meet the minimum requirements in today's proposal. EPA considers independent organizations to include a wide array of program providers who are not affiliated with the Class A, B, or C operators they are training. For example, Class A or B operators can train other Class A or B operators at the same UST facility, but they cannot develop or conduct the evaluation component of the training program for those operators. However, as discussed earlier, Class A or B operators can train and evaluate Class C operators. In addition, the implementing agency may develop and administer a training program or comparable examination.

Although not specifically listed in the regulation, EPA will allow a variety of ways to train operators. These include classroom, computer-based, hands on, and any combination of these.

Accepted in lieu of completing a training program, Class A, B, or C operators can pass a comparable examination (for example, via classroom, Internet, or computer program) that meets the requirements for operator training criteria described in today's proposal.

When designated operators must complete operator training—EPA is proposing that UST owners and operators ensure all Class A, B, and C operators successfully complete a training program or a comparable examination over three years, based on UST installation dates. This phased-in approach will stagger the need for operator training and reduce a rush at the end of the initial three year period. Since older USTs potentially pose a greater risk to the environment, EPA decided Class A, B, and C operators of those systems should be trained first.

After the initial three year phase-in period and for consistency with EPA's operator training grant guidelines for states, EPA is proposing new Class A, B, and C operators be trained as follows:

- Class A and B operators must be trained within 30 days of assuming duties. 30 days are sufficient for Class A and B operators to receive operator training.
- Class C operators must be trained before they assume their duties; it is critical that they are trained immediately in order to respond to emergencies.

Retraining—UST system noncompliance can be an indication that Class A and B operators are not doing what is necessary to maintain compliance. If an UST system is out of compliance, then generally, Class A and B operators designated for that UST system need to be retrained. Retraining must, at a minimum, cover those areas determined by the implementing agency to be out of compliance. Retraining must be completed within 30 days of the implementing agency making a final determination of noncompliance. EPA is proposing to allow annual refresher training in lieu of retraining as long as all training areas required by regulation are covered. Refresher training must have been in place at the time the implementing agency determined the UST system was out of compliance.

EPA is also proposing to allow implementing agencies, at their discretion, to waive the retraining requirement. EPA recommends that such a waiver be in writing. In granting a waiver, EPA expects the implementing agency to consider factors such as the severity and areas of noncompliance. In those instances where UST system noncompliance violations do not warrant retraining, EPA encourages implementing agencies to provide information to Class A and B operators so they are able to return their facilities to compliance. These allowances will provide greater flexibility for UST owners and operators to meet the retraining requirement. This proposal is consistent with EPA's retraining requirement for noncompliance with significant operational compliance requirements and an annual refresher training allowance provided in our operator training grant guidelines for states.

EPA considered requiring retraining when UST facilities change equipment,

but decided this would be an unnecessary burden on both the regulated community and implementing agencies. If an UST system is out of compliance because of an equipment change, EPA is proposing that the implementing agency require that UST owners and operators ensure Class A and B operators are retrained as proposed above.

Documentation—EPA is proposing UST owners and operators maintain a list of Class A, B, and C operators at each UST facility for the previous three years. Keeping this list for three years is adequate because it is consistent with the inspection frequency provided by the Energy Policy Act. Owners and operators must have a list of trained operators for the past three years each time they are inspected. In addition, UST owners and operators must also document verification of training or retraining, as appropriate, for each class of operator. EPA will require basic information to document Class A, B, and C operators and confirm they are appropriately trained. For example, classroom training must be signed by the trainer; computer based training does not require a signature but must indicate the name of the training. Records verifying training or retraining must be maintained as long as the Class A, B, and C operators are designated at the facility. This time frame will allow owners and operators to demonstrate Class A, B, and C operators are trained as long as they are designated at the facility.

What issues related to this change does EPA request comment or additional data on?

- Should EPA impose a limit on the number of USTs or facilities a Class A or B operator is responsible for? If so, what should the limit be and why?
- EPA is seeking information about the number of unattended regulated UST facilities in the United States. How many regulated UST facilities are unattended in the United States?
- EPA is basing the initial period for meeting the training requirement on the UST installation date. Should we consider other criteria? If so, what and why?
- Is there a need for a phased-in schedule for operator training? If so, is EPA's proposed schedule reasonable?
- Does EPA's proposal prohibit training approaches currently available? If so, which ones and why?
- Should EPA prohibit particular training approaches? If so, which ones and why?
- Although operators can access any available information source to obtain necessary knowledge of UST systems, in order to address potential conflicts of interest concerns, only independent organizations are allowed to develop and administer the evaluation component of training programs and comparable examinations. Are there cases where EPA should consider exceptions to this proposed requirement?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

2. Secondary Containment

What is EPA proposing?

EPA is proposing to add in 40 CFR part 280 secondary containment and interstitial monitoring requirements for new and replaced tanks and piping. In addition, UST systems must have under-dispenser containment for new dispenser systems.

New Definitions

EPA is proposing the following new terms and definitions:

- Dispenser system—Equipment located above ground that meters the amount of regulated substances transferred to a point of use outside the UST system, such as a motor vehicle. This system includes equipment necessary to connect the dispenser to the UST system.
- Replaced—
  - *For a tank:* To remove a tank and install another tank.
  - *For piping:* To remove 50 percent or more of piping and install other piping, excluding connectors, connected to a single tank. For tanks with multiple piping runs, this definition applies independently to each piping run.
- Secondary containment or secondarily contained—A release prevention and release detection system for a tank and/or piping. This system has an inner and outer barrier with an interstitial space that is monitored for leaks.
- Under-dispenser containment (UDC)—Containment underneath a dispenser system designed to prevent dispenser system leaks from reaching soil or groundwater.

Secondary Containment

EPA is proposing owners and operators install secondary containment (including interstitial monitoring) for new or replaced tanks and piping installed after the effective date of the final UST regulation. EPA is not proposing secondary containment for the following types of piping:

- Suction piping that meets the requirements of § 280.41(b)(2)(i) through (v), sometimes called safe suction piping; and
- Piping associated with field-constructed tanks and airport hydrant fuel distribution systems.

EPA is proposing secondarily contained tanks and piping be:

- Able to contain regulated substances leaked from the primary containment until they are detected and removed;
- Able to prevent release of regulated substances to the environment at any time during the operational life of the UST system; and
- Monitored for a leak at least once every 30 days using interstitial monitoring according to § 280.43(g).

In addition to the requirements above, pressurized piping must have an automatic line leak detector according to § 280.44(a).

EPA is proposing to remove the option in § 280.42 for owners and operators to use a release detection method other than interstitial monitoring for hazardous substance USTs installed after the effective date of the final UST regulation.

Under-Dispenser Containment

EPA is proposing owners and operators install under-dispenser containment beneath new dispenser systems at UST systems. EPA will incorporate this new requirement by adding a new subsection (f) to § 280.20, which will require under-dispenser containment beneath each new dispenser system at an UST system.

EPA is proposing a dispenser system be considered new when both the dispenser system and equipment needed to connect the dispenser system to the UST system are installed at an UST facility. The equipment connecting the dispenser system to the UST system includes check valves, shear valves, unburied risers or flexible connectors, or other transitional components beneath the dispenser that connect it to underground piping. Finally, under-dispenser containment must be liquid tight on its sides, bottom, and at any penetrations and allow for visual inspection and access to the components in the containment system, or must be continuously monitored for leaks from the dispenser system.

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing this change to prevent regulated substances from reaching the environment and ensure a consistent level of environmental protection for regulated UST systems across the United States. Data from

release sites show a higher number of releases from single-walled tanks and piping when compared to secondarily contained systems.[8] [9] Releases could be reduced for tanks and piping if they are secondarily contained.

The Energy Policy Act requires state implementing agencies, as a condition of receiving federal Subtitle I money, implement additional measures to protect groundwater. Under the law, state implementing agencies' choices to protect groundwater were secondary containment (including under-dispenser containment) or financial responsibility for manufacturers and installers (and installer certification). 54 of 56 state implementing agencies chose secondary containment. The Energy Policy Act did not specifically require additional measures to protect groundwater in Indian country. As the primary implementer for more than 2,600 UST systems in Indian country, [10] EPA is proposing secondary containment for new and replaced tanks and piping along with under-dispenser containment beneath all new dispenser systems at UST systems. Over the last seven years, approximately 25 new UST systems per year were installed in Indian country.[11] The final UST regulation will bring UST systems in Indian country to the same level of environmental protection as those regulated by states.

The Energy Policy Act requires states that receive federal Subtitle I money (and that choose the secondary containment option) to have secondary containment and under-dispenser containment for tanks, piping, and dispensers only if they are installed or replaced within 1,000 feet of an existing community water system or potable drinking water well.[12] However, EPA is proposing all new and replaced tanks and piping have secondary containment and UST systems have under-dispenser containment beneath all new dispenser systems for the following reasons:

- Nearly all new and replaced tanks and piping are installed within 1,000 feet of an existing community water system or potable drinking water well. We assume that any UST listed with a commercial ownership type (*i.e.,* gas station) is located within 1,000 feet of an on-site well or public water line because nearly all commercially-owned facilities with USTs require water utilities in order to operate and all privately owned facilities (*i.e.,* fleet fueling for non-marketers) are also assumed to be in close proximity to some type of water supply given that these sites are typically combined with other functional operations (office, maintenance, manufacturing, *etc.*) and require water for restrooms, water fountains, shops, *etc.;*[13]
- Some state implementing agencies that require secondary containment only within 1,000 feet of one of these water sources have informed EPA that installations of single-walled tanks or piping are not occurring; and
- Secondary containment and under-dispenser containment will help protect other sensitive areas, such as designated source water protection areas, natural springs, and surface waters.

EPA is not proposing secondary containment for piping that meets the requirements of 280.41(b)(2)(i) through (v), sometimes called safe suction piping because it is currently not required to meet release detection requirements. This type of piping uses a suction pump to deliver regulated substances from the UST to the dispenser. Safe suction piping operates at less than atmospheric pressure, slopes back towards the UST so regulated substances drain to the UST if suction is lost, and has only one check valve located close to the suction pump. As discussed in the 1988 UST regulation preamble, these characteristics ensure that little, if any, regulated substances will be released if a break occurs in the line.[14]

EPA is not proposing secondary containment for piping associated with field-constructed tanks and airport hydrant fuel distribution systems. EPA understands this piping typically is larger diameter and runs for long distances, making it difficult to slope the piping back to an interstitial monitoring area. In addition, EPA understands it is difficult to keep water out of the interstitial area of these long piping runs. Since nearly all this piping is steel, corrosion can occur in the interstitial area when an electrolyte, such as water, is in the interstitial area. This corrosion can significantly shorten the piping's life. Corrosion protection safeguards piping in contact with the ground, but does not protect the inside part of piping from corrosion. To prevent corrosion caused by water in the interstitial area, owners and operators would need to add corrosion protection inside the interstitial area of piping, which EPA realizes would be difficult, if not impossible, to do. Given all of these issues, secondary containment for these piping runs could potentially reduce environmental protection.

EPA is proposing owners and operators install tank and piping secondary containment that: will contain regulated substances leaked from the primary containment until they are detected and removed; is able to prevent the release of regulated substances to the environment at any time during the operational life of the UST system; and is monitored for a leak at least once every 30 days using interstitial monitoring. These requirements are consistent with the 1988 UST regulation for secondarily contained hazardous substance tanks (§ 280.42) and are necessary to help prevent releases to the environment.

The secondary containment requirement applies to new or replaced underground tanks and piping regulated under Subtitle I except those excluded by regulation at 40 CFR 280.10(b) and those deferred by regulation at 40 CFR 280.10(c). All petroleum and hazardous USTs are intended to meet the secondary containment requirement with the corresponding use of interstitial monitoring. EPA's current regulation allows variances to the use of interstitial monitoring as the method of release detection for hazardous substance USTs. Since these variances are no longer an option, EPA is eliminating this language to avoid confusion.

EPA is not proposing secondary containment and/or under-dispenser containment for UST systems where installation began on or before the effective date of the final UST regulation. Similar to the definition of existing tank system in the 1988 UST regulation, EPA considers an installation to have begun after the owner or operator has obtained all federal, state, and local approvals or permits and:

[8] Petroleum Releases At Underground Storage Tank Facilities In Florida, Peer Review Draft, U.S. EPA/OUST, March 2005.

[9] Evaluation Of Releases From New And Upgraded Underground Storage Tanks, Peer Review Draft, U.S. EPA/OUST, August 2004.

[10] Semi-Annual Report Of UST Performance Measures, End Of Fiscal Year 2009, *http://epa.gov/oust/cat/camarchv.htm.*

[11] E2, Incorporated, memoranda and analyses submitted under Contract EP–W–05–018, ''U.S. Environmental Protection Agency. Underground Storage Tanks/Leaking Underground Storage Tanks Analytical And Technical Support.'' These supporting materials can be found in the docket for the proposed rulemaking.

[12] Title XV, subtitle B, Section 1530 of Energy Policy Act of 2005, 109th Congress Public Law 58, August 8, 2005.

[13] E2, Incorporated, memoranda and analyses submitted under Contract EP–W–05–018, ''U.S. Environmental Protection Agency. Underground Storage Tanks/Leaking Underground Storage Tanks Analytical And Technical Support.'' These supporting materials can be found in the docket for the proposed rulemaking.

[14] Preamble to 40 CFR part 280, FR Vol. 53, No. 185, Friday, September 23, 1988, p. 37154.

• Physical construction or installation began; or

• The owner or operator entered into a contractual agreement that cannot be cancelled or modified without substantial loss and physical construction or installation will commence within a reasonable time frame.

Requiring retrofits would be a significant financial burden for owners and operators. EPA anticipates owners and operators will replace single-walled UST systems as they age. When owners and operators replace singled-walled UST systems after the effective date of the final UST regulation, new tanks and piping will need to be secondarily contained and new dispensers will have under-dispenser containment.

To implement secondary containment and under-dispenser containment, EPA is proposing to add new terms and definitions: Dispenser system; replaced; secondary containment or secondarily contained; and under-dispenser containment. EPA defined these terms so they are no less stringent than the definitions contained in EPA's secondary containment grant guidelines to state implementing agencies.[15]

EPA's secondary containment grant guidelines provide states with significant flexibility to define ''replaced'' as it applies to piping. The guidelines require that states, at a minimum, consider replacing piping when 100 percent of piping, excluding connectors, connected to a single UST is removed and other piping is installed. When deciding how to best define replaced as it applies to piping, EPA analyzed state UST regulations for approximately 40 states that currently require secondary containment and interstitial monitoring.[16] About 75 percent of these states have requirements as stringent as, or more stringent than, the 50 percent threshold EPA proposes.

In addition, EPA performed a screening analysis using limited, readily-available data to determine when repair cost approached replacement cost (and at what point owners and operators were most likely to replace the entire piping run rather than repair it).[17] The screening analysis suggested replacement cost of an entire piping run became equal to repair cost when about 60 percent of a piping run is repaired. Based on this information, EPA is proposing owners and operators secondarily contain an entire piping run when 50 percent or more of a piping run is replaced. This is consistent with most state implementing agency decisions and existing economic incentives. This will also prevent owners and operators from leaving small pipe sections in the ground to avoid this proposed secondary containment requirement. If an UST has multiple piping runs, the secondary containment requirement will only apply to those where 50 percent or more of piping is replaced. Currently installed piping runs, and piping runs where less than 50 percent of the piping is repaired, will not require secondary containment.

For pressurized piping, EPA considers a piping run to be the piping that connects the submersible turbine pump (STP) to all of the dispensers fed by that pump. For example, if a tank has two STPs, the piping associated with each STP would be considered separate piping runs. For suction piping, a piping run is the piping that runs between the tank and the suction pump.

Consistent with EPA's current policy, if an owner or operator chooses to reinstall a secondarily contained tank or piping that was previously installed, that tank or piping must meet new tank and piping standards in § 280.20 at the time of installation.

The Energy Policy Act defined secondary containment as a release detection and prevention system that meets the interstitial monitoring requirement in § 280.43(g). Based on this definition, EPA is proposing to include interstitial monitoring as part of the secondary containment definition. Therefore, secondary containment means having an interstitial space to monitor and monitoring that space for a leak. Consistent with the 1988 UST regulation release detection requirements, EPA is proposing interstitial monitoring of new and replaced secondarily contained tanks and piping at least once every 30 days.

EPA is proposing owners and operators install under-dispenser containment beneath new dispenser systems at UST systems. Data from release sites show dispensers are one of the leading release sources.[18] [19] Under-dispenser containment is located underground and will prevent some releases by containing small releases that occur inside and beneath the dispenser. EPA considers a dispenser system new when both the dispenser and equipment needed to connect the dispenser to an UST system are installed at an UST facility. EPA is proposing check valves, shear valves, unburied risers or flexible connectors, and other transitional components be included as equipment that connects a dispenser to an UST system. This equipment is located beneath the dispenser and typically connects underground piping to a dispenser. If an owner or operator replaces a dispenser but uses existing equipment to connect a dispenser to the UST system, then under-dispenser containment is not required.

To contain small releases from the dispenser, piping, and other equipment, the under-dispenser containment must be liquid tight. EPA is proposing under-dispenser containment be liquid tight on its sides, bottom, and at any penetrations through the containment. EPA is proposing periodic testing of under-dispenser containment in the secondary containment tests section (see section B–4). In addition, an owner or operator must have access to and be able to visually inspect the containment. If visual inspection and access are not available, then under-dispenser containment must be continuously monitored to ensure containment is intact and free of liquids. Continuous monitoring and visual inspections (required in the proposed walkthrough inspections discussed in section B–1) will ensure problems with the under-dispenser containment will be detected before a release to the environment occurs.

The Energy Policy Act requires under-dispenser containment beneath new motor fuel dispenser systems at UST systems. However, EPA is aware of a small number of dispenser systems which do not dispense motor fuel (for example, kerosene dispensers). Small releases can occur at these dispensers in the same manner as they occur at motor fuel dispensers.[20] [21] [22] Therefore, EPA is

[15] Grant Guidelines To States For Implementing The Secondary Containment Provision Of The Energy Policy Act Of 2005: *http://epa.gov/oust/fedlaws/secondco.htm.*

[16] E2, Incorporated, memoranda and analyses submitted under Contract EP–W–05–018, ''U.S. Environmental Protection Agency. Underground Storage Tanks/Leaking Underground Storage Tanks Analytical And Technical Support.'' These supporting materials can be found in the docket for the proposed rulemaking.

[17] IEc Incorporated, Work Assignment # 1–19, ''Methodology and Calculator for Secondary Containment for Piping,'' October 3, 2008.

[18] Petroleum Releases At Underground Storage Tank Facilities In Florida, Peer Review Draft, U.S. EPA/OUST, March 2005.

[19] Evaluation Of Releases From New And Upgraded Underground Storage Tanks, Peer Review Draft, U.S. EPA/OUST, August 2004.

[20] Petroleum Releases At Underground Storage Tank Facilities In Florida, Peer Review Draft, U.S. EPA/OUST, March 2005.

[21] Evaluation Of Releases From New And Upgraded Underground Storage Tanks, Peer Review Draft, U.S. EPA/OUST, August 2004.

[22] Frequency And Extent Of Dispenser Releases At Underground Storage Tank Facilities In South

Continued

proposing owners and operators install under-dispenser containment beneath new dispenser systems at UST systems, irrespective of whether they dispense motor fuel.

What issues related to this change does EPA request comment or additional data on?

- If you have any of the following data, please provide the:
  - ○ Number of UST systems not installed within 1,000 feet of any existing community water system or potable drinking water well.
  - ○ Number of non-motor fuel dispensers connected to UST systems in the United States.
  - ○ Typical length or percentage of piping repaired during a typical repair.
  - ○ Costs, types and frequency of piping repairs and replacements.
- Are there regulatory incentives that EPA should consider to encourage owners and operators to move toward secondary containment? If yes, what are those incentives?
- In addition to the three types of piping identified for exclusion by EPA, are there other types of piping for which secondary containment is impractical or unnecessary? If yes, what are those types and why is secondary containment impractical or unnecessary?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

B. Additional Requirements for Operation and Maintenance

The 1988 UST regulation required owners and operators to install improved UST system equipment to detect and prevent releases; however, it did not require operation and maintenance for all of that equipment. Owners and operators need to properly operate and maintain their UST system equipment in order to prevent and quickly detect releases. Therefore, we propose to add requirements for periodic spill, overfill, secondary containment, and release detection testing along with periodic walkthrough inspections to prevent and quickly detect releases.

When a test or inspection occurs, owners and operators may find problems with the UST system. When a test or inspection indicates a problem, owners and operators must repair the problem to remain in compliance with the 1988 UST regulation. Section 280.33 of the 1988 regulation describes repair requirements for UST systems.

1. Walkthrough Inspections

What is EPA proposing?

In § 280.37, EPA is proposing owners and operators perform walkthrough inspections of their UST systems at least once every 30 days and meet one of these three options:

- *Option 1:* Conduct operation and maintenance walkthrough inspections that, at a minimum and as appropriate to the facility, check the following equipment:
  - ○ Spill prevention equipment
    - ■ Open and visually check for any damage;
    - ■ Remove any liquid or debris;
    - ■ Check each fill cap to make sure it is securely on the fill pipe; and
    - ■ If secondarily contained with continuous interstitial monitoring, check for a leak in the interstitial area.
  - ○ Sumps and dispenser cabinets
    - ■ Open and visually check for any damage, leaks to the containment area, or releases to the environment;
    - ■ Remove any liquid (in contained areas) or debris; and
    - ■ If contained areas are secondarily contained with continuous interstitial monitoring, check for a leak in the interstitial area.
  - ○ Monitoring/observation wells
    - ■ Check covers to make sure they are secured.
  - ○ Cathodic protection
    - ■ Check to make sure impressed current cathodic protection rectifiers are on and operating; and
    - ■ Ensure records of three year cathodic protection testing and 60 day impressed current system inspections are reviewed and current.
  - ○ Release detection
    - ■ Check to make sure the release detection system is on and operating with no alarm conditions or other unusual operating conditions present;
    - ■ Check any devices such as tank gauge sticks, groundwater bailers, and hand-held vapor monitoring devices for operability and serviceability; and
    - ■ Ensure records of release detection testing are reviewed monthly and current.
- Option 2—Conduct operation and maintenance walkthrough inspections according to a standard code of practice developed by a nationally recognized association or independent testing laboratory that are comparable to the specific requirements listed above.
- Option 3—Conduct operation and maintenance walkthrough inspections developed by the implementing agency that are comparable to the specific requirements listed above.

EPA is proposing owners and operators maintain walkthrough inspection records for one year. Each record must include a listing of each area checked, whether each area checked was acceptable or needed to have some action taken, and a description of actions taken to correct an issue.

Why is EPA proposing this change? What background information is available about this change?

The 1988 UST regulation focused on owners and operators installing improved UST equipment, but did not require significant equipment operation and maintenance activities. After more than 20 years of experience with UST requirements, EPA finds both using improved equipment and operating and maintaining UST equipment are necessary to protect human health and the environment. 12 states have adopted monthly walkthrough inspection requirements for their UST facilities. Of those states, only California has been implementing the requirement long enough to provide input about the effectiveness of walkthrough inspections. California indicates that, according to UST inspectors and industry people, the monthly inspections decreased the number of violations found, reduced the frequency and duration of release detection alarms, prompted better record keeping, and resulted in overall better operations at the UST facility.[23]

As part of operating and maintaining UST systems, EPA proposes owners and operators conduct walkthrough inspections at least once every 30 days. Periodic walkthrough inspections will help owners and operators detect problems earlier, resulting in fewer releases to the environment and reduced environmental impacts of releases that reach the environment.

Walkthrough inspections are designed to verify proper function or operating condition of easily accessible UST system components and ensure required records are current. These inspections typically include reviewing records and checking components to confirm function or condition. For example, owners and operators will be required to review current records and ensure equipment is operating properly; containment sumps are free of liquid and debris; and leaks are not occurring at dispensers, submersible turbine pumps, and other areas. EPA used the Petroleum Equipment Institute's Recommended Practice 900, Recommend Practices for the Inspection and Maintenance of UST Systems, as a

Carolina (EPA–510–R–04–004, September 2004). *http://epa.gov/oust/pubs/dispenser.htm.*

[23] Email from Laura Fisher, California State Water Resources Control Board, April 30, 2010.

guide as we developed the proposed walkthrough inspection requirements. EPA is proposing allowing owners and operators to hire a third party to conduct walkthrough inspections instead of performing the inspection themselves.

EPA is proposing three options for owners and operators to choose from in conducting walkthrough inspections: follow the specific requirements (described below) appropriate to the UST facility; use a code of practice developed by a nationally recognized association or independent testing laboratory; or follow requirements developed by the implementing agency. At a minimum, walkthrough inspections conducted according to a code of practice or developed by the implementing agency need to be comparable to the following requirements. The specific requirements proposed and reasons for their inclusion in the regulation are:

• For spill prevention equipment—open each spill prevention area, check for damage, and remove any liquid or debris; check the fill cap to make sure it is securely on the fill pipe; and for secondarily contained spill prevention equipment with continuous interstitial monitoring, check for a leak in the interstitial area.

○ Damaged spill prevention equipment can release regulated substances into the environment and liquid or debris can reduce the equipment's capacity. Fill caps not secure on the fill pipe can result in vapors exiting the tank and can render overfill prevention inoperable in tanks that use flow restrictors in the vent line. Some spill prevention equipment construction materials may not be designed to contain regulated substances for long periods of time. For spill prevention equipment with two walls and continuous interstitial area monitoring, owners and operators need to check the monitoring device or area to make sure the interstitial monitoring is operating properly and does not indicate a leak in the interstitial area.

• For sumps, including submersible turbine pump sumps and transition sumps—open and visually check for damage, leaks to the containment area, or releases to the environment; remove any liquid (in contained sumps) or debris; and for secondarily contained sumps with continuous interstitial monitoring, check for a leak in the interstitial area.

○ Drips and other small releases from damaged components contained by the sump can result in regulated substances remaining in the sump. Damaged sumps can release regulated substances into the environment. Liquid or debris can reduce the capacity of a contained sump. Some sump construction materials may not be designed to contain regulated substances for long periods of time. For sumps with two walls and continuous interstitial area monitoring, owners and operators need to check the monitoring device or area to make sure the interstitial monitoring is operating properly and does not indicate a leak in the interstitial area.

• For dispenser cabinets—open each cabinet; visually check for damage, leaks to the containment area, or releases to the environment; remove any liquid (in dispensers with under-dispenser containment) or debris; and for dispenser sumps with continuous interstitial monitoring, check for a leak in the interstitial area.

○ Visual checks for dispensers are important because the 1988 UST regulation does not require release detection for dispensers. Drips and other small releases from damaged components in the dispenser cabinet can result in regulated substances remaining in the dispenser sump or being released to the environment. Damaged under-dispenser containment (if present) can release regulated substances into the environment. If under-dispenser containment is present, liquid or debris can reduce the capacity of the containment sump. Some under-dispenser containment construction materials may not be designed to contain regulated substances for long periods of time. For dispenser sumps with two walls and continuous interstitial area monitoring, owners and operators need to check the monitoring device or area to make sure the interstitial monitoring is operating properly and does not indicate a leak in the interstitial area.

• For monitoring or observation wells—check the covers to make sure they are secured.

○ These wells need to be secured to avoid potential contamination of wells through the well cover (for example by surface runoff or accidental fuel delivery to the well).

• For cathodic protection—check to make sure impressed current cathodic protection rectifiers are on and operating; ensure records of three year cathodic protection testing and 60 day impressed current system inspections are reviewed and up to date.

○ Impressed current cathodic protection systems need to be on and operating to protect underground metal components of the UST system that routinely contain regulated substances from corrosion. In addition, owners and operators need to retain records of the most recent two cathodic protection tests (required once every three years) and the most recent three inspections (required once every 60 days) for impressed current systems. These records show that cathodic protection systems are on and operating properly to protect UST system components from corrosion. Owners and operators who record rectifier readings and compare those readings to the normal operating parameters of the rectifier during the 30 day walkthrough inspections will meet the 60 day impressed current inspection requirement in § 280.31(c) without further activity. Failure to operate and maintain cathodic protection could mean that metal UST system components are corroding and could result in a release to the environment.

• For release detection—check to make sure the release detection system is on and operating with no alarm conditions or other unusual operating conditions present; check any devices such as tank gauge sticks, groundwater bailers, and hand-held vapor monitoring devices for operability and serviceability; and ensure records of release detection testing are reviewed monthly and up to date.

○ Release detection equipment needs to be operable in order to detect releases when they occur. Owners and operators must respond to release detection alarms. Manual release detection equipment needs to be serviceable and operational so owners and operators can perform proper release detection. In addition, owners and operators need to ensure they review the most recent month's release detection information and retain the most recent year's worth of release detection records. These records are required for all methods of release detection, and reviews ensure UST systems are being checked for a release at least once every 30 days. Failure to perform these checks could mean release detection equipment is not operating properly and could result in a release to the environment.

Owners and operators using continuous interstitial monitoring for double-walled spill prevention devices, sumps, or dispenser containment areas need to check the interstitial monitoring to make sure it is operating properly and does not indicate a leak in the interstitial area. EPA is aware of these continuous interstitial monitoring methods: vacuum, pressure, or liquid-filled interstitial area monitoring and placing sensors in the interstitial area. For vacuum, pressure, or liquid-filled interstitial area monitoring using electronic devices and sensors, owners and operators will need to check the electronic device to make sure it is not

in alarm. For interstitial areas monitored using vacuum, pressure, or liquid-filled interstitial area monitoring not using some type of electronic monitoring, owners and operators will need to make sure the vacuum, pressure, or liquid is maintaining its appropriate level. Owners and operators who do not check the interstitial monitoring of spill prevention devices must perform periodic spill prevention equipment testing described in § 280.35(a)(ii) of the proposed UST regulation. Owners and operators who do not check the interstitial monitoring of sumps or dispenser containment areas and who use those areas for interstitial monitoring for their piping must perform the periodic testing of secondary containment described § 280.36(a)(iii) of the proposed UST regulation.

EPA is proposing walkthrough inspections be conducted at least every 30 days. 30 days is a reasonable time frame because:

- Deliveries occur frequently—often daily or every few days;
- Dispenser filters are changed every few weeks or months;
- It is consistent with the 30 day release detection monitoring requirement; and
- Current operation and maintenance industry standards (Petroleum Equipment Institute Recommended Practice 900) recommend monthly checks as one of the periodic inspection frequencies.

EPA is proposing owners and operators retain the most recent year's worth of records to demonstrate compliance with the walkthrough inspection requirement. Owners and operators will be required to document they performed each of the required activities at least once every 30 days. Keeping one year's worth of records is consistent with the current recordkeeping requirement for release detection monitoring. EPA is proposing owners and operators document each area checked, whether each area checked was acceptable or needed to have some action taken, and provide a description of any actions taken to correct an issue. This information is important to assist implementing agencies in determining proper operation and maintenance.

What issues related to this change does EPA request comment or additional data on?

- Is a 30 day inspection frequency an appropriate time frame for owners and operators to conduct walkthrough inspections?
- Is it reasonable for owners and operators to begin conducting walkthrough inspections immediately after the final UST regulation becomes effective?
- Is specialized training required for individuals completing walkthrough inspections? If yes, what should EPA establish as the extent of the training?
- Are there other codes of practice that should be included for conducting walkthrough inspections?
- Is requiring owners and operators to keep the most recent year's worth of records sufficient?
- Are the items EPA proposes checking appropriate? Should EPA add anything? Are there checks EPA is proposing that should not be required?
- Should EPA consider not requiring owners and operators to remove water from contained sumps when both of the following conditions exist?
  - Owners and operators choose to connect an anode to the metal components in the sump for corrosion protection and
  - The sump is not used for interstitial monitoring.

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

2. Spill Prevention Equipment Tests

What is EPA proposing?

In § 280.35, EPA is proposing owners and operators test spill prevention equipment (such as a catchment basin, spill bucket, or other spill containment device) at installation and at least once every 12 months. This test must ensure spill prevention equipment is liquid tight by performing a vacuum, pressure, or liquid test according to one of the following:

- Requirements developed by the manufacturer (Note that owners and operators may use this option only if the manufacturer developed spill prevention equipment test requirements);
- Code of practice developed by a nationally recognized association or independent testing laboratory; or
- Requirements determined by the implementing agency to be no less protective of human health and the environment than the two bulleted items above.

Exception: EPA is proposing spill prevention equipment tests not be required in those situations where spill prevention equipment has two walls and the space between the walls is monitored continuously (interstitial monitoring) to ensure the integrity of both the inner and outer wall.

EPA is proposing owners and operators maintain the following:

- Records of spill prevention equipment tests for three years; or
- Documentation showing the spill prevention equipment has two walls and is monitored continuously for each spill prevention device installed at the facility. Owners and operators must maintain this documentation for as long as the spill prevention equipment is monitored continuously and for three additional years after continuous monitoring ends.

EPA is proposing owners and operators meet this requirement within one year after the effective date of the final UST regulation for existing UST systems and at installation for UST systems installed after the effective date of the final regulation.

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing this change to help ensure small releases occurring when the delivery transfer hose is disconnected from the fill pipe are contained in the spill prevention equipment. Owners and operators need to properly operate and maintain their spill prevention equipment in order to prevent releases to the environment. If a small release occurs at the fill port and the spill prevention equipment is not liquid tight, then the release can exit the spill prevention equipment and reach the environment. EPA is aware of various problems with spill prevention equipment. Examples include damage due to: Vehicle drive over; ground movement or freeze/thaw cycles; inadequate installation practices; and normal wear and tear. In addition, the typical life of spill prevention equipment is about three to seven years, but the 1988 UST regulation does not have a replacement requirement. Today's proposed periodic spill prevention equipment test will minimize problems and ensure spill prevention equipment will contain small releases from the delivery hose when disconnected from the fill pipe.

EPA is proposing not to require owners and operators of double-walled spill prevention equipment with continuous interstitial monitoring to conduct annual tests because this spill prevention equipment is continuously checked for tightness through interstitial monitoring. EPA is proposing owners and operators in the monthly walkthrough inspections visually check continuous interstitial monitoring methods that do not alert the owner and operator with an alarm. Additional

information on these inspections is available in section B–1.

EPA is proposing to require vacuum, pressure, or liquid methods when testing spill prevention equipment. We believe these options provide owners and operators with significant flexibility for testing this equipment.

EPA is proposing to specifically allow owners and operators to use manufacturer's requirements or a code of practice developed by a nationally recognized association or independent testing laboratory for spill prevention equipment tests. The manufacturer's requirement is an option only when the manufacturer has developed a testing requirement. In response to today's proposed regulation, EPA anticipates nationally recognized associations or independent testing laboratories will develop codes of practice for spill prevention equipment tests and manufacturers will develop testing requirements. In addition, EPA is providing implementing agencies flexibility to allow other methods they determine to be as protective of human health and the environment as the manufacturer's requirements or a code of practice. This option allows alternatives in the event codes of practice and manufacturer's testing requirements are not developed.

EPA is proposing owners and operators conduct spill prevention equipment tests at least once every 12 months. We propose this frequency because spill prevention equipment is prone to problems that can occur over the course of a year and frequent tests will catch problems earlier. In addition, testing every 12 months is consistent with other testing requirements, such as annual automatic line leak detector testing, in the 1988 regulation.

EPA is proposing owners and operators maintain spill prevention equipment test records three years for each spill containment device at a facility. These records will enable implementing agencies to determine whether owners and operators conducted annual spill prevention equipment testing during the three year inspections required by the Energy Policy Act. These records will also demonstrate that owners and operators tested their spill prevention equipment, ensuring it will contain small drips and spills that can occur when the transfer hose is disconnected from the fill pipe. In order for double-walled spill prevention equipment with continuous interstitial monitoring to be exempt from spill prevention equipment tests, owners and operators will need to maintain documentation showing spill prevention equipment has two walls and uses continuous interstitial monitoring. In addition, EPA is proposing owners and operators maintain this documentation for three years after continuous interstitial monitoring ends. EPA is proposing maintaining this documentation so owners and operators can demonstrate compliance with the spill prevention equipment testing requirement.

What issues related to this change does EPA request comment or additional data on?

- Is a 12 month frequency an appropriate time frame for spill prevention equipment tests? For example, should EPA consider more frequent tests in sensitive areas, such as source water protection areas?
- Are there other acceptable test methods in addition to vacuum, pressure, or liquid spill prevention equipment tests?
- Is the one year time frame proposed for owners and operators to begin implementing this requirement reasonable?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

3. Overfill Prevention Equipment Tests

What is EPA proposing?

In § 280.35, EPA is proposing owners and operators test proper operation of overfill prevention equipment (automatic shutoff devices, flow restrictors, and high level alarms) at installation and at least once every three years. The test must ensure overfill prevention equipment is set to activate at the appropriate level in the tank (as specified in § 280.20(c)) and the equipment will activate when the regulated substance reaches that height. EPA is proposing owners and operators test according to one of the following:

- Requirements developed by the manufacturer (Note that owners and operators may use this option only if the manufacturer developed overfill prevention equipment test requirements);
- Code of practice developed by a nationally recognized association or independent testing laboratory; or
- Requirements determined by the implementing agency to be no less protective of human health and the environment than the two bulleted items above.

EPA is proposing owners and operators maintain records of overfill prevention equipment tests for three years for each overfill device installed at a facility.

For UST systems installed after the effective date of the final UST regulation, EPA is proposing owners and operators meet this requirement at installation. For UST systems installed on or before the final UST regulation is effective, EPA is proposing owners and operators meet this requirement within three years and according to the time frames in the following table:

PHASE-IN SCHEDULE FOR OVERFILL PREVENTION EQUIPMENT TESTS

Criteria	Date by which first test must be conducted
One or more USTs at the facility were installed on or before 12/22/1988	One year after effective date of rule.
No USTs at the facility were installed on or before 12/22/1988 and at least one UST at the facility was installed on or before 12/22/1998.	Two years after effective date of rule.
All USTs at the facility were installed after 12/22/1998	Three years after effective date of rule.

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing this change to help ensure overfill prevention equipment is operating properly and will activate before an UST is overfilled. Owners and operators need to properly operate and maintain their overfill prevention equipment in order to prevent releases to the environment. If overfill prevention equipment is not working properly, an UST can be overfilled and release product to the environment. EPA is aware that USTs are being overfilled and there are problems with overfill prevention equipment. Examples include: Tampering; improper use; and normal wear and tear. The proposed periodic overfill prevention equipment tests will minimize problems and ensure overfill prevention equipment is operating properly.

Overfill prevention test methods should not overfill the tank to determine whether overfill prevention equipment is operating properly. Rather, the equipment should be tested or inspected to determine whether it will operate or activate properly according to requirements set forth in the UST regulation. For example, a test or inspection for an automatic shutoff device in the fill pipe might include removing the device and checking it for the ability to operate and measuring the position of the device in the tank to determine whether it will activate at the correct height.

For overfill prevention equipment tests, EPA is proposing owners and operators use manufacturer's requirements or a code of practice developed by a nationally recognized association or independent testing laboratory. The manufacturer's requirement is an option only when the manufacturer has developed a testing requirement. In response to this proposed regulation, EPA anticipates nationally recognized associations or independent testing laboratories will develop codes of practice for overfill prevention equipment tests, and manufacturers will develop testing requirements. In addition, EPA is providing implementing agencies flexibility to allow other methods they determine to be as protective of human health and the environment as the manufacturer's requirements or a code of practice. This option allows alternatives in the event that codes of practice and manufacturer's testing requirements are not developed.

EPA is proposing owners and operators conduct overfill prevention equipment tests at least once every three years. We propose this frequency because overfill prevention equipment is less prone to problems than spill prevention equipment, but still needs periodic testing. In addition, a three year time frame is consistent with other testing requirements, such as cathodic protection testing and the proposed three year interstitial integrity testing.

EPA is proposing to stagger implementation over a three year period based on the installation date of the oldest UST at the facility. The proposed phase-in will require overfill prevention equipment in older UST systems that pose a greater risk to the environment to be tested first. The phase-in approach will allow overfill prevention equipment tests to be spread out and reduce the risk of a last-minute rush of owners and operators obtaining overfill prevention equipment tests at the end of the initial three-year period.

EPA is proposing owners and operators maintain overfill prevention equipment test records for three years for each overfill device at a facility. These records will demonstrate to implementing agencies that the overfill prevention equipment has been tested, is set at the appropriate height in the tank, and will activate when regulated substances reach that height. EPA is proposing owners and operators maintain records for three years to coincide with the three year inspection frequency required by the Energy Policy Act.

What issues related to this change does EPA request comment or additional data on?

- Is a three year frequency an appropriate time frame for overfill prevention equipment tests? For example, should EPA consider more frequent tests in sensitive areas such as source water protection areas? Should EPA consider less frequent testing?
- Should EPA consider owners and operators retain overfill prevention equipment test records for a different time frame?
- Is the three year time frame and phase-in proposed for owners and operators to begin implementing this requirement reasonable?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

4. Secondary Containment Tests

What is EPA proposing?

In § 280.36, EPA is proposing owners and operators test secondary containment areas that use interstitial monitoring at least once every three years. A secondary containment test (also called an interstitial integrity test) is performed in the space between tank walls, pipe walls, or in a secondary containment sump area and ensures the area being tested has integrity and will contain a leak. Secondary containment areas include tank and piping interstitial areas, as well as containment sumps used as part of the piping secondary containment and interstitial monitoring. EPA is proposing owners and operators test interstitial integrity areas using a vacuum, pressure, or liquid method according to one of the following:

- Requirements developed by the manufacturer (Note that owners and operators may use this option only if the manufacturer developed interstitial integrity test requirements);
- Code of practice developed by a nationally recognized association or independent testing laboratory; or
- Requirements determined by the implementing agency to be no less protective of human health and the environment than the two bulleted items above.

Exceptions: EPA is proposing the following exceptions apply to interstitial integrity tests:

- *Tanks*—Owners and operators using continuous interstitial monitoring on their tanks will not be required to perform periodic interstitial integrity tests.
- *Piping*—Owners and operators using vacuum monitoring, pressure monitoring, or liquid-filled interstitial space monitoring on their underground piping will not be required to perform periodic interstitial integrity tests.
- *Containment sumps*—Owners and operators using containment sumps which have two walls and continuously monitor the interstitial space between the walls for releases will not be required to perform interstitial integrity tests.

EPA is proposing owners and operators maintain the following:

- Records of interstitial integrity tests for three years; or
- Documentation demonstrating that the tanks, piping, or containment sumps are not required to have a periodic interstitial integrity test according to the exceptions above. Owners and operators must maintain this documentation for as long as the tank, piping, or containment sump uses one of the continuous methods listed in the exceptions and for three additional years after continuous monitoring ends.

For UST systems installed after the effective date of the final UST regulation, EPA is proposing owners and operators meet this requirement at installation. For UST systems installed on or before the final UST regulation is effective, EPA is proposing owners and operators meet this requirement within three years and according to the time frames in the following table:

PHASE-IN SCHEDULE FOR INTERSTITIAL INTEGRITY TESTS

Criteria	Date by which first test must be conducted
One or more USTs at the facility were installed on or before 12/22/1988	One year after effective date of rule.
No USTs at the facility were installed on or before 12/22/1988 and at least one UST at the facility was installed on or before 12/22/1998.	Two years after effective date of rule.
All USTs at the facility were installed after 12/22/1998	Three years after effective date of rule.

This proposed requirement only applies to UST systems using interstitial monitoring. It does not apply to UST systems without secondary containment or those with secondary containment but not using interstitial monitoring for release detection.

Why is EPA proposing this change? What background information is available about this change?

The Energy Policy Act requires states that receive federal Subtitle I money implement additional measures to protect groundwater, either with secondary containment for new and replaced tanks and piping or financial responsibility for manufacturers and installers. 54 of 56 states have implemented the secondary containment option. To ensure secondary containment is working properly, the integrity of the interstitial space needs to be tested. Therefore, EPA is proposing periodic interstitial integrity tests of the interstitial space in secondarily-contained UST systems which use interstitial monitoring for release detection. These systems need to contain a leak until interstitial monitoring detects the regulated substance. Currently, EPA has no requirement for ensuring the integrity of secondary containment areas.

Since most states implemented the secondary containment requirements in the Energy Policy Act for most new and replaced tanks and piping, new and replaced UST systems will be secondarily contained with interstitial monitoring. This requirement signals a move from non-secondarily contained UST systems using methods of release detection that detect a release only after regulated substances have reached the environment to secondary containment with interstitial monitoring that identifies a problem before regulated substances reach the environment. Interstitial integrity tests will confirm for owners and operators that secondary containment will contain a leak until it is detected and the problem is repaired.

Some interstitial monitoring methods for tanks, piping, and containment sumps already continuously ensure the interstitial area's integrity. When an owner or operator uses one of these methods, EPA will not require periodic interstitial integrity tests.

• *Tanks*—According to EPA's source and cause of release information, tanks are not the leading source of releases [24] [25] In addition, tanks are nearly always constructed in a factory under controlled conditions, making it less likely problems will occur in interstitial areas after installation. For these reasons, EPA proposes not to require owners and operators to conduct periodic interstitial integrity tests of tanks using continuous interstitial monitoring. Methods of continuous interstitial monitoring for tanks include liquid filled, vacuum, pressure, and sensors in the interstitial space.

• *Piping*—EPA's source and cause of release information shows that a significant number of releases occur from piping.[26] [27] In addition, piping and containment sumps are assembled in the field during the installation process, potentially creating increased opportunities for releases. Therefore, unless owners and operators use continuous liquid-filled, vacuum, or pressure interstitial monitoring for piping release detection, EPA is proposing to require periodic interstitial integrity testing for piping. For example, owners and operators who choose to use sensors in containment sumps for piping interstitial monitoring must also perform three year interstitial integrity tests of the piping interstitial space.

• *Containment sumps*—Similar to piping, EPA's source and cause of release information shows that a significant number of releases occur in containment sump areas. EPA is also aware of issues with the tightness of containment sumps. Based on this information, EPA is proposing owners and operators conduct periodic interstitial integrity tests of containment sumps used for piping interstitial monitoring, unless the containment sump has two walls and the interstitial space between the walls in the sump is continuously monitored. For example, if an owner or operator has a double-walled containment sump and uses a sensor, vacuum, pressure, or liquid-filled interstitial area to continuously monitor the space between the two walls, then periodic interstitial integrity tests of that sump are not required under this proposal. Owners and operators of double-walled sumps without continuous interstitial monitoring must perform three year interstitial integrity tests.

Continuous interstitial monitoring means the secondary containment space is monitored all the time by a method or device and owners and operators check the continuous monitoring method or device for a leak at least once every 30 days. In addition, owners and operators must immediately respond to any alarms they encounter. Methods of continuous interstitial monitoring include vacuum, pressure, and liquid-filled interstitial areas along with sensors and probes located in the interstitial area.

EPA is proposing owners and operators conduct interstitial integrity tests for tanks, piping, and sumps at least once every three years. EPA is proposing this frequency because we believe secondarily contained UST systems are much less prone to releases than single-walled UST systems. However, since owners and operators are relying on the interstitial space to detect problems, the interstitial areas still need periodic tests to ensure proper operation and maintenance. A three year time frame is consistent with other testing requirements, such as cathodic protection testing and the proposed overfill prevention equipment testing.

EPA is proposing to stagger implementation over a three year period based on the installation date of the oldest UST at the facility. The proposed phase-in will require older UST systems that may pose a greater risk to the environment to be tested first. The phase-in approach will allow interstitial tests to be spread out and reduce the risk of a last-minute rush of owners and operators obtaining tests at the end of the initial three-year period.

[24] Petroleum Releases At Underground Storage Tank Facilities In Florida, Peer Review Draft, U.S. EPA/OUST, March 2005.

[25] Evaluation Of Releases From New And Upgraded Underground Storage Tanks, Peer Review Draft, U.S. EPA/OUST, August 2004.

[26] Petroleum Releases At Underground Storage Tank Facilities In Florida, Peer Review Draft, U.S. EPA/OUST, March 2005.

[27] Evaluation Of Releases From New And Upgraded Underground Storage Tanks, Peer Review Draft, U.S. EPA/OUST, August 2004.

EPA is proposing owners and operators maintain interstitial integrity test records for three years for each regulated tank, pipe, and containment sump at a facility or maintain documentation demonstrating periodic interstitial integrity tests are not required. Documentation supporting that periodic interstitial integrity tests are not required could include: the tank or piping uses vacuum, pressure, or liquid-filled interstitial monitoring; the tank uses continuous interstitial sensors for interstitial monitoring; or the containment sump has two walls and the space between the containment sump walls is continuously monitored. In addition, EPA is proposing owners and operators maintain this documentation for three years after continuous interstitial monitoring ends. EPA is proposing owners and operators maintain this documentation so they can demonstrate to implementing agencies compliance with the interstitial integrity test requirement. This documentation coincides with the three year inspection requirements in the Energy Policy Act.

What issues related to this change does EPA request comment or additional data on?

- Is a three year frequency an appropriate time frame for interstitial integrity tests? For example, should EPA consider more frequent tests in sensitive areas such as source water protection areas?
- Should EPA consider owners and operators retain records of interstitial integrity tests for a different time frame?
- Should EPA consider interstitial integrity tests for tanks using continuous interstitial sensors? Should EPA consider limiting this exclusion to discriminating sensors?
- Is there a need for a phased-in schedule to implement this requirement? Is the three year time frame and phase-in proposed for owners and operators to begin implementing this requirement reasonable?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

5. Operation and Maintenance Requirements for Release Detection Equipment

What is EPA proposing?

In § 280.40, EPA is proposing UST owners and operators perform annual operation and maintenance tests on electronic and mechanical components of their release detection equipment to ensure the equipment is operating properly. Owners and operators will be required to check the following equipment:

- ATG and other controllers
  - Test alarm;
  - Verify system configuration; and
  - Test battery back-up.
- Probes and sensors
  - Inspect for residual build-up;
  - Ensure floats move freely;
  - Ensure shaft is not damaged;
  - Ensure cables are free of kinks, bends, and breaks; and
  - Test alarm operability and communication with controller.
- Line leak detector
  - Simulate leak which determines capability to detect a leak; and
  - Inspect leak sensing o-ring.
- Vacuum pumps and pressure gauges
  - Ensure communication with sensors and controller.

EPA is proposing owners and operators meet this requirement according to one of the following: manufacturer's instructions; a code of practice developed by a nationally recognized association or independent testing laboratory; or requirements developed by the implementing agency.

EPA is proposing owners and operators maintain records of the annual operation tests for three years. At a minimum, records must: list each component tested; indicate whether each component met the criteria listed above or needed to have action taken; and describe any action taken to correct an issue.

EPA is proposing owners and operators begin meeting this requirement no later than one year after the effective date of the final UST regulation.

Why is EPA proposing this change? What background information is available about this change?

EPA is concerned about the performance of release detection equipment. Inspectors routinely find release detection equipment installed on UST systems, but that equipment is not properly operated and maintained. In addition, information from an analysis in Florida indicates, ''Leak detection successfully detected 26 percent of all releases. Conversely, leak detection was specifically identified as failing to detect 23 percent of releases.'' The analysis also says the exact reason for the leak detection failure could not be determined. However, the analysis provided these possible reasons, ''* * * faulty equipment; improper installation; operation or maintenance; or insufficient performance standards.'' [28] To increase the effectiveness of release detection, EPA is targeting operation and maintenance.

The 1988 UST regulation in § 280.40(a)(2) requires that release detection ''Is installed, calibrated, operated, and maintained in accordance with the manufacturer's instructions, including routine maintenance and service checks for operability or running condition;''. Most owners and operators installed the required release detection equipment, but some owners and operators are not properly operating and maintaining their equipment. To achieve optimal performance from equipment and meet release detection requirements, it is important for UST system owners and operators to both install the equipment and properly operate and maintain it. In the 1988 UST regulation, EPA did not provide specifics on minimum requirements to ensure adequate operation and maintenance of release detection equipment. As a result, operation and maintenance requirements vary greatly, even between similar types of equipment.

Some manufacturers' requirements do not adequately address operation and maintenance. For example, some manufacturers only recommend operation and maintenance checks; but EPA is taking the position that checks should be mandatory instead of optional. In addition, similar release detection components should be tested in a similar manner, which will increase the likelihood all release detection equipment will function at optimal levels for as long as possible. California's in-field analysis of sensors used for release detection and anecdotal feedback supports EPA's belief. [29]

EPA is proposing this change to improve and standardize operation and maintenance for all release detection equipment. This proposed change will provide owners and operators with an understanding of equipment tests necessary to ensure equipment is properly operated and maintained. EPA is proposing a set of minimum operation and maintenance criteria owners and operators must follow for all electronic- and mechanical-based release detection equipment. EPA is also addressing equipment that is neither electronically nor mechanically based (for example,

[28] Petroleum Releases At Underground Storage Tank Facilities In Florida, Peer Review Draft, U.S. EPA/OUST, March 2005.

[29] California's ''Field Evaluation Of Underground Storage Tank System Leak Detection Sensors,'' August 2002. *http://www.waterboards.ca.gov/water_issues/programs/ust/leak_prevention/sensors/index.shtml.*

bailers and measuring sticks used for activities such as statistical inventory reconciliation [SIR]) separately under the walkthrough inspections section (see section B–1).

EPA based these proposed operation and maintenance minimum requirements for release detection on common requirements and recommendations by various equipment manufacturers of similar equipment. EPA used the National Work Group on Leak Detection Evaluation's (NWGLDE) list of leak detection equipment to identify commonly used equipment.[30] In addition, EPA's publication, *Operating And Maintaining Underground Storage Tanks Systems: Practical Help And Checklists* and Petroleum Equipment Institute's *Recommended Practices for the Inspection and Maintenance of UST Systems (RP 900)* also helped establish proper operation and maintenance activities.

Regarding our proposal to use a code of practice developed by a nationally recognized association or independent testing laboratory, EPA knows of one code of practice currently being developed that may address operability testing for release detection equipment. After that code of practice is final, EPA will review it and decide whether to include it in the final UST regulation.

EPA is proposing owners and operators maintain records of annual operation tests for three years. Results of tests must include: a list of each component tested; whether it tested acceptable or needed action; and a description of any action taken to correct an issue. Three years worth of records are consistent with the three year inspection cycle, and content of the records will allow owners and operators to demonstrate compliance with this operation and maintenance requirement.

Finally, EPA is allowing owners and operators up to one year from the effective date of the final UST regulation to meet this requirement. One year is consistent with the annual test frequency requirement already in place for automatic line leak detectors, and many third-party service providers nationwide already perform the testing.

What issues related to this change does EPA request comment or additional data on?

- Are the proposed minimum operation and maintenance requirements sufficient to cover release detection equipment on regulated UST systems?
- Are there additional performance tests EPA should consider?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

C. Addressing Deferrals

Note about the overlap of UST regulations and Spill Prevention Control and Countermeasures (SPCC) regulations: At the time of the 1988 UST regulation, facilities with an aggregate completely buried storage capacity greater than 42,000 gallons and located near navigable waters of the U.S. or adjoining shorelines were subject to both UST rules and SPCC rules. Since then, SPCC rules have been amended and the rule exempts completely buried storage tanks, as well as connected underground piping, underground ancillary equipment, and containment systems, when subject to the technical requirements of 40 CFR part 280. In today's proposal, EPA proposes to continue to defer the aboveground components associated with airport hydrant systems and USTs with field-constructed tanks. Only those deferred aboveground components will be subject to SPCC requirements. EPA is proposing to regulate the underground components associated with airport hydrant systems and USTs with field-constructed tanks. In addition, EPA is proposing to regulate wastewater treatment tank systems and UST systems that store fuel solely for use by emergency power generators deferred under the 1988 regulation. Once the proposal becomes final, these UST systems will no longer be subject to SPCC requirements.

1. Emergency Power Generator UST Systems

What is EPA proposing?

EPA is proposing to eliminate the current deferral in § 280.10(d) for UST systems storing fuel solely for use by emergency power generators. This means emergency power generator USTs will no longer be deferred from release detection requirements in 40 CFR part 280, subpart D and will be subject to all UST requirements.

In addition, EPA is proposing that, no later than 30 days after the effective date of the final UST regulation, owners of UST systems storing fuel solely for use by emergency power generators notify appropriate implementing agencies that their systems exist.

EPA is proposing owners and operators of UST systems storing fuel solely for use by emergency power generators begin meeting these requirements as follows:

- For systems installed after the effective date of the final UST regulation, at the time of installation.
- For systems installed on or before the effective date of the final UST regulation, within one year of the effective date of the final UST regulation.

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing to regulate UST systems storing fuel solely for use by emergency power generators because our previous rationale for deferring release detection no longer applies. To allow time for developing workable release detection requirements, EPA in the 1988 UST regulation deferred release detection requirements for UST systems storing fuel solely for use by emergency power generators. The 1988 UST regulation preamble indicated that monthly monitoring requirements were unworkable because these tanks often were located at unmanned stations in remote areas and visited infrequently.

EPA always intended for these systems to meet release detection requirements when appropriate release detection methods became available. Since the 1988 UST regulation, release detection technologies have matured greatly. In addition, technology is now available to perform release detection at remote sites. Emergency generator tanks and piping can now be monitored for releases by the majority of methods listed in § 280.43. EPA estimates about 30 percent of active UST systems storing fuel solely for use by emergency power generators already have release detection.

Effective remote monitoring methods for release detection are now available and used to monitor unmanned UST systems storing fuel solely for use by emergency power generators. Numerous contractors perform remote monitoring for releases at these unmanned sites. Remote monitors transmit visual or audible alarms to a receiving console at a manned location when there is a suspected or confirmed release. This provides owners and operators with real-time release detection data for immediate response to suspected or confirmed releases at sites with unmanned UST systems storing fuel solely for use by emergency power generators.

Emergency power generator UST systems are located throughout the

[30] National Work Group On Leak Detection Evaluation's (NWGLDE) List Of Leak Detection Evaluations For Storage Tank Systems: *http://www.nwglde.org/*.

country. EPA's review of several state databases revealed these systems are located at hospitals, universities, communication utilities, military installations, and other locations relying on backup power sources. EPA estimates UST systems storing fuel solely for use by emergency power generators now represent approximately 3 percent of the active tank population.[31]

Additionally, 21 states currently require release detection for emergency power generator UST systems. Automatic tank gauging and secondary containment with interstitial monitoring are the most common release detection methods used for tanks associated with these systems. Line tightness testing, line leak detectors, or secondary containment with interstitial monitoring are the most common release detection methods used for piping. Note that safe suction piping does not require release detection. With technology now available to detect releases from emergency power generator UST systems and because these systems pose the same risk to human health and the environment as any other UST system, EPA is proposing to remove the deferral from release detection.

EPA is proposing owners and operators of emergency power generator UST systems installed on or before the effective date of the final UST regulation begin performing release detection within one year of the effective date of the final regulation. EPA is taking the position that one year is reasonable because these USTs are fully regulated except for release detection, and some are already performing release detection. After the effective date of the final regulation, all emergency power generator UST systems must include release detection when installed.

Notification

To make implementing agencies aware that emergency power generator UST systems exist, EPA is proposing owners of these systems submit a one-time notification to the implementing agency. Owners must notify within 30 days of the effective date of the final regulation. This will allow implementing agencies to include emergency power generator UST systems in their inventories.

What issues related to this change does EPA request comment or additional data on?

- Is EPA's estimate of 3 percent for UST systems storing fuel solely for use by emergency power generators accurate?
- Are there technical concerns EPA should address in requiring release detection for emergency power generator UST systems?
- Is EPA's estimate of 30 percent installed release detection on UST systems storing fuel solely for use by emergency power generators accurate?
- How many UST facilities have 10 or more emergency power generator UST systems? Who owns these facilities?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

2. Airport Hydrant Fuel Distribution Systems

What is EPA proposing?

EPA is proposing to regulate currently deferred airport hydrant fuel distribution systems (also referred to as airport hydrant systems). This means airport hydrant systems will no longer be deferred from the requirements of 40 CFR part 280, subparts B (*UST Systems: Design, Construction, Installation and Notification*); C (*General Operating Requirements*); D (*Release Detection*); E (*Release Reporting, Investigation, and Confirmation*); G (*Out-of-Service UST Systems and Closure*); and H (*Financial Responsibility*).

Airport hydrant systems installed on or before the effective date of the final UST regulation must begin meeting the requirements of subparts B (except § 280.22) and C within three years of the effective date of the final UST regulation, subpart D according to the schedule in the table below, and § 280.22 of subpart B along with subparts E, G, and H on the effective date of the final UST regulation. Airport hydrant systems installed after the effective date of the final UST regulation must meet these requirements at the time of installation. Airport hydrant systems with aboveground storage tanks (ASTs) directly connected to the underground hydrant piping are not regulated UST systems under 40 CFR part 280, unless 10 percent or more of the total capacity of the system, including underground piping, is beneath the surface of the ground.

SCHEDULE FOR PHASE IN OF SUBPART D

Component and type of release detection used	Time frame (after [effective date of rule])	Description of requirement
Piping using periodic pressurized bulk line tightness testing.	Within three years.	Conduct one piping tightness test according to the bulk line tightness testing requirement using the maximum detectable leak rates for semiannual testing. For bulk piping segments not capable of meeting the 3.0 gallon per hour leak rate, owners and operators may use a leak rate of up to 6.0 gallons per hour.
	Between years three and six	
	Between years six and seven.	Conduct one piping tightness test according to the bulk line tightness testing requirement using the maximum detectable leak rates for semiannual testing.
	After year seven.	Begin conducting piping tightness testing according to the bulk line tightness testing requirement.
All other piping and tank release detection methods.	Within three years.	Perform release detection according to this subpart.

EPA is proposing to define an airport hydrant fuel distribution system as an UST system that is a combination of one or more tanks directly connected to underground hydrant piping used to fuel aircraft. These systems do not have a dispenser at the end of the piping run, but rather a hydrant (fill stand). If an AST is feeding an intermediary tank or

[31] Industrial Economics, Inc., ''Detailed Assessment of UST Universe by Tank Use and Industry Sector,'' Work Assignment 1–15, Task 6, January 23, 2009.

tanks, this proposed definition does not include the AST, but does include all underground piping entering and leaving intermediary tanks and the intermediary tank(s). Intermediary tanks are those tanks directly connected to the hydrant piping.

Release Detection—Tanks

EPA is proposing airport hydrant system tanks installed prior to the effective date of the final UST regulation meet these requirements:

• The following tanks must be monitored using release detection methods specified in § 280.43.

○ Shop fabricated tanks.

○ Field-constructed tanks with a capacity less than or equal to 50,000 gallons.

• Field-constructed tanks with capacity greater than 50,000 gallons must either be monitored using release detection methods specified in § 280.43 or use one of the alternatives for tanks listed in section C–3—UST Systems With Field-Constructed Tanks.

EPA is proposing new or replaced airport hydrant system tanks installed after the effective date of the final UST regulation be secondarily contained and perform interstitial monitoring according to § 280.43(g).

Release Detection—Piping

EPA is proposing airport hydrant system piping meet these release detection requirements:

• Piping must be monitored using release detection methods specified in § 280.44; or

• Use one of these alternatives:

Perform a semiannual or annual bulk line tightness test at or above operating pressure in accordance with the table below. Bulk piping segments ≥100,000 gallons not capable of meeting the maximum 3.0 gallon per hour leak rate for the semiannual test may be tested at a leak rate up to 6.0 gallons per hour according to the schedule in § 280.40(c):

MAXIMUM DETECTABLE LEAK RATE PER TEST SECTION VOLUME

Test section volume (gallons)	Semiannual test maximum detectable leak rate (gallons per hour)	Annual test maximum detectable leak rate (gallons per hour)
<50,000	1.0	0.5
≥50,000 to <75,000	1.5	0.75
≥75,000 to <100,000	2.0	1.0
≥100,000	3.0	1.5

The bulk line tightness test must be capable of detecting the maximum detectible leak rate listed in the table above with a probability of detection of 0.95 and a probability of false alarm of 0.05.

○ Perform continuous interstitial monitoring designed to detect a release from any portion of the underground piping that routinely contains product according to § 280.43(g).

○ Use an automatic line leak detector that alerts the presence of a leak by restricting or shutting off flow of regulated substances through piping or triggering an audible or visual alarm. This method may be used only if it can detect a leak of three gallons per hour at 10 pounds per square inch line pressure within one hour or equivalent. When using this method, also:

–At least every three months, perform interstitial monitoring, designed to detect a release from any portion of the underground piping that routinely contains product, according to § 280.43(g); and

–Conduct an annual leak detector operation test according to § 280.40(a)(3).

○ The implementing agency may approve another method if the owner and operator can demonstrate the method can detect a release as effectively as any of the other three methods. In comparing methods, the implementing agency shall consider the size of release the method can detect and frequency and reliability of detection. Owners and operators must comply with conditions imposed by the implementing agency.

All recordkeeping requirements in § 280.45 apply to these proposed release detection methods.

Release Prevention

EPA is proposing airport hydrant systems meet corrosion protection, spill, and overfill requirements. For corrosion protection, EPA is proposing airport hydrant systems meet one of these:

• The new tank and piping standards described in § 280.20; or

• Airport hydrant systems installed on or before the effective date of the final UST regulation can be constructed of metal and cathodically protected according to a code of practice developed by a nationally recognized association or independent testing laboratory and meet the following:

○ Field installed cathodic protection systems must be: designed by a corrosion expert; designed to allow for the determination of current operating status for impressed current systems; and operated and maintained in accordance with § 280.31 or guidelines established by the implementing agency; and

○ Tanks greater than 10 years old without cathodic protection must be assessed to ensure they are structurally sound and free of corrosion holes prior to adding cathodic protection. The assessment must be by internal inspection or another method the implementing agency determines adequately assesses the tank for structural soundness and corrosion holes.

EPA is proposing airport hydrant systems installed on or before the effective date of the final UST regulation that are not upgraded according to § 280.21 within three years of the effective date of the final UST regulation be permanently closed according to § 280.70. EPA is proposing internal lining not be allowed for meeting the corrosion protection upgrade requirement.

EPA is proposing to exclude new and replaced piping in airport hydrant systems from secondary containment requirements in § 280.20(b).

Notification

EPA is proposing that, no later than 30 days after the effective date of the final UST regulation, owners of regulated airport hydrant systems installed prior to the effective date of final UST regulation notify appropriate implementing agencies that their systems exist.

Financial Responsibility

EPA is proposing airport hydrant systems no longer be deferred. This means airport hydrant systems that have not been permanently closed will be

subject to financial responsibility requirements in subpart H.

Deferred Components

Aboveground components of airport hydrant systems are currently regulated by SPCC because they are not fully regulated under the UST regulations.[32] EPA is proposing to continue deferring aboveground tanks associated with airport hydrant systems that meet the UST system definition from the requirements of subparts B, C, D, E, and G.

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing to regulate airport hydrant systems because a release from one of these systems may pose a significant threat to human health and the environment. In addition, technology is now available for release prevention and adequate release detection monitoring. In some cases airport hydrant system piping stores millions of gallons of fuel; airport hydrant systems handle large volumes of regulated substances on a daily basis. Leaks from underground piping and other appurtenances can contaminate subsurface soil beneath the airport apron and runways, groundwater, and nearby surface water. Even though there is a small universe of these systems, mainly owned by the Department of Defense (DoD), evidence shows a substantial release can have a major impact on the environment.

For example, at Pease Air Force Base, jet fuel was delivered to the runway apron via an underground fueling system. Throughout the life of the system, releases contaminated soils and groundwater, forming plumes of regulated substances in the groundwater.[33] A site release study identified 60 to 70 release points with varying degrees of severity along the refueling system line. Free product was found under the apron when the systems were closed.[34] There are no available historical records showing the sources of release or the volumes of regulated substances released. However, the presence of soil and groundwater contamination poses a significant threat to public health and the environment.

In the 1988 UST regulation, EPA deferred airport hydrant systems because release detection and prevention technologies were not readily available for these unique systems. Given current availability of those technologies, requiring release prevention equipment and regular release detection tests are keys to preventing and quickly identifying releases before they contaminate the surrounding environment. Additionally, 16 state UST programs which include approximately 40 percent of the existing universe of these UST systems, no longer defer airport hydrant systems and now regulate them.

EPA is proposing to define airport hydrant system in order to clarify which components of these systems will be regulated. There is currently some uncertainty about what an airport hydrant system is because of the lack of a federal definition and inconsistencies between different state definitions. Today's proposed definition of airport hydrant system clarifies which components will be regulated. Examples of tank and piping configurations for airport hydrant systems can be found in the docket for this proposed rulemaking.[35]

EPA is proposing airport hydrant systems installed on or before the effective date of the final UST regulation begin meeting the requirements of subparts B (except § 280.22) and C within three years of the effective date of the final UST regulation, subpart D according to the phase in schedule in the table above, and § 280.22 of subpart B along with subparts E, G, and H on the effective date of the final UST regulation. Airport hydrant systems installed after the effective date of the final UST regulation must meet all requirements at installation. Three years allows owners and operators enough time to implement the requirements of subparts B (except § 280.22) and C. EPA is providing a phase in period for bulk line tightness testing in subpart D to allow owners and operators ample time to upgrade their piping systems and meet the leak rate criteria. EPA is proposing to allow owners and operators for the first six years (two test periods) to meet a higher threshold of up to 6.0 gallons per hour for those piping segments that cannot meet the more stringent maximum 3.0 gallons per hour threshold due to technical reasons. These technical reasons include exceeding capabilities of currently available pressure-based methods to achieve the required leak rate. Currently available methods are capable of testing larger volume test sections to a leak rate of 6.0 gallons. The higher threshold of 6.0 gallons per hour provides for use of existing test methods during the first six year period. Six years will provide owners and operators time to upgrade their piping systems to meet the up to 3.0 gallon per hour threshold for semiannual testing. Between years six and seven of the phase in, EPA proposes to allow owners and operators to conduct one additional bulk tightness test that meets the semiannual testing threshold. Beginning in year seven, owners and operators must begin meeting the semiannual and annual bulk line tightness testing requirements described earlier in this section. For all other tank and piping release detection options, EPA is proposing a three year phase in because these methods will not require significant construction or upgrades for implementation. Finally, owners and operators can implement the requirements of § 280.22 of subpart B along with subparts E, G, and H beginning on the effective date of the final UST regulation because upgrades or special equipment are not needed to meet the requirements in these subparts.

Release Detection

EPA is proposing release detection for airport hydrant systems because, unlike in the 1980s, release detection technologies are now available. Airport hydrant systems typically consist of a series of large diameter shop-fabricated tanks; although some airport hydrant systems use field-constructed tanks. EPA is proposing release detection requirements for shop-fabricated tanks and field-constructed tanks in airport hydrant systems. See section C–3 for proposed release detection requirements for UST systems with field-constructed tanks.

EPA discussed airport hydrant systems in the 1988 UST regulation preamble. These systems were very large, contained great volumes of fuel (capacities in the millions of gallons), and consisted of miles of piping that was typically eight to 24 inches in diameter. Airport hydrant systems typically had cathodic protection and were monitored for releases periodically. Inventory control was often used, but the sensitivity of this technique was limited due to the large volume airport hydrant systems typically handled. No single leak test appeared to be an industry standard.

Between proposing and finalizing the 1988 UST regulation, EPA became

[32] Spill Prevention, Control, And Countermeasure Rule. *http://www.epa.gov/oem/content/spcc/index.htm.*

[33] New Hampshire Department of Environmental Services, Air Resources Division. 2009. Permit Application Review Summary, Former Pease AFB Remediation Project, 09–0113. 10 March 2010, see: *http://www2.des.state.nh.us/OneStopPub/Air/330159094909-0113TypeSummary.pdf.*

[34] Hilton, Scott. Site Summaries Pease Air Force Base Newington/Portsmouth. 2008. NH Department of Environmental Services. 10 March 2010 see: *http://des.nh.gov/organization/divisions/waste/hwrb/fss/superfund/summaries/pease.htm.*

[35] Example Tank and Piping Configurations for Airport Hydrant Systems developed by EPA/OUST.

aware of several airport hydrant system leaks that harmed the environment. However, limited information kept EPA from realizing the extent of airport hydrant system problems. At the time, EPA believed release detection was not feasible for airport hydrant systems. To allow more time to gather information, EPA deferred airport hydrant systems in the 1988 regulation from release detection requirements in subpart D as well as subparts B, C, E, G, and H requirements.

Over the last 20 years, the petroleum services industry developed release detection monitoring technologies for airport hydrant systems. NWGLDE's list in *Large Diameter Line Leak Detection Methods (6 Inches Diameter Or Above)*[36] identifies methods capable of detecting releases from airport hydrant systems.

EPA contacted several vendors to determine strengths and limitations of release detection methods for airport hydrant systems. EPA also talked with DoD's Defense Logistics Agency (DLA) Energy[37] about their challenges in addressing release detection requirements in states, such as California, which do not defer airport hydrant systems from release detection. DLA Energy also monitors airport hydrant systems in other states, which provides them with significant information about airport hydrant system release detection.

EPA acknowledges airport hydrant systems vary greatly and most of these systems cannot meet underground piping release detection requirements in the 1988 UST regulation because of issues such as time to conduct the test and leak rate thresholds. Nonetheless, other release detection methods are currently available to monitor airport hydrant systems. EPA is not proposing release detection methods monitor at the same leak rate or frequency as pressurized piping systems at retail service stations. Standard release detection systems can successfully test and detect releases on USTs and pressurized piping at retail service stations, but cannot achieve the same accuracy within a reasonable time frame on underground piping in airport hydrant systems. The large diameters and varying pipe lengths in airport hydrant systems introduce variables that prohibit accurate monitoring at leak rates within a reasonable time frame required in the 1988 UST regulation.

Compared to typical retail service stations, airport hydrant systems have large product volume throughputs. The 1988 UST regulation release detection test methods are limited by volume. To produce accurate test results, underground hydrant system piping needs to be isolated in appropriately sized segments. Some airport hydrant systems have numerous isolation points with available connections for release detection equipment; others have up to one-half mile between underground piping segments available for accurate testing. The greater the volume of a segment, the more time it takes to obtain a valid result at a given leak rate.

Product temperature fluctuations present challenges for release detection testing of airport hydrant system piping. As temperatures fluctuate, product expands or contracts, increasing or decreasing product volume and pressure. Fluctuating line pressure during a release detection test can mask an existing release or falsely indicate one occurred. To lessen this, an out of service period when testing large diameter airport hydrant piping could range from one to several days after the last product transfer in order to meet maximum leak detection rates in the 1988 UST regulation. Removing airport hydrant systems from service for these extended periods will greatly impede their purpose. In contrast, out of service periods on underground piping at retail service stations can last up to several hours after the last product transfer prior to pressure testing.

Although technology is available, it would be cost prohibitive and require significant facility down time for owners and operators to monitor airport hydrant systems for releases at the rates and frequencies required in the 1988 UST regulation.[38] As a result, EPA is proposing several options for owners and operators to meet the release detection requirement. These options provide flexibility for a wide variety of airport hydrant systems. In those instances where airport hydrant systems can meet the release detection methods in § 280.43 and § 280.44, owners and operators may use those methods. EPA is also proposing the following four alternatives to meet the airport hydrant system release detection requirement for piping.

- Perform semiannual or annual bulk line testing at or above operating pressure with a probability of detection of 0.95 and a probability of false alarm of 0.05. EPA thinks this will be the most frequently used method due to cost and minimal impact on down time for the piping system. It allows owners and operators to meet a variable leak rate based on piping test section volume. The leak rate ranges from one to three gallons[39] per hour, depending on piping volume for semiannual testing and from 0.5 to 1.5 gallons per hour for annual testing. EPA is proposing three gallons per hour as the maximum threshold because the majority of available bulk line testing methods are capable of meeting this leak detection rate. To effectively detect leaks from the pressurized piping systems, industry practice involves performing pressure-based testing at levels above standard operating pressure. EPA is proposing requiring a test pressure at or above operating pressure in consideration of these bulk piping systems typically operating at pressures much higher than conventional gasoline stations. Testing at 1.5 times operating pressure may not be practical or safe for these piping systems. The probabilities of detection and false alarm are consistent with the line leak detection requirements in the 1988 UST regulation.
- *Use continuous interstitial monitoring*—This monitoring method is designed to detect a release from any portion of the underground piping that routinely contains product; it must operate in an uninterrupted manner. EPA considered requiring an automatic line leak detector in combination with this alternative method, similar to conventional pressurized piping requirements in the 1988 UST regulation. However, conventional line leak detectors today cannot properly operate on bulk pressurized piping in airport hydrant systems.
- *Use an automatic line leak detector*—Conventional pressurized piping systems operate at a significantly lower pressure than airport hydrant systems. In addition, EPA is not aware of a line leak detector that adequately detects releases on airport hydrant systems. Yet because some states regulate airport hydrant systems and industry has experience with these systems, comparable release detection technology may be developed in the future. With that in mind, EPA is

[36] National Work Group On Leak Detection Evaluation's (NWGLDE) List Of Leak Detection Evaluations For Storage Tank Systems: *http://www.nwglde.org/.*

[37] Defense Logistics Agency Energy was formerly known as Defense Energy Support Center (DESC).

[38] See section F of this preamble and Regulatory Impact Analysis (RIA) for the proposed rule, available as a separate document in the docket, for information on the cost differences between meeting conventional release detection requirements and the proposed alternative requirements for airport hydrant systems and UST systems with field-constructed tanks.

[39] Owners and operators of bulk piping systems with test section volumes of 100,000 gallons or greater, due to technical reasons discussed in this section, may test their systems at a higher threshold of up to 6.0 gallons per hour within the six year phase-in period.

proposing line leak detectors be capable of detecting a release rate of three gallons per hour at 10 pounds per square inch line pressure within one hour or equivalent. This is consistent with the 1988 UST regulation. To detect a release from any portion of the underground piping that routinely contains product, EPA is proposing to combine this alternative with interstitial monitoring performed at least once every three months. This combination will quickly detect catastrophic releases while checking for much smaller problems on a less frequent—every three month—basis. Owners and operators will be required to conduct an annual test of the line leak detector's operation according to the final UST regulation. See section B–5 for more information on the annual test.

• Approval by the implementing agency of another method if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods listed above—The implementing agency must consider the size of the release that the method can detect as well as the frequency and reliability of detection when comparing methods. Owners and operators must comply with any conditions imposed by the implementing agency on the method's use.

Release Prevention

In § 280.20, EPA is proposing new or replaced tanks and piping have secondary containment with interstitial monitoring. Airport hydrant systems' piping ranges from eight to 24 inches in diameter with very long lengths, sometimes miles. In contrast, pressurized piping at a typical retail gas station is two inches in diameter with relatively short lengths.

EPA discussed with DLA Energy and industry the feasibility of installing secondary containment on piping associated with airport hydrant systems. These systems, primarily located on military installations, are complex and lack similarity. EPA is taking the position that installing secondary containment on airport hydrant system piping may be impracticable.

To detect a leak, secondary containment must be a liquid tight barrier designed to hold the leak between the tank and the barrier. Piping is sloped in fractions of an inch per foot of piping run to direct a leak toward the interstitial monitor. Because airport hydrant system piping lengths can typically be thousands of feet, it would be very difficult to install a system with enough slope that could adequately monitor the lowest point of a piping run. In addition, variable sized fittings are needed to join different diameters of piping, increasing the complexity of installing secondary containment. Finally, airport hydrant system piping is normally constructed of steel. Condensation can accumulate between the inner and outer walls, promoting corrosion of both pipe walls in the interstitial space and increasing the likelihood of a release to the environment.

EPA acknowledges engineering and design challenges (that is, varying piping diameter and length, along with corrosion) that can occur when providing secondary containment for piping associated with airport hydrant systems.[40] Therefore, EPA is proposing not to require this piping meet secondary containment requirements. However, EPA is proposing new and replaced underground tanks associated with airport hydrant systems meet secondary containment requirements. See section A–2 for more information about proposed secondary containment requirements for tanks.

As with all other regulated UST systems, EPA is proposing all airport hydrant systems meet corrosion protection requirements. Because interim prohibition has been in effect since May 1985, these systems generally are already equipped with corrosion protection (that is, constructed of: non-corrodible material; coated and cathodically protected steel; fiberglass reinforced plastic; or steel tank clad with fiberglass reinforced plastic).

EPA is proposing not to allow adding internal lining as a means of corrosion protection for tanks in airport hydrant systems that are not already upgraded. In the 1988 UST regulation, EPA allowed internal lining as a corrosion protection upgrade, but stated in the preamble that internal lining of steel tanks was a temporary upgrade to meet corrosion protection requirements, only if the lining continued meeting original design specifications. After 1998, if an inspected lining did not meet original design specifications and could not be repaired according to industry codes, it no longer met the upgrade requirements and had to be replaced. In addition, lining inspections show there are issues with internal linings.[41] Reports of premature failures due to improper installation cause additional concerns about the long-term integrity of the lining.[42] A study of lined tanks up to12 years old concluded that 44 percent of tanks' linings were cracked, discolored, and flaked from tank walls.[43] If internal lining fails, the chance of a leak into the environment is greater when there is no external corrosion protection on the tank. Because of these concerns, EPA is proposing internal lining not be an option for meeting the corrosion protection requirements for tanks in airport hydrant systems.

As with all other regulated UST systems, EPA is proposing airport hydrant systems meet spill and overfill requirements to prevent releases to the environment. After discussion with industry and DLA Energy, EPA is taking the position that existing airport hydrant systems are already equipped with spill prevention devices that will adequately prevent spills and overfills.

Airport hydrant systems installed on or before the effective date of the final UST regulation that do not meet the upgrade requirements within three years after the effective date of the rule must be permanently closed according to § 280.70. EPA is requiring permanent closure to prevent releases to the environment from airport hydrant systems that have not been upgraded.

Notification

To make implementing agencies aware airport hydrant systems exist, EPA is proposing owners of these systems submit a one-time notification to the implementing agency. Owners must notify within 30 days of the effective date of the final regulation. This will allow implementing agencies to include airport hydrant systems in their inventories.

Financial Responsibility

Because EPA is proposing to eliminate the deferral for airport hydrant systems, they will no longer be exempt from financial responsibility requirements in subpart H. Owners and operators will be required to comply by the effective date of the final UST regulation. The 1988 UST financial responsibility regulation exempts state and federal entities. Therefore, federal and state owners and operators of airport hydrant systems will not have to meet the financial responsibility requirement. Nearly all airport hydrant systems are owned by the federal government.

[40] DOD's DLA Energy, ''Response to EPA—Release Detection Point Paper,'' dated 03/10.

[41] LUSTLINE, Bulletin 38, June 2001. *http://www.neiwpcc.org/lustline/.*

[42] Wisconsin Department Of Commerce Web site: *http://www.commerce.state.wi.us/er/pdf/bst/ProgramLetters_PL/ER-BST-PL-LINING.pdf.*

[43] LUSTLINE, Bulletin 30, September 1998. *http://www.neiwpcc.org/lustline/.*

Deferred Components

EPA is proposing to continue deferring aboveground tanks associated with airport hydrant systems from the requirements of subparts B, C, D, E, and G. EPA regulates underground storage tanks and piping through 40 CFR part 280 and aboveground tanks through 40 CFR part 112 (Oil Pollution Prevention). Facilities with 1,320 gallons of aboveground oil storage capacity that could reasonably be expected to discharge oil into navigable waters or adjoining shoreline are subject to the SPCC regulation, under the authority of the Clean Water Act (CWA).[44] The SPCC regulation includes requirements for oil spill prevention, preparedness, and response to prevent oil discharges to navigable waters and adjoining shorelines.[45] The SPCC regulation requires periodic integrity testing and inspection of bulk storage containers and periodic integrity testing and leak testing of valves and piping associated with containers. The SPCC regulation also requires regulated facilities prepare and maintain a written plan that includes measures to prevent, prepare for, and respond to oil discharges that threaten navigable waters and adjoining shorelines. For these reasons, we believe the SPCC regulation is the most effective means of addressing aboveground tanks associated with airport hydrant systems.

What issues related to this change does EPA request comment or additional data on?

- Are the release detection options and time frames appropriate and sufficient?
- Is the performance requirement of three gallons per hour at 10 pounds per square inch line pressure within one hour or equivalent proposed for line leak detectors for bulk piping appropriate?
- Should EPA consider including specific requirements for non-pressurized piping tightness testing methods such as chemical marker methods? If so, what should those requirements be?
- Are there other release detection options EPA should consider?
- In order to address potential concerns associated with over pressurizing bulk piping systems, EPA proposed testing at the system's operating pressure instead of above it. EPA understands there are industry standards that recommend testing above operating pressure. Is testing these systems at operating pressure sufficient? Please provide specific detail to accompany your answer.
- Is the definition of airport hydrant fuel distribution system clear and appropriate?
- Are you aware of any releases from airport hydrant systems? If so, what were the sources, causes, and impacts to the environment?
- Should EPA consider revising the date in 280.73 for previously deferred UST systems? Revision of this date would mean that these UST systems closed prior to the effective date of the final rule would not have to meet Subpart G unless the implementing agency directs otherwise based on a current or potential threat to human health and the environment. How many of these UST systems have been closed since December 22, 1988?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

3. UST Systems With Field-Constructed Tanks

What is EPA proposing?

EPA is proposing to regulate currently deferred UST systems with field-constructed tanks. This means field-constructed tanks will no longer be deferred from the requirements of 40 CFR part 280, subparts B (*UST Systems: Design, Construction, Installation and Notification*), C (*General Operating Requirements*), D (*Release Detection*), E (*Release Reporting, Investigation, and Confirmation*), G (*Out-of-Service UST Systems and Closure*), and H (*Financial Responsibility*).

UST systems with field-constructed tanks installed on or before the effective date of the final UST regulation must begin meeting the requirements of subparts B (except § 280.22) and C within three years of the effective date of the final UST regulation, subpart D according to the schedule in the table below, and § 280.22 of subpart B along with subparts E, G, and H on the effective date of the final UST regulation. UST systems with field-constructed tanks installed after the effective date of the final UST regulation must meet these requirements at the time of installation.

SCHEDULE FOR PHASE IN OF SUBPART D

Component and type of release detection used	Time frame (after [effective date of rule])	Description of requirement
Piping using periodic pressurized bulk line tightness testing.	Within three years. Between years three and six.	Conduct one piping tightness test according to the bulk line tightness testing requirement using the maximum detectable leak rates for semiannual testing. For bulk piping segments not capable of meeting the 3.0 gallon per hour leak rate, owners and operators may use a leak rate of up to 6.0 gallons per hour.
	Between years six and seven.	Conduct one piping tightness test according to the bulk line tightness testing requirement using the maximum detectable leak rates for semiannual testing.
	After year seven.	Begin conducting piping tightness testing according to the bulk line tightness testing requirement.
All other piping and tank release detection methods.	Within three years.	Perform release detection according to this subpart.

[44] Overview Of Oil Pollution Prevention Regulations. *http://www.epa.gov/oem/content/lawsregs/opprover.htm.*

[45] Spill Prevention, Control, And Countermeasure Rule. *http://www.epa.gov/oem/content/spcc/index.htm.*

Release Detection—Tanks

EPA is proposing that UST systems with field-constructed tanks installed prior to the effective date of the final UST regulation meet these release detection requirements:

- Field-constructed tanks with capacity less than or equal to 50,000 gallons must be monitored using the release detection methods in § 280.43.
- Field-constructed tanks with a capacity greater than 50,000 gallons must either be monitored using release detection methods in § 280.43 or use one of these alternatives:
  - Conduct an annual bulk tank tightness test that can detect a 0.5 gallon per hour leak rate;
  - At least once every 30 days, use an automatic tank gauging system to perform release detection, which can detect a leak rate of one gallon per hour or less. At least every three years, this method must be combined with a bulk tank tightness test that can detect a 0.2 gallon per hour leak rate;
  - At least once every 30 days, use an automatic tank gauging system to perform release detection, which can detect a leak rate of two gallons per hour or less. At least every two years, this method must be combined with a bulk tank tightness test that can detect a 0.2 gallon per hour leak rate; or
  - The implementing agency may approve another method if the owner and operators can demonstrate the method can detect a release as effectively as any of the other three methods. In comparing methods, the implementing agency shall consider the size of release the method can detect and frequency and reliability of detection. Owners and operators must comply with conditions imposed by the implementing agency.

All bulk tank tightness testing must be capable of detecting leak rates with a probability of detection of 0.95 and a probability of false alarm of 0.05.

All recordkeeping requirements in § 280.45 apply to these proposed release detection methods.

Tanks associated with new or replaced UST systems with field-constructed tanks installed after the effective date of the final UST regulation must be secondarily contained and perform interstitial monitoring according to § 280.43(g).

Release Detection—Piping

EPA is proposing underground piping of UST systems with field-constructed tanks meet the release detection requirements for hydrant piping described in C–2—Airport Hydrant Fuel Distribution Systems.

Release Prevention

EPA is proposing UST systems with field-constructed tanks meet corrosion protection, spill, and overfill requirements. For corrosion protection, EPA is proposing UST systems with field-constructed tanks meet one of these:

- The new tank and piping standards described in § 280.20; or
- UST systems with field-constructed tanks installed on or before the effective date of the final UST regulation can be constructed of metal and cathodically protected according to a code of practice developed by a nationally recognized association or independent testing laboratory and meet the following:
  - Field installed cathodic protection systems must be: designed by a corrosion expert; designed to allow for the determination of current operating status for impressed current systems; and operated and maintained in accordance with § 280.31 or guidelines established by the implementing agency; and
  - Tanks greater than 10 years old without cathodic protection must be assessed to ensure they are structurally sound and free of corrosion holes prior to adding cathodic protection. The assessment must be by internal inspection or another method the implementing agency determines adequately assesses the tank for structural soundness and corrosion holes.

EPA is proposing UST systems with field-constructed tanks installed on or before the effective date of the final UST regulation that are not upgraded according to § 280.21 within three years of the effective date of the final UST regulation must be permanently closed according to § 280.70. EPA is proposing internal lining not be allowed for meeting the corrosion protection upgrade requirement.

EPA is proposing to exclude new and replaced piping of UST systems with field-constructed tanks from secondary containment requirements in § 280.20(b).

Notification

EPA is proposing that, no later than 30 days after the effective date of the final UST regulation, owners of regulated UST systems with field-constructed tanks notify appropriate implementing agencies that their systems exist.

Financial Responsibility

EPA is proposing UST systems with field-constructed tanks no longer be deferred. This means UST systems with field-constructed tanks that have not been permanently closed will be subject to financial responsibility requirements in subpart H.

Deferred Components

EPA is proposing to continue deferring aboveground tanks associated with UST systems with field-constructed tanks from the requirements of subparts B, C, D, E, and G.

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing to regulate UST systems with field-constructed tanks because they are very large and pose a substantial threat to human health and the environment. Typical tank sizes range from 20,000 gallons to greater than two million gallons. The total universe of UST systems with field-constructed tanks is small. There are approximately 239 UST systems with field-constructed tanks.

Several releases from bulk field-constructed tanks have been recorded at the Craney Island Fuel Terminal in Portsmouth, VA.[46] For example, a 2.1 million gallon field-constructed UST system that operated from the 1950s to the mid 1980s released an estimated 300,000 to 500,000 gallons of product into the environment. Free product was found within 20 feet of a nearby creek, and the resulting plume covered more than five acres. Remediation efforts have been on-going since 1986. The release was attributed to tank and/or piping failures and possibly from a nearby tank that had a 127,000 gallon overfill in 1986. Another 2.1 million gallon field-constructed tank system that operated from the 1950s until 2000 released an estimated 175,000 to 250,000 gallons of jet fuel into the environment. The release was attributed to piping failures. The resulting plume covered three acres and threatened a nearby creek. In both of these examples, release prevention and release detection requirements could have reduced the severity of these releases and may well have prevented these releases.

EPA is also proposing this change because design and construction standards for UST systems with field-constructed tanks are now available. In the 1988 UST regulation preamble, EPA indicated tank design and construction methods for field-constructed tanks differed from factory-built tanks; we did not have sufficient time to develop an appropriate regulation related to design and construction for those tanks. Although design standards are now

[46] Virginia Department of Environmental Quality.

available for aboveground field-constructed tanks, EPA is not aware of standards written according to a national code of practice developed by a nationally recognized or independent testing laboratory. However, military construction standards, written as guidance for aboveground and underground storage tank construction projects on military installations, are available.[47] EPA considers current military construction standards appropriate to sufficiently address field-constructed tank design and construction. Implementing agencies may use military design and construction standards to address the site specific nature of field-constructed tank systems on military installations. Note that more stringent standards will prevail if a field-constructed tank is installed in a locale with more stringent design standards. EPA expects owners and operators to use these existing standards and specifications for design and construction of UST systems with field-constructed tanks.

EPA is proposing UST systems with field-constructed tanks installed on or before the effective date of the final UST regulation begin meeting the requirements of subparts B (except § 280.22) and C within three years of the effective date of the final UST regulation, subpart D according to the phase in schedule in the table above, and § 280.22 of subpart B along with subparts E, G, and H on the effective date of the final UST regulation. UST systems with field-constructed tanks installed after the effective date of the final UST regulation must meet all requirements at installation. Three years allows owners and operators enough time to implement the requirements of subparts B (except § 280.22) and C. EPA is providing a phase in period for bulk line tightness testing in subpart D to allow owners and operators ample time to upgrade their piping systems and meet the leak rate criteria. EPA is proposing to allow owners and operators for the first six years (two test periods) to meet a higher threshold of up to 6.0 gallons per hour for those piping segments that cannot meet the more stringent maximum 3.0 gallons per hour threshold, due to technical reasons. These technical reasons include exceeding capabilities of currently available pressure-based methods to achieve the required leak rate. Currently available methods are capable of testing larger volume test sections to a leak rate of 6.0 gallons. The higher threshold of 6.0 gallons per hour provides for use of existing test methods during the first six year period. Six years will provide owners and operators time to upgrade their piping systems to meet the up to 3.0 gallon per hour threshold for semiannual testing. Between years six and seven of the phase in, EPA proposes to allow owners and operators to conduct one additional bulk tightness test that meets the semiannual testing threshold. Beginning in year seven, owners and operators must begin meeting the semiannual and annual bulk line tightness testing requirements described earlier in this section. For all other tank and piping release detection options, EPA is proposing a three year phase in because these methods will not require significant construction or upgrades for implementation. Finally, owners and operators can implement the requirements of § 280.22 of subpart B along with subparts E, G, and H beginning on the effective date of the final UST regulation because upgrades or special equipment are not needed to meet the requirements in these subparts.

Release Detection

In the 1988 UST regulation, EPA deferred UST systems with field-constructed tanks in part due to lack of appropriate release detection methods. At that time, EPA believed the majority of release detection methods applied to factory-built tank systems and did not adequately work for UST systems with field-constructed tanks. Over the last 20 years, effective release detection methods for UST systems with field-constructed tanks have evolved. However, prescribed leak rates for field-constructed tanks differ from those in § 280.43 of the 1988 UST regulation, which generally apply to factory-built tanks. Additionally, 19 state UST programs, which include approximately 60 percent of the existing universe of these UST systems, now regulate UST systems with field-constructed tanks.

NWGLDE's list in *Bulk Underground Storage Tank Leak Detection Methods (50,000 Gallons or Greater)*[48] identifies several methods applicable to field-constructed tanks. Third party evaluators verified those release detection methods achieve a variety of performance standards. EPA contacted several vendors and DLA Energy to find out about their experiences with release detection methods for field-constructed tanks in states, such as California, which require UST systems with field-constructed tanks meet release detection requirements.

EPA recognizes that most release detection methods for factory-built tanks are capable of monitoring UST systems with field-constructed tanks up to 50,000 gallons. After evaluating current methods, EPA realized existing release detection options for tanks in § 280.41 of the 1988 UST regulation are generally not applicable to UST systems greater than 50,000 gallons because most methods are limited by tank capacity. As a result, EPA is proposing alternative release detection monitoring methods at different leak rates and frequencies for UST systems with field-constructed tanks greater than 50,000 gallons than for factory-built tanks.

Based on limited data about leaks from field-constructed tanks, EPA is proposing two release detection requirements depending on tank size. UST systems with field-constructed tanks up to 50,000 gallons will be required to meet requirements in § 280.41(a). UST systems with field-constructed tanks greater than 50,000 gallons will be required either to meet requirements in § 280.41(a) or use an alternative release detection method described below. EPA estimates a subset of larger size tanks will be able to use automatic tank gauging systems set to achieve leak rates in 280.43(d). NWGLDE's list identifies numerous automatic tank gauging systems capable of detecting leaks on tanks up to 100,000 gallons.[49]

Owners and operators of UST systems with field-constructed tanks greater than 50,000 gallons will be allowed to choose several alternative release detection methods. They must either perform annual bulk underground tank tightness testing that can detect a 0.5 gallon per hour leak rate or use an automatic tank gauging system that can detect up to a two gallon per hour leak rate. Depending on the automatic tank gauging system's leak rate, a bulk underground tank tightness test at a rate of 0.2 gallon per hour will be required at least every two or three years. This proposed automatic tank gauging requirement is different from the 1988 release detection requirement for factory-built tanks. These proposed leak

[47] United Facilities Criteria (UFC) 3–460–01, ''Petroleum Fuel Facilities,'' prescribes basic specifications and guidance for designing fueling systems on military installations. Unless otherwise noted, the handbook uses nationally recognized association and institute standards in accordance with the appropriate service policy. For the purposes of this preamble, a ''field-constructed tank'' is analogous to a ''cut and cover'' tank.

[48] National Work Group on Leak Detection Evaluation's (NWGLDE) List of Leak Detection Evaluations for Storage Tank Systems: *http://www.nwglde.org/.*

[49] National Work Group on Leak Detection Evaluation's (NWGLDE) List of Leak Detection Evaluations for Storage Tank Systems: *http://www.nwglde.org/.*

rates and time frames for release detection testing are appropriate because they will detect releases within a reasonable time frame given the large tank sizes and time needed to perform testing on these tanks.

In addition, implementing agencies may approve another method of release detection for UST systems with field-constructed tanks if the owner and operator can demonstrate the method can detect a release as effectively as any of the methods listed above. The implementing agency must consider the size of release the method can detect as well as frequency and reliability of detection when comparing methods. Owners and operators must comply with any conditions imposed by the implementing agency on the method's use.

EPA acknowledges the complexities in performing release detection on tanks significantly larger than 50,000 gallons. Perhaps the most critical aspect is allowing sufficient time for a tank to reach a state of equilibrium. As tank size increases, the time for a tank to reach an equilibrium state increases significantly. Based on discussions with release detection vendors, many larger tanks require multiple inactive days to yield an accurate test result.

Most UST systems with field-constructed tanks are owned by DoD. Taking these tanks out of service for multiple days to meet the 1988 release detection requirement would impede DoD's mission, be impractical to sustain, and result in significant costs.[50] Our proposed alternatives for release detection provide appropriate environmental protection without substantially compromising DoD's mission. DoD can choose to combine an automatic tank gauge, at leak rates achievable by automatic tank gauges on the market for monthly tank monitoring, with precision bulk tank tightness testing. The probabilities of detection and false alarm EPA proposes for bulk tank tightness testing are consistent with the line leak detection requirements in the 1988 UST regulation. DoD can also choose to perform bulk tank tightness testing as a stand-alone method of release detection. Staggering the test frequency will allow DoD to take tanks out of service at different intervals without hindering its mission.

Although current release detection methods can successfully perform tests and detect leaks on pressurized piping at retail service stations, these systems cannot achieve the same level of accuracy on large diameter underground piping of UST systems with field-constructed tanks. EPA is proposing piping of UST systems with field-constructed tanks meet the same requirements proposed for airport hydrant system piping. See section C–2 for proposed release detection requirements for airport hydrant system piping.

Release Prevention

In § 280.20, EPA is proposing new or replaced tanks and piping have secondary containment. Secondary containment poses a much smaller risk to the environment by providing an additional measure for containing released regulated substances in the interstitial space between the two walls of the UST system. Secondary containment must be: Able to contain regulated substances released from the UST system until they are detected and removed; able to prevent the release of regulated substances to the environment at any time during the operational life of the UST system; and checked for evidence of a leak at least once every 30 days using interstitial monitoring that meets the requirements of 280.43(g) for tanks. For UST systems with field-constructed tanks, EPA is proposing only new and replaced tanks meet the secondary containment requirement.

EPA discussed with DLA Energy and other vendors the feasibility of installing secondary containment on piping of UST systems with field-constructed tanks. Field-constructed tank system pipes range from four to 20 inches in diameter, with lengths normally greater than 30,000 feet.[51] Due to complex configurations and varying pipe lengths, we believe installing secondary containment on piping of UST systems with field-constructed tanks may be impractical. It would be difficult to design a liquid tight barrier that could accommodate varying diameters of underground piping. Because leaks occur at fittings and valves, installing fittings and valves to join pipes with various diameters along the piping run increases the likelihood of a release. Because field-constructed tank system pipe lengths are normally significantly greater than lengths of piping at a typical retail gasoline station, it would be very difficult to install a system with enough sloping that could adequately monitor the lowest point of a piping run. Finally, condensation can accumulate in the interstice between the inner and outer steel pipe walls, promoting corrosion of both pipe walls in the interstitial space and increasing the likelihood of a release to the environment.

EPA acknowledges there are engineering and design challenges (that is, varying pipe diameter and length, along with water accumulation in the interstitial space) when secondarily containing piping of UST systems with field-constructed tanks.[52] Therefore, EPA is proposing not to require secondary containment for piping of UST systems with field-constructed tanks. However, EPA is proposing new and replaced field-constructed tanks meet secondary containment requirements. See section A–2 for more information about the proposed secondary containment requirements for tanks.

As with all other regulated UST systems, EPA is proposing UST systems with field-constructed tanks meet corrosion protection requirements. Because interim prohibition has been in effect since May 1985, UST systems with field-constructed tanks generally are already equipped with corrosion protection (that is, constructed of: Non-corrodible material; coated and cathodically protected steel; fiberglass reinforced plastic; or steel tank clad with fiberglass reinforced plastic). Field-constructed UST systems made of concrete would meet the corrosion protection requirement because they are constructed of a non-corrodible material.

As with airport hydrant systems, EPA is proposing not to allow adding an internal lining as a means of corrosion protection for UST systems with field-constructed tanks that are not already upgraded. See section C–2 for an explanation of why EPA is not allowing these USTs to be upgraded with internal lining.

As with all other regulated UST systems, EPA is proposing UST systems with field-constructed tanks meet spill and overfill requirements to prevent releases to the environment. After discussion with industry and DoD's DLA Energy, EPA is taking the position that existing UST systems with field-constructed tanks are already equipped with spill and overfill prevention devices that will adequately prevent spills and overfills.

[50] See section F of this preamble and Regulatory Impact Analysis (RIA) for the proposed rule, available as a separate document in the docket, for information on the cost differences between meeting conventional release detection requirements and the proposed alternative requirements for airport hydrant systems and UST systems with field-constructed tanks.

[51] DOD's DLA Energy, ''Response to EPA—Release Detection Point Paper,'' dated 03/10.

[52] DOD's DLA Energy, ''Response to EPA—Release Detection Point Paper,'' dated 03/10.

UST systems with field-constructed tanks installed on or before the effective date of the final UST regulation that do not meet the upgrade requirements within three years after the effective date of the rule must be permanently closed according to § 280.70. EPA is requiring permanent closure to prevent releases to the environment from UST systems with field-constructed tanks that have not been upgraded.

Notification

To make implementing agencies aware that UST systems with field-constructed tanks exist, EPA is proposing owners of these systems submit a one-time notification to the implementing agency. Owners must notify within 30 days of the effective date of the final regulation. This will allow implementing agencies to include UST systems with field-constructed tanks in their inventories.

Financial Responsibility

Because EPA is proposing to eliminate the deferral for UST systems with field-constructed tanks, they will no longer be exempt from financial responsibility requirements in subpart H. Owners and operators will be required to comply by the effective date of the final UST regulation. The 1988 UST financial responsibility regulation exempts state and federal entities. Therefore, federal and state owners and operators of UST systems with field-constructed tanks will not have to meet the financial responsibility requirement. Nearly all UST systems with field-constructed tanks are owned by the federal government.

Deferred Components

As with airport hydrant systems, EPA is proposing to continue deferring the aboveground tanks associated with UST systems with field-constructed tanks from subparts B, C, D, E, and G. See section C–2 for an explanation of why EPA proposes to continue deferring these aboveground components.

What issues related to this change does EPA request comment or additional data on?

- Are the release detection options and time frames appropriate and sufficient?
- Are there other release detection options EPA should consider?
- Are you aware of any releases from UST systems with field-constructed tanks? If so, what were the sources, causes, and impacts to the environment?
- Is the proposed time frame for implementing the requirements for UST systems with field-constructed tanks reasonable? If not, please explain why.
- Should EPA consider alternative options for closing very large UST systems in place? For example, should EPA consider requiring removal or allowing closure in place without filling the UST?
- Should EPA consider revising the date in 280.73 for previously deferred UST systems? Revision of this date would mean that these UST systems closed prior to the effective date of the final rule would not have to meet Subpart G unless the implementing agency directs otherwise based on a current or potential threat to human health and the environment. How many of these UST systems have been closed since December 22, 1988?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

4. Wastewater Treatment Tank Systems

What is EPA proposing?

EPA is proposing to regulate wastewater treatment tank systems that are not part of a wastewater treatment facility regulated under § 402 or 307(b) of the CWA.

This means wastewater treatment tank systems that are currently deferred in § 280.10(c)(1) will no longer be deferred from the requirements of 40 CFR part 280 subparts B (*UST Systems: Design, Construction, Installation and Notification*), C (*General Operating Requirements*), D (*Release Detection*), E (*Release Reporting, Investigation, and Confirmation*), G *(Out-of-Service UST Systems and Closure*), and H (*Financial Responsibility*). These wastewater treatment tanks that are currently deferred in § 280.10(c)(1) will be referred to as ''wastewater treatment tanks'' in the discussion below.

Wastewater treatment tank systems installed on or before the effective date of the final UST regulation must begin meeting the requirements of subparts B (except § 280.22), C, and D within three years of the effective date of the final UST regulation and § 280.22 of subpart B along with subparts E, G, and H on the effective date of the final UST regulation. Wastewater treatment tank systems installed after the effective date of the final UST regulation must meet these requirements at the time of installation.

Release Detection

EPA is proposing wastewater treatment tank systems no longer be deferred from release detection. This means wastewater treatment tank systems must meet the release detection requirements in 40 CFR part 280, subpart D.

Release Prevention

EPA is proposing wastewater treatment tank systems meet corrosion protection, spill, and overfill requirements. For corrosion protection, EPA is proposing wastewater treatment tank systems meet one of these:

- The new tank and piping standards described in § 280.20; or
- Wastewater treatment tank systems installed on or before the effective date of the final UST regulation can be constructed of metal and cathodically protected according to a code of practice developed by a nationally recognized association or independent testing laboratory and meet the following:
  - Field installed cathodic protection systems must be: Designed by a corrosion expert; designed to allow for the determination of current operating status for impressed current systems; and operated and maintained in accordance with § 280.31 or guidelines established by the implementing agency; and
  - Tanks greater than 10 years old without cathodic protection must be assessed to ensure they are structurally sound and free of corrosion holes prior to adding cathodic protection. The assessment must be by internal inspection or another method the implementing agency determines adequately assesses the tank for structural soundness and corrosion holes.

EPA is proposing wastewater treatment tank systems installed on or before the effective date of the final UST regulation that are not upgraded according to § 280.21 within three years of the effective date of the final UST regulation be permanently closed according to § 280.70. EPA is proposing internal lining not be allowed for meeting the corrosion protection upgrade requirement.

Notification

EPA is proposing that, no later than 30 days after the effective date of the final UST regulation, wastewater treatment tank system owners notify appropriate implementing agencies that their systems exist.

Financial Responsibility

EPA is proposing wastewater treatment tank systems no longer be deferred. This means wastewater treatment tank systems that have not been permanently closed will be subject to financial responsibility requirements in subpart H.

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing to regulate wastewater treatment tank systems (including oil-water separators) containing regulated substances in 40 CFR part 280 if they are not part of a wastewater treatment facility regulated under § 402 or 307(b) of the CWA. In the 1988 UST regulation, EPA deferred these systems because we were uncertain about how many of these UST systems exist and the appropriateness of some release detection systems for these systems. EPA still is uncertain about how many wastewater treatment tank systems exist. Removing the deferral will allow us to determine how many are subject to 40 CFR part 280;. In addition, release detection methods are available to detect releases from these systems. EPA is proposing to regulate these types of UST systems to protect human health and the environment from discharges of regulated substances contained in these systems. When wastewater treatment tank systems are not part of a wastewater treatment facility regulated under § 402 or 307(b) of the CWA, they must meet all requirements in 40 CFR part 280, including requirements for design, construction, installation, and notification; general operating; release detection; and closure.

To help determine the universe of wastewater treatment tank systems we are proposing to regulate, EPA queried several field experts. They were not aware of any wastewater treatment tank systems that are part of a wastewater treatment facility not regulated under § 402 or 307(b) of the CWA. Based on the experts' information, all wastewater treatment tanks, including those at most publicly-owned treatment works and many private treatment facilities, are all part of a wastewater treatment facility regulated by either § 402 or § 307(b) of the CWA and, therefore, are excluded from 40 CFR part 280. As a result, it appears there are no wastewater treatment tank systems currently deferred. However, in the event such tanks exist, they present the same risks as other UST systems currently regulated and need to meet the requirements in 40 CFR part 280 in order to protect human health and the environment.

EPA is proposing that wastewater treatment tank systems installed on or before the effective date of the final UST regulation begin meeting the requirements in 40 CFR 280 subparts B (except § 280.22), C, and D within three years of the effective date of the final UST regulation and § 280.22 of subpart B along with subparts E, G, and H on the effective date of the final UST regulation. This includes requirements for design, construction, and installation (including spill, overfill, and corrosion protection); release detection; notification; operation and maintenance; recordkeeping; and closure. In the 1988 UST regulation, deferred wastewater treatment tank systems were required to meet the interim prohibition requirements of § 280.11 (that is, corrosion protected, made of non-corrodible materials, or otherwise designed and constructed to prevent releases during the operating life of the facility due to corrosion or structural failure). Therefore, wastewater treatment tank systems are already equipped with corrosion protection. Wastewater treatment tank systems installed after the effective date of the final UST regulation must meet all 40 CFR part 280 requirements at installation. Three years allows owners and operators enough time to implement the requirements of subparts B (except § 280.22), C, and D. EPA also is taking the position that owners and operators can implement the requirements of § 280.22 of subpart B along with subparts E, G, and H beginning on the effective date of the final UST regulation because upgrades or special equipment are not needed to meet the requirements in these subparts.

As with airport hydrant systems and UST systems with field-constructed tanks, EPA is proposing not to allow adding an internal lining as a means of corrosion protection for wastewater treatment tank systems that are not already upgraded. See section C–2 for an explanation of why EPA is not allowing these USTs to be upgraded with internal lining.

Wastewater treatment tank systems installed on or before the effective date of the final UST regulation that do not meet the upgrade requirements within three years after the effective date of the rule must be permanently closed according to § 280.70. EPA is requiring permanent closure to prevent releases to the environment from wastewater treatment tank systems that have not been upgraded.

Notification

EPA is proposing owners submit a one-time notification to implementing agencies for wastewater treatment tank systems not regulated by the CWA. Owners must notify within 30 days of the effective date of the final regulation. EPA is proposing this to ensure implementing agencies are aware these systems exist.

Financial Responsibility

Because wastewater treatment tank systems will no longer be deferred, those systems not permanently closed will need to meet financial responsibility requirements as described in 40 CFR part 280, subpart H. Federal- and state-owned facilities are exempt from this requirement. Therefore, federal and state owners and operators of wastewater treatment tank systems will not have to meet this requirement.

What issues related to this change does EPA request comment or additional data on?

- EPA is taking the position that there are no wastewater treatment tank systems affected by this proposal. Are you aware of systems that would be subject to this proposed change? If yes, please provide information about the number and location of wastewater treatment tank systems that would be regulated. For instance are there units associated with natural gas drilling that are not regulated by 402 or 307(b)?
- If there are wastewater tank systems, is it most appropriate to regulate, exempt, or continue to defer these systems? Please explain why.
- Should EPA consider revising the date in 280.73 for previously deferred UST systems? Revision of this date would mean that these UST systems closed prior to the effective date of the final rule would not have to meet Subpart G unless the implementing agency directs otherwise based on a current or potential threat to human health and the environment. How many of these UST systems have been closed since December 22, 1988?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

5. Maintain Deferral for USTs Containing Radioactive Material and Emergency Generator UST Systems at Nuclear Power Generation Facilities Regulated by the Nuclear Regulatory Commission

EPA is not proposing changes to the 1988 UST regulation deferral in § 280.10(c)(2) and (3) for USTs containing radioactive material and for emergency generator UST systems at nuclear power generation facilities regulated by the Nuclear Regulatory Commission (NRC). Currently, these types of UST systems are deferred from most UST requirements but are subject to requirements for interim prohibition, release response and corrective action, and where applicable, lender liability (40 CFR part 280, subparts A, F, and I,

respectively). EPA has decided to keep the deferral in order to retain EPA's requirements for cleaning up releases from these USTs.

EPA compared Department of Energy (DOE) Orders [53] and NRC requirements to the 1988 UST regulation. This assessment revealed DOE and NRC requirements are comparable to EPA requirements for new and existing USTs regarding spill and overfill control (§ 280.30); operation and maintenance of corrosion protection (§ 280.31); compatibility (§ 280.32); and release detection (40 CFR part 280, subpart D). However, there is no independent regulatory authority for DOE and NRC to remediate releases. With that in mind, EPA is taking the position that it is appropriate to maintain the deferral for these USTs as it currently exists in order for EPA to continue requiring release response and corrective action.

D. Other Changes

1. Changes To Overfill Prevention Equipment Requirements

What is EPA proposing?

In § 280.20, EPA is proposing to eliminate flow restrictors (also called ball float valves) in vent lines as an overfill prevention option either when an UST system is installed or when an UST system's overfill prevention equipment is replaced.

Owners and operators using a vent line flow restrictor before the final UST regulation becomes effective may continue using a flow restrictor to meet the overfill prevention requirements, as long as it restricts the flow of regulated substances into the UST when the device activates.

Owners and operators may continue to use flow restrictors not in vent lines (such as flow restrictors in fill pipes), automatic shutoff devices, and high level alarms as overfill prevention for all UST systems.

Why is EPA proposing this change? What background information is available about this change?

Spills and overfills are a common cause of UST system releases (see sections B–2 and B–3 for additional discussion). Through extensive stakeholder outreach, EPA identified vent line flow restrictors as a significant concern for operability and safety. To reduce the frequency of UST releases due to operability and to address system safety and personnel safety concerns, EPA is proposing to eliminate vent line flow restrictors for new installations and replacements.

- *Operability*—For a vent line flow restrictor to operate properly, the device must restrict the flow of regulated substance into the UST when the flow restrictor engages. If the tank top is not liquid or vapor tight, flow into the UST is not restricted because vapors continue to escape through these non-tight areas. If vapors continue to escape the UST, there is no pressure buildup in the vapor area of the tank, resulting in no reduced flow rate into the UST. Examples where non-tight tank tops may result in ineffective flow restrictors include: Loose tank bungs or other tank top components; tanks with coaxial stage I vapor recovery installed; and tanks with both tank top and remote fill areas.
- *System safety*—Vent line flow restrictors can create safety concerns when they activate. USTs can become over pressurized and damaged during a pressurized delivery. The 2005 version of the Petroleum Equipment Institute's installation standard, RP100, recommends against using vent restriction devices because the vent line flow restrictor pressurizes the UST, creating a hazardous condition when the device operates as designed.
- *Personnel safety*—Delivery personnel can be sprayed with regulated substances when they disconnect the delivery hose from the fill pipe and the vent line flow restrictor activates.

What issues related to this change does EPA request comment or additional data on?

- EPA considered eliminating or phasing out vent line flow restrictors for currently installed UST systems, but finds the cost burden for owners and operators could be high. Please provide input and information in support of or against eliminating or phasing out vent line flow restrictors.

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

2. Internal Linings That Fail the Periodic Lining Inspection and Cannot Be Repaired

What is EPA proposing?

In § 280.21, EPA is proposing owners and operators permanently close an UST that uses internal lining as the sole method of corrosion protection when both of these conditions exist:

- A lining inspection determines the internal lining is no longer performing according to original design specifications; and
- The internal lining cannot be repaired according to a code of practice developed by a nationally recognized association or independent testing laboratory.

For tanks with both internal lining and cathodic protection, EPA is proposing to allow owners and operators continue operating an UST if it fails the lining inspection and cannot be repaired if both of these criteria are met:

- The cathodic protection is operated and maintained according to § 280.31; and
- The tank was assessed and found to be structurally sound and free of corrosion holes when the cathodic protection was added to the tank.

Why is EPA proposing this change? What background information is available about this change?

About 3 percent of tanks today rely on internal lining as the sole method of corrosion protection to meet the 1988 UST regulation.[54] Tanks that are internally lined to meet the 1988 UST regulation corrosion protection requirement at § 280.21 are typically older, bare steel tanks installed before 1986. The 1988 UST regulation preamble says that internal lining, when used as the sole method for corrosion protection, is not regarded as a permanent upgrade. However, it is adequate if the lining continues to meet original design specifications. If the internal lining no longer meets original design specifications and cannot be repaired according to industry codes, then the lined tank is subject to unprotected tank requirements and must be replaced after 1998. However, the language from the 1988 preamble was not included in § 280.21(b)(1).

EPA is proposing to revise the internal lining requirements to match EPA's intent of replacing internally lined tanks that fail a lining inspection and cannot be repaired according to a code of practice. EPA is proposing that a lined tank must be permanently closed if, when inspected, it cannot be repaired according to a code of practice.

Owners and operators may continue using internal lining to meet the corrosion protection requirement, as long as:

[53] DOE Orders establish management objectives, identify performance requirements and assign responsibilities consistent with policy and regulations. See: *https://www.directives.doe.gov/directives/types-of-directives.*

[54] E2, Incorporated, memoranda and analyses submitted under Contract EP–W–05–018, ''U.S. Environmental Protection Agency. Underground Storage Tanks/Leaking Underground Storage Tanks Analytical And Technical Support.'' These supporting materials can be found in the docket for the proposed rulemaking.

• The internal lining is periodically inspected according to § 280.21(b)(1)(ii); and

• The internal lining passes the inspection or is repaired so it meets original design specifications according to a code of practice developed by a nationally recognized association or independent testing laboratory.

Consistent with current EPA policy,[55] tanks using the combination of cathodic protection and internal lining for corrosion protection are not required to be closed if the internal lining fails and cannot be repaired as long as:

• The cathodic protection is operated and maintained according to § 280.31; and

• The tank was assessed and found to be structurally sound and free of corrosion holes when the cathodic protection was added to the tank.

What issues related to this change does EPA request comment or additional data on?

• Should EPA consider requiring lined tanks be closed when they fail a lining inspection independent of whether the lining can be repaired? If yes, please provide information to support your answer.

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

3. Notification Requirements

What is EPA proposing?

EPA is proposing these notification requirement changes in § 280.22:

• Notify implementing agencies within 30 days of assuming ownership of an UST system. A new owner is required to submit a form which provides the new owner's name, mailing address, physical location of USTs, and name of previous owner;

• Require owners who bring new UST systems into service notify implementing agencies of USTs, rather than state or local agencies designated by EPA;

• Merge the paragraph about minimum information with the paragraph explaining what forms to use for notification and delete the minimum information paragraph;

• Require owners of deferred UST systems EPA is proposing to require a one-time notification to implementing agencies within 30 days of the effective date of the final UST regulation.

EPA is proposing changes to the ''Notification For Underground Storage Tanks'' form in Appendix I.

EPA is proposing changes to the form as a result of today's proposal, and to change ''State'' to ''Implementing Agency'' throughout the form.

EPA is proposing a new form titled ''Notification of Ownership Change for Underground Storage Tanks'' under Appendix II.

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing the new ownership change notification to more effectively administer the UST program. EPA required a one-time notification of regulated USTs by May 8, 1986,[56] and owners who purchased newly installed UST systems completed and submitted notification forms to implementing agencies. However, EPA did not require people notify implementing agencies when acquiring a regulated UST, such as when purchasing an existing service station.

Without a requirement to notify when persons assume ownership of UST systems, implementing agencies have difficulty administering the UST program. Persons can assume ownership through purchase, inheritance, acquisition of property, or other means. EPA estimates on average 10 percent of retail UST facilities change ownership in a given year.[57] Any communication or outreach is impaired if implementing agencies do not know the correct owners of a large proportion of regulated USTs. When final, this change will ensure implementing agencies know the current ownership of regulated UST systems.

At least 48 of 56 states and territories realized this need and instituted some form of ownership change notification. EPA is following the example of these states and will require an ownership change notification to more effectively administer the UST program.

EPA is proposing to include a form in Appendix II titled ''Notification of Ownership Change for Underground Storage Tanks.'' The new form specifies the information persons need to submit to the implementing agency after they become owners of underground storage tanks. EPA is proposing these owners provide their name, address, phone number, name of the facility, location of USTs, as well as the name, address, and phone number of the previous owner.

EPA is also proposing owners who bring UST systems into service notify implementing agencies, rather than state and local agencies identified by EPA. This change is needed for two reasons. First, an unintended result of the existing requirement is owners in Indian country submitted notification forms to state or local agencies, not to EPA, even though EPA is the implementing agency in Indian country. When final, this change will greatly assist EPA in implementing the UST program in these areas. Second, many of the agency names and addresses EPA identified in 1988 are no longer accurate. When final, this change will provide owners with clarity about where to send notification forms and better accommodate changes of implementing agencies.

EPA is proposing to merge the paragraphs discussing the minimum information owners and operators need to submit and the form to be submitted to implementing agencies. This will reduce redundancy and ease understanding of this requirement. As a result, a separate paragraph explaining what minimum information to submit for notification will be unnecessary.

EPA is proposing owners of previously deferred UST systems notify implementing agencies within 30 days of the effective date of the final UST regulation. EPA is proposing this one-time notification because owners of previously deferred UST systems brought into service after May 8, 1986 were not required to notify implementing agencies. Because EPA is proposing to regulate previously deferred UST systems and to ensure they meet requirements of the final UST regulation, it is imperative implementing agencies receive notice about these UST systems.

Due to EPA's proposed changes to the UST regulation, we are proposing changes to the notification form under Appendix I. This will make the form request appropriate information according to today's proposal. For instance, the release detection section of the 1988 UST regulation form did not include statistical inventory reconciliation or bulk tightness testing. The proposed form includes these methods.

What issues related to this change does EPA request comment or additional data on?

• Is a one-time notification for all UST owners also necessary to effectively administer the UST program in jurisdictions (eight states and

[55] EPA UST Technical Compendium Question and Answer #14: *http://epa.gov/oust/compend/nus.htm.*

[56] Solid Waste Disposal Act § 9002(a)(1).

[57] E2, Incorporated, memoranda and analyses submitted under Contract EP–W–05–018, ''U.S. Environmental Protection Agency. Underground Storage Tanks/Leaking Underground Storage Tanks Analytical And Technical Support.'' These supporting materials can be found in the docket for the proposed rulemaking.

territories and Indian country) where implementing agencies do not currently require ownership change notification? EPA is posing this question because of the high rate of UST ownership changes and resulting likelihood implementing agencies do not know who owns numerous UST systems.

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

4. Alternative Fuels And Compatibility

What is EPA proposing?

EPA is proposing changes to two definitions in § 280.12 of the 1988 UST regulation.

• *Regulated substance*—delete "* * * derived from crude oil though[58] [*sic*] processes of separation, conversion, upgrading, and finishing * * *"

• *Motor fuel*—include explanatory language that a petroleum or petroleum-based substance is typically used to operate a motor engine and provide example products (motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any blend containing one or more of these substances, such as motor gasoline blended with alcohol) meeting the definition.

In addition, EPA is proposing changes to the compatibility requirement in § 280.32 of the 1988 UST regulation. These changes explain how owners and operators storing certain regulated substances must demonstrate that their UST systems are compatible with substances stored. Specifically, EPA is proposing:

• Owners and operators storing any regulated substance blended with greater than 10 percent ethanol or greater than 20 percent biodiesel, or any other regulated substance identified by the implementing agency, must use one or more of the following methods to demonstrate UST system compatibility with these regulated substances:

○ Certification or listing of UST system components by a nationally recognized, independent testing laboratory for use with the fuel stored;

○ Equipment or component manufacturer approval. The manufacturer's approval must be in writing; indicate an affirmative statement of compatibility; specify the range of ethanol or biodiesel blends the component is compatible with; and be from the equipment or component manufacturer; or

○ Another method determined by the implementing agency to be no less protective of human health and the environment than the previously listed methods.

• Owners and operators must maintain the following records (according to § 280.34) for the life of the equipment or component:

○ Documentation of compliance with the above section as applicable; and

○ Records of all equipment or components installed or replaced after the effective date of the final UST regulation. At a minimum, each record must include the date of installation or replacement, manufacturer, and model.

EPA is also proposing to delete these codes of practice.

• American Petroleum Institute Publication 1626, "Storing and Handling Ethanol and Gasoline-Ethanol Blends at Distribution Terminals and Service Stations"

• American Petroleum Institute Publication 1627, "Storage and Handling of Gasoline-Methanol/Cosolvent Blends at Distribution Terminals and Service Stations"

Why is EPA proposing this change? What background information is available about this change?

Regulated Substance and Motor Fuel Definitions

EPA is proposing a change in the regulated substance definition to clarify that petroleum does not need to be derived from crude oil in order to be regulated when stored in USTs. The preamble to the supplement to the proposal for the original UST regulation indicates that petroleum products can be derived from other materials, such as biomass, plant material, organic waste, coal, and shale oil.[59] Petroleum is comprised of a complex blend of hydrocarbons regardless of its source material; therefore, all petroleum poses risks to human health and the environment.

Many people interpreted the 1988 UST regulation definition of regulated substance as applying to petroleum USTs only if the petroleum was derived from crude oil. Over time, this misinterpretation may become more problematic as the amount of petroleum derived from non-crude oil based products, such as natural gasoline, increases as a result of requirements in the Energy Independence and Security Act of 2007. Today's regulated substance clarification will eliminate uncertainty about the regulatory status of tanks storing petroleum products derived from sources other than crude oil.

EPA is proposing a change in the motor fuel definition to better accommodate new motor fuels that may be marketed and stored in the future. The 1988 UST regulation definition listed motor fuel products, leading to confusion as to whether new fuels, such as petroleum blended with ethanol or biodiesel, are motor fuels. Today's proposal clarifies the motor fuel definition to explain that it is any fuel typically used to operate a motor engine.

Compatibility

EPA understands that the chemical and physical properties of ethanol and biodiesel can be more degrading to certain UST system materials than petroleum alone. As the use of ethanol- and biodiesel-blended fuels increases, EPA is concerned that not all UST system components are compatible with these fuel blends.

Gasoline containing 10 percent or less ethanol (known as E10) has been used in parts of the United States for many years, and UST equipment manufacturers accommodated the E10 market by producing compatible equipment. According to the Renewable Fuels Association, ethanol is blended into over 90 percent of all gasoline sold in the country,[60] predominantly as E10. Recently, there has been a movement toward higher blends of ethanol, due in part to federal and state laws encouraging the increased use of biofuels. While most UST system equipment and components are compatible with E10, blends greater than 10 percent ethanol do not have a long history of storage and may not be compatible with certain materials used in UST systems. According to a 2011 report published by U.S. Department of Energy's Oak Ridge National Laboratory,[61] some elastomeric materials are particularly affected by intermediate ethanol blends and certain sealants may not be suitable for any ethanol-blended fuels. A 2007 report from Underwriters Laboratories (UL)[62]

[58] This is an error in 40 CFR 280; "though" should be "through."

[59] "40 CFR Parts 280 and 281 USTs; Supplement to Proposed Rule," 52 Federal Register 246 (23 December 1987), pg. 48640.

[60] Renewable Fuels Association, "Building Bridges to a More Sustainable Future: 2011 Ethanol Industry Outlook." *http://www.ethanolrfa.org/page/-/2011%20RFA%20Ethanol%20Industry%20Outlook.pdf?nocdn=1.*

[61] Oak Ridge National Laboratory, "Intermediate Ethanol Blends Infrastructure Materials Compatibility Study: Elastomers, Metals, and Sealants" (March 2011).

[62] Underwriters Laboratories, Inc., "Underwriters Laboratories Research Program on Material Compatibility and Test Protocols for E85 Dispensing Equipment" (December 2007). Available in the UST Docket under Docket ID No. EPA–HQ–UST–2010–0651.

evaluated the effect of 85 percent ethanol and 25 percent ethanol blends on dispenser components. Results indicated some materials used in the manufacture of seals were degraded more when exposed to the 25 percent ethanol test fluid than when exposed to the 85 percent ethanol test fluid. Other literature suggests ethanol fuel blends can be more aggressive toward certain materials than independent fuel constituents, with maximum polymer swelling observed at approximately 15 percent ethanol by volume.[63] Therefore, EPA is clarifying the compatibility requirements for owners and operators who choose to store regulated substances containing greater than 10 percent ethanol.

EPA is also clarifying the compatibility requirements for owners and operators who choose to store regulated substances containing greater than 20 percent biodiesel. Although the total use of biodiesel is significantly less than that of ethanol, it has become increasingly available across the United States and may also be incompatible with certain materials used in UST systems. Pure biodiesel (B100), for example, has known compatibility issues with certain materials. According to the U.S. Department of Energy's National Renewable Energy Laboratory (NREL) *Biodiesel Handling and Use Guide, Fourth Edition,*[64] ''B100 will degrade, soften, or seep through some hoses, gaskets, seals, elastomers, glues, and plastics with prolonged exposure * * * Nitrile rubber compounds, polypropylene, polyvinyl, and Tygon® materials are particularly vulnerable to B100.''

In contrast, the properties of very low blends of biodiesel (B5 or less) are so similar to those of petroleum diesel that ASTM International (ASTM) considers conventional diesel that contains up to 5 percent biodiesel to meet its ''Standard Specification for Diesel Fuel Oils''[65]. For biodiesel blends between 5 and 100 percent, there is very little compatibility information; however, NREL's handling and use guide concludes that biodiesel blends of B20 or less have less of an effect on materials and very low blends of biodiesel (for example, B5 and B2) '' * * * have no noticeable effect on materials compatibility.''[66] In addition, fleet service sites have stored B20 in USTs for years, and EPA is not aware of compatibility-related releases associated with those USTs storing B20. Therefore, EPA is proposing to require tank owners and operators who store greater than 20 percent biodiesel in their UST systems demonstrate compatibility of UST equipment by one of the methods proposed in § 280.32.

To avoid risk of increased releases due to incompatibility of ethanol or biodiesel blends with UST system components, EPA is proposing several options for owners and operators to demonstrate that their UST systems are compatible with regulated substances containing greater than 10 percent ethanol or greater than 20 percent biodiesel. These options provide owners and operators with flexibility in demonstrating compatibility, yet still protect human health and the environment. In the past, tank owners typically demonstrated compatibility by using equipment certified or listed by a nationally recognized, independent testing laboratory, such as Underwriters Laboratories (UL). Many UST components in the ground today were manufactured before regulated substances containing ethanol or biodiesel existed and are not approved by nationally recognized, independent testing laboratories for use with these fuel blends. Currently, certain tanks and piping have been tested and are listed by UL for use with higher-level ethanol blends. Many other components of the UST system, such as leak detection devices, sealants, and containment sumps, may not be listed by UL or another nationally recognized, independent testing laboratory for use with these blends.

In addition, EPA is not aware of any nationally recognized, independent testing laboratory that has performed testing on UST system components with biodiesel-blended fuels. Absent certification or listing from a nationally recognized, independent testing laboratory, or other verification that components may be used with anything beyond conventional fuels, the suitability of these components for use with ethanol or biodiesel blends comes into question. As a result, EPA is providing options for demonstrating compatibility to reduce the risk of releases due to material incompatibility. Owners and operators choosing to store regulated substances blended with greater than 10 percent ethanol or greater than 20 percent biodiesel must demonstrate compatibility of the UST system before storing those regulated substances.

EPA is proposing owners and operators use one of these two methods for demonstrating compatibility of UST equipment or components with regulated substances containing greater than 10 percent ethanol or greater than 20 percent biodiesel: using equipment or components that are certified or listed by a nationally recognized, independent testing laboratory for use with the fuel stored; or using equipment or components approved by the manufacturer to be compatible with the fuel stored. In addition, implementing agencies will have the flexibility to evaluate and allow other methods, if they are no less protective of human health and the environment than those EPA is proposing today.

For those components tested and approved by a nationally recognized, independent testing laboratory, owners and operators will be able to demonstrate compatibility solely by keeping records of these components. In this instance, the testing laboratory's listing, labeling, or approval demonstrates the equipment or component's suitability to be used with the regulated substance stored, which means owners and operators will be able to demonstrate compatibility by retaining equipment or component records.

Owners and operators will also be able to demonstrate compatibility by obtaining manufacturer's approval of components' compatibility with the regulated substance to be stored. The manufacturer's approval must be in writing and include an affirmative statement that the component is compatible with the fuel blend stored. To add clarity for tank owners and operators, the manufacturer's approval must also specify the range of fuel blends for which the component is compatible. Finally, the manufacturer's approval must be issued from the equipment or component manufacturer, not another entity (such as the installer or distributor). A manufacturer's approval will enable owners and operators to demonstrate compatibility for components not approved for use by a nationally recognized, independent testing laboratory. It will also provide confidence for implementing agencies that the component is compatible with the fuel stored.

EPA is proposing an additional option which would allow implementing

[63] Westbrook, P.A., ''Compatibility and Permeability of Oxygenated Fuels to Materials in Underground Storage and Dispensing Equipment'' (January 1999). Available in the UST Docket under Docket ID No. EPA–HQ–UST–2010–0651.

[64] National Renewable Energy Laboratory, ''Biodiesel Handling and Use Guide, Fourth Edition.'' (2009). Available in the UST Docket under Docket ID No. EPA–HQ–UST–2010–0651.

[65] ASTM Standard D975, 2010c ''Standard Specification for Diesel Fuel Oils,'' ASTM International, West Conshohocken, PA, 2010, DOI: 10.1520/D0975–10C, *http://www.astm.org.*

[66] National Renewable Energy Laboratory, ''Biodiesel Handling and Use Guide, Fourth Edition.'' (2009). Available in the UST Docket under Docket ID No. EPA–HQ–UST–2010–0651.

agencies to approve other methods for demonstrating compatibility with regulated substances containing greater than 10 percent ethanol or greater than 20 percent biodiesel. Implementing agencies will be able to approve methods they consider no less protective of human health and the environment in addition to the manufacturer's approval or the listing, labeling, or approval by a nationally recognized, independent testing laboratory. This will provide owners and operators with additional flexibility when new methods to determine UST system component compatibility are developed.

Although these methods for demonstrating compatibility will apply to UST systems storing regulated substances containing greater than 10 percent ethanol and greater than 20 percent biodiesel, EPA is proposing to extend the methods to other regulated substances identified by implementing agencies. This will provide implementing agencies with flexibility when new regulated substances (for example, biobutanol) enter the fuel market and allow implementing agencies to apply these methods for determining UST system compatibility to other regulated substances.

EPA is proposing owners and operators maintain records for the life of UST systems, if the UST system stores regulated substances containing greater than 10 percent ethanol or greater than 20 percent biodiesel or another regulated substance identified by implementing agencies. Owners and operators will be required to retain equipment or component records in order to demonstrate their systems are compatible with these regulated substances. Without records of the equipment or components, owners and operators will not be allowed to store regulated substances containing greater than 10 percent ethanol or greater than 20 percent biodiesel in their UST systems.

To demonstrate compatibility with regulated substances stored in UST systems, owners and operators of new and replaced equipment or components must retain records for the life of the equipment or component. This will ensure new and replaced equipment and components are compatible with the regulated substances stored. As equipment or components are replaced, records will be available for all UST system equipment or components, making it easier for owners and operators to demonstrate compatibility with new regulated substances.

Owners and operators must demonstrate compatibility for the following UST system equipment or components: Tank or internal tank lining; piping; line leak detector; flexible connectors; drop tube; spill and overfill prevention equipment and components; submersible turbine pump equipment and components; sealants (including pipe dope and thread sealant); fittings; gaskets; bushings; couplings; boots; containment sumps (including submersible turbine sumps and under dispenser containment); release detection floats, sensors, and probes; fill and riser caps; and the product shear valve. These equipment or components are a subset of an UST system, as defined by § 280.12, which, if incompatible, would lead to a liquid release to the environment.

EPA is clarifying that the requirements in this section also apply to both newly installed equipment or components and equipment where one or more components are replaced. For newly installed equipment comprised of multiple individual, smaller components and assembled by the manufacturer, some manufacturers provide a compatibility certification for the equipment as a whole. For example, a manufacturer may certify the entire submersible turbine pump as being compatible. The submersible turbine pump certification would include all components (gaskets, sealants, bushings, *etc.*) of the equipment assembled by the manufacturer. Therefore, an owner may obtain one certification for newly installed manufacturer-assembled equipment, as long as the manufacturer certifies the entire piece of equipment as compatible. However, over the lifetime of a typical UST system, equipment is likely to require maintenance, which may involve replacing components such as gaskets, sealants, and bushings. It is important for tank owners to use compatible replacement components, especially since these components are sometimes constructed of materials that are not compatible with biofuel blends. Therefore, components (such as gaskets, sealants, bushings, *etc.*) replaced after the equipment was originally installed will not be covered by the original manufacturer's approval. Owners and operators will need to obtain manufacturer's certification indicating the replaced component is compatible with the regulated substance stored in the UST system.

These proposed changes will protect human health and the environment from potential additional releases as a result of incompatible UST systems. Also, the changes are not overly burdensome, nor do they require costly retrofits. These changes will give owners and operators flexibility, yet provide EPA with confidence that UST systems will be compatible with new fuel blends when owners and operators use one or more of the proposed methods to determine compatibility. The additional language also provides owners and operators with certainty on what is acceptable in demonstrating UST system compatibility with the substances stored.

EPA is also proposing to delete two codes of practice listed in the 1988 UST regulation. EPA included codes of practice to help owners and operators demonstrate compliance with the compatibility requirement. EPA is now proposing methods for determining compatibility, so referencing codes of practice is unnecessary.

In August 2010, American Petroleum Institute (API) published an updated version of API Recommended Practice 1626. Today's proposal incorporates several methods API recommends owners and operators storing blends of greater than 10 percent ethanol use to demonstrate UST system compatibility. If owners and operators follow API Recommended Practice 1626, Section 7 requirements, for regulated substances blended with ethanol, they will meet today's proposed § 280.32(b) changes.

What issues related to this change does EPA request comment or additional data on?

- How many UST systems currently store petroleum not derived from crude oil (such as natural gasoline)?
- Should EPA consider allowing professional engineers to make compatibility determinations?
- Are there additional methods for effectively demonstrating compatibility? If yes, please provide details.
- Are there other alternatives to demonstrating compatibility (such as using secondarily contained USTs) that tank owners and operators should be allowed to use, that are no less protective of human health and the environment?
- Are the proposed criteria for manufacturer's approval reasonable?
- Should EPA consider tiering methods? For example, if an approval or listing from a nationally recognized, independent third party is available, then the manufacturer approval is not an option for that component?
- Should EPA waive the compatibility requirement for UST systems with secondary containment and interstitial monitoring? Why or why not?
- While this proposal requires owners and operators maintain records to demonstrate compatibility, we are not requiring owners and operators transfer

records to new owners and operators. Should EPA consider requiring records transfer?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

5. Improving Repairs

What is EPA proposing?

EPA is proposing to revise the definition of repair in § 280.12 to:

- Clarify that all UST system components, including piping, spill prevention equipment, overfill prevention equipment, corrosion protection equipment, and release detection equipment are included under the repairs allowed section of the regulation, and
- Remove the link that repairs are only associated with a release from an UST system by adding to the definition suspected release and equipment that has failed to function properly.

For repairs to secondary containment areas of UST systems, overfill prevention equipment, and spill prevention equipment, EPA is proposing to add tests after a repair to the repairs allowed section (§ 280.33). The tests after repair requirements for these areas are the same as those for periodic spill and overfill tests discussed in sections B–2 and B–3. The tests for interstitial areas after a repair and periodic interstitial integrity (in section B–4) are the same, except tanks with continuous interstitial sensors must perform a vacuum, pressure, or liquid test following the repair. These tests must be conducted within 30 days of a repair.

Why is EPA proposing this change? What background information is available about this change?

Clarification of UST system components in the definition of repair—EPA is proposing to add the following UST system components to the definition of repair: Piping; spill prevention equipment; overfill prevention equipment; corrosion protection equipment; and release detection equipment. By adding these UST system components, EPA is making it clear that these specific components are subject to the repairs allowed section of the regulation. This means owners and operators performing repairs on these UST system components must follow the repairs allowed section (§ 280.33). The 1988 UST regulation definition of repair uses the generic term UST system component and provides less detail about what an UST system component is.

Including repairs not associated with a confirmed release or suspected release from the UST system—It is common practice for owners and operators to fix UST components that have not caused a release or suspected release of product from the UST system. However, the repair definition in the 1988 UST regulation does not consider these non-release fixes as repairs. EPA is proposing to modify the repair definition to include the concept of repairing equipment that failed to function properly, delinking a repair with a release from the UST system. This proposed change will ensure repair activities not associated with a release are conducted properly. For example, under the 1988 UST regulation, fixing a cathodic protection system would not be considered a repair because the UST component likely has not yet caused a release of product from the UST system. In addition, EPA is proposing to include a suspected release as part of the definition, so repairs associated with suspected releases are covered under the repair definition.

By removing the link between repair and release, EPA is proposing owners and operators meet the repairs allowed section (§ 280.33) when fixing UST system components that have not caused a release of product from the UST system. This means owners and operators will need to have repairs performed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and test the equipment after the repair is completed.

Tests after repairs—To ensure equipment is operating as intended after a repair, EPA is proposing to require tests within 30 days of repairing spill, overfill, and secondary containment equipment. Except for interstitial integrity tests in USTs with continuous interstitial sensors, the tests after repairs proposal uses periodic tests described in sections B–2, B–3, and B–4. For USTs with continuous interstitial sensors, owners and operators must conduct vacuum, pressure, or liquid tests to ensure the secondary containment area is operating as intended. EPA is proposing to require tests because sensors alone cannot immediately determine whether repairs were completed properly. Vacuum, pressure, and liquid tests will be able to ensure the adequacy of the repair by evaluating the interstitial area. Tests after repairs will only apply to those UST components being repaired and not to all components at the UST site.

EPA is proposing that tests of spill, overfill, and interstitial areas after a repair occur within 30 days of the repair. EPA chose 30 days to be consistent with the time frame for the tightness testing requirement after repairing tanks and piping in § 280.33.

What issues related to this change does EPA request comment or additional data on?

- Should EPA consider changing the time frame for conducting an interstitial, spill, or overfill test from 30 days to before returning the UST system to service?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

6. Phase Out Vapor Monitoring and Groundwater Monitoring as Release Detection Methods

What is EPA proposing?

EPA is proposing to phase out vapor monitoring and groundwater monitoring as methods of release detection for tanks and piping in § 280.43.

Owners and operators of UST systems installed before the effective date of the final UST regulation will have five years to comply with another release detection monitoring method in 40 CFR 280, subpart D.

Why is EPA proposing this change? What background information is available about this change?

Although EPA is proposing new and replaced tanks and piping use interstitial monitoring (see section A–2), UST systems installed before the effective date of the final UST regulation may continue to use internal or interstitial release detection methods listed in subpart D of the 1988 UST regulation. Automatic tank gauging and statistical inventory reconciliation are internal monitoring methods and are characterized by activities within the tank or piping to monitor any discrepancies. Groundwater monitoring and vapor monitoring are external monitoring methods and are characterized by monitoring external areas (specifically groundwater or soil-vapor) that surround an UST system. An interstitial method monitors the space between tank or piping walls and detects a release before it reaches the environment.

EPA is proposing to phase out the two external release detection methods—vapor monitoring and groundwater monitoring—because these methods detect releases well after they enter the environment. In addition, there are inherent problems with installing and confirming proper use of these methods. As methods of release detection, they

are less protective of the environment than others. Regulators inspecting UST systems report common problems they encounter when inspecting UST systems using vapor or groundwater monitoring methods, such as an insufficient number of wells or wells improperly located to sufficiently monitor for potential releases.

Vapor monitoring problems pertain to confirming whether certain site conditions exist. In particular, surrounding soil should be sufficiently porous to readily allow diffusion into the excavation area; the ability to measure vapors should not be affected by groundwater, rainfall, or soil moisture; and background contamination should not interfere with monitoring methods.

A commonly encountered groundwater monitoring problem is that groundwater, at times, can be more than 20 feet from the ground surface, due to seasonal water table variations. According to the 1988 UST regulation, groundwater must never be more than 20 feet from the ground surface and well slotting must be designed to allow entry of regulated substances on the water table into the well under both high and low groundwater conditions. Unfortunately, many wells are not installed appropriately resulting in the depth of groundwater requirement not being met.

Many UST facilities do not have site assessments that confirm whether site conditions support use of vapor monitoring and groundwater monitoring release detection. In instances when site assessments are available, they are often not thorough enough to verify whether regulatory requirements are met. Without site assessments, regulators are unable to determine whether site conditions are met. Reassessing sites to verify if site conditions support use of vapor monitoring or groundwater monitoring is intrusive and costly. Some UST facilities switch between vapor monitoring and groundwater monitoring, depending on seasonal variations. This practice further complicates using these methods, such as whether groundwater rendered the vapor monitoring inoperable or whether the wells are designed for both methods. Even if optimal operating conditions are met in both of these external methods, by the time a release is detected, contamination has already significantly impacted the environment.

In contrast, internal release detection methods have an advantage over external monitoring methods. Internal methods provide an early warning to owners and operators because they indicate unusual operating conditions, such as water in the tank or incremental loss of product. An early warning alerts owners and operators to take action and minimize releases to the environment.

EPA estimates approximately 5 percent of all active UST systems are using vapor monitoring or groundwater monitoring to comply with release monitoring requirements.[67] Because of the time it may take for owners and operators to convert to another method of release detection, five years will allow sufficient time for UST system owners and operators to begin using another method of release detection.

What issues related to this change does EPA request comment or additional data on?

- Is five years for owners and operators using vapor monitoring and groundwater monitoring to switch to another method too short, too long, or an appropriate length?
- Are there circumstances at existing facilities that would warrant a subset of UST systems to use vapor monitoring or groundwater monitoring beyond the proposed period of five years. If so, what are the circumstances?
- Is EPA's assumption of 5 percent accurate for the number of active UST systems using vapor monitoring or groundwater monitoring to comply with release detection requirements?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

7. Interstitial Monitoring Results, Including Interstitial Alarms, Under Subpart E

What is EPA proposing?

EPA is proposing clarifications of UST owners' and operators' responsibilities regarding interstitial monitoring results, including alarms, under 40 CFR part 280, subpart E. Specifically, EPA is proposing these changes:

- Section 280.50(b)—add interstitial spaces of secondarily contained UST systems and provide examples of unusual operating conditions.
- Section 280.50(c)—clarify that an alarm during release detection monitoring is subject to the reporting requirement.
- Section 280.52(a)—require owners and operators of UST systems with secondary containment using interstitial monitoring follow integrity test requirements (proposed in section B–4) to confirm a suspected release, and clarify actions UST owners and operators must take if a test confirms a leak or indicates a release exists.

Why is EPA proposing this change? What background information is available about this change?

The 1988 UST regulation adequately covers interstitial monitoring. Nonetheless, EPA is proposing these changes to reinforce that a leak into an interstitial space of a secondarily contained UST system is also a potential threat to the environment and must be investigated, addressed, and as necessary, reported.

In section A–2, EPA is proposing interstitial monitoring for all new or replaced tanks and piping. As new systems are installed, interstitial monitoring will become more widely used as a method of release detection. With this in mind, EPA wants UST owners and operators to clearly understand how interstitial monitoring results, including interstitial alarms (and alarms associated with other types of release detection monitoring if interstitial monitoring is not used), must be handled.

In the 1988 UST regulation, EPA intended that product or water in the interstice, and alarms signifying the presence of those conditions, are unusual operating conditions and must be investigated appropriately. However, EPA did not indicate how UST owners and operators were to address discrepancies with interstitial spaces. As a result, some UST owners and operators were uncertain about how best to respond to interstitial monitoring results and alarms associated with interstitial monitoring that indicate a release may have occurred. This section provides specific information to alleviate uncertainty for owners and operators.

- Add interstitial spaces of secondarily contained UST systems and provide examples of unusual operating conditions
  - Two unusual operating condition examples—water in the interstitial space (presumably from a breach in the secondary wall) and product in the interstitial space (presumably from a breach in the primary wall)—are important along with other suspected release conditions listed in the 1988 UST regulation. Water or product in the interstitial space indicates there is a problem with the UST system that needs to be resolved. As a result, EPA is specifying these conditions as unusual operating conditions and will

[67] E2, Incorporated, memoranda and analyses submitted under Contract EP–W–05–018, ''U.S. Environmental Protection Agency. Underground Storage Tanks/Leaking Underground Storage Tanks Analytical And Technical Support.'' These supporting materials can be found in the docket for the proposed rulemaking.

require UST owners and operators investigate and address them.

• Clarify that an alarm during release detection monitoring, which indicates a potential release or compromise of the interstitial space, is subject to the reporting requirement

○ UST owners and operators must appropriately address release detection monitoring alarms. For example, continuously monitored systems will trigger an alarm indicating a potential release or that the interstitial space has been compromised. UST owners and operators must appropriately address all alarms in the same manner. EPA is adding interstitial monitoring in subpart E to emphasize its importance because the proposed secondary containment requirement for new and replaced system discussed in section A–2 will increase the use of interstitial monitoring. UST owners and operators will not be required to report alarms from defective equipment or false alarms as suspected releases. Also, UST owners and operators will not have to report leaks that are contained in the interstitial space, but they must investigate and repair the problems. However, as required in § 280.43(g), groundwater, soil moisture, or rainfall must not render the testing or sampling method inoperative so that a release could go undetected for more than 30 days. Finally, regulated substance in the interstitial space poses safety concerns and can also affect testing and sampling methods. For safety reasons, owners and operators must ensure the method of interstitial monitoring continues to operate and should always remove any regulated substance from the interstitial area.

• Require owners and operators of UST systems with secondary containment using interstitial monitoring follow integrity test requirements (proposed in section B–4) to confirm a suspected release and clarify actions UST owners and operators must take if a test confirms a leak or indicates a release exists

○ Requiring UST owners and operators to follow integrity test requirements of the interstitial area will ensure both inner and outer walls are checked when investigating a suspected release. EPA also is taking the position that it is important to clarify actions UST owners and operators must take if a test confirms a leak or indicates a release exists. If a leak is confirmed, UST owners and operators must correct or address the problem. In addition to options listed in the 1988 UST regulation, EPA is proposing to include closure as another option. Nothing in this proposal changes the requirement in subpart F for UST owners and operators to take corrective action if a release occurred.

What issues related to this change does EPA request comment or additional data on?

EPA did not identify specific issues for comment.

E. General Updates

1. Incorporate Newer Technologies

What is EPA proposing?

EPA is proposing to include technologies developed since issuing the 1988 UST regulation and clarify the use of those technologies. EPA is proposing these changes:

• Tanks—revise steel-fiberglass-reinforced-plastic composite in § 280.20(a)(3) to steel tank clad or jacketed with a non-corrodible material. UST owners and operators will be able to use jacketed tanks to meet EPA's proposed requirement for secondary containment and interstitial monitoring described in section A–2.

• Piping—revise fiberglass-reinforced plastic in § 280.20(b)(1) to non-corrodible material. This will allow UST owners and operators to install other piping, such as flexible plastic, that does not corrode.

• Release detection—add two release detection options: Continuous in-tank leak detection (CITLD) and statistical inventory reconciliation (SIR). UST owners and operators will be able to use these additional options to meet release detection requirements in § 280.40, as long as the methods meet the following:

○ CITLD—automatic tank gauge operating on an uninterrupted basis or operating within a process that allows the system to gather incremental measurements to determine the leak status of the tank at least once every 30 days.

○ SIR—quantitative analysis with a calculated leak rate capable of detecting a 0.2 gallon per hour leak rate within 30 days with a probability of detection of 0.95 and a probability of false alarm of 0.05 is required, based on a threshold that does not exceed one-half the minimum leak rate.

EPA is proposing to list three additional continuous interstitial monitoring methods in § 280.43(g): Liquid-filled, pressure, and vacuum interstitial monitoring. These methods must be capable of detecting a breach in both the inner and outer walls of the tank and piping.

Why is EPA proposing this change? What background information is available about this change?

Since EPA promulgated the 1988 UST regulation, newer tank, piping, and release detection technologies have been developed and are being used. EPA is proposing this change to acknowledge newer UST related technologies and clarify the use of these technologies.

Clad and Jacketed Tanks

The 1988 UST regulation allows these tank technologies: Coated and cathodically protected steel; fiberglass reinforced plastic; steel-fiberglass-reinforced-plastic composite; and metal without additional corrosion protection, provided that a corrosion expert determines the site is not corrosive enough to cause a release from corrosion during the tank's life. The 1988 regulation also allows use of other tank technologies that implementing agencies determine are no less protective of human health and the environment than those listed above. Additional non-corrodible materials are now used as claddings for steel tanks, and they are as effective at preventing corrosion as technologies in the 1988 regulation. EPA considers a cladding to be a non-corrosive dielectric material, bonded to the steel tank with sufficient durability to prevent corrosion during the tank's life. EPA did not include jacketed tanks in the 1988 regulation, even though they are no less protective of human health and the environment than technologies listed in the regulation. EPA considers jacketed to be a non-corrosive dielectric material that: Is constructed as secondary containment (jacketed) around a steel tank; has sufficient durability to prevent corrosion during the tank's life; and prevents a regulated substance released from the primary steel tank wall from reaching the environment. EPA estimates 10 percent of regulated tanks today are jacketed with a non-corrodible material and 18 percent are clad with a non-corrodible material.[68]

Non-Corrodible Piping

The 1988 UST regulation allows fiberglass-reinforced plastic piping as a non-corrodible piping option, as well as other piping technologies that implementing agencies determine are no less protective of human health and the environment than those in the

[68] E2, Incorporated, memoranda and analyses submitted under Contract EP–W–05–018, ''U.S. Environmental Protection Agency. Underground Storage Tanks/Leaking Underground Storage Tanks Analytical And Technical Support.'' These supporting materials can be found in the docket for the proposed rulemaking.

regulation. Non-corrodible piping not made of fiberglass-reinforced plastic (in particular, flexible plastic piping) was installed beginning in the 1990s and has evolved over the past 20 years. Flexible plastic piping is made of various non-corrodible materials, such as polyethylene and polyurethane. EPA estimates at least 13 percent of regulated piping currently installed is made of non-corrodible materials that are not fiberglass-reinforced plastic.[69] Revising fiberglass-reinforced piping to non-corrodible piping will allow UST owners and operators to install other types of non-corrodible piping, such as flexible plastic, without requiring implementing agencies to make a determination.

Release Detection Technologies

The 1988 UST regulation allows UST owners and operators to use other methods that meet release detection performance criteria listed at § 280.43(h). Although CITLD and SIR are allowed under § 280.43(h), it is important to specify both by name.

CITLD

The 1988 UST regulation allows ATG systems as a recognized method of release detection. However, it is generally listed with performance requirements consistent with the method being used to perform a static test. ATG relies on system down time, absent product delivery or dispensing activities. In static testing mode, the ATG system analyzes product level and determines whether or not a leak is present during that down time. Yet for years, UST owners and operators used ATG systems as a means of continually monitoring tanks for potential releases. Continuous in-tank leak detection has evolved as a reliable means of providing release detection equivalent to other methods specified in § 280.41. Within this category of methods, EPA will also allow continuous in-tank methods where the system incrementally gathers measurements to determine the tank's leak status within the 30-day monitoring period. Today's proposal formally recognizes CITLD as a release detection method in § 280.43(d). Per § 280.41, a conclusive pass or fail result must be obtained within the 30-day monitoring period. All monitoring records must be maintained according to § 280.45. Another method of release detection is required in the event of an inconclusive result. UST owners and operators may perform an in-tank static test using the ATG system or another method in subpart D.

SIR

Today's proposal adds SIR by name to the final UST regulation and clarifies its use. SIR must:

- Report a quantitative result with calculated leak rate;
- Be capable of detecting a leak rate of at least 0.2 gallon per hour with a probability of detection of not less than 0.95 and a probability of false alarm of no greater than 0.05; and
- Use a threshold that does not exceed one-half the minimum detectable leak rate.

A quantitative result with a calculated leak rate is necessary to effectively perform release detection using SIR. Some SIR methods are qualitative based methods that simply provide a result of pass or fail without any additional information for UST owners and operators to gauge the validity of the reported results. Based on information in NWGLDE's list,[70] approximately 15 percent of SIR methods listed are qualitative-based methods. Many state UST implementing agencies already only allow the use of quantitative methods. Today's proposal will no longer allow qualitative SIR as an option for meeting the release detection requirement.

Consistent with some of the release detection methods described in § 280.43(h), EPA maintained the performance standard of 0.2 gallon per hour with a probability of detection of 0.95 and a probability of false alarm of 0.05. However, we are not requiring the additional standard of 150 gallons within a month per § 280.43(h). EPA included this additional standard in the 1988 UST regulation to primarily address external methods. EPA added the standard because it is more difficult to demonstrate that external methods meet a small hourly leak rate than a larger, though equivalent, volume. SIR is an in-tank monitoring method and the 0.2 gallon per hour standard with a probability of detection (Pd) of 0.95 and a probability of false alarm (Pfa) of 0.05 is the applicable standard to use.

SIR must also meet EPA's established requirement for probability of detection and probability of false alarm. In a normal probability distribution, SIR data typically analyzed through the calculation of the reportable values of minimum detectable leak rate (MDL) and the leak declaration threshold (T) are related as follows:

- MDL is always greater than T
- Pd = (1–Pfa), then MDL = 2 times T (*i.e.,* T = ½ MDL).

Any analysis of data indicating a threshold value greater than one-half minimum detectable leak rate should be appropriately investigated as a suspected release.

In this proposal, EPA is addressing the following issues associated with using SIR:

- SIR is not the same as inventory control
  - For years, users, vendors, and regulators incorrectly linked SIR to the inventory control method described in § 280.43(a). SIR is more sophisticated than inventory control and not subject to the same requirement to combine it with tank tightness testing and limit its use to 10 years. Note § 280.50(c)(2) states, ''In the case of inventory control, a second month of data does not confirm the initial result.'' This language allowed owners and operators to use a second month of inventory control data to confirm initial possible failure results. However, this allowance does not apply to SIR.
- Results for release detection, including SIR, are required within the 30-day monitoring period
  - EPA considered including a requirement that UST owners and operators obtain a record of SIR results within 30 days. However, we believe this requirement is adequately covered in 40 CFR part 280, subpart D of the 1988 UST regulation. As § 280.41 states, ''Tanks * * * must be monitored for releases at least every 30 days using one of the methods listed in § 280.43(d) through (h) * * *''. In today's proposal, EPA is adding a subsection to formally recognize SIR. A definitive result of pass or fail that identifies the tank's leak status is required within the 30-day monitoring period for all release detection methods, including SIR.
- Owners and operators must use another method of release detection if SIR results are inconclusive results
  - For years, implementing agencies have been concerned about inconclusive results when using SIR for release detection. In 1993, EPA issued a policy regarding inconclusive SIR results,[71] which says all methods used to meet release detection requirements in § 280.41 must obtain a conclusive result of pass or fail within the 30-day

[69] E2, Incorporated, memoranda and analyses submitted under Contract EP–W–05–018, ''U.S. Environmental Protection Agency. Underground Storage Tanks/Leaking Underground Storage Tanks Analytical And Technical Support.'' These supporting materials can be found in the docket for the proposed rulemaking.

[70] National Work Group On Leak Detection Evaluation's (NWGLDE) List Of Leak Detection Evaluations for Storage Tank Systems: *http://www.nwglde.org/.*

[71] UST Technical compendium, question and answer number 21: *http://epa.gov/oust/compend/rd.htm.*

monitoring period. All monitoring records must be maintained according to § 280.45. For SIR, this means UST owners and operators must obtain a report determining release status within the 30-day monitoring period. Another method of release detection is required: when results are inconclusive; prior to sufficient data being gathered to generate an initial report at startup; or when a report is not available for any month of monitoring.

- Initial SIR report at startup
  - SIR methods need to gather data over a period of time in order to determine whether the tank is leaking. In some cases, regulatory agencies have addressed significant lag times between when data is collected to when a tank status determination is available to owners and operators. NWGLDE's list of third-party evaluated methods indicates the data collection period required for SIR methods ranges from 15 to 90 days. However, most methods require between 23 to 30 days to gather sufficient measurements that provide an accurate result. Any method that goes beyond a 30-day monitoring period is inconsistent with the established requirement and does not protect human health and the environment. It is imperative that UST owners and operators determine the status of their tanks within the established monitoring period to avoid increased risk of contamination.
  - EPA recognizes that a rolling collection of data may be used to analyze the leak status of the tank. For example, data from the previous 30-day monitoring period may be added to measurements taken within the current 30-day monitoring period to determine whether or not the tank is leaking. However, the majority of data must come from the current 30-day period and another method of release detection must be used to monitor the tank during this startup period. Subsequent monitoring continuously rolls data forward and provides sufficient data in a timely manner to determine pass or fail.

Interstitial Monitoring

EPA is proposing to add three methods of interstitial monitoring—vacuum, pressure, and liquid-filled methods—in § 280.43(g)(4). Although these interstitial methods are covered under the general description provided in § 280.43(g), These methods should be included as distinct interstitial monitoring options. Each of these methods must be capable of detecting breaches in both the inner and outer walls of secondarily contained tanks and secondarily contained piping.

What issues related to this change does EPA request comment or additional data on?

- Should EPA require specific performance standards for vacuum, pressure, and liquid-filled interstitial monitoring? If so, what should the performance standards be and why?
- Are there performance standards for release detection methods that should be added or removed?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

2. Updates to Codes of Practice Listed in the UST Regulation

What Is EPA Proposing?

EPA is proposing to update the codes of practice (also called standards or recommended practices) listed in the 1988 UST regulation to reflect new codes, changes to code names, and new nationally recognized associations and independent testing laboratories. EPA proposes to update, add, or remove codes of practice to the following specific areas of the 1988 UST regulation:

Section 280.11—Interim Prohibition for Deferred UST Systems

Updated Codes:

—NACE International Recommended Practice RP 0285, Corrosion Control of Underground Storage Tank Systems by Cathodic Protection

Added Codes:

—NACE International Standard Practice SP 0169, Control of External Corrosion on Underground or Submerged Metallic Piping Systems

—American Petroleum Institute Recommended Practice 1632, Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems

—Steel Tank Institute Recommended Practice R892, Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Petroleum Storage and Dispensing Systems

Section 280.20(a)(1)—Fiberglass Tanks

Updated Codes:

—Underwriters Laboratories Standard 1316, Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products, Alcohols, and Alcohol-Gasoline Mixtures

—Underwriters Laboratories of Canada S615, Standard for Reinforced Plastic Underground Tanks for Flammable and Combustible Liquids

Removed Codes:

—American Society of Testing and Materials Standard D4021–86, Standard Specification for Glass-Fiber-Reinforced Polyester Underground Petroleum Storage Tanks

Section 280.20(a)(2)—Steel Tanks With Cathodic Protection

Updated Codes:

—Steel Tank Institute Specification sti-P3® Specification and Manual for External Corrosion Protection of Underground Steel Storage Tanks

—Underwriters Laboratories Standard 1746, Standard for External Corrosion Protection Systems for Steel Underground Storage Tanks

—Underwriters Laboratories of Canada S603, Standard for Steel Underground Tanks for Flammable and Combustible Liquids

—Underwriters Laboratories of Canada S603.1, Standard for External Corrosion Protection Systems for Steel Underground Tanks for Flammable and Combustible Liquids

—Underwriters Laboratories of Canada S631, Standard for Isolating Bushings for Steel Underground Tanks Protected with External Corrosion Protection Systems

—NACE International Recommended Practice RP 0285, Corrosion Control of Underground Storage Systems by Cathodic Protection

—Underwriters Laboratories Standard 58, Standard for Steel Underground Tanks for Flammable and Combustible Liquids

Added Codes:

—Steel Tank Institute Standard F841, Standard for Dual Wall Underground Steel Storage Tanks

Section 280.20(a)(3)—Clad or Jacketed Steel Tanks

Updated Codes:

—Underwriters Laboratories Standard 1746, Standard for External Corrosion Protection Systems for Steel Underground Storage Tanks

Added Codes:

—Steel Tank Institute Specification F894, ACT–100® Specification for External Corrosion Protection of FRP Composite Steel USTs

—Steel Tank Institute Specification F961, ACT–100–U® Specification for External Corrosion Protection of Composite Steel Underground Storage Tanks

—Steel Tank Institute Specification F922, Steel Tank Institute Specification for Permatank®

Removed Codes:

—Association for Composite Tanks ACT–100, Specification for the

Fabrication of FRP Clad Underground Storage Tanks

Section 280.20(a)(6)—Secondary Containment Tanks (New Addition to the Regulation—See Section A–2)

Added Codes:

—Underwriters Laboratories Standard 58, Standard for Steel Underground Tanks for Flammable and Combustible Liquids
—Underwriters Laboratories Standard 1316, Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products, Alcohols, and Alcohol-Gasoline Mixtures
—Underwriters Laboratories Standard 1746, Standard for External Corrosion Protection Systems for Steel Underground Storage Tanks
—Steel Tank Institute Standard F841, Standard for Dual Wall Underground Steel Storage Tanks
—Steel Tank Institute Specification F922, Steel Tank Institute Specification for Permatank®

Section 280.20(b)(1)—Non-corrodible Piping

Updated Codes:

—Underwriters Laboratories Standard 971, Standard for Non-Metallic Underground Piping for Flammable Liquids
—Underwriters Laboratories of Canada Standard S660, Standard for Non-Metallic Underground Piping for Flammable Liquids

Removed Codes:

—Underwriters Laboratories Standard 567, Pipe Connectors for Flammable and Combustible and LP Gas
—Underwriters Laboratories of Canada Standard CAN 4–S633–M81, Flexible Underground Hose Connectors

Section 280.20(b)(2)—Steel Piping With Cathodic Protection

Updated Codes:

—American Petroleum Institute Recommended Practice 1632, Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems
—NACE International Standard Practice SP 0169, Control of External Corrosion on Underground or Submerged Metallic Piping Systems

Added Codes:

—Underwriters Laboratories Subject 971A, Outline of Investigation for Metallic Underground Fuel Pipe
—Steel Tank Institute Recommended Practice R892, Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Petroleum Storage and Dispensing Systems
—NACE International Recommended Practice RP 0285, Corrosion Control of Underground Storage Systems by Cathodic Protection

Removed Codes:

—National Fire Protection Association Standard 30, Flammable and Combustible Liquids Code
—American Petroleum Institute Publication 1615, Installation of Underground Petroleum Storage Systems

Section 280.20(b)(3)—Metal Piping Without Additional Corrosion Protection

Removed Codes:

—National Fire Protection Association Standard 30, Flammable and Combustible Liquids Code
—National Association of Corrosion Engineers Standard RP–01–69, Control of External Corrosion on Submerged Metallic Piping Systems

Section 280.20(b)(5)—Secondary Containment Piping (New Addition to the Regulation—See Section A–2)

Added Codes:

—Underwriters Laboratories Standard 971, Standard for Non-Metallic Underground Piping for Flammable Liquids
—Underwriters Laboratories Subject 971A, Outline of Investigation for Metallic Underground Fuel Pipe

Section 280.20(d)—Installation

Updated Codes:

—American Petroleum Institute Publication 1615, Installation of Underground Petroleum Storage System
—Petroleum Equipment Institute Publication RP100, Recommended Practices for Installation of Underground Liquid Storage Systems

Added Codes:

—National Fire Protection Association Standard 30, Flammable and Combustible Liquids Code
—National Fire Protection Association Standard 30A, Code for Motor Fuel Dispensing Facilities and Repair Garages

Removed Codes:

—American National Standards Institute Standard B31.3, Petroleum Refinery Piping
—American National Standards Institute Standard B31.4, Liquid Petroleum Transportation Piping System

Section 280.21—Lining Inspection Standards (New Addition to the Regulation—See Section E–3)

Added Codes:

—American Petroleum Institute Recommended Practice 1631, Interior Lining and Periodic Inspection of Underground Storage Tanks
—National Leak Prevention Association Standard 631, Entry, Cleaning, Interior Inspection, Repair, and Lining of Underground Storage Tanks
—Ken Wilcox Associates Recommended Practice, Recommended Practice for Inspecting Buried Lined Steel Tanks Using a Video Camera

Section 280.21(e)—Upgrade Requirements for Previously Deferred UST Systems (New Addition to the Regulation—See Section C)

Added Codes:

—NACE International Recommended Practice RP 0285, Control of Underground Storage Tank Systems by Cathodic Protection
—NACE International Standard Practice SP 0169, Control of External Corrosion on Underground or Submerged Metallic Piping Systems
—National Leak Prevention Association Standard 631, Entry, Cleaning, Interior Inspection, Repair, and Lining of Underground Storage Tanks
—American Society for Testing and Materials Standard G158, Standard Guide for Three Methods of Assessing Buried Steel Tanks

Section 280.30—Spill and Overfill Control

Updated Codes:

—National Fire Protection Association Standard 385, Standard for Tank Vehicles for Flammable and Combustible Liquids
—American Petroleum Institute Recommended Practice 1621, Bulk Liquid Stock Control at Retail Outlets

Added Codes:

—American Petroleum Institute Recommended Practice 1007, Loading and Unloading of MC 306/DOT 406 Cargo Tank Motor Vehicles

Removed Codes:

—National Fire Protection Association Standard 30, Flammable and Combustible Liquids Code

Section 280.31—Operation and Maintenance of Corrosion Protection

Updated Codes:

—NACE International Recommended Practice RP 0285, Control of Underground Storage Tank Systems by Cathodic Protection

Added Codes:

—NACE International Standard Practice SP 0169, Control of External Corrosion on Underground or Submerged Metallic Piping Systems
—NACE International Test Method TM 0101, Measurement Techniques

Related to Criteria for Cathodic Protection on Underground or Submerged Metallic Tank Systems
—NACE International Test Method TM0497, Measurement Techniques Related to Criteria for Cathodic Protection on Underground or Submerged Metallic Piping Systems
—Steel Tank Institute Recommended Practice R051, Cathodic Protection Testing Procedures for sti-P3 USTs

Section 280.32—Compatibility

Removed Codes:

—American Petroleum Institute Publication 1626, Storing and Handling Ethanol and Gasoline-Ethanol Blends at Distribution Terminals and Service Stations
—American Petroleum Institute Publication 1627, Storage and Handling of Gasoline-Methanol/Cosolvent Blends at Distribution Terminals and Service Stations

Section 280.33—Repairs

Updated Codes:

—National Fire Protection Association Standard 30, Flammable and Combustible Liquids Code
—American Petroleum Institute Recommended Practice RP 2200, Repairing Crude Oil, Liquified Petroleum Gas, and Product Pipelines
—American Petroleum Institute Recommended Practice RP 1631, Interior Lining and Periodic Inspection of Underground Storage Tanks
—National Leak Prevention Association Standard 631, Entry, Cleaning, Interior Inspection, Repair, and Lining of Underground Storage Tanks

Added Codes:

—National Fire Protection Association Standard 326, Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair
—Steel Tank Institute Recommended Practice R972, Recommended Practice for the Addition of Supplemental Anodes to sti-P3® Tanks
—NACE International Recommended Practice RP 0285, Control of Underground Storage Tank Systems by Cathodic Protection
—Fiberglass Tank and Pipe Institute Recommended Practice T–95–02, Remanufacturing of Fiberglass Reinforced Plastic (FRP) Underground Storage Tanks

Section 280.36—Secondary Containment Testing (New Addition to the Regulation—See Section B–4)

Added Codes:

—Steel Tank Institute Recommended Practice R012, Recommended Practice for Interstitial Tightness Testing of Existing Underground Double Wall Steel Tanks
—Fiberglass Tank and Pipe Institute Protocol, Field Test Protocol for Testing the Annular Space of Installed Underground Fiberglass Double and Triple-Wall Tanks with Dry Annular Space

Section 280.37—Walkthrough Inspections (New Addition to the Regulation—See Section B–1)

Added Codes:

—Petroleum Equipment Institute Recommended Practice RP 900, Recommended Practices for the Inspection and Maintenance of UST Systems

Section 280.43(a)—Inventory Control

Updated Codes:

—American Petroleum Institute Recommended Practice RP 1621, Bulk Liquid Stock Control at Retail Outlets

Section 280.43(g)—Interstitial Monitoring

Removed Codes:

—Steel Tank Institute Standard F841, Standard for Dual Wall Underground Steel Storage Tanks (moved to new section 280.20(a)(6))

Section 280.71—Permanent Closure

Updated Codes:

—American Petroleum Institute Recommended Practice RP 1604, Closure of Underground Petroleum Storage Tanks
—American Petroleum Institute Recommended Practice RP 1631, Interior Lining and Periodic Inspection of Underground Storage Tanks
—The National Institute for Occupational Safety and Health Publication 80–106, Criteria for a Recommended Standard * * * Working in Confined Space

Added Codes:

—American Petroleum Institute Recommended Practice 2016, Guidelines and Procedures for Entering and Cleaning Petroleum Storage Tanks
—National Fire Protection Association Standard 326, Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing this change to update the codes of practice associated with regulated UST systems. The 1988 UST regulation relies heavily on codes of practice developed by nationally recognized associations or independent testing laboratories.

EPA reviewed information on more than 200 codes of practice from more than 25 code-making groups that have been developed or revised since the 1988 regulation.[72] As a result of this review, EPA proposes to add 18 codes of practice not previously listed in the 1988 regulation, remove or move 12, and update all codes of practice in the 1988 UST regulation (see the specific additions, updates, and removals listed above). EPA is proposing to add the 18 codes of practice that were previously not listed because they are applicable to the UST regulation and did not exist when EPA originally promulgated the 1988 UST regulation. EPA is proposing to remove or move the 12 codes of practice in the 1988 UST regulation for one of the following reasons:

- The code of practice is out of date, no longer available, was withdrawn, or rescinded;
- The code of practice did not provide any information appropriate to the section of the regulation where it was referenced;
- The information in the code of practice did not adequately address the part of the regulation where it was referenced; or
- The code of practice is no longer needed.

For example, the Association for Composite Tanks ACT–100 tank standard was listed in § 280.20(a)(3) as a code of practice for meeting the clad tank requirement. EPA is removing this code of practice because both the association and code of practice no longer exist.

In several cases, EPA is proposing to move a code of practice from one section of the 1988 UST regulation to another section. For example, EPA is proposing to move Steel Tank Institute Standard F841, Standard for Dual Wall Underground Steel Storage Tanks from § 280.43(g)—interstitial monitoring to § 280.20(a)(6)—secondary containment tanks. EPA is proposing this because we are adding secondary containment requirements to the performance standards for new UST systems portion of this proposed UST regulation.

Note: EPA is aware of at least one code of practice (Petroleum Equipment Institute standard for testing of spill, overfill, interstitial areas, and release detection)

[72] E2, Incorporated, memoranda and analyses submitted under Contract EP–W–05–018, ''U.S. Environmental Protection Agency. Underground Storage Tanks/Leaking Underground Storage Tanks Analytical and Technical Support.'' These supporting materials can be found in the docket for the proposed rulemaking.

currently being developed that could be potentially relevant to this proposed UST regulation. Other standards may be developed before EPA publishes a final UST regulation. If so, EPA will consider including them in the final UST regulation.

What issues related to this change does EPA request comment or additional data on?

• Should other codes of practice be added to or removed from the UST regulation? If so, please provide EPA with information about the code and the specific location in the UST regulation where the code should be included or removed.

• The regulations at § 280.20(d) require that all tanks and piping be properly installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and in accordance with manufacturer's instructions. Since the installation codes of practice also address other UST system components such as spill and overfill, should EPA consider revising § 280.20(d) such that all portions of the UST system must be installed according to a code of practice and according to manufacturer's instructions?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

3. Updates to Remove Old Upgrade and Implementation Deadlines

What is EPA proposing?

EPA is proposing to revise the UST regulation to remove references to the 1998 deadline and old phase-in schedules, while continuing to allow testing of corrosion protection and release detection. For those deferred UST systems EPA is proposing to regulate, we are proposing those systems be allowed to upgrade with spill, overfill, and corrosion protection. EPA is proposing the following specific revisions:

Revise upgrading of existing UST systems in the 1988 UST regulation (§ 280.21).

• Remove the 1998 upgrade deadline references, but continue to allow:

○ Testing of internally-lined USTs;

○ Tanks and piping with cathodic protection; and

○ Upgrades of deferred UST systems EPA is proposing to regulate, including wastewater treatment tank systems, airport hydrant systems, UST systems with field-constructed tanks, and UST systems that store fuel solely for use by emergency power generators. See section C for additional information on deferred UST systems.

• Require UST systems not upgraded with corrosion protection, spill, or overfill prevention be permanently closed according to subpart G, unless the implementing agency determines an upgrade is appropriate or the UST system was deferred in the 1988 UST regulation.

Revise release detection requirements in the 1988 UST regulation.

• Section 280.40

○ Remove phase-in schedule for release detection probabilities;

○ Remove phase-in schedule for release detection monitoring;

○ Remove references to upgrade deadlines;

○ Remove references to existing USTs; and

○ Address deferred UST systems EPA is proposing to regulate, add language about implementing release detection monitoring for these systems in § 280.40(c).

• Section 280.41

○ Remove inventory control and annual tightness testing as a regulatory option;

○ Remove reference to upgrade deadlines; and

○ Make the inventory control and five year tightness testing language historical by putting language in this section in the past tense.

• Section 280.42

○ Remove 1998 references and upgrade language for existing hazardous substance UST systems.

EPA is proposing to remove the phase-in schedule in § 280.91 of subpart H to acknowledge that financial responsibility implementation deadlines are passed and remove references to § 280.91 and the deadlines in § 280.90. In addition, EPA is proposing to revise § 280.91 to reference the phase-in schedule for deferred UST systems EPA is proposing to regulate at § 280.10.

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing these changes to acknowledge that the 1998 deadline for upgrading UST systems with release prevention and the 1990s release detection and financial responsibility deadlines passed more than a decade ago. Owners and operators had more than two decades to upgrade their UST systems and meet the 1988 UST regulation. In addition, all UST facilities have been inspected at least once and are required to meet release detection, release prevention, and financial responsibility requirements. EPA is proposing owners and operators of upgraded UST systems continue conducting cathodic protection and internal lining testing consistent with how they previously performed these tests.

For release detection, EPA is proposing to eliminate the phase-in for both release detection probabilities and release detection monitoring. EPA is proposing to eliminate these two phase-in parts because the deadlines for implementing these requirements have passed. Owners and operators have been implementing these requirements for more than two decades. The last phase-in period applied to systems installed between 1980 and 1988, giving owners and operators until 1993 to meet the subpart D requirements. Any new UST installed after 1993 had to meet release detection requirements when installed.

To meet the release detection requirement, § 280.41 allows owners and operators of USTs less than 10 years old to use a combination of monthly inventory control with tank tightness testing every five years, until the UST has been installed for 10 years. When the UST is 10 years old, owners and operators must use another release detection method listed in subpart D. For new and replaced UST systems installed after the effective date of the final UST regulation, interstitial monitoring will be required. The new interstitial monitoring requirement will make inventory control and tank tightness testing obsolete as a release detection method 10 years after the UST regulation is finalized.

For hazardous substance UST systems release detection, EPA is proposing to remove 1998 deadline and upgrade references. The 1988 UST regulation in § 280.41 required existing UST systems meet the requirements for petroleum UST systems until 1998. After 1998, all new and existing hazardous substance UST systems must meet requirements for new hazardous substance UST systems. Since the 1998 deadline has passed, these changes will clarify the hazardous substance UST system requirements.

For financial responsibility, EPA is proposing to remove the phase-in dates in § 280.91. These phase-in dates passed more than a decade ago and are no longer needed. In addition, § 280.90(b) and (e) contain references to § 280.91 and compliance dates that need to be removed.

UST systems with field constructed tanks, airport hydrant systems, and wastewater treatment tank systems may be upgraded according to § 280.21. However, EPA is proposing to no longer allow UST systems regulated under the 1988 UST regulation to be upgraded if they have never met the upgrade requirements. Unless the implementing

agency determines that an UST system is acceptable to upgrade, non-upgraded UST systems must be permanently closed according to the closure requirements in subpart G. UST systems that have not been upgraded are older and have been in the ground for more than two decades. In addition, metal USTs and piping without corrosion protection pose a significant risk to human health and the environment because the metal in contact with soil corrodes. EPA is proposing that implementing agencies make case-by-case determinations on when to allow upgrades. EPA does not expect implementing agencies to allow continued use of USTs or piping not upgraded with corrosion protection. However, some implementing agencies may decide to allow owners and operators of UST systems with corrosion protection, but without spill or overfill prevention, to add spill or overfill prevention instead of requiring permanent closure.

The proposed requirements in § 280.21 will allow UST systems EPA is proposing to no longer defer to be upgraded. See section C for additional information on upgrading these UST systems.

What issues related to this change does EPA request comment or additional data on?

- Does removing the deadlines and making upgrades historical cause any unintended regulatory consequences?
- Should EPA consider not allowing the implementing agency the flexibility of making a determination to allow an upgrade?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

4. Editorial and Technical Corrections

What is EPA proposing?

EPA is proposing these editorial corrections to the 1988 UST regulation:

- Where ''industry codes'' and ''codes and standards'' are used, replace with ''codes of practice''
- Revise to appropriately use the terms: part, subpart, section, and paragraph
- Section 280.10(c)(3)—change ''10 CFR part 50 Appendix A'' to ''10 CFR part 50''
- Section 280.20(a)(2), paragraph (C) in the note—change ''G03.1'' to ''603.1''
- Section 280.21(b)(2)(iii)—change ''by conducting two (2) tightness tests that meet the requirements of § 280.43(c). The first tightness test must be conducted prior to installing the cathodic protection system. The second tightness test must be conducted between three (3) and six (6) months following the first operation of the cathodic protection system; or'' to ''by conducting two tightness tests that meet the requirements of § 280.43(c). The first tightness test must be conducted prior to installing the cathodic protection system. The second tightness test must be conducted between three and six months following the first operation of the cathodic protection system; or''
- Section 280.20(c)(1)(ii)(C)—change ''operator'' to ''transfer operator''
- Section 280.22(a)—change ''Any owner who brings an underground storage tank system into use after May 8, 1986, must within 30 days of bringing such tank into use, submit, in the form prescribed in Appendix I of this part, a notice of existence of such tank system to the state or local agency or department designated in Appendix II of this part to receive such notice.'' to ''After May 8, 1986, an owner must submit notice of a tank system's existence to the implementing agency within 30 days of bringing the underground storage tank system into use. Owners must use the form in Appendix I of this part.''
- Section 280.22(g)—change ''The form provided in Appendix III of this part may be used to comply with this requirement.'' to ''The statement provided in Appendix III of this part, when used on shipping tickets and invoices, may be used to comply with this requirement.''
- Section 280.31—change ''for as long as the UST system is used to store regulated substances'' to ''until the UST system is permanently closed or undergoes a change-in-service pursuant to § 280.71.''
- Section 280.31—change ''steel'' to ''metal''
- Section 280.33(c)—change ''fiberglass pipes'' to ''non-corrodible pipes''
- Section 280.33(g)—change ''for the remaining operating life of the UST system'' to ''until the UST system is permanently closed or undergoes a change-in-service pursuant to § 280.71.''
- Section 280.34—change ''Resource Conservation and Recovery Act'' to ''Solid Waste Disposal Act''
- Section 280.34(b)(2)—change cite from ''280.31'' to ''280.31(d)''
- Section 280.40(a)(3)—change ''probability of detection (Pd) of 0.95 and probability of false alarm (Pfa) of 0.05.'' to ''probability of detection of 0.95 and probability of false alarm of 0.05.''
- Section 280.41(b)(2)—change ''conduct'' to ''conducted''
- Section 280.42(a)(1)(ii)—change ''released from the tank system'' to ''leaked from the primary containment''
- Section 280.42(d)—delete ''jacketing of'' from ''* * * jacketing of double-walled pipe)* * *''
- Section 280.43(b)(4)—change ''leak'' to ''release''
- Section 280.43(b)(5)—delete ''manual'' from ''manual inventory control''
- Section 280.52(a)(1)—change ''repair, replace, or upgrade the UST system'' to ''repair, replace, upgrade, or close the UST system''
- Section 280.52(a)(1)—change ''leak'' to ''release''
- Section 280.52(a)(2)—change ''leak'' to ''release''
- Section 280.52(a)(3)—change ''leak'' to ''release''
- Section 280.92—definition for provider of financial assurance—change ''§§ 280.95–280.103'' to ''§§ 280.95–280.107''
- Section 280.92, § 280.95(b)(1)(iii), § 280.95(c)(5), and § 280.95(d)—change ''Rural Electrification Administration'' to ''Rural Utilities Service''
- Section 280.94(a)(1)—change ''§§ 280.95–280.103'' to ''§§ 280.95–280.107''
- Section 280.95(b)(1)(ii)—change ''165.145'' to ''§ 265.145''
- Section 280.95(c)(5)(i)—change ''form'' to ''from''
- Section 280.95(d)—change ''[insert: ''suddent accidential releases'' and/or ''nonsudden accidential releases]'' to ''[insert: ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases'']''
- Section 280.95(d)—change ''Liabilitly'' to ''Liability'' under Letter From Chief Financial Officer
- Section 280.95(d)—change ''lastest'' to ''latest'' under Letter From Chief Financial Officer, Alternative I, Number 11
- Section 280.95(d)—remove ''$'' symbol for Number 8 under Alternative II of the Letter From Chief Financial Officer
- Section 280.95(d)—add ''$'' symbol for Numbers 13 and 14 under Alternative II of the Letter From Chief Financial Officer
- Section 280.96(b)—change ''§ 280.110(c)'' to ''§ 280.114(e)''
- Section 280.96(c), Guarantee (Recital 3)—change three ''40 CFR 280.108'' citations to ''40 CFR § 280.112''
- Section 280.96(c), Guarantee (Recital 3)—change ''accidential'' to ''accidental''
- Section 280.96(d)—change ''280.108'' to ''§ 280.112''
- Section 280.97(a)—change ''§ 290.93'' to ''§ 280.93''

• Section 280.98(b)—change ''Resource Conservation and Recovery Act (RCRA)'' to Solid Waste Disposal Act''

• Section 280.98(b), Performance Bond, paragraph 4,—change ''[* * * either ''sudden'' or ''nonsudden'' or ''sudden and nonsudden''] accidental releases arising from'' to ''either ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases''] arising from * * *''

• Section 280.98(b)—change two ''40 CFR 280.108'' citations to ''40 CFR 280.112''

• Section 280.98(b)—add end brackets to ''State of Incorporation'' and ''Liability Limit''

• Section 280.98(d)—change ''40 CFR 280.108'' citation to ''40 CFR 280.112''

• Section 280.99(b)—change ''Resource Conservation and Recovery Act of 1976'' to Solid Waste Disposal Act''

• Section 280.99(b)—change ''persuant'' to ''pursuant''

• Section 280.99(b)—change ''curent'' to ''current''

• Section 280.99(c)—change ''40 CFR 280.108'' citation to ''40 CFR 280.112''

• Section 280.101(d)—change ''280.107(b)(5)'' to ''§ 280.111(b)(8)''

• Section 280.103(b)(1), Trust Agreement, paragraph 2—change ''standpoint'' to ''[insert ''standby'' where trust agreement is standby trust agreement]''

• Section 280.103(b)(1), Trust Agreement, section 4—add opening quotation mark for ''Third-Party Liability Claims''

• Section 280.103(b)(1), Trust Agreement, section 4—add opening quotation mark for ''compensating third parties for bodily injury and property damage caused by''

• Section 280.104(b)—change ''Moody's rating of Aaa, A, A'' to ''Moody's rating of Aaa, Aa, A''

• Section 280.104(b)—change ''refunded issues and'' to ''refunded issues, and''

• Section 280.104(e), Letter From Chief Financial Officer—change ''[insert: ''sudden accidental releases'' and/or ''nonsudden accidental releases'']'' to ''[insert: ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases'']''. Note that this change occurs in two places in the letter.

• Section 280.104(e), Letter From Chief Financial Officer, last paragraph—change ''not backed by third-party credit enhancement or are insured by a municipal bond insurance company.'' to ''not backed by third-party credit enhancement or insured by a municipal bond insurance company.''

• Section 280.105(c)—change ''[insert: ''sudden accidental releases'' and/or ''nonsudden accidental releases'']'' to ''[insert: ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases'']''

• Section 280.105(c)—change 10(a) and 11(a) under Worksheet for Municipal Financial Test, Part II from ''Debt Service (from 4d)'' to ''Debt Service (from 4c)''

• Section 280.106(a)(1)—change ''§ 280.104(c)'' to ''§ 280.104(d) and § 280.104(e)''

• Section 280.106(b)—change ''§ 280.114(c)'' to ''§ 280.114(e)''

• Section 280.106(d), under Local Government Guarantee With Standby Trust Made by a State, recital 7d—change ''loaded'' to ''loaned''

• Section 280.106(e), under Local Government Guarantee Without Standby Trust Made by a State, recital 7d—change ''loaded'' to ''loaned''

• Section 280.106(e), under Local Government Guarantee Without Standby Trust Made by a Local Government, recital 8d—change ''loaded'' to ''loaned''

• Section 280.107(d)—change ''[insert: ''sudden accidental releases'' and/or ''nonsudden accidental releases'']'' to ''[insert: ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases'']''

• Section 280.107(d), third paragraph under Letter From Chief Financial Officer—change ''ten'' to ''five''

• Section 280.109(b)(3)—change ''§ 280.107(b)'' to ''§ 280.111(b)''

• Section 280.111(b)(9)(ii)—change ''§ 280.107(a)(3)'' to ''§ 280.107(c)''

• Section 280.111(b)(9)(iii)—change ''§ 280.107(a)(3)'' to ''§ 280.107(c)''

• Section 280.111(b)(9)(iii)—change ''§ 280.107(a)(3)(i)'' to ''§ 280.107(c)(1)''

• Section 280.111(b)(9)(iii)—change ''§ 280.107(a)(3)(ii)'' to ''§ 280.107(c)(2)''

• Section 280.113—change ''properly'' to ''permanently''

EPA is proposing these technical corrections to the 1988 UST regulation:

• Section 280.12—revise exclusion (d) of the definition of UST to incorporate a revision in section 9001 of the SWDA as shown below

''(d) Pipeline facility (including gathering lines):

(1) Which is regulated under chapter 601 of Title 49, or

(2) Which is an intrastate pipeline facility regulated under state laws as provided in chapter 601 of Title 49, and which is determined by the Secretary of Transportation to be connected to a pipeline or to be operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;''

• Section 280.43(b)(1)—replace ''a period of at least 36 hours'' with ''the minimum duration of test in the table below''; this updates current UST capacity allowances when using manual tank gauging as a method of release detection

○ Section 280.43(b)(4)—replace existing table with the one below; this ensures information in the table is consistent with the change in § 280.43(b)(1)

Nominal tank capacity	Minimum duration of test	Weekly standard (one test)	Monthly standard (four test average)
550 gallons or less	36 hours	10 gallons	5 gallons.
551–1,000 gallons (when tank diameter is 64")	44 hours	9 gallons	4 gallons.
551–1,000 gallons (when tank diameter is 48")	58 hours	12 gallons	6 gallons.
551–1,000 gallons (also requires periodic tank tightness testing).	36 hours	13 gallons	7 gallons.
1,001–2,000 gallons (also requires periodic tank tightness testing).	36 hours	26 gallons	13 gallons.

○ Section 280.41(a)(2)—modify tank sizes in text so it is consistent with the table above. ''Tanks with capacity of 550 gallons or less and tanks with a capacity of 551 to 1000 gallons that meet the tank diameter criteria in § 280.43(b) may use manual tank gauging (conducted in accordance with § 280.43(b))''; and

○ Section 280.43(b)(5)—modify tank sizes in text so it is consistent with the table above. ''Tanks of 550 gallons or less nominal capacity and tanks with a nominal capacity of 551 to 1000 gallons that meet the tank diameter criteria in the table in (b)(4) may use this as the sole method of release detection. All other tanks with a nominal capacity of 551 to 2,000 gallons may use the method in place of manual inventory control in § 280.43(a). Tanks of greater than 2,000 gallons nominal capacity may not use this method to meet the requirements of this subpart.''

- Section 280.43—remove the requirement for inventory control in the automatic tank gauging release detection method
- Section 280.92—change the definition of accidental release from ''release of petroleum from an underground storage tank'' to ''release of petroleum arising from operating an underground storage tank''
- Section 280.104(h)—add this subsection: ''(h) If the local government owner or operator fails to obtain alternate assurance within 150 days of finding that it no longer meets the requirements of the bond rating test or within 30 days of notification by the Director of the implementing agency that it no longer meets the requirements of the bond rating test, the owner or operator must notify the Director of such failure within 10 days.''
- Revise Appendix III to read: ''Note. A federal law (the Solid Waste Disposal Act, as amended, requires owners of certain underground storage tanks to notify implementing agencies of the existence of their tanks. Notifications must be made within 30 days of bringing the tank into use. Consult EPA's regulations at 40 CFR 280.22 to determine if you are affected by this law.''

Why is EPA proposing this change? What background information is available about this change?

EPA is proposing to make editorial and technical corrections to the 1988 UST regulation. Proposed editorial corrections include: correcting misspellings; capitalizing words; removing unused acronyms; using conventional number formatting; and appropriately referring to parts, subparts, sections, and paragraphs. In addition, EPA is proposing technical corrections which include updating the regulation to incorporate statutory changes that occurred since the 1988 regulation was promulgated and clarifying long-standing Agency policies.

The editorial change to § 280.10(c)(3) makes the citation to Nuclear Regulatory Commission regulation more general, in the event requirements for emergency generator UST systems at nuclear power facilities are moved from Appendix A to some other part of the Nuclear Regulatory Commission regulation.

The editorial change to § 280.22(a) makes the language easier to understand and consistent with the proposed new paragraphs of § 280.22(b) and § 280.22(h).

The editorial change to § 280.20(c)(1)(ii)(C) clarifies that the transfer operator needs to be alerted. This change makes the language consistent with § 280.20(c)(1)(ii)(B). The editorial change to § 280.22(g) clarifies the content of and how to use Appendix III of the 1988 UST regulation to meet the notification requirement.

The editorial changes to § 280.31 will eliminate any potential confusion with the temporary closure requirement and ensure all metal components comply with this section. Temporary closure requires owners and operators operate and maintain corrosion protection even when the UST system is emptied. The operation and maintenance of corrosion section indicates that releases due to corrosion must be prevented as long as the UST system is used to store regulated substances. While EPA has interpreted that the UST system is used to store regulated substances even if it is empty during temporary closure, this proposed change will clarify this position. In addition, UST systems have metal components, other than steel, protected from corrosion. Changing the word steel to metal at the beginning of this section will make it clear that the operation and maintenance requirements for corrosion protection apply to all metal components.

The editorial change to § 280.33(g) will clarify when the operating life of an UST system ends. EPA does not define an operating life; rather, we describe permanent closure and change-in-service. With this change, EPA is proposing the operating life of an UST system ends when an owner or operator permanently closes the UST system or the UST system undergoes a change-in-service from regulated to unregulated.

EPA is proposing a technical correction to revise the definition of UST as it relates to pipeline facilities. This revision directly incorporates a change made to Section 9001 of the Solid Waste Disposal Act after the 1988 UST regulation was promulgated.

EPA is proposing a technical correction to clarify that hazardous substance USTs must be able to contain regulated substances released from the UST system until the substances are detected and removed. Based on the 1988 UST regulation definition of release, the statement implies that a regulated substance has reached the environment. Because a regulated substance should be contained in the UST system's secondary containment, EPA is proposing to change the term released to leaked, indicating a leak occurred from the primary containment but did not reach the environment. Therefore, secondary containment would then contain the leak. The editorial change to § 280.42(d) removes confusion about whether piping that is already double-walled also needs to be jacketed.

EPA is proposing technical corrections to § 280.43(d) which will codify long-standing Agency policies for using manual tank gauging and automatic tank gauging. These changes update UST capacity allowances when using manual tank gauging and remove the requirement for USTs using automatic tank gauging to conduct additional inventory control. Since 1990 and 1989, EPA allowed these deviations from the 1988 UST regulation through policy for manual tank gauging and automatic tank gauging, respectively. EPA also stated these allowances in our publications: *Manual Tank Gauging For Small Underground Storage Tanks; Musts For USTs: A Summary of Federal Regulations For Underground Storage Tank Systems;* and *Straight Talk On Tanks: Leak Detection Methods For Petroleum Underground Storage Tanks And Piping.* With regard to manual tank gauging, note the expanded coverage of larger tanks is limited in some respects by the diameter of the tank as noted in the revised table.

EPA is proposing to add closure as an option at § 280.52(a)(1) to provide owners and operators additional flexibility when suspected and confirmed releases occur.

EPA is proposing an editorial correction of ''leak'' to ''release'' in § 280.43(b)(4) and § 280.52(a)(1), (2), and (3) because release is defined as regulated substance reaching the environment in the 1988 UST regulation.

EPA is updating references of ''Rural Electrification Administration'' (REA) to ''Rural Utilities Services'' (RUS). Under the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, REA reorganized to RUS.

EPA is proposing to amend the definition of ''accidental release'' under § 280.92 so it matches the definition stated in the original preamble for the financial responsibility requirements

(53 FR 43334). EPA intended the definition in the preamble to be included in the 1988 UST regulation, but two important words were inadvertently omitted. By changing this, EPA is clarifying that owners and operators are required to have financial responsibility for releases arising from operating USTs (including releases due to filling USTs and releases occurring at dispensers).

The editorial change to § 280.103(b)(1) will correct a typographical error [*i.e.,* ''standpoint''] and clarify the trust fund language.

The editorial change to the last paragraph of the Letter to the Chief Financial Officer under § 280.104(e) clarifies that no credit enhancement of any type is permitted for revenue bonds, consistent with the preamble to the 1988 UST regulation (58 FR 9033).

The editorial addition of § 280.104(h) will make requirements for the local government bond rating test under § 280.104 consistent with requirements of the financial test under § 280.95(g). EPA included this requirement for private owners and operators in the 1988 UST regulation but inadvertently omitted it for local government owners and operators.

The editorial change to the third paragraph of the Letter From Chief Financial Officer under § 280.107(d) will make the wording of the letter consistent with the amount of coverage required in § 280.107(b).

EPA defines and discusses permanent closure, not proper closure, in the 1988 UST regulation. This clarified that in § 280.113, financial responsibility is required during temporary closure.

The update to Appendix III removes old dates and clarifies the language in the statement for shipping tickets and invoices.

What issues related to this change does EPA request comment or additional data on?

- Are there other editorial corrections (such as typographical errors or inaccurate references) EPA should make?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

F. Alternative Options EPA Considered

What options did EPA consider?

In developing today's proposed regulatory changes (hereafter the Preferred Option), EPA considered and evaluated variations of a subset of the proposed regulatory requirements using two alternative options (hereafter Option 1 and Option 2). The table below highlights differences between our Preferred Option and Options 1 and 2. Some of the proposed regulatory requirements do not vary across the options (for example, notification of ownership changes is required in all three). As a result, proposed regulatory changes discussed earlier in the preamble, but not listed here, mean those changes are in effect in all three options. Overall, Options 1 and 2 consist of regulatory changes that are more and less stringent, respectively, than proposed changes in the Preferred Option. After reviewing comments, EPA may use one or more of these options in whole or in part to establish the final UST regulation.

COMPARISON OF PREFERRED OPTION AND OPTIONS 1 AND 2

Proposed requirement	Options		
	Preferred	1	2
Walkthrough inspections	Monthly	Monthly	Quarterly.
Overfill prevention equipment tests	3 year	1 year	3 year.
Spill prevention equipment tests	1 year	Require replacement every 3 years (no testing).	1 year.
Secondary containment tests	3 year	1 year	Not required.
Elimination of flow restrictors in vent lines for all new tanks and when overfill devices are replaced.	Required	Required	No change.
Operability tests for release detection methods	1 year	1 year	3 year.
Change leak rate probabilities from 95/5 to 99/1 (Pd/Pfa)	Not required	Required	Not required.
Eliminate groundwater and vapor monitoring as release detection methods.	5-year phase-out	Immediately	No change.
Remove deferrals for airport hydrant fuel distribution systems and UST systems with field-constructed tanks.	Regulate under alternative release detection requirements.	Require them to meet same release detection requirements as conventional USTs.	Maintain deferrals.

Below we explain Options 1 and 2, as well as our rationale for each. (Note that EPA conducted a regulatory impact analysis (RIA) for all three options. The results are discussed in the RIA document titled *Assessment Of The Potential Costs, Benefits, And Other Impacts Of The Proposed Revisions To EPA's Underground Storage Tank Regulations* which is available in the docket for this proposed regulation.)

What is EPA's rationale for Option 1?

In Option 1, EPA considered requiring annual tests of overfill prevention equipment and interstitial areas. EPA assessed the costs of conducting annual tests for these components and decided instead to propose overfill prevention equipment testing and interstitial integrity testing every three years. This will reduce the overall compliance cost burden on owners and operators without significantly compromising benefits of these tests. When compared to other components such as spill prevention equipment, both interstitial areas and overfill prevention equipment are less likely to fail or be damaged. Overfill prevention equipment is in the tank; interstitial areas for tanks and piping are typically buried several feet underground. Spill prevention equipment encounters frequent human and climate interaction, making it prone to frequent damage and failure. Secondary containment reduces the likelihood that a release into the environment will occur because a leak is contained if a breach of the inner wall occurs. As a result, less frequent periodic tests of overfill prevention equipment and interstitial areas would adequately ensure the integrity and functionality of equipment. In addition, a three year test requirement for these two components will match the inspection cycle, allowing inspectors to ensure tests are completed. Therefore,

testing overfill prevention equipment and interstitial areas every three years is sufficient.

In Option 1, EPA considered mandatory replacement of spill prevention equipment every three years, regardless of the spill prevention equipment's condition. As discussed earlier in the preamble, various sources indicated spill prevention equipment is a major source of confirmed releases and typically has a short lifespan. After EPA evaluated the cost of requiring spill prevention equipment replacement every three years, we determined the cost burden of this requirement on owners and operators would be significant. While developing today's proposal, EPA made a conscious effort to limit removing or replacing existing UST system equipment (for example, eliminating the use of ball floats as a form of overfill prevention in new tanks instead of requiring removal in existing tanks) to minimize impacts on owners and operators, both in terms of reducing compliance costs and interrupting daily operations. As a result, EPA instead is proposing annual tests of spill prevention equipment. This balances the benefits of properly functioning spill prevention equipment with the potential costs imposed on owners and operators.

When considering changes to existing release detection requirements, EPA evaluated the possibility of modifying the leak probability of detection (Pd) from 95 percent to 99 percent and the leak probability of false alarm (Pfa) from 5 percent to 1 percent. EPA initially believed increasing the Pd rate for release detection equipment performance would be a relatively low cost action that would significantly increase identifying potential releases to the environment. EPA also believed that decreasing the Pfa rate would be a relatively low cost means of reducing the number of nuisance alarms owners and operators experience. Because they would have a higher confidence that alarms identify real problems, owners and operators would be more likely to respond. Even though most equipment in use today is capable of meeting more stringent probability rates, almost all release detection devices would require some modification to achieve these results. Even a relatively minor software upgrade could be a significant cost to owners and operators. In addition, release detection vendors would need to perform significant testing and verification to determine whether their equipment would meet the new Pd/Pfa rates. After considering the potential cost impacts, other proposed requirements, such as training owners and operators and requiring periodic walkthrough inspections, are sound alternatives for environmental protection. Therefore, EPA instead is proposing periodic operation and maintenance for existing release detection equipment to ensure its proper operation.

EPA is proposing to eliminate groundwater and vapor monitoring as permissible methods of release detection. In Option 1, EPA considered an immediate ban of these two options as release detection methods because inspectors told us these methods are unsuitable and should be removed as soon as possible. Approximately 5 percent of UST systems use groundwater or vapor monitoring for release detection, which means the affected population of users is relatively small. Yet EPA recognizes this would require retrofitting or replacing existing equipment. To accommodate owners and operators and provide them with sufficient lead time to meet this requirement, EPA today is proposing a five year phase out for owners and operators to select, install, and begin using another method of release detection.

In evaluating release detection methods suitable for UST systems with field-constructed tanks and airport hydrant fuel distribution systems, EPA considered requiring these tanks and systems comply with the same release detection requirements conventional UST systems meet under 40 CFR part 280, subpart D. After assessing costs, technical feasibility, and potential impacts to facility operations, EPA decided to propose a release detection regulatory structure specific to field-constructed tanks and airport hydrant fuel distribution piping, per § 280.46 and § 280.47, respectively. It is sometimes impossible for very large tanks and piping volumes to achieve thresholds for current release detection methods. When a threshold is achievable, the time needed to reach it is often very long and impractical. The RIA indicates the total annual costs to meet conventional release detection requirements are $153 million, while total annual costs under the proposed alternative release detection requirements are $23 million. As a result, it is appropriate to propose release detection methods specific to these systems. This will effectively protect the environment by quickly detecting releases from these tanks and piping.

What is EPA's rationale for Option 2?

In comparing costs with benefits of potential proposed changes, EPA weighed different frequencies for walkthrough inspections and periodic equipment testing. In Option 2, EPA assessed quarterly walkthrough inspections and not requiring interstitial integrity testing as ways to reduce potential cost impacts on owners and operators. While quarterly walkthrough inspections would reduce costs to owners and operators, EPA is taking the position that a period less frequent than monthly walkthrough inspections would considerably reduce benefits. High operator turnover, frequency of small leaks at dispensers and submersible turbine sumps, and frequency of deliveries all contribute to the need for monthly walkthrough inspections. With that in mind, EPA today is proposing monthly walkthrough inspections so owners and operators can consistently and routinely verify proper UST system component performance. This will ensure problems are detected before a release occurs or contaminates the environment.

The 1988 UST regulation does not require owners and operators to ensure the integrity of secondarily contained areas, and EPA considered not requiring periodic interstitial integrity testing. Because of the Energy Policy Act secondary containment requirement for nearly all new and replaced tanks and piping, all UST systems will eventually be secondarily contained (including interstitial monitoring for release detection) and we should require periodic interstitial integrity testing to ensure leaks into secondary containment areas will be properly detected and contained. As described in Option 1, EPA considered annual interstitial integrity testing, but decided to propose a three year testing requirement, which will lower cost impacts of this requirement on owners and operators while retaining the environmental benefit of testing.

To reduce total compliance costs of today's proposal for owners and operators, EPA considered allowing continued use of flow restrictors in vent lines (that is, ball float valves) as an acceptable form of overfill prevention equipment. After considering stakeholders' concerns, EPA is taking the position that vent line flow restrictors present problems for operability and safety reasons. As described previously, EPA is proposing to eliminate ball float valves as overfill prevention for all new tanks and when overfill prevention is replaced in existing tanks.

EPA considered maintaining groundwater and vapor monitoring as acceptable forms of release detection in Option 2. All tanks and piping will

eventually use secondary containment with interstitial monitoring as their release detection method, and as a result, groundwater and vapor monitoring will eventually not be used. Stakeholders raised concerns about these two release detection methods, more than other methods. For both groundwater and vapor monitoring, releases travel through the environment to sampling points before releases are discovered. Other release detection methods provide more immediate detection of releases. In addition, numerous concerns were raised about frequent misapplications and improper designs of monitoring wells for these two methods. Consequently, EPA today is proposing to phase out groundwater and vapor monitoring as release detection methods. This will address stakeholders' concerns that UST systems using these two methods represent an unacceptable risk to the environment.

V. Updates to State Program Approval Requirements

What is EPA proposing?

EPA is proposing these substantive changes to the 1988 state program approval (SPA) regulation (40 CFR part 281) to make it consistent with certain Energy Policy Act requirements and certain proposed changes to the 1988 UST technical regulation (40 CFR part 280).

- Section 281.30(a), § 281.33(c)(2), and § 281.33(d)(3)—require secondary containment for new or replaced tanks and piping and under-dispenser containment for new motor fuel dispenser systems for UST systems located within 1,000 feet of a potable drinking water well or community water system, unless a state requires manufacturer and installer financial responsibility according to § 9003(i)(2) of the Solid Waste Disposal Act.
- Section 281.30(b)—eliminate flow restrictors for new or replaced overfill prevention.
- Section 281.30(c)—add notification for ownership changes.
- Section 281.31 and § 281.33(b) and (c)—delete upgrading requirements and eliminate phase-in schedule; add phase-in schedule for previously deferred UST systems.
- Section 281.32(e) and (f) and § 281.33(a)(3)—add periodic testing of spill and overfill prevention equipment, secondary containment areas, and mechanical and electronic components; and operation and maintenance walkthrough inspections, as well as maintaining associated records.
- Section 281.33(c)—limit use of monthly inventory control in combination with tank tightness testing conducted every five years for the first 10 years after the tank is installed or upgraded, if the tank was installed prior to a state receiving SPA.
- Section 281.33(e)—require hazardous substance USTs to only use secondary containment with interstitial monitoring.
- Section 281.34(a)(1)—add ''interstitial space may have been compromised'' to suspected releases.
- Section 281.37—eliminate phase-in requirement for financial responsibility.
- Section 281.39—require operator training according to § 9010 of the Solid Waste Disposal Act.
- Section 281.41(a)—require states to have delivery prohibition in accordance with § 9012 of the SWDA.
- Section 281.60—add requirement for the Administrator to initiate proceedings to withdraw program approval when an approved program fails to submit a revised application within three years of 40 CFR part 281 changes that require a program revision, which will follow the proceedings procedures from the 1988 SPA regulation.

EPA is not proposing to add the proposed compatibility requirement changes (see § 280.32) to 40 CFR part 281.

EPA is also proposing these technical changes to the SPA regulation.

- Section 281.10—change ''subpart'' to ''part''.
- Section 281.11(c), § 281.12(b)(2), § 281.20(d), § 281.21(a)(2), § 281.23, § 281.50(a), and formerly § 281.51—eliminate interim approval.
- Section 281.12(a)(2)—change ''Indian lands'' to ''Indian country''.
- Formerly § 281.32(e)—eliminate requirement to maintain upgrade records.
- Formerly § 281.38—eliminate reserved section for financial responsibility for USTs containing hazardous substances.
- Move § 281.39 to § 281.38—Lender Liability.
- Section 281.51, formerly § 281.52—add requirement for approved states to submit a revised application within three years of 40 CFR part 281 changes that require a program revision.
- Section 281.61—move § 281.60(b) to § 281.61(b)(2).

Why is EPA proposing this change? What background information is available about this change?

The 1988 SPA regulation in 40 CFR part 281 sets criteria state UST programs must meet to receive EPA's approval to operate in lieu of the federal UST program. The 1988 SPA regulation sets performance criteria states must meet to be considered no less stringent than the 1988 UST regulation (hereafter 40 CFR part 280) and provides requirements for states to have adequate enforcement. It also details the components of a SPA application.

EPA is proposing certain changes to the 1988 SPA regulation to make it consistent with today's proposed changes to the 1988 UST technical regulation. By doing so, EPA will require states to adopt UST technical regulation changes when final, in order to obtain or retain SPA. EPA is proposing to keep the general format of the 1988 SPA regulation. We are not proposing to make the SPA regulation as explicit or prescriptive as the UST technical regulation. Finally, EPA is proposing technical corrections and adding a deadline for state program revisions whenever EPA makes substantive changes to the SPA regulation.

Addressing Energy Policy Act Requirements and Proposed 40 CFR Part 280 Changes

How SPA Works

EPA's proposed UST technical regulation changes and Energy Policy Act requirements primarily impact the 1988 SPA regulation in 40 CFR part 281, Subpart C—Criteria for No Less Stringent. Thirty-six states, plus the District of Columbia and Puerto Rico, have state program approval and run their own underground storage tank programs in lieu of the federal program. To ensure these jurisdictions, and any other states or territories obtaining SPA, adopt the 40 CFR part 280 changes when final, EPA must update Subpart C. To continue providing states with flexibility and not disrupt current state programs, EPA is proposing to revise the SPA regulation to make it consistent with, but not identical to, the 40 CFR part 280 changes. Instead, EPA is proposing changes to the SPA regulation in a less prescriptive manner than in the changes in 40 CFR part 280. EPA decided to continue this successful approach to implement the UST SPA program.

The 1988 SPA regulation developed no less stringent criteria in the form of objectives.[73] EPA is continuing this format so that, taken as a whole, state programs will be no less stringent than the federal requirements, even though they may deviate slightly from what is explicitly required in 40 CFR part 280.

[73] **Federal Register**, Vol. 53, No. 185, September 23, 1988, page 37216.

For example, § 281.30 covers the no less stringent requirement for new UST system design, construction, and installation; it corresponds to § 280.20 of the UST technical regulation, but is much less explicit about requirements.

According to § 281.30 and to receive SPA, a state must require all new UST systems ''* * * [b]e designed, constructed, and installed in a manner that will prevent releases for their operating life due to manufacturing defects, structural failure, or corrosion * * *''. In contrast, § 280.20 is much more explicit about how tank owners and operators ensure their tanks and piping prevent releases. It states what is required to prevent releases and provides codes of practice to comply. Although § 281.30 is less explicit, it nonetheless ensures owners and operators in approved states install UST systems that prevent releases and provides states flexibility in achieving that goal.

Proposed Goal Oriented Changes

EPA is proposing these goal oriented changes to Subpart C—Criteria for No Less Stringent. By the term ''goal oriented changes,'' EPA means changes in which states have some flexibility as to how they will meet the goals of the particular SPA regulation section. They reflect certain 40 CFR part 280 proposed changes.

- § 281.30(c)—add notification for ownership changes.
- § 281.31 and § 281.33(b)—add a phase-in schedule for upgrading previously deferred UST systems.
- § 281.32(e) and (f) and § 281.33(a)(3)—add periodic testing of spill and overfill prevention equipment, secondary containment areas, and mechanical and electronic components; and operation and maintenance walkthrough inspections, as well as maintaining associated records.

EPA's proposed ownership change notification requires anyone who assumes ownership of an UST system to notify the implementing agency within 30 days of assuming ownership and specifies what notification must include. Our proposed SPA regulation change in § 281.30(c) is much less prescriptive and indicates states require owners and operators to ''* * * adequately notify the implementing state agency within a reasonable timeframe when assuming ownership of an UST system using a form designated by the state agency.'' This provides states some flexibility in complying, including allowing them to continue relying on an annual tank registration program to meet this requirement. This is a reasonable way to ensure states know who owns USTs in their jurisdiction. EPA does not have an annual registration program, so we specify a timeframe in § 280.22 because we want to know who owns tanks in jurisdictions where we are the implementing agency.

In § 280.21, EPA is proposing that previously deferred wastewater treatment tank systems, airport hydrant fuel distribution systems, and UST systems with field-constructed tanks meet specific upgrade requirements. This is one way of achieving the goal states need to meet in § 281.31. In § 281.31, states will be required to ensure tanks are upgraded to prevent releases due to corrosion, spills, and overfills or be permanently closed. These more general requirements are sufficient for a state program to protect human health and the environment because they require UST systems to ''* * * prevent releases for their operating life * * *''. EPA finds it is also adequate to upgrade previously deferred systems to this standard.

Additionally, EPA is proposing previously deferred UST systems be upgraded within three years of a state submitting its SPA application for approval or revision. In the past, EPA experienced problems with requiring states to have a particular requirement by a certain date in order to receive SPA. States applying for SPA after a deadline passed often have difficulty implementing or obtaining a retroactive requirement. A retroactive or deadline leads to complications with little added benefit.

In today's proposal, EPA is adding various operation and maintenance requirements. In 40 CFR part 280, EPA is proposing specific frequencies and procedures for testing spill and overfill prevention equipment, secondary containment integrity testing, release detection equipment testing, and operation and maintenance walkthrough inspections. In § 281.32, EPA is proposing states require these tests in a manner and frequency that ensures proper functionality of equipment, includes proper operation and maintenance of the UST system, and prevents releases for the life of the equipment and UST system. This approach allows states who have these requirements, despite different frequencies or manners, to receive SPA, as long as their requirements sufficiently ensure properly functioning non-releasing UST systems. EPA is also proposing to update § 281.32(g) by adding these tests to the recordkeeping requirements of SPA.

Proposed Energy Policy Act Changes

In today's SPA regulation proposal, EPA is addressing Energy Policy Act requirements more generally than in today's UST technical regulation proposal, yet they are slightly different than the goal oriented approach above. The Energy Policy Act amends the Solid Waste Disposal Act and requires states that receive federal Subtitle I money to adopt operator training requirements, delivery prohibition, and additional measures to protect groundwater from contamination. In the additional measures to protect groundwater provision, states must meet either secondary containment and interstitial monitoring for new or replaced tanks and piping within 1,000 feet of a potable drinking water well or community water system, *or* manufacturer and installer financial responsibility and installer certification. The secondary containment requirement includes under-dispenser containment on any new motor fuel dispenser system within 1,000 feet of a potable drinking water well or community water system.

EPA developed guidelines for states to implement Energy Policy Act requirements; many states and territories implemented the Energy Policy Act requirements according to these guidelines. In order to establish similar requirements in Indian country and in states and territories that do not adopt Energy Policy Act requirements, EPA is adding secondary containment and operator training to today's 40 CFR part 280 proposal. In proposing those requirements, EPA does not want to supersede programs states developed to meet Energy Policy Act requirements. Requiring states to alter newly implemented provisions would be a disservice to them, as well as UST owners and operators. Therefore, EPA is proposing to address in today's SPA regulation proposal the secondary containment, manufacturer and installer financial responsibility and installer certification, delivery prohibition, and operator training requirements that appear in the Energy Policy Act. So, states already meeting these Energy Policy Act requirements need not change their programs to receive SPA.

EPA is proposing additional measures to protect groundwater and operator training requirements in Subpart C (§ 281.22(d)(3), § 281.30(a), § 281.33(c)(2), and § 281.39). Delivery prohibition is in Subpart D—Adequate Enforcement of Compliance (§ 281.41(a)). Because delivery prohibition is an enforcement tool, EPA is proposing to require states have authority to prohibit deliveries

according to Energy Policy Act, rather than make this a no less stringent requirement.

EPA is not proposing to add delivery prohibition to 40 CFR part 280 because delivery prohibition is primarily an enforcement tool for implementing agencies; it is not a requirement for owners and operators. Because the Energy Policy Act gives EPA clear delivery prohibition enforcement authority, we do not need to add delivery prohibition to the UST technical regulation. However, the only way to ensure states have that same authority is to require states to have authority to implement delivery prohibition as a prerequisite for SPA, as proposed in § 281.41(a).

Proposed Specific Changes

EPA is proposing specific changes below to Subpart C—Criteria for No Less Stringent. They reflect proposed 40 CFR part 280 changes. This specific approach is the only way for states to adopt this group of proposed changes. The goal of these proposed sections remains intact, yet the specific changes ensure states adopt the 40 CFR part 280 changes when final, and are able to receive SPA.

- § 281.30(b)—eliminate flow restrictors for new or replaced overfill prevention
- § 281.31—delete upgrading requirements
- § 281.33(c)—limit use of monthly inventory control in combination with tank tightness testing conducted every five years for the first 10 years after the tank is installed or upgraded, if the tank was installed prior to a state receiving SPA
- § 281.33(e)—require hazardous substance USTs to only use secondary containment with interstitial monitoring
- § 281.34(a)(1)—add ''* * * interstitial space may have been compromised * * *'' to suspected releases
- § 281.37—eliminate phase-in requirement for financial responsibility

EPA is proposing in § 281.30(b) states wishing to receive SPA not allow installation of flow restrictors (commonly referred to as ball floats) in vent lines for overfill protection. The existing goal of § 281.30(b) is for states to require that UST systems have spill and overfill prevention equipment. In the proposed language, EPA maintains the overall goal to prevent spills and overfills; however, owners and operators can no longer install ball floats to achieve that goal.

The deadlines for upgrades and for owners and operators to obtain financial responsibility have passed. As a result, EPA is proposing to eliminate these UST technical regulation deadlines in the SPA regulation. In § 281.31 and § 281.33(b), EPA is removing UST upgrades, except for previously deferred USTs. In § 281.37, we are eliminating the financial responsibility phase-in schedule. Please note EPA is proposing states allow upgrades prior to submitting their approval or revision applications for SPA, rather than only until December 22, 1998. EPA is taking this action due to states' previous problems with implementing a retroactive requirement when applying for SPA after the upgrade deadline.

In § 281.33(c), EPA is proposing monthly inventory control in combination with tank tightness testing conducted every five years for the first 10 years after a tank is installed or upgraded, only if a tank was installed prior to a state receiving SPA. This reflects a proposed change in 40 CFR part 280 and avoids another problem in the 1988 SPA regulation. First, EPA is proposing to eliminate this method. Second, EPA is proposing to tie the date for eliminating this method to a state's submission of its SPA application for approval or revision. As discussed earlier, EPA is taking the position that it is better to tie deadlines in the SPA regulation to states' submission of SPA applications, rather than specific dates.

In today's notice, EPA is proposing states wishing to receive SPA will no longer be able to allow installation of non-secondarily contained hazardous substance UST systems. This is consistent with EPA's proposed change in § 280.42(e); an equivalent and specific proposed change to the SPA regulation is the only way to ensure states adopt it. For consistency with proposed changes in the UST technical regulation and to ensure states wishing to receive SPA adopt this change, in § 281.34(a)(1), EPA is proposing to add ''* * * interstitial space may have been compromised * * *'' to suspected releases conditions.

Proposed UST Technical Regulation Changes Not Addressed in Proposed SPA Regulation

EPA is not proposing to address in the proposed SPA regulation (§ 281.32) the methods for determining compatibility. Today's proposed compatibility proposal in § 281.32 allows owners and operators to use any method for determining compatibility approved by an implementing agency, as long as the method is no less protective of human health and the environment. It is unnecessary to change the SPA regulation because the proposed UST technical regulation in § 281.32 will provide states with discretion to ensure compatibility. Also, the proposed UST technical regulation change delineates how owners and operators can demonstrate they are storing substances in UST systems made of or lined with materials that are compatible with the substances stored. This is more prescriptive than the general format of the SPA regulation, and thus is not appropriate for the SPA regulation.

Addressing SPA Revision Process

EPA is proposing to add a requirement for approved states to submit a revised application within three years of SPA regulation changes that require a program revision under § 281.51. Approved states are required to revise their programs and submit revised applications whenever the federal program changes or EPA's Administrator requests a revised application based on changes to a state's program. Given today's proposed significant changes, it is necessary to develop a timeframe which will ensure approved states meet SPA regulation changes in a reasonable time.

After discussions with states and reviews of other EPA programs, EPA is taking the position that three years is a reasonable time for approved states to submit revised applications resulting from SPA regulation changes. Also, EPA will work with states to ensure they meet this three-year deadline. EPA's proposed language in § 281.51 is intended only to require a state program revision within three years if EPA makes changes that necessitate state program changes. For instance, EPA changes to Subpart C—Criteria for No Less Stringent would likely require a state program revision, unless EPA is only making minor editorial changes.

While most states will be able to meet the three-year deadline for program revision, EPA is aware that some states may need additional time. EPA will notify states that have not revised their program within three years. EPA will ask those states to demonstrate their level of effort, show progress to date, and provide dates when they will achieve major milestones for revising their programs and submitting a revised application. EPA will consider these factors before initiating program approval withdrawal.

Additional Proposed Changes to SPA Regulation

EPA is proposing these additional SPA regulation changes; they are not a direct result of proposed 40 CFR part 280 changes. Rather, the majority are corrections to the 1988 SPA regulation.

- § 281.10—change ''subpart'' to ''part''
- § 281.11(c), § 281.12(b)(2), § 281.23, and formerly § 281.51—eliminate interim approval
- § 281.12(a)(2)—change ''Indian lands'' to ''Indian country''
- § 281.32(e)—eliminate requirement to maintain upgrade records
- Formerly § 281.38—eliminate reserved section for financial responsibility for USTs containing hazardous substances
- Move § 281.39 to § 281.38—Lender Liability
- § 281.61—move § 281.60(b) to § 281.61(b)(2)

The SPA regulation incorrectly uses the term subpart in § 281.10, and therefore EPA is proposing to correctly change this to part. EPA has been using the term Indian country instead of Indian lands for years. We are proposing to incorporate this term, which does not alter the meaning, in the SPA regulation. EPA is proposing to remove the reserved financial responsibility for USTs containing hazardous substances section (formerly § 281.38); move the lender liability section from § 281.39 to § 281.38; and include the new operator training section in § 281.39. Because operator training needs to be in subpart C, which has no remaining section numbers, this eliminates the need to renumber subpart D. Also, the reserved financial responsibility for hazardous substances section is unnecessary since there is no corresponding requirement in 40 CFR part 280.

EPA is proposing to delete the interim SPA approval language (in § 281.11(c) and § 281.51). In more than 20 years of the UST program, no state has sought interim approval; it is more beneficial to receive full approval all at once, rather than in steps. Also, because 36 states plus the District of Columbia and Puerto Rico have SPA, interim SPA approval is unnecessary at this time.

EPA is proposing to eliminate the requirement to maintain upgrade records for the operational life of an UST facility. This requirement in § 281.32(e) of the 1988 SPA regulation does not exist in 40 CFR part 280. In addition, EPA is proposing to no longer allow upgrades.

EPA is also proposing to move § 281.60(b) to § 281.61(b). This paragraph explains the procedure EPA will follow to withdraw approval. This paragraph is better suited for § 281.61, which explains the procedures for withdrawing approval, as opposed to § 281.60, which explains the criteria for withdrawal.

What issues related to this change does EPA request comment or additional data on?

EPA requests comments on:

- Is three years an appropriate timeframe for requiring a SPA state to submit a revised application? Please provide justification.
- Should EPA address the proposed procedures for determining compatibility of § 280.32 into the SPA regulation?

Please provide reasoning or justification if you disagree with or propose something different from EPA's proposal.

VI. Overview of Estimated Costs and Benefits

EPA prepared an analysis of the potential incremental costs and benefits associated with this action. This analysis is contained in the regulatory impact analysis (RIA) document titled *Assessment of the Potential Costs, Benefits, and Other Impacts of the Proposed Revisions to EPA's Underground Storage Tank Regulations,* which is available in the docket for this proposal. RIA estimated regulatory implementation and compliance costs, and benefits for three regulatory options as described above in section V, subsection F. On an annualized basis, the estimated regulatory compliance costs for the three options in today's proposed action are $210 million (Preferred Option), $520 million (Option 1), and $130 million (Option 2). Separately, this analysis assessed the potential benefits of the proposed regulation. As discussed in the RIA, a substantial portion of the beneficial impacts associated with the proposed regulation are avoided cleanup costs as a result of preventing releases and reducing the severity of releases. Today's action is expected to have annual cost savings related to avoided costs of $300–$740 million per year under the Preferred Option, $310–$770 million per year under Option 1, and $110–$590 million per year under Option 2.

We recognize that the estimated number of avoided releases and releases reduced in severity is based on expert judgment. Moreover, the cost savings estimates reflect cost data from only a small number of state programs (*e.g.,* such as New Hampshire). We solicit public input on the accuracy of the expected reduction in releases due to the proposed requirements provided by the experts, as well as remediation cost data for releases of different sizes and types. Please provide relevant data and studies on this topic. EPA solicits comment on the methodology and results from the RIA, as well as any data that the public feels would be useful in a revised analysis including specifically cost estimates for remediation and EPA's methods for estimating prevented releases under the proposed rule.

VII. Statutory and Executive Orders

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

Under section 3(f)(1) of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is an ''economically significant regulatory action'' because it is likely to have an annual effect on the economy of $100 million or more. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and EO 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 1360.11.

Today's proposed regulation contains mandatory information collection requirements. The labor burden and associated costs for these requirements are estimated in the ICR supporting statement for today's proposed action. The supporting statement identifies and estimates the burden for each of the changes to the regulations that include recordkeeping or reporting requirements. Proposed changes include: Adding secondary containment requirements for new and replaced tanks and piping; adding operator training requirements; adding periodic operation and maintenance requirements for UST systems; removing certain deferrals; adding new release prevention and detection technologies; and updating state program approval requirements to incorporate these new changes.

Based on the same data and cost calculations applied in the Regulatory Impact Assessment (RIA) for today's action, but using the burden estimations for ICRs, the ICR supporting statement estimates an average annual labor hour burden of 2.3 million hours and $135 million for the proposed regulation. One

time capital and hourly costs are included in these estimates based on a three year annualization period. Burden is defined at 5 CFR 1320.3(b). The total universe of respondents for this ICR is comprised of 223,558 facilities and 56 states and territories.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA–HQ–UST–2011–0301. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after November 18, 2011, a comment to OMB is best assured of having its full effect if OMB receives it by December 19, 2011. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

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

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

After considering the economic impacts of today's proposed regulation on small entities, EPA certifies that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this proposed rule are small businesses and small governmental jurisdictions. We have determined that at most 1 percent of potentially affected small firms in the retail motor fuel sector (NAICS 447) will experience an impact over 1 percent of revenues but less than 3 percent of revenues. No small firms have impacts above 3 percent of revenues. In addition, we estimate that no small governmental jurisdictions would be impacted at 1 percent or 3 percent of revenues. This certification is based on the small entities analysis contained in the RIA for today's proposal.

Although this proposed regulation will not have a significant economic impact on a substantial number of small entities, EPA nonetheless tried to reduce the impact of this regulation on the regulated community in general, which is primarily comprised of small businesses. EPA conducted extensive outreach in order to determine which changes to make to the 1988 regulations. EPA worked with representatives of owners and operators and reached out specifically to small businesses. In addition, EPA considered the impacts of each potential regulatory change and worked to limit changes that required retrofits, since changes requiring retrofits would place a high financial burden on small businesses. Finally, EPA maintained numerous options for compliance in order to provide small entities with as much flexibility as possible.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule contains a Federal mandate that may result in expenditures of $100 million or more for the private sector in any one year. Accordingly, EPA prepared under section 202 of the UMRA a written statement (an appendix to the RIA), which is summarized below.

As estimated in the RIA, on an annualized basis, the total estimated regulatory compliance costs for the three options in today's proposed action are $210 million (Preferred Option), $520 million (Option 1), and $130 million (Option 2). Of this amount, annualized costs to state/local governments total $9 million under the Preferred Option, $19 million under Option 1, and $6 million under Option 2. These costs consist of estimated regulatory compliance costs for state/local governments that currently own or operate UST systems and annualized costs of $120,000 for states to implement the proposed rule. EPA estimates total annualized costs to owners and operators of tribally owned UST systems are $0.7 million under the Preferred Option. The estimated annualized cost to the private sector range is approximately $180 million under the Preferred Option, $350 million under Option 1, and $120 million under Option 2. While the proposed regulation may result in expenditures of $100 million or more for the private sector, thereby triggering section 202 of the UMRA, this rule is not subject to the requirements of section 204 of UMRA because EPA does not believe state, local, and tribal governments will incur aggregate costs of over $100 million per year.

Consistent with section 205, EPA identified and considered a reasonable number of regulatory alternatives. Today's proposed regulation identifies a number of regulatory options, and the RIA estimates the annual cost across the three considered options may range between $130 million and $520 million. Section 205 of the UMRA requires federal agencies to select the least costly or most cost-effective regulatory alternative unless the Agency publishes with the final rule an explanation of why such alternative was not adopted. As discussed earlier in the preamble, as part of EPA's deliberative process for today's proposed rule, EPA considered and evaluated variations of a subset of the proposed requirements using two alternative options (Options 1 and 2). The preferred option provides the greatest difference between beneficial impact and costs of any of the options. The requirements proposed under the Preferred Option provide for greater protection of human health and the environment and better addresses stakeholder concerns, compared to the lower cost and proposed requirements of Option 2.

This rule is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in EO 13132. Under the proposed rule, total costs to all affected states and local governments (including direct compliance costs, notification costs, and state program costs) are approximately $9 million. This is not considered to be a substantial compliance cost under federalism requirements. Thus, EO 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed action from State and local officials.

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

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA concluded that this action will have tribal implications to the extent that tribally-owned entities with UST systems on Indian country would be affected. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. Total annualized costs for tribally-owned UST systems in Indian country are estimated to be $0.7 million.

EPA consulted with tribal officials early in the process of developing this proposed regulation to welcome meaningful and timely input into its development. EPA began its consultation with Tribes on possible changes to the UST regulation shortly after the passage of the Energy Policy Act of 2005. The Energy Policy Act directed EPA to coordinate with Tribes to develop and implement an UST program strategy in Indian country to supplement the program's existing approach. EPA and Tribes worked collaboratively to develop a tribal strategy.

There are certain key provisions of the Energy Policy Act that apply to states receiving federal Subtitle I money, but do not apply in Indian country. Nonetheless, EPA's goal is to establish in Indian country similar federal requirements to these Energy Policy Act provisions as an important step in achieving more consistent program results in release prevention. Both EPA and Tribes recognize the importance of having policies that can help ensure parity in program implementation between states and in Indian country.

In addition to our early consultation with Tribes, EPA also reached out again to Tribes as we started the official rulemaking process and throughout the development of this proposed regulation. EPA sent letters to leaders of over 500 Tribes as well as to Tribal regulatory staff to invite their participation in the development of the regulation. EPA heard from both Tribal officials who work as regulators as well as representatives of owners and operators of UST systems in Indian country. The Tribal regulators raised concerns about ensuring parity of environmental protection between states and Indian country.

EPA finds that today's proposed changes to the UST regulation are needed to ensure parity between UST systems in states and in Indian country. This regulation is also needed to ensure equipment is not just installed but is working properly to protect the environment from potential releases.

EPA specifically solicits additional comment on this proposed action from Tribal officials.

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

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because the Agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. EPA's risk assessment for this proposed rulemaking examines potential impacts to groundwater and subsequent chemical transport, exposure and risk. While the risk assessment did not specifically measure exposure to children, the general exposure scenarios reflect four exposure pathways that have the most significant potential for human health impacts. These are: (1) Ingestion of chemicals in groundwater that have migrated from the source area to residential drinking water wells; (2) inhalation of volatile chemicals when showering with contaminated groundwater; (3) dermal contact with chemicals while bathing or showering with contaminated groundwater; and (4) inhalation of vapors that may migrate upward from contaminated groundwater into overlying buildings.

Adults and children can potentially be exposed through all four exposure pathways considered. For adults, inhalation of vapors while showering is the most significant exposure pathway; for children, ingestion is the most significant pathway, because they are assumed to take baths and are, therefore, not exposed via shower vapor inhalation. As a result of the longer exposure from showering, adults are the more sensitive receptors for cancer effects compared to children, particularly those under five who are assumed to take more baths and fewer showers.[74]

While the screening level risk assessment is limited in that it only examines benzene impacts, the proposed rule would likely reduce other contaminant exposures to children in a similar pattern and would not create significant adverse impacts on children's health.

The screening level population analysis performed to examine EO 12898 shows that children under 18 years and children under five years are slightly less likely to be found in the vicinity of UST facilities. This suggests that the impacts of the proposed rule will not have a disproportionate impact on children's health. Moreover, because all regulatory options proposed today would increase regulatory stringency and reduce the number and size of releases, EPA does not expect the proposed regulation to have any disproportionate adverse impact on children. The public is invited to submit comments or identify peer-reviewed studies and data that assess effects of early life exposure to petroleum products.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The following summarizes EPA's assessment of the energy impacts that the proposed rulemaking will have on energy supply, distribution, and use.

[74] United States Department of Health and Human Services, Public Health Service, Agency for Toxic Substances and Disease Registry, ''Toxicological Profile for Polycyclic Aromatic Hydrocarbons,'' August 1995.

The proposed regulation consists of additional regulatory requirements that apply to the owners and operators of underground storage tanks. To the extent that the proposed regulation affects the motor fuel sector, it does so at the retail motor fuel sales level, rather than the level of refineries or distributors, who supply the retail stations with motor fuel. Therefore, we do not expect the proposed regulation to have a significant adverse impact on energy supply or distribution.

The additional regulatory requirements contained in the proposed regulation may increase compliance costs for owners and operators of retail motor fuel stations. If owners and operators of retail motor fuel stations affected by the proposed regulation can pass through their increased compliance costs, energy use may be affected via higher energy prices caused by the proposed regulation. However, we do not expect a significant change in retail gasoline prices to result from this proposed regulation for the following reasons: (1) Economic analyses of retail fuel prices have revealed that demand for gasoline is highly sensitive to price (elastic) within localized geographic areas. As a result, if one motor fuel retailer in an area passes through increases in compliance costs by increasing gasoline prices, while another does not, the one with higher prices is at a competitive disadvantage; and (2) retail motor fuel stations often have associated stores and/or services, such as car washes, repair operations, and convenience outlets, on which they can more successfully pass through increases in compliance costs.

Furthermore, when considered in the context of total fuel consumption in the United States, the proposed rule would represent only a very small fraction of motor fuel prices even if it was fully passed through to consumers. According to the Bureau of Transportation Statistics, the United States consumed approximately 171 billion gallons of motor fuel (including gasoline and diesel) in 2008 at an average price of $3.27.[75] This implies that U.S. consumers spent $558 billion in 2008 on motor fuel. The overall cost of the proposed regulation is approximately $210 million, less than one-tenth of 1 percent of the amount spent by end users on motor fuel in 2008. In comparison, an increase of 1 cent in the average price of motor fuel in 2008 would have increased the total cost to consumers by approximately $1.7 billion. Given these circumstances, the proposed regulations should not have a measurable impact on retail motor fuel prices. As a result, EPA does not expect the proposed regulations to have a significant adverse impact on energy prices or use.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113 (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed regulation involves technical standards. EPA is proposing to use voluntary consensus standards, called codes of practice identified in section E–2 of the preamble. These codes of practice meet the objectives of today's proposed regulation by establishing criteria for the design, construction, and maintenance of underground storage tanks.

EPA welcomes comments on this aspect of the proposed regulation and, specifically, invites the public to identify potentially applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

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

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

To inform us about the socioeconomic characteristics of communities potentially affected by the proposed regulation, EPA conducted a screening analysis to examine whether there is a statistically significant disparity between socioeconomic characteristics of populations located near UST facilities and those that are not.[76] As discussed in the RIA, the results indicate that minority and low-income populations are slightly more likely to be located near UST facilities. An environmental justice analysis would then require an assessment of whether there would be disproportionate and adverse impacts on these populations. However, because all regulatory options considered in this proposed regulation would increase regulatory stringency and reduce the number and size of releases, EPA does not anticipate the proposed regulation to have any disproportionately high and adverse human health or environmental effects on these minority or low-income communities or any community.

List of Subjects

40 CFR Part 280

Environmental protection, Administrative practice and procedures, Confidential business information, Groundwater, Hazardous materials, Petroleum, Reporting and recordkeeping requirements, Underground storage tanks, Water pollution control, Water supply.

40 CFR Part 281

Environmental protection, Administrative practice and procedures, Hazardous substances, Petroleum, State program approval, Underground storage tanks.

Dated: October 25, 2011.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, Title 40 Chapter I of Code of Federal Regulations is proposed to be amended as follows.

[75] The 2008 prices per gallon for all grades of retail motor gasoline and No. 2 diesel fuel (all concentrations of sulfur) were $3.32 and $3.15, respectively, as reported by the Bureau of Transportation Statistics in Table 3–8: Sales Price of Transportation Fuel to End-Users in National Transportation Statistics 2010 (at *http://www.bts.gov/publications/national_transportation_statistics/pdf/entire.pdf*). We weight these prices according to prime supplier sales volumes in 2009 published by the Energy Information Administration, which summed to 362,798.5 thousands of gallons per day for gasoline and 132,489.3 thousands of gallons per day for all grades of diesel fuel (at *http://www.eia.gov/dnav/pet/pet_cons_prim_dcu_nus_a.htm*).

[76] Note that the affected populations identified in the screening analysis summarized here are simply defined by specific demographics surrounding UST locations. These affected populations are not necessarily equivalent to communities that others have specifically identified as ''environmental justice communities.''

PART 280—TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (UST)

1. The authority citation for part 280 is revised to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991(a), 6991(b), 6991(c), 6991(d), 6991(e), 6991(f), 6991(g), 6991(h), 6991(i).

2. Revise § 280.10 to read as follows:

§ 280.10 Applicability.

(a) The requirements of this part apply to all owners and operators of an UST system as defined in § 280.12 except as otherwise provided in paragraphs (b) and (c) of this section.

(1) *Previously deferred UST systems.* UST systems previously deferred from subparts B, C, D, E, G and H (airport hydrant fuel distribution systems, UST systems with field-constructed tanks, and wastewater treatment tank systems) and UST systems previously deferred from subpart D (UST systems that store fuel solely for use by emergency power generators) must begin meeting the requirements of this part as follows:

(i) UST systems installed on or before [effective date of rule] must meet the schedule in the following table.

Type of UST system	Subpart or Section	Effective date
UST systems that store fuel solely for use by emergency power generators.	D	[1 Year after effective date of rule].
Airport hydrant fuel distribution systems; UST systems with field-constructed tanks; and wastewater treatment tank systems.	B (except § 280.22) and C D § 280.22 of subpart B, E, G and H	[3 Years after effective date of rule]. See the phase in schedule in § 280.40(c). [effective date of rule].

(ii) UST systems installed after [effective date of rule] must meet all requirements at installation.

(2) Any UST system listed in paragraph (c) of this section must meet the requirements of § 280.11.

(b) The following UST systems are excluded from the requirements of this part:

(1) Any UST system holding hazardous wastes listed or identified under Subtitle C of the Solid Waste Disposal Act, or a mixture of such hazardous waste and other regulated substances.

(2) Any wastewater treatment tank system that is part of a wastewater treatment facility regulated under Section 402 or 307(b) of the Clean Water Act.

(3) Equipment or machinery that contains regulated substances for operational purposes such as hydraulic lift tanks and electrical equipment tanks.

(4) Any UST system whose capacity is 110 gallons or less.

(5) Any UST system that contains a *de minimis* concentration of regulated substances.

(6) Any emergency spill or overflow containment UST system that is expeditiously emptied after use.

(c) *Deferrals.* Subparts B, C, D, E, and G of this part do not apply to:

(1) Aboveground tanks associated with:

(i) Airport hydrant fuel distribution systems; and

(ii) UST systems with field-constructed tanks;

(2) Any UST systems containing radioactive material that are regulated under the Atomic Energy Act of 1954 (42 USC 2011 and following); and

(3) Any UST system that is part of an emergency generator system at nuclear power generation facilities regulated by the Nuclear Regulatory Commission under 10 CFR part 50.

3. In § 280.11 revise the Note at the end of the section to read as follows:

§ 280.11 Interim prohibition for deferred UST systems.

* * * * *

Note to paragraphs (a) and (b): The following codes of practice may be used as guidance for complying with this section:

(A) NACE International Recommended Practice RP 0285, ''Corrosion Control of Underground Storage Systems by Cathodic Protection'';

(B) NACE International Standard Practice SP 0169, ''Control of External Corrosion on Underground or Submerged Metallic Piping Systems'';

(C) American Petroleum Institute Recommended Practice 1632, ''Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems''; or

(D) Steel Tank Institute Recommended Practice R892, ''Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Petroleum Storage and Dispensing Systems''.

4. Section 280.12 is amended as follows:

a. By adding in alphabetical order definitions for ''Airport hydrant fuel distribution system,'' ''Class A operator,'' ''Class B operator,'' ''Class C operator,'' ''Dispenser system,'' ''Replaced,'' ''Secondary containment,'' ''Training program,'' and ''Under-dispenser containment,'' and

b. By revising the definitions for ''Motor fuel,'' ''Regulated substance,'' ''Repair,'' and ''Underground storage tank.''

§ 280.12 Definitions.

* * * * *

Airport hydrant fuel distribution system means an UST system that is a combination of one or more tanks directly connected to underground hydrant piping used to fuel aircraft. These systems do not have a dispenser at the end of the piping run, but rather have a hydrant (fill stand). If an aboveground storage tank (AST) is feeding an intermediary tank or tanks, this definition does not include the AST, but does include all underground piping entering and leaving the intermediary tank(s) and the intermediary tank(s). Intermediary tanks are those tanks directly connected to the hydrant piping.

* * * * *

Class A operator means the individual who has primary responsibility to operate and maintain the UST system in accordance with applicable requirements and standards established by the implementing agency. The Class A operator typically manages resources and personnel, such as establishing work assignments, to achieve and maintain compliance with regulatory requirements.

Class B operator means the individual who has day-to-day responsibility for implementing applicable regulatory requirements and standards established by the implementing agency. The Class B operator typically implements in-field aspects of operation, maintenance, and associated recordkeeping for the UST system.

Class C operator means the employee responsible for initially addressing emergencies presented by a spill or release from an UST system. The Class C operator typically controls or monitors the dispensing or sale of regulated substances.

* * * * *

Dispenser system means equipment located aboveground that meters the amount of regulated substances transferred to a point of use outside the UST system, such as a motor vehicle.

This system includes the equipment necessary to connect the dispenser to the underground storage tank system.

* * * * *

Motor fuel means petroleum or a petroleum-based substance that is typically used in the operation of a motor engine, such as motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any blend containing one or more of these substances (for example: motor gasoline blended with alcohol).

* * * * *

Regulated substance means

(a) Any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 (but not including any substance regulated as a hazardous waste under subtitle C), and

(b) Petroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute). The term ''regulated substance'' includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

* * * * *

Repair means to restore a tank, pipe, spill prevention equipment, overfill prevention equipment, corrosion protection equipment, release detection equipment or other UST system component that has caused a release or a suspected release of product from the UST system or has failed to function properly.

Replaced means

(a) For a tank—to remove a tank and install another tank.

(b) For piping—to remove 50 percent or more of piping and install other piping, excluding connectors, connected to a single tank. For tanks with multiple piping runs, this definition applies independently to each piping run.

* * * * *

Secondary containment or *Secondarily contained* means a release prevention and release detection system for a tank and/or piping. These systems have an inner and outer barrier with an interstitial space that is monitored for leaks.

* * * * *

Training program means any program established by the implementing agency that provides information to and evaluates the knowledge of a Class A, Class B, or Class C operator regarding requirements and standards for UST systems.

Under-dispenser containment or *UDC* means containment underneath a dispenser system designed to prevent dispenser system leaks from reaching soil or groundwater.

* * * * *

Underground storage tank or *UST* means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. This term does not include any:

(a) Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;

(b) Tank used for storing heating oil for consumptive use on the premises where stored;

(c) Septic tank;

(d) Pipeline facility (including gathering lines):

(1) Which is regulated under U.S.C. chapters 601 and 603, or

(2) Which is an intrastate pipeline facility regulated under state laws as provided in U.S.C. 49 chapters 601 and 603,and which is determined by the Secretary of Transportation to be connected to a pipeline, or to be operated or intended to be capable of operating at pipeline pressure, or as an integral part of a pipeline;

(e) Surface impoundment, pit, pond, or lagoon;

(f) Storm-water or wastewater collection system;

(g) Flow-through process tank;

(h) Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or

(i) Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

The term *underground storage tank* or *UST* does not include any pipes connected to any tank which is described in paragraphs (a) through (i) of this definition.

* * * * *

5. Revise Subpart B to read as follows:

Subpart B—UST Systems: Design, Construction, Installation and Notification

Sec.
280.20 Performance standards for new UST systems.
280.21 Upgrading of existing UST systems.
280.22 Notification requirements.

Subpart B—UST Systems: Design, Construction, Installation and Notification

§ 280.20 Performance standards for new UST systems.

In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the following requirements.

(a) *Tanks.* Each tank must be properly designed and constructed, and any portion underground that routinely contains product must be protected from corrosion, in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified in paragraphs (a)(1) through (a)(5) of this section. In addition, all new or replaced tanks where installation began after [effective date of rule] must be secondarily contained in accordance with paragraph (a)(6) of this section:

(1) The tank is constructed of fiberglass-reinforced plastic; or

Note to paragraph (a)(1): The following codes of practice may be used to comply with paragraph (a)(1) of this section:

(A) Underwriters Laboratories Standard 1316, ''Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products, Alcohols, and Alcohol-Gasoline Mixtures''; or

(B) Underwriter's Laboratories of Canada S615, ''Standard for Reinforced Plastic Underground Tanks for Flammable and Combustible Liquids''.

(2) The tank is constructed of steel and cathodically protected in the following manner:

(i) The tank is coated with a suitable dielectric material;

(ii) Field-installed cathodic protection systems are designed by a corrosion expert;

(iii) Impressed current systems are designed to allow determination of current operating status as required in § 280.31(c); and

(iv) Cathodic protection systems are operated and maintained in accordance with § 280.31 or according to guidelines established by the implementing agency; or

Note to paragraph (a)(2): The following codes of practice may be used to comply with paragraph (a)(2) of this section:

(A) Steel Tank Institute Specification ''sti-P3® Specification and Manual for External Corrosion Protection of Underground Steel Storage Tanks'';

(B) Underwriters Laboratories Standard 1746, ''Standard for External Corrosion Protection Systems for Steel Underground Storage Tanks'';

(C) Underwriters Laboratories of Canada S603, ''Standard for Steel Underground Tanks for Flammable and Combustible Liquids,'' and S603.1, ''Standard for External Corrosion Protection Systems for Steel Underground Tanks for Flammable and Combustible Liquids,'' and S631, ''Standard for Isolating Bushings for Steel Underground Tanks Protected with External Corrosion Protection Systems'';

(D) Steel Tank Institute Standard F841, ''Standard for Dual Wall Underground Steel Storage Tanks''; or

(E) NACE International Recommended Practice RP 0285, ''Corrosion Control of Underground Storage Systems by Cathodic Protection,'' and Underwriters Laboratories Standard 58, ''Standard for Steel Underground Tanks for Flammable and Combustible Liquids''.

(3) The tank is constructed of steel and clad or jacketed with a non-corrodible material; or

Note to paragraph (a)(3): The following codes of practice may be used to comply with paragraph (a)(3) of this section:

(A) Underwriters Laboratories Standard 1746, ''Standard for External Corrosion Protection Systems for Steel Underground Storage Tanks'';

(B) Steel Tank Institute Specification F894, ''ACT–100® Specification for External Corrosion Protection of FRP Composite Steel USTs'';

(C) Steel Tank Institute Specification F961, ''ACT–100–U® Specification for External Corrosion Protection of Composite Steel Underground Storage Tanks''; or

(D) Steel Tank Institute Specification F922, ''Steel Tank Institute Specification for Permatank®''.

(4) The tank is constructed of metal without additional corrosion protection measures provided that:

(i) The tank is installed at a site that is determined by a corrosion expert not to be corrosive enough to cause it to have a release due to corrosion during its operating life; and

(ii) Owners and operators maintain records that demonstrate compliance with the requirements of paragraph (a)(4)(i) of this section for the remaining life of the tank; or

(5) The tank construction and corrosion protection are determined by the implementing agency to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than paragraphs (a)(1) through (4) of this section; or

(6) The tank is secondarily contained. Secondary containment must be periodically tested in accordance with § 280.36. Secondarily contained tanks must meet the following:

(i) Be able to contain regulated substances leaked from the primary containment until they are detected and removed; and

(ii) Be able to prevent the release of regulated substances to the environment at any time during the operational life of the UST system.

Note to paragraph (a)(6): The following codes of practice may be used to comply with paragraph (a)(6) of this section:

(A) Underwriters Laboratories Standard 58, ''Standard for Steel Underground Tanks for Flammable and Combustible Liquids'';

(B) Underwriters Laboratories Standard 1316, ''Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products, Alcohols, and Alcohol-Gasoline Mixtures'';

(C) Underwriters Laboratories Standard 1746, ''Standard for External Corrosion Protection Systems for Steel Underground Storage Tanks'';

(D) Steel Tank Institute Standard F841, ''Standard for Dual Wall Underground Steel Storage Tanks''; or

(E) Steel Tank Institute Specification F922, ''Steel Tank Institute Specification for Permatank®''.

(b) *Piping.* The piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified in paragraphs (b)(1) through (b)(4) of this section. In addition, except for suction piping that meets the requirements of 280.41(b)(1)(ii)(A) through (E) and piping associated with field-constructed tanks and airport hydrant fuel distribution systems, all new or replaced piping where installation began after [effective date of rule] must be secondarily contained in accordance with paragraph (b)(5) of this section. The entire piping run must be replaced when 50 percent or more of a piping run is replaced.

(1) The piping is constructed of a non-corrodible material; or

Note to paragraph (b)(1): The following codes of practice may be used to comply with paragraph (b)(1) of this section:

(A) Underwriters Laboratories Standard 971, ''Standard for Non-Metallic Underground Piping for Flammable Liquids''; or

(B) Underwriters Laboratories of Canada Standard S660, '' Standard for Non-Metallic Underground Piping for Flammable Liquids''.

(2) The piping is constructed of steel and cathodically protected in the following manner:

(i) The piping is coated with a suitable dielectric material;

(ii) Field-installed cathodic protection systems are designed by a corrosion expert;

(iii) Impressed current systems are designed to allow determination of current operating status as required in § 280.31(c); and

(iv) Cathodic protection systems are operated and maintained in accordance with § 280.31 or guidelines established by the implementing agency; or

Note to paragraph (b)(2): The following codes of practice may be used to comply with paragraph (b)(2) of this section:

(A) American Petroleum Institute Recommended Practice 1632, ''Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems'';

(B) Underwriters Laboratories Subject 971A, ''Outline of Investigation for Metallic Underground Fuel Pipe'';

(C) Steel Tank Institute Recommended Practice R892, ''Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Petroleum Storage and Dispensing Systems'';

(D) NACE International Standard Practice SP 0169, ''Control of External Corrosion on Underground or Submerged Metallic Piping Systems''; or

(E) NACE International Recommended Practice RP 0285, ''Corrosion Control of Underground Storage Systems by Cathodic Protection''.

(3) The piping is constructed of metal without additional corrosion protection measures provided that:

(i) The piping is installed at a site that is determined by a corrosion expert to not be corrosive enough to cause it to have a release due to corrosion during its operating life; and

(ii) Owners and operators maintain records that demonstrate compliance with the requirements of paragraph (b)(3)(i) of this section for the remaining life of the piping; or

(4) The piping construction and corrosion protection are determined by the implementing agency to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than the requirements in paragraphs (b)(1) through (3) of this section; or

(5) The piping is secondarily contained. Secondary containment must be periodically tested in accordance with § 280.36. Secondarily contained piping must meet the following:

(i) Be able to contain regulated substances leaked from the primary containment until they are detected and removed; and

(ii) Be able to prevent the release of regulated substances to the environment at any time during the operational life of the UST system.

Note to paragraph (b)(5): The following codes of practice may be used to comply with paragraph (b)(5) of this section:

(A) Underwriters Laboratories Standard 971, ''Standard for Non-Metallic Underground Piping for Flammable Liquids''; or

(B) Underwriters Laboratories Subject 971A, ''Outline of Investigation for Metallic Underground Fuel Pipe''.

(c) *Spill and overfill prevention equipment.*

(1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, to prevent spilling and overfilling associated with product transfer to the UST system, owners and operators must use the following spill and overfill prevention equipment:

(i) Spill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fill pipe (for example, a spill catchment basin); and

(ii) Overfill prevention equipment that will:

(A) Automatically shut off flow into the tank when the tank is no more than 95 percent full; or

(B) Alert the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering a high-level alarm; or

(C) Restrict flow 30 minutes prior to overfilling, alert the transfer operator with a high level alarm one minute before overfilling, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.

(2) Owners and operators are not required to use the spill and overfill prevention equipment specified in paragraph (c)(1) of this section if:

(i) Alternative equipment is used that is determined by the implementing agency to be no less protective of human health and the environment than the equipment specified in paragraph (c)(1)(i) or (ii) of this section; or

(ii) The UST system is filled by transfers of no more than 25 gallons at one time.

(3) Flow restrictors used in vent lines may not be used to comply with paragraph (c)(1)(ii) of this section when overfill prevention is installed or replaced after [effective date of rule].

(4) Spill and overfill prevention equipment must be periodically tested in accordance with § 280.35.

(d) *Installation.* All tanks and piping must be properly installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and in accordance with the manufacturer's instructions.

Note to paragraph (d): Tank and piping system installation practices and procedures described in the following codes of practice may be used to comply with the requirements of paragraph (d) of this section:

(A) American Petroleum Institute Publication 1615, ''Installation of Underground Petroleum Storage System''; (B) Petroleum Equipment Institute Publication RP100, ''Recommended Practices for Installation of Underground Liquid Storage Systems''; or

(C) National Fire Protection Association Standard 30, ''Flammable and Combustible Liquids Code'' and Standard 30A, ''Code for Motor Fuel Dispensing Facilities and Repair Garages''.

(e) *Certification of installation.* All owners and operators must ensure that one or more of the following methods of certification, testing, or inspection is used to demonstrate compliance with paragraph (d) of this section by providing a certification of compliance on the UST notification form in accordance with § 280.22.

(1) The installer has been certified by the tank and piping manufacturers; or

(2) The installer has been certified or licensed by the implementing agency; or

(3) The installation has been inspected and certified by a registered professional engineer with education and experience in UST system installation; or

(4) The installation has been inspected and approved by the implementing agency; or

(5) All work listed in the manufacturer's installation checklists has been completed; or

(6) The owner and operator have complied with another method for ensuring compliance with paragraph (d) of this section that is determined by the implementing agency to be no less protective of human health and the environment.

(f) *Dispenser Systems.* Each UST system must be equipped with under-dispenser containment for any new dispenser system installed.

(1) A dispenser system is considered new when both the dispenser and the equipment needed to connect the dispenser to the underground storage tank system are installed at an UST facility. The equipment necessary to connect the dispenser to the underground storage tank system includes check valves, shear valves, unburied risers or flexible connectors, or other transitional components that are beneath the dispenser and connect the dispenser to the underground piping.

(2) Under-dispenser containment must be liquid-tight on its sides, bottom, and at any penetrations. Under-dispenser containment must allow for visual inspection and access to the components in the containment system or be continuously monitored for leaks from the dispenser system.

§ 280.21 Upgrading of existing UST systems.

In accordance with subpart G of this part, owners and operators must permanently close any UST system that does not meet the new UST system performance standards in § 280.20 or has not been upgraded in accordance with paragraphs (b) through (d) of this section. This does not apply to previously deferred UST systems described in paragraph (e) of this section and where an upgrade is determined to be appropriate by the implementing agency.

(a) *Alternatives allowed.* All existing UST systems must comply with one of the following requirements:

(1) New UST system performance standards under § 280.20;

(2) The upgrading requirements in paragraphs (b) through (d) of this section; or

(3) Closure requirements under subpart G of this part, including applicable requirements for corrective action under subpart F.

(b) *Tank upgrading requirements.* Steel tanks must be upgraded to meet one of the following requirements in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory:

(1) *Interior lining.* Tanks upgraded by internal lining must meet the following:

(i) The lining was installed in accordance with the requirements of § 280.33, and

(ii) Within 10 years after lining, and every 5 years thereafter, the lined tank is internally inspected and found to be structurally sound with the lining still performing in accordance with original design specifications. If the internal lining is no longer performing in accordance with original design specifications and cannot be repaired in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory, then the lined tank must be permanently closed in accordance with subpart G of this part.

(2) *Cathodic protection.* Tanks upgraded by cathodic protection must meet the requirements of § 280.20(a)(2)(ii), (iii), and (iv) and the integrity of the tank must have been ensured using one of the following methods:

(i) The tank was internally inspected and assessed to ensure that the tank was structurally sound and free of corrosion holes prior to installing the cathodic protection system; or

(ii) The tank had been installed for less than 10 years and is monitored

monthly for releases in accordance with § 280.43(d) through (i); or

(iii) The tank had been installed for less than 10 years and was assessed for corrosion holes by conducting two tightness tests that meet the requirements of § 280.43(c). The first tightness test must have been conducted prior to installing the cathodic protection system. The second tightness test must have been conducted between three and six months following the first operation of the cathodic protection system; or

(iv) The tank was assessed for corrosion holes by a method that is determined by the implementing agency to prevent releases in a manner that is no less protective of human health and the environment than paragraphs (b)(2)(i) through (iii) of this section.

(3) *Internal lining combined with cathodic protection.* Tanks upgraded by both internal lining and cathodic protection must meet the following:

(i) The lining was installed in accordance with the requirements of § 280.33; and

(ii) The cathodic protection system meets the requirements of § 280.20(a)(2)(ii), (iii), and (iv).

Note to paragraph (b): The following historical codes of practice were listed as options for complying with paragraph (b) of this section:

(A) American Petroleum Institute Publication 1631, ''Recommended Practice for the Interior Lining of Existing Steel Underground Storage Tanks'';

(B) National Leak Prevention Association Standard 631, ''Spill Prevention, Minimum 10 Year Life Extension of Existing Steel Underground Tanks by Lining Without the Addition of Cathodic Protection'';

(C) National Association of Corrosion Engineers Standard RP–02–85, ''Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems''; and

(D) American Petroleum Institute Publication 1632, ''Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems''.

Note to paragraph (b)(1)(ii): The following codes of practice may be used to comply with the periodic lining inspection requirement of this section:

(A) American Petroleum Institute Recommended Practice 1631, ''Interior Lining and Periodic Inspection of Underground Storage Tanks'';

(B) National Leak Prevention Association Standard 631, ''Entry, Cleaning, Interior Inspection, Repair, and Lining of Underground Storage Tanks''; or

(C) Ken Wilcox Associates Recommended Practice, ''Recommended Practice for Inspecting Buried Lined Steel Tanks Using a Video Camera''.

(c) *Piping upgrading requirements.* Metal piping that routinely contains regulated substances and is in contact with the ground must be cathodically protected in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and must meet the requirements of § 280.20(b)(2)(ii), (iii), and (iv).

Note to paragraph (c): The codes of practice listed in the note following § 280.20(b)(2) may be used to comply with this requirement.

(d) *Spill and overfill prevention equipment.* To prevent spilling and overfilling associated with product transfer to the UST system, all existing UST systems must comply with new UST system spill and overfill prevention equipment requirements specified in § 280.20(c).

(e) *Upgrade requirements for previously deferred UST systems.* Previously deferred wastewater treatment tank systems, airport hydrant fuel distribution systems, and UST systems with field-constructed tanks where installation commenced on or before [effective date of rule] must meet the following requirements according to the time table in subpart A or be permanently closed pursuant to subpart G of this part.

(1) *Corrosion protection.* UST system components in contact with the ground that routinely contain regulated substances must meet one of the following:

(i) The new UST system performance standards for tanks at § 280.20(a) and for piping at § 280.20(b); or

(ii) Be constructed of metal and cathodically protected according to a code of practice developed by a nationally recognized association or independent testing laboratory and meets the following:

(A) Cathodic protection must meet the requirements of § 280.20(a)(2)(ii), (iii) and (iv) for tanks, and § 280.20(b)(2)(ii), (iii), and (iv) for piping.

(B) Tanks greater than 10 years old without cathodic protection must be assessed to ensure the tank is structurally sound and free of corrosion holes prior to adding cathodic protection. The assessment must be by internal inspection or another method determined by the implementing agency to adequately assess the tank for structural soundness and corrosion holes.

Note to paragraph (e): The following codes of practice may be used to comply with this paragraph:

(A) NACE International Recommended Practice RP 0285, ''Control of Underground Storage Tank Systems by Cathodic Protection'';

(B) NACE International Standard Practice SP 0169, ''Control of External Corrosion on Underground or Submerged Metallic Piping Systems'';

(C) National Leak Prevention Association Standard 631, ''Entry, Cleaning, Interior Inspection, Repair, and Lining of Underground Storage Tanks''; or

(D) American Society for Testing and Materials Standard G158, ''Standard Guide for Three Methods of Assessing Buried Steel Tanks''.

(2) *Spill and overfill prevention equipment.* To prevent spilling and overfilling associated with product transfer to the UST system, all previously deferred UST systems must comply with new UST system spill and overfill prevention equipment requirements specified in § 280.20(c).

§ 280.22 Notification requirements.

(a) After May 8, 1986, an owner must submit notice of a tank system's existence to the implementing agency within 30 days of bringing the underground storage tank system into use. Owners must use the form in Appendix I of this part.

Note to paragraph (a): Owners and operators of UST systems that were in the ground on or after May 8, 1986, unless taken out of operation on or before January 1, 1974, were required to notify the designated state or local agency in accordance with the Hazardous and Solid Waste Amendments of 1984, Public Law 98–616, on a form published by EPA on November 8, 1985 (50 FR 46602) unless notice was given pursuant to section 103(c) of CERCLA. Owners and operators who have not complied with the notification requirements may use portions I through VI of the notification form contained in Appendix I of this part.

(b) Within 30 days of acquisition, any person who assumes ownership of a regulated underground storage tank system, except as described in paragraph (a) of this section, must submit a notice of the ownership change to the implementing agency, using the form in Appendix II of this part.

(c) In states where state law, regulations, or procedures require owners to use forms that differ from those set forth in Appendix I and Appendix II of this part to fulfill the requirements of this section, the state forms may be submitted in lieu of the forms set forth in Appendix I and Appendix II of this part. If a state requires that its form be used in lieu of the form presented in Appendix I and Appendix II of this part, such form must, at a minimum, collect the information prescribed in Appendix I and Appendix II of this part.

(d) Owners required to submit notices under paragraph (a) or (b) of this section must provide notices to the appropriate

implementing agency for each tank they own. Owners may provide notice for several tanks using one notification form, but owners who own tanks located at more than one place of operation must file a separate notification form for each separate place of operation.

(e) All owners and operators of new UST systems must certify in the notification form compliance with the following requirements:

(1) Installation of tanks and piping under § 280.20(e);

(2) Cathodic protection of steel tanks and piping under § 280.20(a) and (b);

(3) Financial responsibility under subpart H of this part; and

(4) Release detection under §§ 280.41 and 280.42.

(f) All owners and operators of new UST systems must ensure that the installer certifies in the notification form that the methods used to install the tanks and piping complies with the requirements in § 280.20(d).

(g) Beginning October 24, 1988, any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of such tank of the owner's notification obligations under paragraph (a) of this section. The statement provided in Appendix III of this part, when used on shipping tickets and invoices, may be used to comply with this requirement.

(h) Within 30 days of [Effective date of rule], all owners of previously deferred UST systems must submit a notice of tank system existence to the implementing agency, using the form in Appendix I of this part.

6. In § 280.30 revise the Note to read as follows:

§ 280.30 Spill and overfill control.

* * * * *

Note: The transfer procedures described in National Fire Protection Association Standard 385, ''Standard for Tank Vehicles for Flammable and Combustible Liquids'' or American Petroleum Institute Recommended Practice 1007, ''Loading and Unloading of MC 306/DOT 406 Cargo Tank Motor Vehicles'' may be used to comply with paragraph (a) of this section. Further guidance on spill and overfill prevention appears in American Petroleum Institute Recommended Practice 1621, ''Bulk Liquid Stock Control at Retail Outlets''.

* * * * *

7. In § 280.31 revise the introductory text and the Note to read as follows:

§ 280.31 Operation and maintenance of corrosion protection.

All owners and operators of metal UST systems with corrosion protection must comply with the following requirements to ensure that releases due to corrosion are prevented until the UST system is permanently closed or undergoes a change-in-service pursuant to § 280.71:

* * * * *

Note to paragraph (b): The following codes of practice may be used to comply with paragraph (b) of this section:

(A) NACE International Test Method TM 0101, ''Measurement Techniques Related to Criteria for Cathodic Protection on Underground or Submerged Metallic Tank Systems'';

(B) NACE International Test Method TM0497, ''Measurement Techniques Related to Criteria for Cathodic Protection on Underground or Submerged Metallic Piping Systems'';

(C) Steel Tank Institute Recommended Practice R051, ''Cathodic Protection Testing Procedures for sti-P3 USTs'';

(D) NACE International Recommended Practice RP 0285, ''Control of Underground Storage Tank Systems by Cathodic Protection''; or

(E) NACE International Standard Practice SP 0169, ''Control of External Corrosion on Underground or Submerged Metallic Piping Systems''.

* * * * *

8. Amend § 280.32 to revise paragraph (a) and to add paragraphs (b) and (c) to read as follows:

§ 280.32 Compatibility.

* * * * *

(a) Owners and operators must use an UST system made of or lined with materials that are compatible with the substance stored in the UST system.

(b) Owners and operators storing any regulated substance containing greater than 10 percent ethanol or greater than 20 percent biodiesel, or any other regulated substance identified by the implementing agency, must use one or more of the following methods to demonstrate UST system compatibility with these regulated substances:

(1) Certification or listing of UST system components by a nationally recognized, independent testing laboratory for use with the regulated substance stored;

(2) Equipment or component manufacturer approval. The manufacturer's approval must be in writing, indicate an affirmative statement of compatibility, specify the range of biofuel blends the component is compatible with, and be from the equipment or component manufacturer; or

(3) Another method determined by the implementing agency to be no less protective of human health and the environment than the methods listed in paragraphs (b)(1) or (b)(2) of this section.

(c) Owners and operators must maintain the following records (in accordance with § 280.34) for the life of the equipment or component:

(1) Documentation of compliance with paragraph (b) of this section, as applicable; and

(2) Records of all equipment or components installed or replaced after [effective date of rule]. At a minimum, each record must include the date of installation or replacement, manufacturer, and model.

9. Revise § 280.33 to read as follows:

§ 280.33 Repairs allowed.

Owners and operators of UST systems must ensure that repairs will prevent releases due to structural failure or corrosion as long as the UST system is used to store regulated substances. The repairs must meet the following requirements:

(a) Repairs to UST systems must be properly conducted in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory.

Note to paragraph (a): The following codes of practice may be used to comply with paragraph (a) of this section:

(A) National Fire Protection Association Standard 30, ''Flammable and Combustible Liquids Code'';

(B) American Petroleum Institute Recommended Practice RP 2200, ''Repairing Crude Oil, Liquified Petroleum Gas, and Product Pipelines'';

(C) American Petroleum Institute Recommended Practice RP 1631, ''Interior Lining and Periodic Inspection of Underground Storage Tanks'';

(D) National Fire Protection Association Standard 326, ''Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair'';

(E) National Leak Prevention Association Standard 631, ''Entry, Cleaning, Interior Inspection, Repair, and Lining of Underground Storage Tanks'';

(F) Steel Tank Institute Recommended Practice R972, ''Recommended Practice for the Addition of Supplemental Anodes to sti-P3® Tanks'';

(G) NACE International Recommended Practice RP 0285, ''Control of Underground Storage Tank Systems by Cathodic Protection''; or

(H) Fiberglass Tank and Pipe Institute Recommended Practice T–95–02, ''Remanufacturing of Fiberglass Reinforced Plastic (FRP) Underground Storage Tanks''.

(b) Repairs to fiberglass-reinforced plastic tanks may be made by the manufacturer's authorized representatives or in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory.

(c) Metal pipe sections and fittings that have released product as a result of corrosion or other damage must be

replaced. Non-corrodible pipes and fittings may be repaired in accordance with the manufacturer's specifications.

(d) Repaired tanks and piping must be tightness tested in accordance with § 280.43(c) and § 280.44(b) within 30 days following the date of the completion of the repair except as provided in paragraphs (d)(1) through (4), of this section:

(1) The repaired tank is internally inspected in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory; or

(2) The repaired portion of the UST system is monitored monthly for releases in accordance with a method specified in § 280.43(d) through (i);

(3) UST systems with secondary containment must be tested as specified in § 280.36 within 30 days following the completion of any repair. Tanks using interstitial sensors must be tested using a vacuum, pressure, or liquid method in accordance with one of the criteria listed in § 280.36(a)(1)(ii) following any repair; or

(4) Another test method is used that is determined by the implementing agency to be no less protective of human health and the environment than those listed above.

(e) Within 6 months following the repair of any cathodically protected UST system, the cathodic protection system must be tested in accordance with § 280.31(b) and (c) to ensure that it is operating properly.

(f) Within 30 days following any repair to spill or overfill prevention equipment, the repaired spill or overfill prevention equipment must be tested in accordance with § 280.35 to ensure it is operating properly.

(g) UST system owners and operators must maintain records (in accordance with § 280.34) of each repair until the UST system is permanently closed or undergoes a change-in-service pursuant to § 280.71.

10. Revise § 280.34 to read as follows:

§ 280.34 Reporting and recordkeeping.

Owners and operators of UST systems must cooperate fully with inspections, monitoring and testing conducted by the implementing agency, as well as requests for document submission, testing, and monitoring by the owner or operator pursuant to section 9005 of Subtitle I of the Solid Waste Disposal Act, as amended.

(a) *Reporting.* Owners and operators must submit the following information to the implementing agency:

(1) Notification for all UST systems (§ 280.22), which includes certification of installation for new UST systems (§ 280.20(e)) and notification when any person assumes ownership of an UST system (§ 280.22(b));

(2) Reports of all releases including suspected releases (§ 280.50), spills and overfills (§ 280.53), and confirmed releases (§ 280.61);

(3) Corrective actions planned or taken including initial abatement measures (§ 280.62), initial site characterization (§ 280.63), free product removal (§ 280.64), investigation of soil and ground-water cleanup (§ 280.65), and corrective action plan (§ 280.66); and

(4) A notification before permanent closure or change-in-service (§ 280.71).

(b) *Recordkeeping.* Owners and operators must maintain the following information:

(1) A corrosion expert's analysis of site corrosion potential if corrosion protection equipment is not used (§ 280.20(a)(4); § 280.20(b)(3)).

(2) Documentation of operation of corrosion protection equipment (§ 280.31(d));

(3) Documentation of compatibility for UST systems (§ 280.32(c));

(4) Records for all UST system equipment installed or replaced after [effective date of rule] (§ 280.32(c));

(5) Documentation of UST system repairs (§ 280.33(g));

(6) Documentation of compliance for spill and overfill prevention equipment (§ 280.35(c));

(7) Documentation of compliance for tanks, piping, and containment sumps using interstitial monitoring (§ 280.36(c));

(8) Documentation of periodic walkthrough inspections (§ 280.37(b));

(9) Recent compliance with release detection requirements (§ 280.45);

(10) Results of the site investigation conducted at permanent closure (§ 280.74); and

(11) Documentation of operator training (§ 280.245).

(c) *Availability and Maintenance of Records.* Owners and operators must keep the records required either:

(1) At the UST site and immediately available for inspection by the implementing agency; or

(2) At a readily available alternative site and be provided for inspection to the implementing agency upon request.

(3) In the case of permanent closure records required under § 280.74, owners and operators are also provided with the additional alternative of mailing closure records to the implementing agency if they cannot be kept at the site or an alternative site as indicated above.

11. Add § 280.35 to Subpart C to read as follows:

§ 280.35 Periodic testing of spill and overfill prevention equipment.

(a) Owners and operators of UST systems with spill and overfill prevention equipment must meet the following requirements to ensure the equipment is operating properly and will prevent releases to the environment:

(1) Spill prevention equipment (such as a catchment basin, spill bucket, or other spill containment device) must prevent releases to the environment by meeting one of the following:

(i) The spill prevention equipment has two walls and the space between the walls is monitored continuously to ensure the integrity of the inner and outer walls is maintained; or

(ii) The spill prevention equipment is tested at installation and at least once every 12 months to ensure the spill prevention equipment is liquid tight by using vacuum, pressure, or liquid testing in accordance with one of the following criteria:

(A) Requirements developed by the manufacturer (*Note:* Owners and operators may use this option only if the manufacturer has developed testing requirements);

(B) Code of practice developed by a nationally recognized association or independent testing laboratory; or

(C) Requirements determined by the implementing agency to be no less protective of human health and the environment than the requirements listed in paragraphs (a)(1)(ii)(A) and (B) of this section; and

(2) Overfill prevention equipment must be tested at installation and at least once every three years. At a minimum, testing must ensure that overfill prevention equipment is set to activate at the correct level specified in § 280.20(c) and will activate when regulated substance reaches that level. Testing must be conducted in accordance with one of the criteria in paragraph (a)(1)(ii) of this section.

(b) Owners and operators must begin meeting these requirements as follows:

(1) For UST systems in use on or before [Effective date of rule]:

(i) Not later than [One year after effective date of rule] for spill prevention equipment; and

(ii) For overfill prevention equipment, not later than the phase-in schedule in the following table:

PHASE-IN SCHEDULE FOR OVERFILL PREVENTION EQUIPMENT TESTING

Criteria	Date by which first test must be conducted
One or more USTs at the facility were installed on or before 12/22/1988	[1 year after effective date of rule].
No USTs at the facility were installed on or before 12/22/1988 and at least one UST at the facility was installed on or before 12/22/1998.	[2 years after effective date of rule].
All USTs at the facility were installed after 12/22/1998	[3 years after effective date of rule].

(2) For UST systems brought into use after [Effective date of rule], these requirements apply at installation.

(c) Owners and operators must maintain the following records (in accordance with § 280.34) for spill and overfill prevention equipment:

(1) All records of spill prevention equipment testing and overfill prevention equipment testing must be maintained for three years; and

(2) For spill prevention equipment not tested every 12 months, documentation showing that the spill prevention equipment has two walls and is monitored continuously. Owners and operators must maintain this documentation for as long as the spill prevention equipment is monitored continuously, and for three additional years after continuous monitoring ends.

12. Add § 280.36 to Subpart C to read as follows:

§ 280.36 Periodic testing of secondary containment.

(a) Owners and operators of UST systems with secondary containment using interstitial monitoring must ensure the integrity of all interstitial areas (including all containment sumps used for interstitial monitoring).

(1) Tanks must meet one of the following:

(i) The interstitial space is continuously monitored; or

(ii) The interstitial space is not continuously monitored and the integrity of the interstitial space is ensured at least once every three years by using vacuum, pressure, or liquid testing in accordance with one of the following criteria:

(A) Requirements developed by the manufacturer (*Note:* Owners and operators may use this option only if the manufacturer has developed integrity testing requirements);

(B) Code of practice developed by a nationally recognized association or independent testing laboratory; or

(C) Requirements determined by the implementing agency to be no less protective of human health and the environment than the requirements listed in paragraphs (a)(1)(ii)(A) and (B) of this section;

(2) Piping must meet one of the following:

(i) The interstitial space is continuously monitored using vacuum, pressure, or a liquid-filled interstitial space; or

(ii) The interstitial space is monitored using an interstitial monitoring method not listed in paragraph (a)(2)(i) of this section and the integrity of the interstitial space is ensured at least once every three years by using vacuum, pressure, or liquid testing in accordance with one of the criteria listed in paragraph (a)(1)(ii) of this section; and

(3) Containment sumps must meet one of the following:

(i) The containment sump has two walls and the space between the walls is continuously monitored; or

(ii) The containment sump is tested at least every three years to ensure the containment sump is liquid tight by using vacuum, pressure, or liquid testing in accordance with one of the criteria listed in paragraph (a)(1)(ii) of this section.

Note to paragraphs (a)(1)(ii), (a)(2)(ii), and (a)(3)(ii): The following codes of practice may be used to comply with paragraphs (a)(1)(ii), (a)(2)(ii), and (a)(3)(ii) of this section:

(A) Steel Tank Institute Recommended Practice R012, ''Recommended Practice for Interstitial Tightness Testing of Existing Underground Double Wall Steel Tanks''; or

(B) Fiberglass Tank and Pipe Institute Protocol, ''Field Test Protocol for Testing the Annular Space of Installed Underground Fiberglass Double and Triple-Wall Tanks with Dry Annular Space''.

(b) Owners and operators of UST systems using interstitial monitoring must begin meeting this requirement as follows:

(1) For UST systems in use on or before [Effective date of rule], not later than the phase-in schedule in the following table:

PHASE-IN SCHEDULE FOR INTERSTITIAL AREA TESTING

Criteria	Date by which first test must be conducted
One or more USTs at the facility were installed on or before 12/22/1988	[1 year after effective date of rule].
No USTs at the facility were installed on or before 12/22/1988 and at least one UST at the facility was installed on or before 12/22/1998.	[2 years after effective date of rule].
All USTs at the facility were installed after 12/22/1998	[3 years after effective date of rule].

(2) For UST systems brought into use after [Effective date of rule], these requirements apply at installation.

(c) Owners and operators must maintain the following records (in accordance with § 280.34) for the time frames indicated for each tank, piping, and containment sump that uses interstitial monitoring:

(1) Records of interstitial space testing must be maintained for three years; or

(2) As appropriate, records demonstrating: the tank is using continuous interstitial monitoring; the piping is using continuous interstitial monitoring with vacuum, pressure, liquid-filled interstitial space; and the containment sump has two walls and uses continuous interstitial monitoring. Owners and operators must maintain these records for as long as the tank, piping, or containment sump uses one of these continuous methods of interstitial monitoring, and for three additional years after continuous monitoring ends.

13. Add § 280.37 to Subpart C to read as follows:

§ 280.37 Periodic operation and maintenance walkthrough inspections.

(a) To properly operate and maintain UST systems, owners and operators must meet one of the following:

(1) Conduct a walkthrough inspection at least once every 30 days that, at a minimum and as appropriate to the facility, checks the following equipment as specified:

(i) Spill prevention equipment—open and visually check for any damage; remove any liquid or debris; check each fill cap to make sure it is securely on the fill pipe; and for spill prevention equipment with continuous interstitial monitoring, check for a leak in the interstitial area,

(ii) Sumps—open and visually check for any damage, leaks to the containment area, or releases to the environment; remove any liquid (in contained sumps) or debris; and for sumps with continuous interstitial monitoring, check for a leak in the interstitial area,

(iii) Dispenser cabinets—open and visually check for any damage, leaks to the containment area, or releases to the environment; remove any liquid (in dispensers with under-dispenser containment) or debris; and for under-dispenser containment with continuous interstitial monitoring, check for a leak in the interstitial area,

(iv) Monitoring/observation wells—check covers to make sure they are secured,

(v) Cathodic protection—check to make sure impressed current cathodic protection rectifiers are on and operating; and ensure records of three year cathodic protection testing and 60 day impressed current system inspections are reviewed and current, and

(vi) Release detection systems—check to make sure the release detection system is on and operating with no alarms or other unusual operating conditions present; check any devices such as tank gauge sticks, groundwater bailers, and hand-held vapor monitoring devices for operability and serviceability; and ensure records of release detection testing are reviewed monthly and current; or

(2) Conduct operation and maintenance walkthrough inspections at least once every 30 days according to a standard code of practice developed by a nationally recognized association or independent testing laboratory that are comparable to (a)(1) of this section; or

(3) Conduct operation and maintenance walkthrough inspections developed by the implementing agency that are comparable to paragraph (a)(1) of this section.

(b) Owners and operators must maintain records (in accordance with § 280.34) of operation and maintenance walkthrough inspections for one year. The record must include a listing of each area checked, whether each area checked was acceptable or needed to have any action taken, and a description of any actions taken to correct an issue.

Note to paragraph (a)(2): The following code of practice may be used to comply with paragraph (a)(2) of this section:

(A) Petroleum Equipment Institute Recommended Practice RP 900, ''Recommended Practices for the Inspection and Maintenance of UST Systems''.

14. Revise Subpart D to read as follows:

Subpart D—Release Detection

Sec.
280.40 General requirements for all UST systems.
280.41 Requirements for petroleum UST systems.
280.42 Requirements for hazardous substance UST systems.
280.43 Methods of release detection for tanks.
280.44 Methods of release detection for piping.
280.45 Release detection recordkeeping.
280.46 Alternative methods of release detection for field-constructed tanks.
280.47 Alternative methods of release detection for bulk piping.

Subpart D—Release Detection

§ 280.40 General requirements for all UST systems.

(a) Owners and operators of UST systems must provide a method, or combination of methods, of release detection that:

(1) Can detect a release from any portion of the tank and the connected underground piping that routinely contains product;

(2) Is installed and calibrated in accordance with the manufacturer's instructions;

(3) Beginning on [One year after effective date of rule], is operated and maintained, and electronic and mechanical components are tested for proper operation, in accordance with one of the following: Manufacturer's instructions; a code of practice developed by a nationally recognized association or independent testing laboratory; or requirements developed by the implementing agency. A test of the proper operation must be performed at least annually and, at a minimum and as applicable to the facility, cover the following components and criteria:

(i) Automatic tank gauge and other controllers: Test alarm; verify system configuration; test battery backup;

(ii) Probes and sensors: Inspect for residual buildup, ensure floats move freely; ensure shaft is not damaged; ensure cables are free of kinks, bends, and breaks; test alarm operability and communication with controller;

(iii) Line leak detector: Test operation to meet criteria in § 280.44(a) by simulating a leak; inspect leak sensing o-ring; and

(iv) Vacuum pumps and pressure gauges: Ensure proper communication with sensors and controller.

(4) Meets the performance requirements in § 280.43, § 280.44, § 280.46, or § 280.47, as applicable, with any performance claims and their manner of determination described in writing by the equipment manufacturer or installer. In addition, the methods listed in § 280.43(b); § 280.43(c); § 280.43(d); § 280.43(h); § 280.43(i);§ 280.44(a); § 280.44(b); § 280.46; and § 280.47, must be capable of detecting the leak rate or quantity specified for that method in the corresponding section of the rule with a probability of detection of 0.95 and a probability of false alarm of 0.05.

(b) When a release detection method operated in accordance with the performance standards in § 280.43, § 280.44, § 280.46, or § 280.47 indicates a release may have occurred, owners and operators must notify the implementing agency in accordance with subpart E.

(c) Owners and operators of Airport hydrant fuel distribution systems, UST systems with field-constructed tanks, and wastewater treatment tank systems must comply with the release detection requirements of this Subpart according to the following table:

SCHEDULE FOR PHASE-IN OF RELEASE DETECTION FOR AIRPORT HYDRANT FUEL DISTRIBUTION SYSTEMS, UST SYSTEMS WITH FIELD-CONSTRUCTED TANKS, AND WASTEWATER TREATMENT TANK SYSTEMS

Type of UST system	Time frame (after [effective date of rule])	Description of requirement
Bulk piping associated with airport hydrant fuel distribution systems and field-constructed tanks using § 280.47(a) for piping release detection.	Within three years ..... Between years three and six	Conduct one bulk piping tightness test according to § 280.47(a) using the maximum detectable leak rates for semiannual testing. For bulk piping segments not capable of meeting the up to 3.0 gallon per hour leak rate, owners and operators may use a leak rate of up to 6.0 gallons per hour.
	Between years six and seven	Conduct one bulk piping tightness test according to § 280.47(a) using the maximum detectable leak rates for semiannual testing.
	After year seven	Conduct bulk piping tightness testing according to § 280.47(a).
Bulk piping associated with airport hydrant fuel distribution systems and field-constructed tanks not using § 280.47(a) for piping release detection.	Within three years	Perform release detection according to this subpart.
Underground tanks associated with hydrant fuel distribution systems and field-constructed tanks.	Within three years	Perform release detection according to this subpart.
Wastewater treatment tank systems	Within three years	Perform release detection according to this subpart.

(d) Any UST system that cannot apply a method of release detection that complies with the requirements of this subpart must complete the closure procedures in subpart G. For previously deferred UST systems described in subpart A, this requirement applies after the effective date for subpart D described in § 280.10(a)(1).

§ 280.41 Requirements for petroleum UST systems.

Owners and operators of petroleum UST systems must provide release detection for tanks and piping as follows:

(a) *Tanks.* Tanks must be monitored for releases as follows:

(1) Tanks installed on or before [effective date of rule] must be monitored for releases at least every 30 days using one of the methods listed in § 280.43(d) through (i) except that:

(i) UST systems that meet the performance standards in § 280.20 or § 280.21, and the monthly inventory control requirements in § 280.43(a) or (b), may use tank tightness testing (conducted in accordance with § 280.43(c)) at least every 5 years until 10 years after the tank was installed or upgraded under § 280.21(b), whichever is later;

(ii) Tanks with capacity of 550 gallons or less and tanks with a capacity of 551 to 1,000 gallons that meet the tank diameter criteria in § 280.43(b) may use manual tank gauging (conducted in accordance with § 280.43(b));

(iii) Field-constructed tanks greater than 50,000 gallons may use the alternative release detection requirements in § 280.46; and

(iv) Tanks using § 280.43(e) or § 280.43(f) to monitor for releases, must begin using one of the methods listed in § 280.43(d), (g), (h), or (i) not later than [Five years after effective date of rule].

(2) Tanks installed after [effective date of rule] must be monitored for releases at least every 30 days in accordance with § 280.43(g).

(b) *Piping.* Underground piping that routinely contains regulated substances must be monitored for releases in a manner that meets one of the following requirements:

(1) Piping installed on or before [effective date of rule] must meet one of the following:

(i) *Pressurized piping.* Underground piping that conveys regulated substances under pressure must:

(A) Be equipped with an automatic line leak detector conducted in accordance with § 280.44(a); and

(B) Have an annual line tightness test conducted in accordance with § 280.44(b) or have monthly monitoring conducted in accordance with § 280.44(c).

(ii) *Suction piping.* Underground piping that conveys regulated substances under suction must either have a line tightness test conducted at least every 3 years and in accordance with § 280.44(b), or use a monthly monitoring method conducted in accordance with § 280.44(c). No release detection is required for suction piping that is designed and constructed to meet the following standards:

(A) The below-grade piping operates at less than atmospheric pressure;

(B) The below-grade piping is sloped so that the contents of the pipe will drain back into the storage tank if the suction is released;

(C) Only one check valve is included in each suction line;

(D) The check valve is located directly below and as close as practical to the suction pump; and

(E) A method is provided that allows compliance with paragraphs (b)(2)(ii)–(iv) of this section to be readily determined.

(iii) *Bulk piping.* Underground piping associated with airport hydrant fuel distribution systems and field-constructed tanks must meet one of the following release detection requirements:

(A) The requirements in paragraphs (b)(1)(i) or (ii) of this section; or

(B) The alternative release detection requirements in § 280.47.

(2) Piping installed or replaced after [effective date of rule] must meet one of the following:

(i) Pressurized piping must be monitored for releases at least every 30

days in accordance with § 280.43(g) and be equipped with an automatic line leak detector in accordance with § 280.44(a).

(ii) Suction piping must be monitored for releases at least every 30 days in accordance with § 280.43(g). No release detection is required for suction piping that meets paragraphs (b)(1)(ii)(A) through (E) of this section.

(iii) Underground bulk piping associated with airport hydrant fuel distribution systems and field-constructed tanks must meet the requirements in paragraph (b)(1) of this section.

§ 280.42 Requirements for hazardous substance UST systems.

Owners and operators of hazardous substance UST systems must provide containment that meets the following requirements and monitor these systems using § 280.43(g) at least every 30 days:

(a) Secondary containment systems must be designed, constructed and installed to:

(1) Contain regulated substances leaked from the primary containment until they are detected and removed;

(2) Prevent the release of regulated substances to the environment at any time during the operational life of the UST system; and

(3) Be checked for evidence of a release at least every 30 days.

Note to paragraph (a): The provisions of 40 CFR 265.193, Containment and Detection of Releases, may be used to comply with these requirements for tanks installed on or before [effective date of rule].

(b) Double-walled tanks must be designed, constructed, and installed to:

(1) Contain a release from any portion of the inner tank within the outer wall; and

(2) Detect the failure of the inner wall.

(c) External liners (including vaults) must be designed, constructed, and installed to:

(1) Contain 100 percent of the capacity of the largest tank within its boundary;

(2) Prevent the interference of precipitation or ground-water intrusion with the ability to contain or detect a release of regulated substances; and

(3) Surround the tank completely (*i.e.,* it is capable of preventing lateral as well as vertical migration of regulated substances).

(d) Underground piping must be equipped with secondary containment that satisfies the requirements of this section (*e.g.,* trench liners, double-walled pipe). In addition, underground piping that conveys regulated substances under pressure must be equipped with an automatic line leak detector in accordance with § 280.44(a).

(e) For hazardous substance UST systems installed on or before [Effective date of rule] other methods of release detection may be used if owners and operators:

(1) Demonstrate to the implementing agency that an alternate method can detect a release of the stored substance as effectively as any of the methods allowed in §§ 280.43(b) through (i) can detect a release of petroleum;

(2) Provide information to the implementing agency on effective corrective action technologies, health risks, and chemical and physical properties of the stored substance, and the characteristics of the UST site; and,

(3) Obtain approval from the implementing agency to use the alternate release detection method before the installation and operation of the new UST system.

§ 280.43 Methods of release detection for tanks.

Each method of release detection for tanks used to meet the requirements of § 280.41, except field-constructed tanks installed on or before [Effective date of rule] with capacities greater than 50,000 gallons that meet § 280.46, must be conducted in accordance with the following:

(a) *Inventory control.* Product inventory control (or another test of equivalent performance) must be conducted monthly to detect a release of at least 1.0 percent of flow-through plus 130 gallons on a monthly basis in the following manner:

(1) Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank are recorded each operating day;

(2) The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch;

(3) The regulated substance inputs are reconciled with delivery receipts by measurement of the tank inventory volume before and after delivery;

(4) Deliveries are made through a drop tube that extends to within one foot of the tank bottom;

(5) Product dispensing is metered and recorded within the local standards for meter calibration or an accuracy of 6 cubic inches for every 5 gallons of product withdrawn; and

(6) The measurement of any water level in the bottom of the tank is made to the nearest one-eighth of an inch at least once a month.

Note to paragraph (a): Practices described in the American Petroleum Institute Recommended Practice RP 1621, ''Bulk Liquid Stock Control at Retail Outlets'' may be used, where applicable, as guidance in meeting the requirements of this paragraph.

(b) *Manual tank gauging.* Manual tank gauging must meet the following requirements:

(1) Tank liquid level measurements are taken at the beginning and ending of a period of at least 36 hours during which no liquid is added to or removed from the tank;

(2) Level measurements are based on an average of two consecutive stick readings at both the beginning and ending of the period;

(3) The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch;

(4) A release is suspected and subject to the requirements of subpart E if the variation between beginning and ending measurements exceeds the weekly or monthly standards in the following table:

Nominal tank capacity	Minimum duration of test	Weekly standard (one test)	Monthly standard (four test average)
550 gallons or less	36 hours	10 gallons	5 gallons.
551–1,000 gallons (when tank diameter is 64'')	44 hours	9 gallons	4 gallons.
551–1,000 gallons (when tank diameter is 48'')	58 hours	12 gallons	6 gallons.
551–1,000 gallons (also requires periodic tank tightness testing).	36 hours	13 gallons	7 gallons.
1,001–2,000 gallons (also requires periodic tank tightness testing).	36 hours	26 gallons	13 gallons.

(5) Tanks of 550 gallons or less nominal capacity and tanks with a nominal capacity of 551 to 1,000 gallons that meet the tank diameter criteria in the table in paragraph (b)(4) of this section may use this as the sole method

of release detection. All other tanks with a nominal capacity of 551 to 2,000 gallons may use the method in place of inventory control in § 280.43(a). Tanks of greater than 2,000 gallons nominal capacity may not use this method to meet the requirements of this Subpart.

(c) *Tank tightness testing.* Tank tightness testing (or another test of equivalent performance) must be capable of detecting a 0.1 gallon per hour leak rate from any portion of the tank that routinely contains product while accounting for the effects of thermal expansion or contraction of the product, vapor pockets, tank deformation, evaporation or condensation, and the location of the water table.

(d) *Automatic tank gauging.* Equipment for automatic tank gauging that tests for the loss of product and conducts inventory control must meet the following requirements:

(1) The automatic product level monitor test can detect a 0.2 gallon per hour leak rate from any portion of the tank that routinely contains product; and

(2) The test must be performed with the system operating in one of the following modes:

(i) In-tank static testing conducted on a periodic basis; or

(ii) Continuous in-tank leak detection operating on an uninterrupted basis or operating within a process that allows the system to gather incremental measurements to determine the leak status of the tank at least once every 30 days.

(e) *Vapor monitoring.* Testing or monitoring for vapors within the soil gas of the excavation zone must meet the following requirements:

(1) The materials used as backfill are sufficiently porous (*e.g.,* gravel, sand, crushed rock) to readily allow diffusion of vapors from releases into the excavation area;

(2) The stored regulated substance, or a tracer compound placed in the tank system, is sufficiently volatile (*e.g.,* gasoline) to result in a vapor level that is detectable by the monitoring devices located in the excavation zone in the event of a release from the tank;

(3) The measurement of vapors by the monitoring device is not rendered inoperative by the ground water, rainfall, or soil moisture or other known interferences so that a release could go undetected for more than 30 days;

(4) The level of background contamination in the excavation zone will not interfere with the method used to detect releases from the tank;

(5) The vapor monitors are designed and operated to detect any significant increase in concentration above background of the regulated substance stored in the tank system, a component or components of that substance, or a tracer compound placed in the tank system;

(6) In the UST excavation zone, the site is assessed to ensure compliance with the requirements in paragraphs (e)(1) through (4) of this section and to establish the number and positioning of monitoring wells that will detect releases within the excavation zone from any portion of the tank that routinely contains product; and

(7) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.

(f) *Ground-water monitoring.* Testing or monitoring for liquids on the ground water must meet the following requirements:

(1) The regulated substance stored is immiscible in water and has a specific gravity of less than one;

(2) Ground water is never more than 20 feet from the ground surface and the hydraulic conductivity of the soil(s) between the UST system and the monitoring wells or devices is not less than 0.01 cm/sec (*e.g.,* the soil should consist of gravels, coarse to medium sands, coarse silts or other permeable materials);

(3) The slotted portion of the monitoring well casing must be designed to prevent migration of natural soils or filter pack into the well and to allow entry of regulated substance on the water table into the well under both high and low ground-water conditions;

(4) Monitoring wells shall be sealed from the ground surface to the top of the filter pack;

(5) Monitoring wells or devices intercept the excavation zone or are as close to it as is technically feasible;

(6) The continuous monitoring devices or manual methods used can detect the presence of at least one-eighth of an inch of free product on top of the ground water in the monitoring wells;

(7) Within and immediately below the UST system excavation zone, the site is assessed to ensure compliance with the requirements in paragraphs (f)(1) through (5) of this section and to establish the number and positioning of monitoring wells or devices that will detect releases from any portion of the tank that routinely contains product; and

(8) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.

(g) *Interstitial monitoring.* Interstitial monitoring between the UST system and a secondary barrier immediately around or beneath it may be used, but only if the system is designed, constructed and installed to detect a leak from any portion of the tank that routinely contains product and also meets one of the following requirements:

(1) For double-walled UST systems, the sampling or testing method can detect a release through the inner wall in any portion of the tank that routinely contains product;

(2) For UST systems with a secondary barrier within the excavation zone, the sampling or testing method used can detect a release between the UST system and the secondary barrier;

(i) The secondary barrier around or beneath the UST system consists of artificially constructed material that is sufficiently thick and impermeable (at least 10^{-6} cm/sec for the regulated substance stored) to direct a release to the monitoring point and permit its detection;

(ii) The barrier is compatible with the regulated substance stored so that a release from the UST system will not cause a deterioration of the barrier allowing a release to pass through undetected;

(iii) For cathodically protected tanks, the secondary barrier must be installed so that it does not interfere with the proper operation of the cathodic protection system;

(iv) The ground water, soil moisture, or rainfall will not render the testing or sampling method used inoperative so that a release could go undetected for more than 30 days;

(v) The site is assessed to ensure that the secondary barrier is always above the ground water and not in a 25-year flood plain, unless the barrier and monitoring designs are for use under such conditions; and,

(vi) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.

(3) For tanks with an internally fitted liner, an automated device can detect a release between the inner wall of the tank and the liner, and the liner is compatible with the substance stored.

(4) For UST systems using continuous vacuum, pressure, or liquid-filled methods of interstitial monitoring, the method must be capable of detecting a breach in both the inner and outer walls of the tank and/or piping.

(h) *Statistical inventory reconciliation.* Statistically based testing or monitoring methods must meet the following requirements:

(1) Report a quantitative result with a calculated leak rate;

(2) Be capable of detecting a leak rate of 0.2 gallon per hour; and

(3) Use a threshold that does not exceed one-half the minimum detectible leak rate.

(i) *Other methods.* Any other type of release detection method, or combination of methods, can be used if:

(1) It can detect a 0.2 gallon per hour leak rate or a release of 150 gallons within a month with a probability of detection of 0.95 and a probability of false alarm of 0.05; or

(2) The implementing agency may approve another method if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in paragraphs (c) through (h) of this section. In comparing methods, the implementing agency shall consider the size of release that the method can detect and the frequency and reliability with which it can be detected. If the method is approved, the owner and operator must comply with any conditions imposed by the implementing agency on its use to ensure the protection of human health and the environment.

§ 280.44 Methods of release detection for piping.

Each method of release detection for piping used to meet the requirements of § 280.41, except bulk piping that meets § 280.47, must be conducted in accordance with the following:

(a) *Automatic line leak detectors.* Methods which alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of 3 gallons per hour at 10 pounds per square inch line pressure within 1 hour. An annual test of the operation of the leak detector must be conducted in accordance with § 280.40(a)(3).

(b) *Line tightness testing.* A periodic test of piping may be conducted only if it can detect a 0.1 gallon per hour leak rate at one and one-half times the operating pressure.

(c) *Applicable tank methods.* Except as described in § 280.41(a), any of the methods in § 280.43(e) through (i) may be used if they are designed to detect a release from any portion of the underground piping that routinely contains regulated substances.

§ 280.45 Release detection recordkeeping.

All UST system owners and operators must maintain records in accordance with § 280.34 demonstrating compliance with all applicable requirements of this subpart. These records must include the following:

(a) All written performance claims pertaining to any release detection system used, and the manner in which these claims have been justified or tested by the equipment manufacturer or installer, must be maintained for 5 years, or for another reasonable period of time determined by the implementing agency, from the date of installation;

(b) The results of any sampling, testing, or monitoring must be maintained for at least 1 year, or for another reasonable period of time determined by the implementing agency, except as follows:

(1) The results of annual operation tests conducted in accordance with § 280.40(a)(3) must be maintained for three years. At a minimum, the results must list each component tested, indicate whether each component tested meets criteria in § 280.40(a)(3) or needs to have action taken, and describe any action taken to correct an issue; and

(2) The results of tank tightness testing or bulk tank tightness testing conducted in accordance with § 280.43(c) or § 280.46 must be retained until the next test is conducted; and

(c) Written documentation of all calibration, maintenance, and repair of release detection equipment permanently located on-site must be maintained for at least one year after the servicing work is completed, or for another reasonable time period determined by the implementing agency. Any schedules of required calibration and maintenance provided by the release detection equipment manufacturer must be retained for 5 years from the date of installation.

§ 280.46 Alternative methods of release detection for field-constructed tanks.

Owners and operators of field-constructed tanks with a capacity greater than 50,000 gallons may use one or a combination of the following alternative methods of release detection:

(a) Conduct an annual bulk tank tightness test that can detect a 0.5 gallon per hour leak rate;

(b) Use an automatic tank gauging system to perform release detection at least every 30 days that can detect a leak rate less than or equal to one gallon per hour. This method must be combined with a bulk tank tightness test that can detect a 0.2 gallon per hour leak rate performed at least every three years;

(c) Use an automatic tank gauging system to perform release detection at least every 30 days that can detect a leak rate less than or equal to two gallons per hour. This method must be combined with a bulk tank tightness test that can detect a 0.2 gallon per hour leak rate performed at least every two years; or

(d) Another method approved by the implementing agency if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in paragraphs (a) through (c) of this section. In comparing methods, the implementing agency shall consider the size of release that the method can detect and the frequency and reliability of detection. If the method is approved, the owner and operator must comply with any conditions imposed by the implementing agency on its use.

§ 280.47 Alternative methods of release detection for bulk piping.

Owners and operators of underground piping associated with airport hydrant fuel distribution systems and field-constructed tanks may use one or a combination of the following alternative methods of release detection:

(a) Perform a semiannual or annual bulk line tightness test at or above operating pressure in accordance with the table below. Bulk piping segments ≥100,000 gallons not capable of meeting the maximum 3.0 gallon per hour leak rate for the semiannual test may be tested at a leak rate up to 6.0 gallons per hour according to the schedule in § 280.40(c):

MAXIMUM DETECTABLE LEAK RATE PER TEST SECTION VOLUME

Test section volume (gallons)	Semiannual test maximum detectable leak rate (gallons per hour)	Annual test maximum detectable leak rate (gallons per hour)
<50,000	1.0	0.5
≥50,000 to <75,000	1.5	0.75
≥75,000 to <100,000	2.0	1.0
≥100,000	3.0	1.5

(b) Perform continuous interstitial monitoring designed to detect a release from any portion of the underground piping that routinely contains product in accordance with § 280.43(g);

(c) Use an automatic line leak detector that alerts the operator to the presence of a leak by restricting or shutting off flow of regulated substances through piping or triggering an audible or visual alarm. This method may be used only if it can detect a leak of three gallons per hour at 10 pounds per square inch line pressure within one hour or equivalent. When using this method, the following must also be met:

(1) Perform interstitial monitoring, designed to detect a release from any portion of the underground piping that routinely contains product, in accordance with § 280.43(g) at least every three months; and

(2) Conduct an annual test of the operation of the leak detector in accordance with § 280.40(a)(3); or

(d) Another method approved by the implementing agency if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in paragraphs (a) through (c) of this section. In comparing methods, the implementing agency shall consider the size of release that the method can detect and the frequency and reliability of detection. If the method is approved, the owner and operator must comply with any conditions imposed by the implementing agency on its use.

15. In § 280.50 revise paragraphs (b) and (c) to read as follows:

§ 280.50 Reporting of suspected releases.

* * * * *

(b) Unusual operating conditions observed by owners and operators (such as the erratic behavior of product dispensing equipment, the sudden loss of product from the UST system, an unexplained presence of water in the tank, or water or product in the interstitial space of secondarily contained systems), unless system equipment is found to be defective but not leaking, and is immediately repaired or replaced.

(c) Monitoring results, including alarms, from a release detection method required under § 280.41 and § 280.42 that indicate a release may have occurred unless:

(1) The monitoring device is found to be defective, and is immediately repaired, recalibrated or replaced, and additional monitoring does not confirm the initial result; or

(2) In the case of inventory control, a second month of data does not confirm the initial result.

16. In § 280.52 revise paragraph (a) to read as follows:

§ 280.52 Release investigation and confirmation steps.

* * * * *

(a) *System test.* Owners and operators must conduct tests (according to the requirements for tightness testing in § 280.43(c) and § 280.44(b) or, for UST systems with secondary containment and interstitial monitoring, the integrity testing specified in § 280.36) that determine whether a leak exists in that portion of the tank that routinely contains product, the attached delivery piping, or a breach of the interstitial space.

(1) If the system test confirms a leak, owners and operators must repair, replace, upgrade, or close the UST system. In addition, owners and operators must begin corrective action in accordance with subpart F if the test results for the system, tank, or delivery piping indicate that a release exists.

(2) Further investigation is not required if the test results for the system, tank, and delivery piping do not indicate that a release exists and if environmental contamination is not the basis for suspecting a release.

(3) Owners and operators must conduct a site check as described in paragraph (b) of this section if the test results for the system, tank, and delivery piping do not indicate that a release exists but environmental contamination is the basis for suspecting a release.

* * * * *

17. In § 280.71 revise the Note at the end of the section to read as follows:

§ 280.71 Permanent closure and changes-in-service.

* * * * *

[**Note:** The following cleaning and closure procedures may be used to comply with this section:

(A) American Petroleum Institute Recommended Practice RP 1604, ''Closure of Underground Petroleum Storage Tanks'';

(B) American Petroleum Institute Standard 2015, ''Requirements for Safe Entry and Cleaning of Petroleum Storage Tanks'';

(C) American Petroleum Institute Recommended Practice 2016, ''Guidelines and Procedures for Entering and Cleaning Petroleum Storage Tanks'';

(D) American Petroleum Institute Recommended Practice RP 1631, ''Interior Lining and Periodic Inspection of Underground Storage Tanks,'' may be used as guidance for compliance with this section;

(E) National Fire Protection Association Standard 326, ''Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair''; and

(F) The National Institute for Occupational Safety and Health Publication 80–106, ''Criteria for a Recommended Standard * * * Working in Confined Space'' may be used as guidance for conducting safe closure procedures at some hazardous substance tanks.]

* * * * *

18. Revise § 280.90 to read as follows:

§ 280.90 Applicability.

(a) This subpart applies to owners and operators of all petroleum underground storage tank (UST) systems except as otherwise provided in this section.

(b) Owners and operators of petroleum UST systems are subject to these requirements in accordance with § 280.91.

(c) State and Federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States are exempt from the requirements of this subpart.

(d) The requirements of this subpart do not apply to owners and operators of any UST system described in § 280.10 (b), (c)(2) or (c)(3).

(e) If the owner and operator of a petroleum underground storage tank are separate persons, only one person is required to demonstrate financial responsibility; however, both parties are liable in event of noncompliance.

19. Revise § 280.91 to read as follows:

§ 280.91 Compliance dates.

Owners of petroleum underground storage tanks must comply with the requirements of this subpart. Previously deferred UST systems must comply with the requirements of this subpart according to the schedule in § 280.10.

20. In § 280.92 revise the definitions ''Accidental release,'' ''Financial reporting year,'' and ''Provider of financial assurance'' to read as follows:

§ 280.92 Definition of terms.

* * * * *

Accidental release means any sudden or nonsudden release of petroleum arising from operating an underground storage tank that results in a need for corrective action and/or compensation for bodily injury or property damage neither expected nor intended by the tank owner or operator.

* * * * *

Financial reporting year means the latest consecutive twelve-month period for which any of the following reports used to support a financial test is prepared:

(1) a 10–K report submitted to the SEC;

(2) an annual report of tangible net worth submitted to Dun and Bradstreet; or

(3) annual reports submitted to the Energy Information Administration or the Rural Utilities Service.

''Financial reporting year'' may thus comprise a fiscal or a calendar year period.

* * * * *

Provider of financial assurance means an entity that provides financial assurance to an owner or operator of an underground storage tank through one of the mechanisms listed in §§ 280.95–280.107, including a guarantor, insurer, risk retention group, surety, issuer of a letter of credit, issuer of a state-required mechanism, or a state.

* * * * *

21. Revise § 280.94 paragraph (a)(1) to read as follows:

§ 280.94 Allowable mechanisms and combinations of mechanisms.

(a) * * *

(1) An owner or operator, including a local government owner or operator, may use any one or combination of the mechanisms listed in §§ 280.95 through 280.107 to demonstrate financial responsibility under this subpart for one or more underground storage tanks; and

* * * * *

22. In § 280.95 revise paragraph s(b)(1)(ii), (b)(4)(i), (c)(5) introductory text, (c)(5)(i) and (d) to read as follows:

§ 280.95 Financial test of self-insurance.

* * * * *

(b) * * *

(1) * * *

(ii) The sum of the corrective action cost estimates, the current closure and post-closure care cost estimates, and amount of liability coverage for which a financial test is used to demonstrate financial responsibility to EPA under 40 CFR 264.101, 264.143, 264.145, 265.143, 265.145, 264.147, and 265.147 or to a state implementing agency under a state program authorized by EPA under 40 CFR part 271; and

(4) * * *

(i) File financial statements annually with the U.S. Securities and Exchange Commission, the Energy Information Administration, or the Rural Utilities Service; or

* * * * *

(c) * * *

(5) If the financial statements of the owner or operator, and/or guarantor, are not submitted annually to the U.S. Securities and Exchange Commission, the Energy Information Administration or the Rural Utilities Service, the owner or operator, and/or guarantor, must obtain a special report by an independent certified public accountant stating that:

(i) He has compared the data that the letter from the chief financial officer specifies as having been derived from the latest year-end financial statements of the owner or operator, and/or guarantor, with the amounts in such financial statements; and

* * * * *

(d) To demonstrate that it meets the financial test under paragraph (b) or (c) of this section, the chief financial officer of the owner or operator, or guarantor, must sign, within 120 days of the close of each financial reporting year, as defined by the twelve-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter from Chief Financial Officer

I am the chief financial officer of [insert: name and address of the owner or operator, or guarantor]. This letter is in support of the use of [insert: ''the financial test of self-insurance,'' and/or ''guarantee''] to demonstrate financial responsibility for [insert: ''taking corrective action'' and/or ''compensating third parties for bodily injury and property damage''] caused by [insert: ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases''] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test or a financial test under an authorized State program by this [insert: ''owner or operator,'' and/or ''guarantor'']: [List for each facility: the name and address of the facility where tanks assured by this financial test are located, and whether tanks are assured by this financial test or a financial test under a State program approved under 40 CFR part 281. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test or a financial test under a State program authorized under 40 CFR part 281 by the tank identification number provided in the notification submitted pursuant to 40 CFR 280.22 or the corresponding State requirements.]

A [insert: ''financial test,'' and/or ''guarantee''] is also used by this [insert: ''owner or operator,'' or ''guarantor''] to demonstrate evidence of financial responsibility in the following amounts under other EPA regulations or state programs authorized by EPA under 40 CFR parts 271 and 145:

EPA Regulations	Amount
Closure (§§ 264.143 and 265.143)	$_____
Post-Closure Care (§§ 264.145 and 265.145).	$_____
Liability Coverage (§§ 264.147 and 265.147).	$_____
Corrective Action (§§ 264.101(b)) ..	$_____
Plugging and Abandonment (§ 144.63).	$_____
Closure	$_____
Post-Closure Care	$_____
Liability Coverage	$_____
Corrective Action	$_____
Plugging and Abandonment	$_____
Total	$_____

This [insert: ''owner or operator,'' or ''guarantor''] has not received an adverse opinion, a disclaimer of opinion, or a ''going concern'' qualification from an independent auditor on his financial statements for the latest completed fiscal year.

[Fill in the information for Alternative I if the criteria of paragraph (b) of § 280.95 are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of paragraph (c) of § 280.95 are being used to demonstrate compliance with the financial test requirements.]

Alternative I	
1. Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee	$_____
2. Amount of corrective action, closure and post-closure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee.	$_____
3. Sum of lines 1 and 2	$_____
4. Total tangible assets	$_____
5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6].	$_____
6. Tangible net worth [subtract line 5 from line 4]	$_____
	Yes / No
7. Is line 6 at least $10 million?	_____
8. Is line 6 at least 10 times line 3?	_____
9. Have financial statements for the latest fiscal year been filed with the Securities and Exchange Commission?	_____

10. Have financial statements for the latest fiscal year been filed with the Energy Information Administration?	_____
11. Have financial statements for the latest fiscal year been filed with the Rural Utilities Service?	_____
12. Has financial information been provided to Dun and Bradstreet, and has Dun and Bradstreet provided a financial strength rating of 4A or 5A? [Answer ''Yes'' only if both criteria have been met.]	_____
Alternative II	
1. Amount of annual UST aggregate coverage being assured by a test, and/or guarantee	$_____
2. Amount of corrective action, closure and post-closure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee.	$_____
3. Sum of lines 1 and 2	$_____
4. Total tangible assets	$_____
5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6].	$_____
6. Tangible net worth [subtract line 5 from line 4]	$_____
7. Total assets in the U.S. [required only if less than 90 percent of assets are located in the U.S.]	$_____
	Yes / No
8. Is line 6 at least $10 million?	_____
9. Is line 6 at least 6 times line 3?	_____
10. Are at least 90 percent of assets located in the U.S.? [If ''No,'' complete line 11.]	_____
11. Is line 7 at least 6 times line 3? [Fill in either lines 12–15 or lines 16–18:]	_____
12. Current assets	$_____
13. Current liabilities	$_____
14. Net working capital [subtract line 13 from line 12]	$_____
15. Is line 14 at least 6 times line 3?	_____
16. Current bond rating of most recent bond issue	_____
17. Name of rating service	_____
18. Date of maturity of bond	_____
19. Have financial statements for the latest fiscal year been filed with the SEC, the Energy Information Administration, or the Rural Utilities Service?	_____

[If ''No,'' please attach a report from an independent certified public accountant certifying that there are no material differences between the data as reported in lines 4–18 above and the financial statements for the latest fiscal year.]

[For both Alternative I and Alternative II complete the certification with this statement.]

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR part 280.95(d) as such regulations were constituted on the date shown immediately below.

[Signature]

[Name]

[Title]

[Date]

* * * * *

23. In § 280.96 revise paragraphs (b), (c)(3), and (d) to read as follows:

§ 280.96 Guarantee.

* * * * *

(b) Within 120 days of the close of each financial reporting year the guarantor must demonstrate that it meets the financial test criteria of § 280.95 based on year-end financial statements for the latest completed financial reporting year by completing the letter from the chief financial officer described in § 280.95(d) and must deliver the letter to the owner or operator. If the guarantor fails to meet the requirements of the financial test at the end of any financial reporting year, within 120 days of the end of that financial reporting year the guarantor shall send by certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. If the Director of the implementing agency notifies the guarantor that he no longer meets the requirements of the financial test of § 280.95 (b) or (c) and (d), the guarantor must notify the owner or operator within 10 days of receiving such notification from the Director. In both cases, the guarantee will terminate no less than 120 days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternative coverage as specified in § 280.114(e).

(c) * * *

(3) [Insert appropriate phrase: ''On behalf of our subsidiary'' (if guarantor is corporate parent of the owner or operator); ''On behalf of our affiliate'' (if guarantor is a related firm of the owner or operator); or ''Incident to our business relationship with'' (if guarantor is providing the guarantee as an incident to a substantial business relationship with owner or operator)] [owner or operator], guarantor guarantees to [implementing agency] and to any and all third parties that:

In the event that [owner or operator] fails to provide alternative coverage within 60 days after receipt of a notice of cancellation of this guarantee and the [Director of the implementing agency] has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the [Director], shall fund a standby trust fund in accordance with the provisions of 40 CFR 280.112, in an amount not to exceed the coverage limits specified above.

In the event that the [Director] determines that [owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with 40 CFR part 280, subpart F, the guarantor upon written instructions from the [Director] shall fund a standby trust in accordance with the provisions of 40 CFR 280.112, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by [''sudden'' and/or ''nonsudden''] accidental releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the [Director], shall fund a standby trust in accordance with the provisions of 40 CFR 280.112 to satisfy such judgment(s), award(s), or settlement

agreement(s) up to the limits of coverage specified above.

* * * * *

(d) An owner or operator who uses a guarantee to satisfy the requirements of § 280.93 must establish a standby trust fund when the guarantee is obtained. Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee will be deposited directly into the standby trust fund in accordance with instructions from the Director of the implementing agency under § 280.112. This standby trust fund must meet the requirements specified in § 280.103.

24. In § 280.97 revise paragraph (a) to read as follows:

§ 280.97 Insurance and risk retention group coverage.

(a) An owner or operator may satisfy the requirements of § 280.93 by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group. Such insurance may be in the form of a separate insurance policy or an endorsement to an existing insurance policy.

* * * * *

25. In § 280.98 revise paragraphs (b) and (d) to read as follows:

§ 280.98 Surety bond.

* * * * *

(b) The surety bond must be worded as follows, except that instructions in brackets must be replaced with the relevant information and the brackets deleted:

Performance Bond

Date bond executed: _____

Period of coverage: _____

Principal: [legal name and business address of owner or operator]

_____

Type of organization: [insert ''individual,'' ''joint venture,'' ''partnership,'' or ''corporation'']

_____

State of incorporation (if applicable):

_____

Surety(ies): [name(s) and business address(es)]

_____

Scope of Coverage: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 40 CFR 280.22, or the corresponding state requirement, and the name and address of the facility. List the coverage guaranteed by the bond: ''taking corrective action'' and/or ''compensating third parties for bodily injury and property damage caused by'' either ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases'' ''arising from operating the underground storage Tank'']

Penal sums of bond:

Per occurrence $ _____

Annual aggregate $ _____

Surety's bond number: _____

Know All Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to [the implementing agency], in the above penal sums for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sums jointly and severally only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under Subtitle I of the Solid Waste Disposal Act, as amended, to provide financial assurance for [insert: ''taking corrective action'' and/or ''compensating third parties for bodily injury and property damage caused by'' either ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases''; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tanks identified above, and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully [''take corrective action, in accordance with 40 CFR part 280, subpart F and the Director of the state implementing agency's instructions for,'' and/or ''compensate injured third parties for bodily injury and property damage caused by'' either ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases''] arising from operating the tank(s) indentified above, or if the Principal shall provide alternate financial assurance, as specified in 40 CFR part 280, subpart H, within 120 days after the date the notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

Such obligation does not apply to any of the following:

(a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR 280.93.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by [the Director of the implementing agency] that the Principal has failed to [''take corrective action, in accordance with 40 CFR part 280, subpart F and the Director's instructions,'' and/or ''compensate injured third parties''] as guaranteed by this bond, the Surety(ies) shall either perform [''corrective action in accordance with 40 CFR part 280 and the Director's instructions,'' and/or ''third-party liability compensation''] or place funds in an amount up to the annual aggregate penal sum into the standby trust fund as directed by [the Regional Administrator or the Director] under 40 CFR 280.112.

Upon notification by [the Director] that the Principal has failed to provide alternate financial assurance within 60 days after the date the notice of cancellation is received by the Principal from the Surety(ies) and that [the Director] has determined or suspects that a release has occurred, the Surety(ies) shall place funds in an amount not exceeding the annual aggregate penal sum into the standby trust fund as directed by [the Director] under 40 CFR 280.112.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the annual aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal, as evidenced by the return receipt.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Thereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 40 CFR 280.98(b) as such regulations were constituted on the date this bond was executed.

Principal
[Signature(s)]
[Names(s)]
[Title(s)]
[Corporate seal]
Corporate Surety(ies)
[Name and address]
[State of Incorporation: _____]
[Liability limit: $_____]
[Signature(s)]
[Names(s) and title(s)]
[Corporate seal]
[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]
Bond premium: $_____

* * * * *

(d) The owner or operator who uses a surety bond to satisfy the requirements of § 280.93 must establish a standby trust fund when the surety bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the Director under § 280.112. This standby trust fund must meet the requirements specified in § 280.103.

26. In § 280.99 revise paragraphs (b) and (c) to read as follows:

§ 280.99 Letter of credit.

* * * * *

(b) The letter of credit must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Irrevocable Standby Letter of Credit

[Name and address of issuing institution]
[Name and address of Director(s) of state implementing agency(ies)]

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. _____ in your favor, at the request and for the account of [owner or operator name] of [address] up to the aggregate amount of [in words] U.S. dollars ($[insert dollar amount]), available upon presentation [insert, if more than one Director of a state implementing agency is a beneficiary, ''by any one of you''] of

(1) your sight draft, bearing reference to this letter of credit, No. _____, and

(2) your signed statement reading as follows: ''I certify that the amount of the draft is payable pursuant to regulations issued under authority of Subtitle I of the Solid Waste Disposal Act, as amended.''

This letter of credit may be drawn on to cover [insert: ''taking corrective action'' and/or ''compensating third parties for bodily injury and property damage caused by'' either ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases''] arising from operating the underground storage tank(s) identified below in the amount of [in words] $[insert dollar amount] per occurrence and [in words] $[insert dollar amount] annual aggregate:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 40 CFR 280.22, or the corresponding state requirement, and the name and address of the facility.]

The letter of credit may not be drawn on to cover any of the following:

(a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR 280.93.

This letter of credit is effective as of [date] and shall expire on [date], but such expiration date shall be automatically extended for a period of [at least the length of the original term] on [expiration date] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify [owner or operator] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event that [owner or operator] is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by [owner or operator], as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [owner or operator] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in 40 CFR 280.99(b) as such regulations were constituted on the date shown immediately below.

[Signature(s) and title(s) of official(s) of issuing institution]
[Date]

This credit is subject to [insert ''the most recent edition of the Uniform Customs and Practice for Documentary Credits, published and copyrighted by the International Chamber of Commerce,'' or ''the Uniform Commercial Code'']. (c) An owner or operator who uses a letter of credit to satisfy the requirements of § 280.93 must also establish a standby trust fund when the letter of credit is acquired. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Director of the implementing agency will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the Director under § 280.112. This standby trust fund must meet the requirements specified in § 280.103.

* * * * *

27. In § 280.101 revise paragraph (d) to read as follows:

§ 280.101 State fund or other state assurance.

* * * * *

(d) The Regional Administrator will notify the state of his determination regarding the acceptability of the state's fund or other assurance in lieu of financial mechanisms specified in this subpart. Within 60 days after the Regional Administrator notifies a state that a state fund or other state assurance is acceptable, the state must provide to each owner or operator for which it is assuming financial responsibility a letter or certificate describing the nature of the state's assumption of responsibility. The letter or certificate from the state must include, or have attached to it, the following information: The facility's name and address and the amount of funds for corrective action and/or for compensating third parties that is assured by the state. The owner or operator must maintain this letter or certificate on file as proof of financial responsibility in accordance with § 280.111(b)(8).

28. In § 280.103 revise paragraph (b)(1) and the Trust Agreement introductory text and section 4 to read as follows:

§ 280.103 Standby trust fund.

* * * * *

(b)(1) The standby trust agreement, or trust agreement, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Trust Agreement

Trust agreement, the ''Agreement,'' entered into as of [date] by and between [name of the owner or operator], a [name of state] [insert ''corporation,'' ''partnership,'' ''association,'' or ''proprietorship''], the ''Grantor,'' and [name of corporate trustee], [insert ''Incorporated in the state of _____'' or ''a national bank''], the ''Trustee.''

Whereas, the United States Environmental Protection Agency, ''EPA,'' an agency of the United States Government, has established certain regulations applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed for corrective action and third-party compensation for bodily injury and property

damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank. The attached Schedule A lists the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located that are covered by the [insert ''standby'' where trust agreement is standby trust agreement] trust agreement.

[Whereas, the Grantor has elected to establish [insert either ''a guarantee,'' ''surety bond,'' or ''letter of credit''] to provide all or part of such financial assurance for the underground storage tanks identified herein and is required to establish a standby trust fund able to accept payments from the instrument (This paragraph is only applicable to the standby trust agreement.)];

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee;

Now, therefore, the Grantor and the Trustee agree as follows:

* * * * *

Section 4. Payment for [''Corrective Action'' and/or ''Third-Party Liability Claims'']

The Trustee shall make payments from the Fund as [the Director of the implementing agency] shall direct, in writing, to provide for the payment of the costs of [insert: ''taking corrective action'' and/or ''compensating third parties for bodily injury and property damage caused by'' either ''sudden accidental releases'' or ''nonsudden accidental Releases'' or ''accidental releases''] arising from operating the tanks covered by the financial assurance mechanism identified in this Agreement.

The Fund may not be drawn upon to cover any of the following:

(a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR 280.93.

The Trustee shall reimburse the Grantor, or other persons as specified by [the Director], from the Fund for corrective action expenditures and/or third-party liability claims in such amounts as [the Director] shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as [the Director] specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

* * * * *

29. Amend § 280.104 as follows:

a. By revising paragraph (b)

b. By revising paragraph (d)

c. By revising paragraph (e)

d. By adding paragraph (h)

§ 280.104 Local government bond rating test.

* * * * *

(b) A local government owner or operator or local government serving as a guarantor that is not a general-purpose local government and does not have the legal authority to issue general obligation bonds may satisfy the requirements of § 280.93 by having a currently outstanding issue or issues of revenue bonds of $1 million or more, excluding refunded issues, and by also having a Moody's rating of Aaa, Aa, A, or Baa, or a Standard & Poor's rating of AAA, AA, A, or BBB as the lowest rating for any rated revenue bond issued by the local government. Where bonds are rated by both Moody's and Standard & Poor's, the lower rating for each bond must be used to determine eligibility. Bonds that are backed by credit enhancement may not be considered in determining the amount of applicable bonds outstanding.

* * * * *

(d) To demonstrate that it meets the local government bond rating test, the chief financial officer of a general purpose local government owner or operator and/or guarantor must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter from Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to demonstrate financial responsibility for [insert: ''taking corrective action'' and/or ''compensating third parties for bodily injury and property damage''] caused by [insert: ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases''] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this bond rating test: [List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

Issue date	Maturity date	Outstanding amount	Bond rating	Rating agency
				[Moody's or Standard & Poor's]

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of $1 million. All outstanding general obligation bonds issued by this government that have been rated by Moody's or Standard & Poor's are rated as at least investment grade (Moody's Baa or Standard & Poor's BBB) based on the most recent ratings published within the last 12 months. Neither rating service has provided notification within the last 12 months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR part 280.104(d) as such regulations were constituted on the date shown immediately below.

[Date] _____

[Signature] _____

[Name] _____

[Title] _____

(e) To demonstrate that it meets the local government bond rating test, the chief financial officer of local government owner or operator and/or guarantor other than a general purpose government must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter from Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to demonstrate financial responsibility for [insert: ''taking corrective action'' and/or ''compensating third parties for bodily injury and property damage''] caused by [insert: ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases''] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from

operating (an) underground storage tank(s). This local government is not organized to provide general governmental services and does not have the legal authority under state law or constitutional provisions to issue general obligation debt.

Underground storage tanks at the following facilities are assured by this bond rating test: [List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding revenue bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

Issue date	Maturity date	Outstanding amount	Bond rating	Rating agency
				[Moody's or Standard & Poor's]

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of $1 million. All outstanding revenue bonds issued by this government that have been rated by Moody's or Standard & Poor's are rated as at least investment grade (Moody's Baa or Standard & Poor's BBB) based on the most recent ratings published within the last 12 months. The revenue bonds listed are not backed by third-party credit enhancement or insured by a municipal bond insurance company. Neither rating service has provided notification within the last 12 months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR part 280.104(e) as such regulations were constituted on the date shown immediately below.

[Date] _____
[Signature] _____
[Name] _____
[Title] _____

* * * * *

(h) If the local government owner or operator fails to obtain alternate assurance within 150 days of finding that it no longer meets the requirements of the bond rating test or within 30 days of notification by the Director of the implementing agency that it no longer meets the requirements of the bond rating test, the owner or operator must notify the Director of such failure within 10 days.

30. In § 280.105 revise paragraph (c) and the Letter From Chief Financial Officer to read as follows:

§ 280.105 Local government financial test.

* * * * *

(c) To demonstrate that it meets the financial test under paragraph (b) of this section, the chief financial officer of the local government owner or operator, must sign, within 120 days of the close of each financial reporting year, as defined by the twelve-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter From Chief Financial Officer

I am the chief financial officer of [insert: name and address of the owner or operator]. This letter is in support of the use of the local government financial test to demonstrate financial responsibility for [insert: ''taking corrective action'' and/or ''compensating third parties for bodily injury and property damage''] caused by [insert: ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases''] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating [an] underground storage tank[s].

Underground storage tanks at the following facilities are assured by this financial test [List for each facility: the name and address of the facility where tanks assured by this financial test are located. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the notification submitted pursuant to 40 CFR part 280.22 or the corresponding state requirements.]

This owner or operator has not received an adverse opinion, or a disclaimer of opinion from an independent auditor on its financial statements for the latest completed fiscal year. Any outstanding issues of general obligation or revenue bonds, if rated, have a Moody's rating of Aaa, Aa, A, or Baa or a Standard and Poor's rating of AAA, AA, A, or BBB; if rated by both firms, the bonds have a Moody's rating of Aaa, Aa, A, or Baa and a Standard and Poor's rating of AAA, AA, A, or BBB.

Worksheet for Municipal Financial Test

Part I: Basic Information

1. Total Revenues

a. Revenues (dollars)_____

Value of revenues excludes liquidation of investments and issuance of debt. Value includes all general fund operating and non-operating revenues, as well as all revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity.

b. Subtract interfund transfers (dollars)_____
c. Total Revenues (dollars)_____

2. Total Expenditures

a. Expenditures (dollars)_____

Value consists of the sum of general fund operating and non-operating expenditures including interest payments on debt, payments for retirement of debt principal, and total expenditures from all other governmental funds including enterprise, debt service, capital projects, and special revenues.

b. Subtract interfund transfers (dollars)_____
c. Total Expenditures (dollars) _____

3. Local Revenues

a. Total Revenues (from 1c) (dollars)_____
b. Subtract total intergovernmental transfers (dollars)_____
c. Local Revenues (dollars)_____

4. Debt Service

a. Interest and fiscal charges (dollars)_____
b. Add debt retirement (dollars)_____
c. Total Debt Service (dollars)_____

5. Total Funds (Dollars)_____

(Sum of amounts held as cash and investment securities from all funds, excluding amounts held for employee retirement funds, agency funds, and trust funds)

6. Population (Persons)_____

Part II: Application of Test

7. Total Revenues to Population

a. Total Revenues (from 1c)_____
b. Population (from 6)_____
c. Divide 7a by 7b_____
d. Subtract 417_____
e. Divide by 5,212_____
f. Multiply by 4.095_____

8. Total Expenses to Population

a. Total Expenses (from 2c)_____
b. Population (from 6)_____
c. Divide 8a by 8b_____
d. Subtract 524_____
e. Divide by 5,401_____
f. Multiply by 4.095_____

9. Local Revenues to Total Revenues

a. Local Revenues (from 3c)_____

b. Total Revenues (from 1c)_____
c. Divide 9a by 9b_____
d. Subtract .695_____
e. Divide by .205_____
f. Multiply by 2.840_____

10. Debt Service to Population

a. Debt Service (from 4c)_____
b. Population (from 6)_____
c. Divide 10a by 10b_____
d. Subtract 51_____
e. Divide by 1,038_____
f. Multiply by −1.866_____

11. Debt Service to Total Revenues

a. Debt Service (from 4c)_____
b. Total Revenues (from 1c)_____
c. Divide 11a by 11b_____
d. Subtract .068_____
e. Divide by .259_____
f. Multiply by -3.533_____

12. Total Revenues to Total Expenses

a. Total Revenues (from 1c)_____
b. Total Expenses (from 2c)_____
c. Divide 12a by 12b_____
d. Subtract .910_____
e. Divide by .899_____
f. Multiply by 3.458_____

13. Funds Balance to Total Revenues

a. Total Funds (from 5)_____
b. Total Revenues (from 1c)_____
c. Divide 13a by 13b_____
d. Subtract .891_____
e. Divide by 9.156_____
f. Multiply by 3.270_____

14. Funds Balance to Total Expenses

a. Total Funds (from 5)_____
b. Total Expenses (from 2c)_____
c. Divide 14a by 14b_____
d. Subtract .866_____
e. Divide by 6.409_____
f. Multiply by 3.270_____

15. Total Funds to Population_____

a. Total Funds (from 5)_____
b. Population (from 6)_____
c. Divide 15a by 15b_____
d. Subtract 270_____
e. Divide by 4,548_____
f. Multiply by 1.866_____

16. Add 7f + 8f + 9f + 10f + 11f + 12f + 13f + 14f + 15f + 4.937_____

I hereby certify that the financial index shown on line 16 of the worksheet is greater than zero and that the wording of this letter is identical to the wording specified in 40 CFR part 280.105(c) as such regulations were constituted on the date shown immediately below.

[Date]
[Signature]
[Name]
[Title]

* * * * *

31. Amend § 280.106 as follows:

a. By revising paragraph (a)(1)

b. By revising paragraph (b)

c. By revising paragraph (d)(7)(d)

d. By revising paragraph (e)(7)(d)

e. By revising paragraph (e)(8)(d)

§ 280.106 Local government guarantee.

(a) * * *

(1) Demonstrate that it meets the bond rating test requirement of § 280.104 and deliver a copy of the chief financial officer's letter as contained in § 280.104(d) and § 280.104(e) to the local government owner or operator; or

* * * * *

(b) If the local government guarantor is unable to demonstrate financial assurance under any of § § 280.104, 280.105, 280.107(a), 280.107(b), or 280.107(c), at the end of the financial reporting year, the guarantor shall send by certified mail, before cancellation or non-renewal of the guarantee, notice to the owner or operator. The guarantee will terminate no less than 120 days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternative coverage as specified in § 280.114(e).

* * * * *

(d) * * *

(7) * * *

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

* * * * *

(e) * * *

(7) * * *

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

* * * * *

(8) * * *

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

* * * * *

32. In § 280.107 revise paragraph (d) to read as follows:

§ 280.107 Local government fund.

* * * * *

(d) To demonstrate that it meets the requirements of the local government fund, the chief financial officer of the local government owner or operator and/or guarantor must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter from Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the local government fund mechanism to demonstrate financial responsibility for [insert: ''taking corrective action'' and/or ''compensating third parties for bodily injury and property damage''] caused by [insert: ''sudden accidental releases'' or ''nonsudden accidental releases'' or ''accidental releases''] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this local government fund mechanism: [List for each facility: the name and address of the facility where tanks are assured by the local government fund].

[Insert: ''The local government fund is funded for the full amount of coverage required under § 280.93, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage.'' or ''The local government fund is funded for five times the full amount of coverage required under § 280.93, or funded for part of the required amount of coverage and used in combination with other mechanisms(s) that provide the remaining coverage,'' or ''A payment is made to the fund once every year for seven years until the fund is fully-funded and [name of local government owner or operator] has available bonding authority, approved through voter referendum, of an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund'' or ''A payment is made to the fund once every year for seven years until the fund is fully-funded and I have attached a letter signed by the State Attorney General stating that (1) the use of the bonding authority will not increase the local government's debt beyond the legal debt ceilings established by the relevant state laws and (2) that prior voter approval is not necessary before use of the bonding authority'']].

The details of the local government fund are as follows:

Amount in Fund (market value of fund at close of last fiscal year):_____

[If fund balance is incrementally funded as specified in § 280.107(c), insert:

Amount added to fund in the most recently completed fiscal year:_____
Number of years remaining in the pay-in period: _____]

A copy of the state constitutional provision, or local government statute, charter, ordinance or order dedicating the fund is attached.

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR 280.107(d) as such regulations were constituted on the date shown immediately below.

[Date]
[Signature]
[Name]
[Title]

* * * * *

33. In § 280.109 revise paragraph (b)(3) to read as follows:

§ 280.109 Cancellation or nonrenewal by a provider of financial assurance.

* * * * *

(b) * * *

(3) The evidence of the financial assistance mechanism subject to the termination maintained in accordance with § 280.111(b).

34. In § 280.111 revise paragraphs (b)(9)(ii) and (iii) to read as follows:

§ 280.111 Recordkeeping.

* * * * *

(b) * * *

(9) * * *

(ii) Year-end financial statements for the most recent completed financial reporting year showing the amount in the fund. If the fund is established under § 280.107(c) using incremental funding backed by bonding authority, the financial statements must show the previous year's balance, the amount of funding during the year, and the closing balance in the fund.

(iii) If the fund is established under § 280.107(c) using incremental funding backed by bonding authority, the owner or operator must also maintain documentation of the required bonding authority, including either the results of a voter referendum (under § 280.107(c)(1)), or attestation by the State Attorney General as specified under § 280.107(c)(2).

* * * * *

35. Revise § 280.113 to read as follows:

§ 280.113 Release from the requirements.

An owner or operator is no longer required to maintain financial responsibility under this subpart for an underground storage tank after the tank has been permanently closed or, if corrective action is required, after corrective action has been completed and the tank has been permanently closed as required by 40 CFR part 280, subpart G.

36. Add Subpart J to read as follows:

Subpart J—Operator Training

Sec.

280.240 General requirement for all UST systems.
280.241 Designation of operators.
280.242 Requirements for operator training.
280.243 Timing of operator training.
280.244 Retraining.
280.245 Documentation.

Subpart J—Operator Training

§ 280.240 General requirement for all UST systems.

Not later than [Three years after effective date of rule], all owners and operators of UST systems must ensure they have designated Class A, Class B, and Class C operators who meet the requirements of this subpart.

§ 280.241 Designation of operators.

UST system owners and operators must designate:

(a) At least one Class A and one Class B operator for each UST or group of USTs at a facility; and

(b) Each individual who meets the definition of Class C operator at the UST facility as a Class C operator. Class C operators must be employees of the UST system owner and operator.

§ 280.242 Requirements for operator training.

UST system owners and operators must ensure Class A, Class B, and Class C operators meet the requirements of this section. Any individual designated for more than one operator class must successfully complete the required training program or comparable examination according to the operator class in which the individual is designated.

(a) *Class A operators.* Each designated Class A operator must either be trained in accordance with paragraphs (a)(1) and (a)(2) of this section or pass a comparable examination in accordance with paragraph (e) of this section. Class A operators must receive training from an independent trainer.

(1) At a minimum, the training program for the Class A operator must provide general knowledge of the requirements in this paragraph. At a minimum, the training must teach the Class A operators, as applicable, on the purpose, methods, and function of:

(i) Spill and overfill prevention;

(ii) Release detection;

(iii) Corrosion protection;

(iv) Emergency response;

(v) Product and equipment compatibility;

(vi) Financial responsibility;

(vii) Notification and storage tank registration;

(viii) Temporary and permanent closure;

(ix) Related reporting and recordkeeping;

(x) Environmental and regulatory consequences of releases; and

(xi) Training requirements for Class B and Class C operators.

(2) At a minimum, the training program must evaluate Class A operators to determine these individuals have the knowledge and skills to make informed decisions regarding compliance and determine whether appropriate individuals are fulfilling the operation, maintenance, and recordkeeping requirements for UST systems in accordance with paragraph (a)(1) of this section.

(b) *Class B operators.* Each designated Class B operator must either receive training in accordance with paragraphs (b)(1) and (b)(2) of this section or pass a comparable examination, in accordance with paragraph (e) of this section. Class B operators must receive training from an independent trainer.

(1) At a minimum, the training program for the Class B operator must cover either: General requirements that encompass all regulatory requirements and typical equipment used at UST facilities; or site-specific requirements which address only the regulatory requirements and equipment specific to the facility. At a minimum, the training program for Class B operators must teach the Class B operator, as applicable, on the purpose, methods, and function of:

(i) Operation and maintenance;

(ii) Spill and overfill prevention;

(iii) Release detection and related reporting;

(iv) Corrosion protection and related testing;

(v) Emergency response;

(vi) Product and equipment compatibility;

(vii) Reporting and recordkeeping;

(viii) Environmental and regulatory consequences of releases; and

(ix) Training requirements for Class C operator.

(2) At a minimum, the training program must evaluate Class B operators to determine these individuals have the knowledge and skills to implement applicable UST regulatory requirements in the field on the components of typical UST systems or, as applicable, site-specific equipment used at an UST facility in accordance with paragraph (b)(1) of this section.

(c) *Class C operators.* Each designated Class C operator must either: Be trained by a Class A or Class B operator in accordance with paragraphs (c)(1) and (c)(2) of this section; complete a training program in accordance with paragraphs (c)(1) and (c)(2) of this section; or pass a comparable examination, in accordance with paragraph (e) of this section.

(1) At a minimum, the training program for the Class C operator must teach the Class C operators to take appropriate actions in response to:

(i) Emergencies; and

(ii) Alarms caused by spills or releases from the UST system.

(2) At a minimum, the training program must evaluate Class C operators to determine these individuals have the knowledge and skills to take appropriate

action in response to emergencies (including situations posing an immediate danger or threat to the public or to the environment and that require immediate action) or alarms caused by spills or releases from an underground storage tank system.

(d) *Training program.* Any training program must meet the minimum requirements of this section and include an evaluation through testing, a practical demonstration, or another approach acceptable to the implementing agency. The evaluation component of the training program must be developed and administered by an independent organization or the implementing agency or delegated authority.

(e) *Comparable Examination.* A comparable examination must, at a minimum, test the knowledge of the Class A, Class B, or Class C operators in accordance with the requirements of paragraphs (a), (b), (c) of this section, as applicable. The examination must be developed and administered by an independent organization or the implementing agency or delegated authority.

§ 280.243 Timing of operator training.

(a) An owner and operator must ensure that designated Class A, Class B, and Class C operators meet requirements in § 280.242 according to the following schedule:

PHASE-IN SCHEDULE FOR OPERATOR TRAINING

Criteria	Date when operator training or comparable examination is required
One or more USTs at the facility were installed on or before 12/22/1988	[1 year after effective date of rule].
No USTs at the facility were installed on or before 12/22/1988 and at least one UST at the facility was installed on or before 12/22/1998.	[2 years after effective date of rule].
All USTs at the facility were installed after 12/22/1998	[3 years after effective date of rule].

(b) Class A and Class B operators designated after the applicable effective date indicated in the schedule above must meet requirements in § 280.242 within 30 days of assuming duties.

(c) Class C operators designated after the applicable effective date indicated in the schedule above must be trained before assuming duties of a Class C operator.

§ 280.244 Retraining.

Class A and Class B operators of UST systems determined by the implementing agency to be out of compliance must complete a training program or comparable examination in accordance with requirements in § 280.242. At a minimum, the training must cover the area(s) determined to be out of compliance. UST system owners and operators must ensure Class A and Class B operators are retrained pursuant to this section no later than 30 days from the date the implementing agency determines the facility is out of compliance except in one of the following situations:

(a) Class A and Class B operators take annual refresher training. Refresher training for Class A and Class B operators must cover all applicable requirements in § 280.242, or

(b) The implementing agency, at its discretion, grants a waiver of this retraining requirement to either the Class A or Class B operator or both.

§ 280.245 Documentation.

Owners and operators of underground storage tank systems must maintain a list of designated Class A, Class B, and Class C operators and maintain records verifying that training and retraining, as applicable, have been completed, in accordance with § 280.34 as follows:

(a) The list must:

(1) Identify all Class A, Class B, and Class C operators at the facility over the last three years; and

(2) Include names, class of operator trained, date assumed duties, date each completed initial training, and any retraining.

(b) Records verifying completion of training or retraining must be a paper or electronic record for Class A, Class B, and Class C operators. The records, at a minimum, must identify name of trainee, date trained, and operator training class completed. Owners and operators must maintain these records for as long as Class A, Class B, and Class C operators are designated. The following requirements also apply to the following types of training:

(1) Records from classroom or field training programs or a comparable examination must, at a minimum, be signed by the trainer or examiner and list the printed name of the trainer or examiner and the company name, address, and phone number;

(2) Records from computer-based training must, at a minimum, indicate the name of the training program and web address, if Internet-based; and

(3) Records of retraining must include those areas on which the Class A or Class B operator has been retrained.

37. Appendix III to Part 280 is revised to read as follows:

Appendix III to Part 280—Statement for Shipping Tickets and Invoices

Note. A federal law (the Solid Waste Disposal Act, as amended), requires owners of certain underground storage tanks to notify implementing agencies of the existence of their tanks. Notifications must be made within 30 days of bringing the tank into use. Consult EPA's regulations at 40 CFR 280.22 to determine if you are affected by this law.

BILLING CODE 6560–50–P

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United States
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Washington, DC 20460

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OMB No.2050-0068

Notification for Underground Storage Tanks

Implementing Agency Name and Address:

IMPLEMENTING AGENCY USE ONLY
ID NUMBER:
DATE RECEIVED:
DATE ENTERED INTO COMPUTER:
DATA ENTRY CLERK INITIALS:
OWNER WAS CONTACTED TO CLARIFY RESPONSES, COMMENTS:

TYPE OF NOTIFICATION

☐ A. NEW FACILITY ☐ B. AMENDED ☐ C. CLOSURE

_____ Number of tanks at facility _____ Number of continuation sheets attached

INSTRUCTIONS AND GENERAL INFORMATION

Please type or print in ink. Also, be sure you have signatures in ink for sections VIII and XI. Complete a notification form for each location containing underground storage tanks. If more than 5 tanks are owned at this location, you may photocopy pages 3 through 5 and use them for additional tanks.

The primary purpose of this notification form is to locate and evaluate underground storage tank systems (USTs) that store or have stored petroleum or hazardous substances. The information you provide will be based on reasonably available records, or in the absence of such records, your knowledge or recollection.

Federal law requires UST owners to use this notification form for all USTs storing regulated substances that are brought into use after May 8, 1986, or USTs in the ground as of May 8, 1986 that have stored regulated substances at any time since January 1, 1974. The information requested is required by Section 9002 of the Solid Waste Disposal Act (SWDA), as amended.

Who Must Notify? Section 9002 of SWDA, as amended, requires owners of USTs that store regulated substances (unless exempted) to notify designated state or local agencies of the existence of their USTs. "Owner" is defined as:

· In the case of an UST in use on November 8, 1984, or brought into use after that date, any person who owns an UST used for storage, use, or dispensing of regulated substances; or

· In the case of an UST in use before November 8, 1984, but no longer in use on that date, any person who owned the UST immediately before its discontinuation.

Also, if the state so requires, any facility that has made any changes to facility information or UST system status, must submit a notification form (only amended information needs to be included).

What USTs Are Included? An UST system is defined as any one or combination of tanks that is used to contain an accumulation of regulated substances, and whose volume (including connected underground piping) is 10 percent or more beneath the ground. Regulated USTs store petroleum or hazardous substances (see the "What Substances Are Covered").

What Tanks Are Excluded From Notification (see § 280.10 and § 280.12)?

- Tanks removed from the ground before May 8, 1986;
- Farm or residential tanks of 1,100 gallons or less capacity storing motor fuel for noncommercial purposes;
- Tanks storing heating oil for use on the premises where stored;
- Septic tanks;
- Certain pipeline facilities regulated under chapter 601 of Title 49;
- Surface impoundments, pits, ponds, or lagoons;
- Storm water or wastewater collection systems;
- Flow-through process tanks;
- Liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;
- Tanks on or above the floor of underground areas, such as basements or tunnels;
- Tanks with a capacity of 110 gallons or less.

What Substances Are Covered? The notification requirements apply to USTs containing petroleum or certain hazardous substances. Petroleum includes gasoline, used oil, diesel fuel, crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute). Hazardous substances are those found in Section 101 (14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), with the exception of those substances regulated as hazardous waste under Subtitle C of RCRA.

Where To Notify? Send completed forms to:

When To Notify? Owners who bring USTs into use after May 8, 1986, must notify within 30 days of bringing the UST into use. Owners of previously deferred USTs must notify by [ENTER DATE 30 days after REG]. If the state requires notification of any amendments to facility, send information to state agency immediately.

Penalties: Any owner who knowingly fails to notify or submits false information shall be subject to a civil penalty not to exceed $16,000 for each tank for which notification is not given or for which false information is given.

I. OWNERSHIP OF UST(s)

Owner Name (Corporation, Individual, Public Agency, or Other Entity)

Street Address

County

City	State	Zip Code

Phone Number (Include Area Code)

II. LOCATION OF UST(s)

If required by implementing agency, give the geographic location of USTs by degrees, minutes, and seconds. Example: Latitude 42° 36' 12" N, Longitude 85° 24' 17" W

Latitude _____ **Longitude** _____

Facility Name or Company Site Identifier, as applicable

☐ If address is the same as in Section I, check the box and proceed to section III.
If address is different, enter address below:
Street Address

County

City	State	Zip Code

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Notification for Underground Storage Tanks

III. TYPE OF OWNER

- ☐ Federal Government
- ☐ State Government ☐ Commercial
- ☐ Local Government ☐ Private

IV. INDIAN COUNTRY

- ☐ USTs are located on land within an Indian Reservation or on trust lands outside reservation boundaries.
- ☐ USTs are owned by a Native American nation or tribe.

Tribe or Nation where USTs are located:

V. TYPE OF FACILITY

- ☐ Gas Station
- ☐ Petroleum Distributor
- ☐ Air Taxi (Airline)
- ☐ Aircraft Owner
- ☐ Auto Dealership
- ☐ Railroad
- ☐ Federal - Non-Military
- ☐ Federal - Military
- ☐ Industrial
- ☐ Contractor
- ☐ Trucking/Transport
- ☐ Utilities
- ☐ Residential
- ☐ Farm
- ☐ Other (Explain) _____

VI. CONTACT PERSON IN CHARGE OF TANKS

Name:	Job Title:	Address:	Phone Number (Include Area Code):

VII. FINANCIAL RESPONSIBILITY

☐ I have met the financial responsibility requirements (in accordance with 40 CFR Part 280 Subpart H) by using the following mechanisms:

Check All that Apply

- ☐ Self Insurance
- ☐ Commercial Insurance
- ☐ Risk Retention Group
- ☐ Local Government Financial Test
- ☐ Guarantee
- ☐ Surety Bond
- ☐ Letter of Credit
- ☐ Bond Rating Test
- ☐ State Funds
- ☐ Trust Fund
- ☐ Other Method (describe here)

_____

VIII. CERTIFICATION (Read and sign after completing ALL SECTIONS of this notification form)

I certify under penalty of law that I have personally examined and am familiar with the information submitted in Sections I through XI of this notification form and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete.

Name and official title of owner or owner's authorized representative (Print)	Signature	Date Signed

Paperwork Reduction Act Notice
The public reporting and recordkeeping burden for this collection of information is estimated to average 30 minutes per response. Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, Collection Strategies Division, U.S. Environmental Protection Agency (2822T), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed form to this address.

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Notification for Underground Storage Tanks

IX. DESCRIPTION OF UNDERGROUND STORAGE TANKS (Complete for all tanks and piping at this location.)

Tank Identification Number	Tank No.	Tank No.	Tank No.	Tank No.	Tank No.
1. Status of Tank (check only one) Currently In Use	☐	☐	☐	☐	☐
Temporarily Closed	☐	☐	☐	☐	☐
Permanently Closed	☐	☐	☐	☐	☐
2. Date of Installation (month/year)					
3. Estimated Total Capacity (gallons)					
4. Material of Construction (check all that apply) Asphalt Coated or Bare Steel	☐	☐	☐	☐	☐
Cathodically Protected Steel	☐	☐	☐	☐	☐
Coated and Cathodically Protected Steel	☐	☐	☐	☐	☐
Composite (steel clad with noncorrodible material)	☐	☐	☐	☐	☐
Fiberglass Reinforced Plastic	☐	☐	☐	☐	☐
Lined Interior	☐	☐	☐	☐	☐
Excavation Liner	☐	☐	☐	☐	☐
Double Walled	☐	☐	☐	☐	☐
Noncorrodible Tank Jacket	☐	☐	☐	☐	☐
Concrete	☐	☐	☐	☐	☐
Unknown	☐	☐	☐	☐	☐
If other, please specify here	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
Check box if tank has ever been repaired	☐	☐	☐	☐	☐
5. Piping Material (check all that apply) Bare Steel	☐	☐	☐	☐	☐
Galvanized Steel	☐	☐	☐	☐	☐
Fiberglass Reinforced Plastic	☐	☐	☐	☐	☐
Flexible Plastic	☐	☐	☐	☐	☐
Copper	☐	☐	☐	☐	☐
Cathodically Protected	☐	☐	☐	☐	☐
Double Walled	☐	☐	☐	☐	☐
Secondary Containment	☐	☐	☐	☐	☐
Unknown	☐	☐	☐	☐	☐
If other, please specify here	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
6. Piping Type (check all that apply) Safe Suction (no valve at tank)	☐	☐	☐	☐	☐
U.S. Suction (valve at tank)	☐	☐	☐	☐	☐
Pressure	☐	☐	☐	☐	☐
Gravity Feed	☐	☐	☐	☐	☐

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Tank Identification Number	Tank No.	Tank No.	Tank No.	Tank No.	Tank No.
7. Substance Currently Stored (or last stored in the case of closed tanks) (check all that apply) — Gasoline (containing ≤10% ethanol)	☐	☐	☐	☐	☐
Diesel	☐	☐	☐	☐	☐
Biodiesel	☐	☐	☐	☐	☐
Kerosene	☐	☐	☐	☐	☐
Heating Oil	☐	☐	☐	☐	☐
Used Oil	☐	☐	☐	☐	☐
Gasoline Containing >10% Ethanol (specify amount)	_____	_____	_____	_____	_____
If other, please specify here	_____	_____	_____	_____	_____
Hazardous Substance	☐	☐	☐	☐	☐
CERCLA Name and/or CAS Number	_____	_____	_____	_____	_____
Mixture of Substances	☐	☐	☐	☐	☐
Please specify here	_____	_____	_____	_____	_____

8. **Release Detection** (check all that apply)	TANK	PIPE	TANK	PIPE	TANK	PIPE	TANK	PIPE	TANK	PIPE
Manual Tank Gauging	☐		☐		☐		☐		☐	
Tank Tightness Testing	☐		☐		☐		☐		☐	
Inventory Control	☐		☐		☐		☐		☐	
Automatic Tank Gauging	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Vapor Monitoring	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Groundwater Monitoring	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Interstitial Monitoring (required for new or replaced tanks/piping)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Statistical Inventory Reconciliation	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Automatic Line Leak Detectors		☐		☐		☐		☐		☐
Line Tightness Testing (applicable suction piping)		☐		☐		☐		☐		☐
Bulk Tightness Test (field-constructed tank)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Bulk Line Tightness Test (airport hydrant distribution system)		☐		☐		☐		☐		☐
No Release Detection Dequired (such as some types of suction piping)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Other method allowed by implementing agency	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
If other, please specify here										

9. **Spill and Overfill Protection**					
Overfill Device Installed	☐	☐	☐	☐	☐
Spill Device Installed	☐	☐	☐	☐	☐

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Form Approved.
OMB No.2050-0068

Notification for Underground Storage Tanks

Tank Identification Number	Tank No.	Tank No.	Tank No.	Tank No.	Tank No.
X. CLOSURE OR CHANGE IN SERVICE					
Closure or Change in Service					
Estimated date the UST was last used for storing regulated substances (month/day/year)	_____	_____	_____	_____	_____
Check box if this is a change in service	☐	☐	☐	☐	☐
2. **Tank Closure**					
Estimated date tank closed (month/day/year)	_____	_____	_____	_____	_____
(check all that apply below)					
Tank was removed from ground	☐	☐	☐	☐	☐
Tank was closed in ground	☐	☐	☐	☐	☐
Tank filled with inert material	☐	☐	☐	☐	☐
Describe the inert fill material here	_____	_____	_____	_____	_____
3. **Site Assessment**					
Check box if the site assessment was completed	☐	☐	☐	☐	☐
Check box if evidence of a leak was detected	☐	☐	☐	☐	☐
XI. CERTIFICATION OF INSTALLATION (COMPLETE FOR UST SYSTEMS INSTALLED AFTER DECEMBER 22, 1988)					
Installer Of Tank And Piping Must Check All That Apply:					
Installer certified by tank and piping manufacturers	☐	☐	☐	☐	☐
Installer certified or licensed by the implementing agency	☐	☐	☐	☐	☐
Installation inspected by a registered engineer	☐	☐	☐	☐	☐
Installation inspected and approved by implementing agency	☐	☐	☐	☐	☐
Manufacturer's installation checklists have been completed	☐	☐	☐	☐	☐
Another method allowed by State agency If so, please specify here	☐	☐	☐	☐	☐
	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____

Signature of UST Installer Certifying Proper Installation of UST System

Name _____ Signature _____ Date _____

Position _____ Company _____

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Washington, DC 20460

Form Approved.
OMB No.XXXXXX

Notification of Ownership Change for Underground Storage Tanks

Implementing Agency Name and Address:

IMPLEMENTING AGENCY USE ONLY
ID NUMBER:
DATE RECEIVED:
DATE ENTERED INTO COMPUTER:
DATA ENTRY CLERK INITIALS:
OWNER WAS CONTACTED TO CLARIFY RESPONSES, COMMENTS:

INSTRUCTIONS AND GENERAL INFORMATION

Please type or print in ink. Also, be sure you have signatures in ink.

The primary purpose of this notification form is to inform implementing agencies of ownership changes for underground storage tank (UST) systems that store or have stored petroleum or hazardous substances.

Federal regulation requires UST owners to notify the implementing agency of any ownership change for USTs storing regulated substances after [ENTER EFFECTIVE DATE OF RULE].

Who Must Notify? 40 CFR part 280, as amended, requires owners of USTs that store regulated substances (unless exempted) to notify implementing agencies of any ownership changes. Owner is defined as:

· In the case of an UST in use on November 8, 1984, or brought into use after that date, any person who owns an UST used for storage, use, or dispensing of regulated substances; or

· In the case of an UST in use before November 8, 1984, but no longer in use on that date, any person who owned the UST immediately before its discontinuation.

What USTs Are Included? An UST system is defined as any one or combination of tanks that is used to contain an accumulation of regulated substances, and whose volume (including connected underground piping) is 10 percent or more beneath the ground. Regulated USTs store petroleum or hazardous substances (see "What Substances Are Covered").

When To Notify? Any owner or operator who assumes ownership of a regulated UST system must notify the implementing agency within 30 days of assuming such ownership.

What Tanks Are Excluded From Notification (see § 280.10 and § 280.12)?
- Tanks removed from the ground before May 8, 1986;
- Farm or residential tanks of 1,100 gallons or less capacity storing motor fuel for noncommercial purposes;
- Tanks storing heating oil for use on the premises where stored;
- Septic tanks;
- Certain pipeline facilities regulated under chapter 601 of Title 49;
- Surface impoundments, pits, ponds, or lagoons;
- Storm water or wastewater collection systems;
- Flow-through process tanks;
- Liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;
- Tanks on or above the floor of underground areas, such as basements or tunnels;
- Tanks with a capacity of 110 gallons or less.

What Substances Are Covered? The notification requirements apply to USTs containing petroleum or certain hazardous substances. Petroleum includes gasoline, used oil, diesel fuel, crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute). Hazardous substances are those found in Section 101 (14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), with the exception of those substances regulated as hazardous waste under Subtitle C of RCRA.

Where To Notify? Send completed forms to:

Penalties: Any owner who knowingly fails to notify or submits false information shall be subject to a civil penalty not to exceed $16,000 for each tank for which notification is not given or for which false information is given.

OWNERSHIP OF UST(s) Corporation, Individual, Public Agency, or Other Entity		**FACILITY NAME AND LOCATION OF UST(s)**
Current Owner Name	Previous Owner Name	Facility Name ☐ Check here if name changed after ownership Change
Address	Address	☐ Check this box if the physical address of the UST(s) is the same as the current owner address. If address is different, enter address below: If required by implementing agency, give the geographic location of UST(s) by degrees, minutes, and seconds. **Latitude** _____ **Longitude** _____
Phone	Phone	Date of Ownership Change

Signature of Current Owner: _____ Date: _____

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PART 281—APPROVAL OF STATE UNDERGROUND STORAGE TANK PROGRAMS

38. Revise Part 281 to read as follows:

PART 281—APPROVAL OF STATE UNDERGROUND STORAGE TANK PROGRAMS

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281.60 Criteria for withdrawal of approval of state programs.
281.61 Procedures for withdrawal of approval of state programs.

Authority: Sections 2002, 9004, 9005, 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6912, 6991(c), (d), (e)).

Subpart A—Purpose, General Requirements and Scope

§ 281.10 Purpose.

(a) This part specifies the requirements that state programs must meet for approval by the Administrator under § 9004 of the Solid Waste Disposal Act, and the procedures EPA will follow in approving, revising and withdrawing approval of state programs.

(b) State submissions for program approval must be in accordance with the procedures set out in this part.

(c) A state may apply for approval under this part at any time after the promulgation of release detection, prevention, and corrective action regulations under § 9003 of the Solid Waste Disposal Act.

(d) Any state program approved by the Administrator under this part shall at all times be conducted in accordance with the requirements of this part.

§ 281.11 General Requirements.

(a) State Program Elements. The following substantive elements of a state program must be addressed in a state application for approval:

(1) Requirements for all existing and new underground storage tanks:

(i) New UST systems (design, construction, installation, and notification);

(ii) Upgrading of existing UST systems;

(iii) General operating requirements;

(iv) Release detection;

(v) Release reporting, investigation, and confirmation;

(vi) Out-of-service USTs and closure;

(vii) Release response and corrective action;

(viii) Financial responsibility for UST systems containing petroleum; and

(ix) Operator training.

(2) Provisions for adequate enforcement of compliance with the above program elements.

(b) Final Approval. The state must demonstrate that its requirements under each state program element for existing and new UST systems are no less stringent than the corresponding federal requirements as set forth in subpart C of this part. The state must also demonstrate that it has a program that provides adequate enforcement of compliance with these requirements.

(c) States with programs approved under this part are authorized to administer the state program in lieu of the federal program and will have primary enforcement responsibility with respect to the requirements of the approved program. EPA retains authority to take enforcement action in approved states as necessary and will notify the designated lead state agency of any such intended action.

§ 281.12 Scope and Definitions.

(a) Scope

(1) The Administrator may approve either partial or complete state programs. A ''partial'' state program regulates either solely UST systems containing petroleum or solely UST systems containing hazardous substances. If a ''partial'' state program is approved, EPA will administer the remaining part of the program. A ''complete'' state program regulates both petroleum and hazardous substance tanks.

(2) EPA will administer the UST program in Indian country, except where Congress has clearly expressed an intention to grant a state authority to regulate petroleum and hazardous substance USTs in Indian country. In either case, this decision will not impair a state's ability to obtain program approval for petroleum and/or hazardous substances in non-Indian country in accordance with this part.

(3) Nothing in this subpart precludes a state from:

(i) Adopting or enforcing requirements that are more stringent or more extensive than those required under this part; or

(ii) Operating a program with a greater scope of coverage than that required under this part. Where an approved state program has a greater scope of coverage than required by federal law, the additional coverage is not part of the federally-approved program.

(b) Definitions

(1) The definitions in part 280 apply to this entire part.

(2) For the purposes of this part the term ''final approval'' means the approval received by a state program that meets the requirements in § 281.11(b).

Subpart B—Components of a Program Application

§ 281.20 Program Application.

Any state that seeks to administer a program under this part must submit an application containing the following parts:

(a) A transmittal letter from the Governor of the state requesting program approval;

(b) A description in accordance with § 281.21 of the state program and operating procedures;

(c) A demonstration of the state's procedures to ensure adequate enforcement;

(d) A Memorandum of Agreement outlining roles and responsibilities of EPA and the implementing agency;

(e) An Attorney General's statement in accordance with § 281.25 certifying to applicable state authorities; and

(f) Copies of all applicable state statutes and regulations.

Note to § 281.20: EPA has designed an optional application form that is available for use by state applicants.

§ 281.21 Description of State Program.

A state seeking to administer a program under this part must submit a description of the program it proposes to administer under state law in lieu of the federal program. The description of a state's existing or planned program must include:

(a) The scope of the state program:

(1) whether the state program regulates UST systems containing petroleum or hazardous substances, or both;

(2) whether the state program is more stringent or broader in scope than the federal program, and in what ways; and

(3) whether the state has any existing authority over Indian lands or has existing agreements with Indian Tribes relevant to the regulation of underground storage tanks.

(b) The organization and structure of the state and local agencies with responsibility for administering the program. The jurisdiction and responsibilities of all state and local implementing agencies must be delineated, appropriate procedures for coordination set forth, and one state agency designated as a ''lead agency'' to facilitate communications between EPA and the state.

(c) Staff resources to carry out and enforce the required state program elements, both existing and planned, including the number of employees, agency where employees are located, general duties of the employees, and current limits or restrictions on hiring or utilization of staff.

(d) An existing state funding mechanism to meet the estimated costs of administering and enforcing the required state program elements, and any restrictions or limitations upon this funding.

§ 281.22 Procedures for Adequate Enforcement.

A state must submit a description of its compliance monitoring and enforcement procedures, including related state administrative or judicial review procedures.

§ 281.23 Memorandum of Agreement.

EPA and the approved state will negotiate a Memorandum of Agreement (MOA) containing proposed areas of coordination and shared responsibilities between the state and EPA and separate EPA and state roles and responsibilities in areas including, but not limited to: Implementation of partial state programs; enforcement; compliance monitoring; EPA oversight; and sharing and reporting of information. At the time of approval, the MOA must be signed by the Regional Administrator and the appropriate official of the state lead agency.

§ 281.24 Attorney General's Statement.

(a) A state must submit a written demonstration from the Attorney General that the laws and regulations of the state provide adequate authority to carry out the program described under § 281.21 and to meet other requirements of this part. This statement may be signed by independent legal counsel for the state rather than the Attorney General, provided that such counsel has full authority to independently represent the state Agency in court on all matters pertaining to the state program. This statement must include citations to the specific statutes, administrative regulations, and where appropriate, judicial decisions that demonstrate adequate authority to regulate and enforce requirements for UST systems. State statutes and regulations cited by the state Attorney General must be fully effective when the program is approved.

(b) If a state currently has authority over underground storage tank activities on Indian country, the statement must contain an appropriate analysis of the state's authority.

Subpart C—Criteria for No Less Stringent

§ 281.30 New UST System Design, Construction, Installation, and Notification.

In order to be considered no less stringent than the corresponding federal requirements for new UST system design, construction, installation, and notification, the state must have requirements that ensure all new underground storage tanks, and the attached piping in contact with the ground and used to convey the regulated substance stored in the tank, conform to the following:

(a) Be designed, constructed, and installed in a manner that will prevent releases for their operating life due to manufacturing defects, structural failure, or corrosion. Unless the state requires manufacturer and installer financial responsibility and installer certification in accordance with § 9003(i)(2) of the Solid Waste Disposal Act, then the state must meet the following:

(1) Tanks and piping replaced or installed after the state's submission of its state program approval or revision application must use interstitial monitoring within secondary containment in accordance with § 9003(i)(1) of the Solid Waste Disposal Act.

(2) Motor fuel dispenser systems installed and connected to an UST system after the state's submission of its state program approval or revisions application must be equipped with under-dispenser containment in accordance with § 9003(i)(1) of the Solid Waste Disposal Act.

Note to paragraph (a): Codes of practice developed by nationally-recognized organizations and national independent testing laboratories may be used to demonstrate that the state program requirements are no less stringent in this area.;

(b) Be provided with equipment to prevent spills and tank overfills when new tanks are installed or existing tanks are upgraded, unless the tank does not receive more than 25 gallons at one time. Flow restrictors used in vent lines are not allowable forms of overfill prevention when overfill prevention is installed or replaced after the state applies for state program approval or revision.

(c) All UST system owners and operators must notify the implementing state agency of the existence of any new UST system and adequately notify the implementing state agency within a reasonable timeframe when assuming ownership of an UST system using a form designated by the state agency.

§ 281.31 Upgrading UST Systems.

In order to be considered no less stringent than the corresponding federal upgrading requirements, the state must have requirements that ensure UST systems installed prior to the state applying for state program approval or revision meet the requirements of § 281.30; are upgraded to prevent releases for their operating life due to corrosion, and spills, and overfills; or are permanently closed with the following exceptions:

(a) Upgrade Requirements for Previously Deferred UST Systems. Previously deferred wastewater treatment tank systems, airport hydrant fuel distribution systems, and UST systems with field-constructed tanks where installation commenced before the state's submission of its state program approval or revision application must, within three years of the effective date of this section, as amended, or prior to the state's

submission of its state program approval or revision application, whichever date is later, meet the requirements of § 281.30 or be permanently closed.

(b) Upgrade Requirements for Other UST Systems. States may allow UST systems to be upgraded if the state determines that the upgrade is appropriate to prevent releases for the operating life of the UST system due to corrosion and spill or overfills.

§ 281.32 General Operating Requirements.

In order to be considered no less stringent than the corresponding federal general operating requirements, the state must have requirements that ensure all new and existing UST systems conform to the following:

(a) Prevent spills and overfills by ensuring that the space in the tank is sufficient to receive the volume to be transferred and that the transfer operation is monitored constantly;

(b) Where equipped with cathodic protection, be operated and maintained by a person with sufficient training and experience in preventing corrosion, and in a manner that ensures that no releases occur during the operating life of the UST system;

Note to paragraph (b): Codes of practice developed by nationally-recognized organizations and national independent testing laboratories may be used to demonstrate the state program requirements are no less stringent.

(c) Be made of or lined with materials that are compatible with the substance stored;

(d) At the time of upgrade or repair, be structurally sound and upgraded or repaired in a manner that will prevent releases due to structural failure or corrosion during their operating lives;

(e) Have spill and overfill prevention equipment periodically tested in a manner and frequency that ensures its functionality for the operating life of the equipment and have the integrity of secondary containment periodically tested in a manner and frequency that prevents releases during the operating life of the UST system, except on equipment not required to be tested by 40 CFR part 280.

(f) Have operation and maintenance walkthrough inspections periodically conducted in a manner and frequency that ensures proper operation and maintenance for the operating life of the UST system.

(g) Have records of monitoring, testing, repairs, and operation and maintenance walkthrough inspections. These records must be made readily available when requested by the implementing agency.

§ 281.33 Release Detection.

In order to be considered no less stringent than the corresponding federal requirements for release detection, the state must have requirements that at a minimum ensure all UST systems are provided with release detection that conforms to the following:

(a) General Methods. Release detection requirements for owners and operators must consist of a method, or combination of methods, that is:

(1) Capable of detecting a release of the regulated substance from any portion of the UST system that routinely contains regulated substances—as effectively as any of the methods allowed under the federal technical standards—for as long as the UST system is in operation. In comparing methods, the implementing agency shall consider the size of release that the method can detect and the speed and reliability with which the release can be detected.

(2) Designed, installed, calibrated, operated and maintained so that releases will be detected in accordance with the capabilities of the method;

(3) Operated and maintained, and electronic and mechanical components are tested periodically, in a manner and frequency that ensures proper operation to detect releases for the operating life of the release detection equipment.

(b) Phase-in of requirements. Release detection requirements must, at a minimum, be applied at all UST systems, except for UST systems previously deferred under § 280.10(a)(1), prior to the state's submission of its state program approval or revision application. Release detection requirements must, at a minimum, be scheduled to be applied to previously deferred UST systems as follows:

(1) Immediately when a new previously deferred UST system is installed, and

(2) For any wastewater treatment tank system, airport hydrant fuel distribution system, or UST system with field constructed tanks installed prior to the state's submission of its state program approval or revision application, within three years of the effective date of this section, as amended, or prior to the state's submission of its state program approval or revision application, whichever date is later.

(3) For any UST system that stores fuel solely for the use of emergency power generators that was installed prior to the state's submission of its state program approval or revision application, within one year of the effective date of this section, as amended, or prior to the state's submission of its state program approval or revision application, whichever date is later.

(c) Requirements for Petroleum Tanks. All petroleum tanks must meet the following requirements:

(1) All petroleum tanks must be sampled, tested, or checked for releases at least monthly, except that tanks (that is, tanks and piping protected from releases due to corrosion and equipped with both spill and overfill prevention devices) installed prior to the state's submission of its State Program Approval or revision application may temporarily use monthly inventory control (or its equivalent) in combination with tightness testing (or its equivalent) conducted every five years for the first 10 years after the tank is installed; and

(2) New or replaced petroleum tanks must use interstitial monitoring within secondary containment in accordance with § 9003(i)(1) of the Solid Waste Disposal Act except when the state requires manufacturer and installer financial responsibility and installer certification in accordance with § 9003(i)(2) of the Solid Waste Disposal Act.

(d) Requirements for Petroleum Piping. All underground piping attached to the tank that routinely conveys petroleum must conform to the following:

(1) If the petroleum is conveyed under greater than atmospheric pressure:

(i) The piping must be equipped with release detection that detects a release within an hour by restricting or shutting off flow or sounding an alarm; and

(ii) The piping must have monthly monitoring applied or annual tightness tests conducted.

(2) If suction lines are used:

(i) Tightness tests must be conducted at least once every 3 years, unless a monthly method of detection is applied to this piping; or

(ii) The piping is designed to allow the contents of the pipe to drain back into the storage tank if the suction is released and is also designed to allow an inspector to immediately determine the integrity of the piping system.

(3) New or replaced petroleum piping must use interstitial monitoring within secondary containment in accordance with § 9003(i)(1) of the Solid Waste Disposal Act except when the state requires evidence of financial responsibility and certification in accordance with § 9003(i)(2) of the Solid Waste Disposal Act.

(e) Requirements for Hazardous Substance UST Systems. All hazardous substance UST systems must use interstitial monitoring within secondary containment of the tanks and the attached underground piping that conveys the regulated substance stored in the tank. For hazardous substance UST systems installed prior to the state's submission of its state program

approval or revision application, owners and operators can use another form of release detection if the owner and operator can demonstrate to the state (or the state otherwise determines) that another method will detect a release of the regulated substance as effectively as other methods allowed under the state program for petroleum UST systems and that effective corrective action technology is available for the hazardous substance being stored that can be used to protect human health and the environment.

§ 281.34 Release Reporting, Investigation and Confirmation.

In order to be considered no less stringent than the corresponding federal requirements for release reporting, investigation, and confirmation, the state must have requirements that ensure all owners and operators conform with the following:

(a) Promptly investigate all suspected releases, including:

(1) When unusual operating conditions, release detection signals and environmental conditions at the site suggest a release of regulated substances may have occurred or the interstitial space may have been compromised; and

(2) When required by the implementing agency to determine the source of a release having an impact in the surrounding area; and

(b) Promptly report all confirmed underground releases and any spills and overfills that are not contained and cleaned up.

(c) Ensure that all owners and operators contain and clean up unreported spills and overfills in a manner that will protect human health and the environment.

§ 281.35 Release Response and Corrective Action.

In order to be considered no less stringent than the corresponding federal requirements for release response and corrective action, the state must have requirements that ensure:

(a) All releases from UST systems are promptly assessed and further releases are stopped;

(b) Actions are taken to identify, contain and mitigate any immediate health and safety threats that are posed by a release (such activities include investigation and initiation of free product removal, if present);

(c) All releases from UST systems are investigated to determine if there are impacts on soil and ground water, and any nearby surface waters. The extent of soil and ground-water contamination must be delineated when a potential threat to human health and the environment exists.

(d) All releases from UST systems are cleaned up through soil and ground water remediation and any other steps, as necessary to protect human health and the environment;

(e) Adequate information is made available to the state to demonstrate that corrective actions are taken in accordance with the requirements of paragraphs (a) through (d) of this section. This information must be submitted in a timely manner that demonstrates its technical adequacy to protect human health and the environment; and

(f) In accordance with § 280.67, the state must notify the affected public of all confirmed releases requiring a plan for soil and ground water remediation, and upon request provide or make available information to inform the interested public of the nature of the release and the corrective measures planned or taken.

§ 281.36 Out-of-Service UST Systems and Closure.

In order to be considered no less stringent than the corresponding federal requirements for temporarily closed UST systems and permanent closure, the state must have requirements that ensure UST systems conform with the following:

(a) Removal from Service. All new and existing UST systems temporarily closed must:

(1) Continue to comply with general operating requirements, release reporting and investigation, and release response and corrective action;

(2) Continue to comply with release detection requirements if regulated substances are stored in the tank;

(3) Be closed off to outside access; and

(4) Be permanently closed if the UST system has not been protected from corrosion and has not been used in one year, unless the state approves an extension after the owner and operator conducts a site assessment.

(b) Permanent Closure of UST Systems. All tanks and piping must be cleaned and permanently closed in a manner that eliminates the potential for safety hazards and any future releases. The owner or operator must notify the state of permanent UST system closures. The site must also be assessed to determine if there are any present or were past releases, and if so, release response and corrective action requirements must be complied with.

(c) All UST systems taken out of service before the effective date of the federal regulations must permanently close in accordance with paragraph (b) of this section when directed by the implementing agency.

§ 281.37 Financial Responsibility for UST Systems Containing Petroleum.

(a) In order to be considered no less stringent than the federal requirements for financial responsibility for UST systems containing petroleum, the state requirements for financial responsibility for petroleum UST systems must ensure that:

(1) Owners and operators have $1 million per occurrence for corrective action and third-party claims in a timely manner to protect human health and the environment;

(2) Owners and operators not engaged in petroleum production, refining, and marketing and who handle a throughput of 10,000 gallons of petroleum per month or less have $500,000 per occurrence for corrective action and third-party claims in a timely manner to protect human health and the environment;

(3) Owners and operators of 1 to 100 petroleum USTs must have an annual aggregate of $1 million; and

(4) Owners and operators of 101 or more petroleum USTs must have an annual aggregate of $2 million.

(b) States may allow the use of a wide variety of financial assurance mechanisms to meet this requirement. Each financial mechanism must meet the following criteria in order to be no less stringent than the federal requirements. The mechanism must: Be valid and enforceable; be issued by a provider that is qualified or licensed in the state; not permit cancellation without allowing the state to draw funds; ensure that funds will only and directly be used for corrective action and third party liability costs; and require that the provider notify the owner or operator of any circumstances that would impair or suspend coverage.

(c) States must require owners and operators to maintain records that demonstrate compliance with the state financial responsibility requirements, and these records must be made readily available when requested by the implementing agency.

§ 281.38 Lender Liability.

(a) A state program that contains a security interest exemption will be considered to be no less stringent than, and as broad in scope as, the federal program provided that the state's exemption:

(1) Mirrors the security interest exemption provided for in 40 CFR part 280, subpart I; or

(2) Achieves the same effect as provided by the following key criteria:

(i) A holder, meaning a person who maintains indicia of ownership primarily to protect a security interest in

a petroleum UST or UST system or facility or property on which a petroleum UST or UST system is located, who does not participate in the management of the UST or UST system as defined under § 280.10 of this chapter, and who does not engage in petroleum production, refining, and marketing as defined under § 280.200(b) of this chapter is not:

(A) An ''owner'' of a petroleum UST or UST system or facility or property on which a petroleum UST or UST system is located for purposes of compliance with the requirements of 40 CFR part 280; or

(B) An ''operator'' of a petroleum UST or UST system for purposes of compliance with the requirements of 40 CFR part 280, provided the holder is not in control of or does not have responsibility for the daily operation of the UST or UST system.

(ii) [Reserved]

(b) [Reserved]

§ 281.39 Operator Training.

In order to be considered no less stringent than the corresponding federal requirements for operator training, the state must have an operator training program that meets the minimum requirements of § 9010 of the Solid Waste Disposal Act.

Subpart D—Adequate Enforcement of Compliance

§ 281.41 Requirements for Enforcement Authority.

(a) Any state agency administering a program must have the authority to implement the following remedies for violations of state program requirements:

(1) To restrain immediately and effectively any person by order or by suit in state court from engaging in any unauthorized activity that is endangering or causing damage to public health or the environment;

(2) To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement;

(3) To assess or sue to recover in court civil penalties as follows:

(i) Civil penalties for failure to notify or for submitting false information pursuant to tank notification requirements must be capable of being assessed up to $5,000 or more per violation.

(ii) Civil penalties for failure to comply with any state requirements or standards for existing or new tank systems must be capable of being assessed for each instance of violation, up to $5,000 or more for each tank for each day of violation. If the violation is continuous, civil penalties shall capable of being assessed up to $5,000 or more for each day of violation.

(4) To prohibit the delivery, deposit, or acceptance of a regulated substance into an underground storage tank identified by the state to be ineligible for such delivery, deposit, or acceptance in accordance with § 9012 of the Solid Waste Disposal Act.

(b) The burden of proof and degree of knowledge or intent required under state law for establishing violations under paragraph (a)(3) of this section, must be no greater than the burden of proof or degree of knowledge or intent that EPA must provide when it brings an action under Subtitle I of the Solid Waste Disposal Act.

(c) A civil penalty assessed, sought, or agreed upon by the state enforcement agency(ies) under paragraph (a)(3) of this section must be appropriate to the violation.

§ 281.42 Requirements for Public Participation.

Any state administering a program must provide for public participation in the state enforcement process by providing any one of the following three options:

(a) Authority that allows intervention analogous to Federal Rule 24(a)(2), and assurance by the appropriate state enforcement agency that it will not oppose intervention under the state analogue to Rule 24(a)(2) on the ground that the applicant's interest is adequately represented by the State.

(b) Authority that allows intervention as of right in any civil action to obtain the remedies specified in 281.41 by any citizen having an interest that is or may be adversely affected; or

(c) Assurance by the appropriate state agency that:

(1) It will provide notice and opportunity for public comment on all proposed settlements of civil enforcement actions (except where immediate action is necessary to adequately protect human health and the environment);

(2) It will investigate and provide responses to citizen complaints about violations; and

(3) It will not oppose citizen intervention when permissive intervention is allowed by statute, rule, or regulation.

§ 281.43 Sharing of Information.

(a) States with approved programs must furnish EPA, upon request, any information in state files obtained or used in the administration of the state program. This information includes:

(1) Any information submitted to the state under a claim of confidentiality. The state must submit that claim to EPA when providing such information. Any information obtained from a state and subject to a claim of confidentiality will be treated in accordance with federal regulations in 40 CFR part 2; and

(2) Any information that is submitted to the state without a claim of confidentiality. EPA may make this information available to the public without further notice.

(b) EPA must furnish to states with approved programs, upon request, any information in EPA files that the state needs to administer its approved state program. Such information includes:

(1) Any information that is submitted to EPA without a claim of confidentiality; and

(2) Any information submitted to EPA under a claim of confidentiality, subject to the conditions in 40 CFR part 2.

Subpart E—Approval Procedures

§ 281.50 Approval Procedures for State Programs.

(a) The following procedures are required for all applications, regardless of whether the application is for a partial or complete program, as defined in § 281.12, or final approval in accordance with § 281.11.

(b) Before submitting an application to EPA for approval of a state program, the state must provide an opportunity for public notice and comment in the development of its underground storage tank program.

(c) When EPA receives a state program application, EPA will examine the application and notify the state whether its application is complete, in accordance with the application components required in § 281.20. The 180-day statutory review period begins only after EPA has determined that a complete application has been received.

(d) The state and EPA may by mutual agreement extend the review period.

(e) After receipt of a complete program application, the Administrator will tentatively determine approval or disapproval of the state program. EPA shall issue public notice of the tentative determination in the **Federal Register**; in enough of the largest newspapers in the state to attract statewide attention; and to persons on the state agency mailing list and any other persons who the agency has reason to believe are interested. Notice of the tentative determination must also:

(1) Afford the public 30 days after the notice to comment on the state's application and the Administrator's tentative determination; and

(2) Include a general statement of the areas of concern, if the Administrator indicates the state program may not be approved; and

(3) Note the availability for inspection by the public of the state program application; and

(4) Indicate that a public hearing will be held by EPA no earlier than 30 days after notice of the tentative determination unless insufficient public interest is expressed, at which time the Regional Administrator may cancel the public hearing.

(f) Within 180 days of receipt of a complete state program application, the Administrator must make a final determination whether to approve the state program after review of all public comments. EPA will give notice of its determination in the **Federal Register** and codify the approved state program. The notice must include a statement of the reasons for this determination and a response to significant comments received.

§ 281.51 Revision of Approved State Programs.

(a) Either EPA or the approved state may initiate program revision. Program revision may be necessary when the controlling federal or state statutory or regulatory authority is changed or when responsibility for the state program is shifted to a new agency or agencies. The state must inform EPA of any proposed modifications to its basic statutory or regulatory authority or change in division of responsibility among state agencies. EPA will determine in each case whether a revision of the approved program is required. Approved state programs must submit a revised application within three years of any changes to this part that requires a program revision.

(b) Whenever the Administrator has reason to believe that circumstances have changed with respect to an approved state program or the federal program, the Administrator may request, and the state must provide, a revised application as prescribed by EPA.

(c) The Administrator will approve or disapprove program revisions based on the requirements of this part and of Subtitle I pursuant to the procedures under this section, or under § 281.50 if EPA has reason to believe the proposed revision will receive significant negative comment from the public.

(1) The Administrator must issue public notice of planned approval or disapproval of a state program revision in the **Federal Register**; in enough of the largest newspapers in the state to attract statewide attention; and by mailing to persons on the state agency mailing list and to any other persons who the agency has reason to believe are interested. The public notice must summarize the state program revision, indicate whether EPA intends to approve or disapprove the revision, and provide for an opportunity to comment for a period of 30 days.

(2) The Administrator's decision on the proposed revision becomes effective 60 days after the date of publication in the **Federal Register** in accordance with paragraph (c)(1) of this section, unless significant negative comment opposing the proposed revision is received during the comment period. If significant negative comment is received, EPA must notify the state and within 60 days after the date of publication, publish in the **Federal Register** either:

(i) A withdrawal of the immediate final decision, which will then be treated as a tentative decision in accordance with the applicable procedures of § 281.50(e) and (f); or

(ii) A notice that contains a response to significant negative comments and affirms either that the immediate final decision takes effect or reverses the decision.

(d) Revised state programs that receive approval must be codified in the **Federal Register**.

Subpart F—Withdrawal of Approval of State Programs

§ 281.60 Criteria for Withdrawal of Approval of State Programs.

The Administrator may withdraw program approval when the Agency determines that a state no longer has adequate regulatory or statutory authority or is not administering and enforcing an approved program in accordance with this part. The state must have adequate capability to administer and enforce the state program. In evaluating whether such capability exists, the Agency will consider whether the state is implementing an adequate enforcement program by evaluating the quality of compliance monitoring and enforcement actions.

§ 281.61 Procedures for Withdrawal of Approval of State Programs.

(a) The following procedures apply when a state with an approved program voluntarily transfers to EPA those program responsibilities required by federal law.

(1) The state must give EPA notice of the proposed transfer, and submit, at least 90 days before the transfer, a plan for the orderly transfer of all relevant program information necessary for EPA to administer the program.

(2) Within 30 days of receiving the state's transfer plan, EPA must evaluate the plan and identify any additional information needed by the federal government for program administration.

(3) At least 30 days before the transfer is to occur, EPA must publish notice of the transfer in the **Federal Register**; in enough of the largest newspapers in the state to attract statewide attention; and to persons on appropriate state mailing lists.

(b) The following procedures apply when the Administrator considers withdrawing approval.

(1) When EPA begins proceedings to determine whether to withdraw approval of a state program (either on its own initiative or in response to a petition from an interested person), withdrawal proceedings will be conducted in accordance with procedures set out in 40 CFR 271.23(b) and (c), except for § 271.23(b)(8)(iii) to the extent that it deviates from requirements under § 281.60.

(2) If the state fails to take appropriate action within a reasonable time, not to exceed 120 days after notice from the Administrator that the state is not administering and enforcing its program in accordance with the requirements of this part, EPA will withdraw approval of the state's program.

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Part IV

Farm Credit Administration

12 CFR Part 652

Federal Agricultural Mortgage Corporation Funding and Fiscal Affairs; Farmer Mac Investments and Liquidity Management; Proposed Rule

FARM CREDIT ADMINISTRATION

12 CFR Part 652

RIN 3052–AC56

Federal Agricultural Mortgage Corporation Funding and Fiscal Affairs; Farmer Mac Investments and Liquidity Management

AGENCY: Farm Credit Administration.

ACTION: Proposed rule.

SUMMARY: The Farm Credit Administration (FCA, Agency, us, or we) proposes to amend our regulations governing the Federal Agricultural Mortgage Corporation (Farmer Mac or the Corporation) in the areas of non-program investments and liquidity. We are proposing to modify the specific requirements supporting our objective to ensure that Farmer Mac maintains adequate liquidity to withstand stressful conditions in accordance with board-established risk tolerance and holds only high-quality, liquid investments in its liquidity reserve. We also propose to expand the allowable purposes of Farmer Mac's non-program investments to include investments that would add value to Farmer Mac's operations by complementing its program activities. Further, we request comments on the best approach for compliance with section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or DFA), which requires us to remove all references to and requirements relating to credit ratings and to substitute other appropriate standards of creditworthiness. Finally, we propose significant reorganizing of sections to make the flow of the issues covered more logical.

DATES: You may send us comments by January 17, 2012.

ADDRESSES: We offer a variety of methods for you to submit comments on this proposed rule. For accuracy and efficiency reasons, commenters are encouraged to submit comments by email or through the Agency's Web site. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at *reg-comm@fca.gov.*
- *FCA Web site: http://www.fca.gov.* Select ''Public Commenters,'' then ''Public Comments,'' and follow the directions for ''Submitting a Comment.''
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Laurie A. Rea, Director, Office of Secondary Market Oversight, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of all comments we receive at our office in McLean, Virginia, or on our Web site at *http://www.fca.gov.* Once you are in the Web site, select ''Public Commenters,'' then ''Public Comments,'' and follow the directions for ''Reading Submitted Public Comments.'' We will show your comments as submitted, but for technical reasons we may omit items such as logos and special characters. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce Internet spam.

FOR FURTHER INFORMATION CONTACT:

Joseph T. Connor, Associate Director for Policy and Analysis, Office of Secondary Market Oversight, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4280, TTY (703) 883–4434;

or

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SUPPLEMENTARY INFORMATION:

I. Objective

The objective of this proposed rule is to ensure the safety and soundness and continuity of Farmer Mac operations for the purpose of furthering its public mission. To achieve this objective FCA is proposing to:

- Revise the permissible purposes of non-program investments;
- Modify the type, quality, maximum remaining term and maximum amount of non-program investments [1] that may be held by Farmer Mac;
- Strengthen diversification requirements, including portfolio limits on specific types of investments and counterparty exposure limits;
- Revise board policy and stress testing requirements;
- Modify the non-program investment portfolio limit;
- Revise the computation, and level of the minimum, liquidity reserve requirement;
- Reduce the regulatory burden associated with investments that fail to meet eligibility criteria after purchase or are otherwise unsuitable;
- Seek public input on approaches to remove reliance on credit ratings in compliance with section 939A of the Dodd-Frank Act; and
- Reorganize the regulations to make the flow of the issues covered more logical by delineating more clearly among sections governing investment management, interest rate risk management, and liquidity risk management.

II. Introduction

On May 19, 2010, we published an advance notice of proposed rulemaking (ANPRM) that considered revisions to Farmer Mac's non-program investment and liquidity requirements.[2] The 45-day comment period ended on July 6, 2010. After considering the comments we received on this ANPRM, we now propose revisions to these requirements.

III. Background

Congress established Farmer Mac in 1988 as part of its effort to resolve the agricultural crisis of the 1980s. Congress expected that establishing a secondary market for agricultural and rural housing mortgages would increase the availability of competitively priced mortgage credit to America's farmers, ranchers, and rural homeowners.

A guiding principle for FCA in establishing regulations governing Farmer Mac is to maintain an appropriate balance between the Corporation's mission achievement and risk. Specifically, the intent of this regulation is to allow Farmer Mac to sufficient flexibility to fully serve its customers and provide an appropriate return for investors while ensuring that it engages in safe and sound operations. We believe achieving an appropriate balance between mission achievement and risk should provide a high degree of certainty that Farmer Mac will continue to make its products available to serve customers without the need to issue debt to the Department of Treasury or seek any other form of government financial assistance.[3]

Existing FCA regulations currently authorize Farmer Mac to invest in non-program investments for three purposes;

[1] Section 652.5 defines ''non-program investments'' as investments other than those in (1) ''qualified loans'' as defined in section 8.0(9) of the Farm Credit Act of 1971, as amended (Act), or (2) securities collateralized by ''qualified loans.'' Section 8.0(9) is codified at 12 U.S.C. 2279aa.

[2] 75 FR 27951.

[3] Under certain specific adverse circumstances, Farmer Mac is authorized to issue debt to the Department of the Treasury to meet obligations on guarantees. *See* section 8.13 of the Act (12 U.S.C. 2279aa–13).

to manage short-term surplus funds, to comply with interest rate risk requirements, and to comply with liquidity reserve requirements.[4] Liquidity is a firm's ability to meet its obligations as they come due without substantial negative impact on its operations or financial condition. The availability of an appropriately sized portfolio comprised of highly liquid assets is necessary for the Corporation to conduct its business and to achieve its statutory purposes. Moreover, we believe that Farmer Mac's liquidity reserve portfolio, while it must be low risk, can appropriately include investments that provide a positive return on the portfolio and still fulfill the investment purposes authorized by regulation under most market conditions.

Liquidity risk is the risk that the Corporation could become unable to meet expected obligations and reasonably estimated unexpected obligations as they come due without substantial adverse impact on its operations or financial condition. Reasonably estimated liquidity risk should consider scenarios of debt market disruptions, asset market disruptions such as industry sector security price risk scenarios, and other contingent liquidity events. Contingent liquidity events include significant changes in overall economic conditions, events that would impact the market's perception of Farmer Mac (such as reputation risks and legal risks), and a broad and significant deterioration in the agriculture sector and its potential impact on Farmer Mac's need for cash to fulfill obligations under the terms of products such as Long-Term Standby Purchase Commitments and AgVantage Plus bond guarantees.

While the management of Farmer Mac's non-program investment portfolio and its liquidity risk are closely linked, they are not synonymous. Management of the non-program investment portfolio includes market risk, credit risk, and cash management, as well as earnings performance.[5] Moreover, as discussed below, we propose to permit investments that complement program activities, even if those investments may not contribute significantly to liquidity risk management. The inclusion of investments of this nature highlights the distinction between investment management and liquidity risk management.

IV. General Discussion of Letters Commenting on the ANPRM

We received four comment letters on the ANPRM, one each from the Farm Credit Council (Council), AgFirst Farm Credit Bank (AgFirst), Farm Credit West ACA (Farm Credit West), and Farmer Mac. We discuss in this preamble those comments that pertain to changes we are proposing or to certain provisions where we propose no changes. Some of the questions in our ANPRM, however, were very general and theoretical and discussed potential policy options that we have elected not to propose in this rulemaking. We do not discuss comments submitted in response to those questions, but we will consider them in future rulemakings as appropriate.

The Council commented generally that Farmer Mac's liquidity requirements should be commensurate with its funding risk and equivalent to the liquidity standards required for Farm Credit System (System) lenders engaged in similar activities. The Council's letter also included detailed comments to many of the specific questions raised in the ANPRM, and it identified specific instances where the Council believes the Farmer Mac regulations should be more closely aligned with those governing the System. Ag First's and Farm Credit West's letters concurred with the opinions expressed in the Council's comment letter, and Ag First's letter also included several specific comments.

In response to commenters, we agree, in general that the liquidity requirements governing Farmer Mac and the System should be consistent, and alignment is appropriate in certain areas. However, we also believe that Farmer Mac's business model, which focuses on secondary market activities (as opposed to the wholesale and retail lending models of FCS banks), combined with the other differences in their authorizing statutes, provide ample justification for differences in certain areas of their regulatory structures. We address the Council's and AgFirst's specific comments, including specific areas of alignment and differentiation, below in the section-by-section discussion.

In its comment letter, Farmer Mac agreed that the ANPRM identified important questions relating to liquidity. It believes, however, that a number of these questions relate specifically to policies and procedures that should be set at its board level. It therefore reserved specific comments until FCA issues a proposed rule, and it instead submitted two conceptual level comments for FCA's consideration.

Farmer Mac first suggested that ''any proposed regulation should establish broad guidelines that lead to prudent risk management rather than being prescriptive.'' Farmer Mac stated that in an economic environment that could change from 1 minute to the next, its ability to respond quickly to market forces and adjust its use of a range of asset classes is critical. It expressed concern that rigid and narrow eligibility criteria and amounts for its liquidity portfolio could lead to limited options and thus result in greater concentrations of relatively higher risk asset classes or particular assets. It recognized the FCA's regulatory responsibility to ensure safety and soundness, but it believes the onus of establishing appropriate specific policies and procedures should be left to its board and management.

We agree that Farmer Mac's board of directors is ultimately accountable and responsible for effective implementation of prudent policies and practices. Nonetheless, as the Corporation's prudential regulator, we are charged with establishing an appropriate regulatory and supervisory framework to promote the long-term viability and safety and soundness of the Corporation as well as achievement of its public mission.

Farmer Mac encouraged FCA to consider the 2010 Interagency Policy Statement on Funding and Liquidity Risk Management adopted by the other Federal banking regulatory agencies.[6] Farmer Mac stated that this policy outlines a comprehensive yet flexible regulatory policy for funding and liquidity risk that promotes safety and soundness and yet allows for differences in board-approved policies across financial institutions as well as across market and economic environments. Farmer Mac further stated that regulations should allow for adherence in a variety of market situations to ensure real safety and soundness and, for this reason, regulations that establish guidelines or parameters, together with an examination process that tests board-approved policies and procedures,

[4] 12 CFR 652.25.

[5] We view the management of non-program investment earnings performance as including both the avoidance of underperforming appropriate benchmarks for this portfolio as well as avoiding performance that is excessive relative to appropriate benchmarks—as excessive returns can reasonably be viewed as indications of excessive liquidity risk. We discuss this concept at length in our ANPRM, at 75 FR 27952–53. We continue to study this concept but do not propose regulatory guidance regarding the establishment of such benchmarks at this time.

[6] *See* 75 FR 13656, Mar. 22, 2010. These agencies are the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Federal Reserve), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUS).

would be the best framework for ensuring that Farmer Mac continues to maintain adequate amounts and types of liquidity.

In response to Farmer Mac's request that FCA consider the Interagency Policy Statement, we note that there are many similarities between that Statement and this proposed rule, particularly with respect to the definition of highly liquid assets, stress testing requirements, and contingency funding plans. In addition, this proposed rule has also, where appropriate, drawn on guidance issued to international regulators by the Basel Committee on Banking Supervision (Basel Committee) on the topic of liquidity risk management.[7]

However, both the Interagency Policy Statement and the guidance issued by the Basel Committee apply to a very large and diverse group of financial institutions with wide variation in structure, size, and complexity of operations. That breadth of covered institutions necessitates that any Interagency Policy Statement providing guidance to all of them must be general in its content.

OSMO's role as regulator of one institution provides the opportunity to be more specific in its guidance. Nonetheless, we generally agree with Farmer Mac's main point to preserve as much of the flexibility embedded in the Interagency Policy Statement as is appropriate.

Farmer Mac's second conceptual level comment is that, since its liquidity portfolio will continue to be a large part of its balance sheet, any new regulatory approach should recognize the tradeoff between the need for liquidity and the need for ''asset income'' (*i.e.,* earnings). Farmer Mac states that prudent business practices cannot ignore the need to provide some return on investments, given the necessary size of its portfolio. Farmer Mac believes the need for return on its investments is even more critical because of the statutory requirements that it hold minimum capital of 275 basis points against the investments.[8] Farmer Mac asserted the importance of balancing the costs of ''a strong liquidity position with the economic interests of Farmer Mac's customers and other stakeholders that serve rural America.'' Farmer Mac suggests this need for regulatory balance is even more critical in volatile financial markets, when asset prices or expected returns can change suddenly. The Corporation further states that regulations that establish ''guidelines'' rather than prescriptive ''narrow targets or asset classes'' would provide Farmer Mac the flexibility to respond appropriately to volatile markets and ''prudently reduce risk by adjusting policies and changing the asset mix to eliminate illiquid assets, while maintaining an appropriate return.'' Farmer Mac asserts that ultimately, this will lead to the safest and most liquid portfolio possible.

In response to this point, we agree that our regulations should recognize the tradeoff between the need for liquidity and the need for a reasonable return on assets. This concept is central to this rulemaking and we discussed the policy implications of the risk and return tradeoff in detail in the ANPRM.[9] There, we noted that the balance we target in the revised regulations is intended to serve all Farmer Mac stakeholders, who include not only customers who serve the financing needs of rural America and investors who require a return on investment, but also taxpayers. Liquidity risk management is a specified purpose of the non-program investment portfolio. Income, while acceptable within a reasonable range, is not a purpose of the non-program investment portfolio. Accordingly, our guiding principle is that high liquidity attributes must generally take precedence over earnings generation in Farmer Mac's non-program investment portfolio.

V. Section-by-Section Discussion of Proposed Revisions

We propose to reorganize the rule considerably and provide the following table to orient the reader to the proposed reorganization. The left column of the table contains the existing rule's section headings and the right column contains the proposed reorganization of section sequence and heading changes.

Existing regulations	Proposed reorganization
§ 652.1 Purpose.	§ 652.1 Purpose.
§ 652.5 Definitions.	§ 652.5 Definitions.
§ 652.10 Investment management and requirements.	§ 652.10 Investment management.
§ 652.15 Interest rate risk management and requirements.	§ 652.15 Non-program investment purposes and limitation.
§ 652.20 Liquidity reserve management and requirements.	§ 652.20 Eligible non-program investments.
§ 652.25 Non-program investment purposes and limitation.	§ 652.25 Management of ineligible and unsuitable investments.
§ 652.30 Temporary regulatory waivers or modifications for extraordinary situations.	§ 652.30 Interest rate risk management.
§ 652.35 Eligible non-program investments.	§ 652.35 Liquidity management.
§ 652.40 Stress tests for mortgage securities.	§ 652.40 Liquidity reserve requirement and supplemental liquidity.
§ 652.45 Divestiture of ineligible non-program investments.	§ 652.45 Temporary regulatory waivers or modifications for extraordinary situations.

We will address each section below in the order it appears in these proposed regulations and discuss, where applicable, the rationale for the reorganization. Generally, the proposed reorganization is meant to address sequentially as completely as possible the three major categories of management governed in the rule: Investment management; interest rate risk management; and liquidity management.

Throughout this regulation, we propose minor technical, clarifying, and non-substantive language changes that we do not specifically discuss in this preamble.

A. Section 652.1—Purpose

We propose to delete the first sentence of this section as unnecessary. There is no need to list the topics of the subpart.

B. Section 652.5—Definitions

To enhance clarity of the rule, we propose to add a definition of ''cash'' to

[7] ''Principles for Sound Liquidity Risk Management and Supervision,'' Basel Committee on Banking Supervision, September 2008, and ''International framework for liquidity risk management, standards and monitoring,'' Consultative Document, Basel Committee on Banking Supervision, December 2009. These documents can be found on the Basel Committee's Web site at *http://www.bis.org/bcbs.*

[8] Section 8.33 of the Act (12 U.S.C. 2279bb–2).

[9] 75 FR 27952–53, May 19, 2010.

mean cash balances held at Federal Reserve Banks, proceeds from traded-but-not-yet-settled debt, and the insured amount of balances held in deposit accounts at Federal Deposit Insurance Corporation-insured banks.

We also propose to add definitions for two newly proposed planning requirements, the Liability Maturity Management Plan and the Contingency Funding Plan, which are discussed below in the discussion of § 652.35.

We propose to delete the definition of ''liquid investments,'' as well as the definition of ''marketable'' in current § 652.20(c), and to replace those terms with a description of the term ''highly marketable'' in § 652.40(c). This term is addressed in the discussion of that section.

We propose to add a definition of ''liquidity reserve.'' This new definition is described in the discussion of proposed § 652.40.

Finally, we are proposing several technical changes. We propose to correct an erroneous regulatory reference in the definition of *affiliate.* We propose to clarify the definitions of *FCA, Government agency,* and *Government-sponsored agency.* And we define *OSMO* to mean FCA's Office of Secondary Market Oversight.

C. Section 652.10—Investment Management

Section 652.10 would continue to require Farmer Mac to establish and follow certain fundamental practices to effectively manage risks in its investment portfolio. The recent crisis and its lingering effects have re-emphasized the importance of sound investment management, and we believe that strengthened regulation would further insure the safe and sound management of investments. Accordingly, we are proposing the revisions discussed herein. In addition, we propose minor technical, clarifying, and non-substantive language changes to this section that we do not specifically discuss in this preamble.

We propose to revise the section heading to delete ''and requirements'' as it should be understood that the regulations contain requirements.

1. Section 652.10(a)—Responsibilities of the Board of Directors

In § 652.10(a), we propose to add the requirement that the Farmer Mac board of directors affirmatively validate the sufficiency of investment policies to ensure the board's full and in-depth understanding of, and control over, the policies.

2. Section 652.10(b)—Investment Policies—General Requirements

Section 652.10(b) lists the items that the board's investment policy must address, and it includes every requirement of § 652.10. Because we propose to change some of those requirements, we also propose to change the listing, to clarify our expectations as to the appropriate content of the board's policies. We discuss below the requirements we propose to revise.

In addition, we propose to move existing § 652.10(c)(2), which requires that Farmer Mac's records or minutes must document any analyses used in formulating policies or amendments of policies, to § 652.10(b). With this move, this requirement would no longer be limited to policies governing market risk; it would apply to all investment management policies.

3. Section 652.10(c)—Investment Policies—Risk Tolerance

Our proposed changes in this section add greater specificity to our expectations regarding our existing requirements. These proposed changes are intended to provide clarity to our expectations but are not intended to fundamentally change the requirements.

Proposed § 652.10(c)(1) requires Farmer Mac's investment policies to establish risk limits for credit risk. Policies would have to include credit quality standards, limits on counterparty risk, and risk diversification standards that appropriately limit concentrations based on geographical area, industry sectors, or asset classes or obligations with similar characteristics. Policies would also have to address management of relationship brokers, dealers and investment bankers, as well as collateral management related to margin requirements on repurchase agreements.

Proposed § 652.10(c)(2) requires Farmer Mac's investment policies to establish risk limits for market risk as the value of its holdings may decline in response to changes in interest rates or market conditions. Exposure to market risk is measured by assessing the effect of changing rates and prices on either the earnings or economic value of an individual instrument, a portfolio, or the entire Corporation.

4. Section 652.10(e)—Internal Controls

In § 652.10(e)(2), we propose adding to the list of personnel whose duties and supervision must be separated from personnel who execute investment transactions. These additional personnel are those who post accounting entries, reconcile trade confirmations, and report compliance with investment policy. We believe this additional separation is a best practice that Farmer Mac must have in place to ensure controls are sufficient and appropriate.

In § 652.10(e)(4), we propose to require Farmer Mac to implement an effective internal audit program to review, at least annually, its investment controls, processes, and compliance with FCA regulations and other regulatory guidance. The internal audit program would specifically have to include a review of Farmer Mac's process for ensuring all investments are eligible and suitable for purchase under its board's investment policies. We believe this requirement provides important guidance on Agency expectations regarding internal oversight of these operations.

5. Section 652.10(f)—Due Diligence

Proposed § 652.10(f) would cover the pre-purchase analysis, ongoing value determination, quarterly stress testing, and pre-sale value verification that Farmer Mac must perform on each non-program investment that it purchases. This provision would combine in one location requirements that are now primarily in existing § 652.10(f) and § 652.40 and in other provisions as well. It would also contain a more detailed description of the due diligence procedures that are required for investments, but we do not intend to change the fundamental intent of the provision.

a. Section 652.10(f)(1)—Pre-Purchase Analysis

Proposed § 652.10(f)(1) would require Farmer Mac to satisfy certain requirements for each investment that it wishes to purchase. Proposed § 652.10(f)(1)(i) sets forth pre-purchase requirements regarding the objective, eligibility, and suitability of investments. This provision would require Farmer Mac, before it purchases an investment, to document the Corporation's investment objective.[10]

Proposed § 652.10(f)(1)(i) would also require Farmer Mac to conduct sufficient due diligence to determine whether the investment is eligible under § 652.35 and suitable under its board-approved investment policies and to document the investment's eligibility and suitability. ''Suitability'' is a term that is new to our regulations. A non-program investment is ''suitable'' if it is eligible under § 652.35(a) and conforms to Farmer Mac board policy. A non-

[10] A similar requirement is currently contained in § 652.15(d)(5), and we therefore propose to delete that provision.

program investment is unsuitable if it is eligible but does not conform to Farmer Mac board policy.

Finally, proposed § 652.10(f)(1)(i) would require Farmer Mac's investment policies to fully address the extent of pre-purchase analysis that management must perform for various types, classes, and structure of investments.

In proposed § 652.10(f)(1)(ii), we would retain from existing § 652.10(f)(1) the requirement that prior to purchase, Farmer Mac must verify the value of an investment (unless it is a new issue) with a source that is independent of the broker, dealer, counterparty, or other intermediary to the transaction.

In proposed § 652.10(f)(1)(iii), we would require Farmer Mac to document its risk assessment of each investment, including, at a minimum, an evaluation of credit risk, market risk, and liquidity risk. In its evaluation of credit risk, § 652.10(f)(1)(iii)(A) would require Farmer Mac to consider, as applicable, the nature and type of underlying collateral, credit enhancements, complexity of the structure, and any other available indicators of the risk of default.

In its evaluation of market risk, § 652.10(f)(1)(iii)(B) would require Farmer Mac to consider how various market stress scenarios including, at a minimum, potential changes in interest rates and market conditions (such as changes in market perceptions of creditworthiness), are likely to affect the cash flow and price of the instrument, using reasonable and appropriate methodologies for stress testing for the type or class of instrument to ensure the investment complies with risk limits established in its investment and interest rate risk policies.

We note that in our existing regulations, the pre-purchase stress testing requirement is combined with a quarterly portfolio stress testing requirement in § 652.40, which is a standalone stress testing regulation. With the intent of improving the organization of the regulations, we have moved the pre-purchase and quarterly stress testing requirements into the paragraph covering due diligence in our investment management regulation (§ 652.10) and have separated the two stress tests in that paragraph to make clearer the difference in stress tests to evaluate individual securities prior to purchase and quarterly stress tests conducted on the investment portfolio.[11]

Existing § 652.40 imposes stress testing requirements only on mortgage securities and requires consideration of interest rate risk scenarios only. The pre-purchase stress testing requirements in proposed § 652.10(f)(1)(iii)(B) would apply to all non-program investments, including Treasury securities, and they would more broadly include market stress scenarios such as changes in market conditions, including market perceptions of creditworthiness, as well as stressed interest rate scenarios. We believe that all investments must be stress tested to provide for a comprehensive and internally consistent analytical framework from which to evaluate the risks in the investment portfolio. In addition, we believe that a broader consideration of changes in market conditions is necessary because of the potential for a direct impact on liquidity of adverse changes in those conditions.

In its response to a question in our ANPRM about stress testing, the Council stated that stress testing should be an integral part of managing liquidity and that regulatory requirements should focus on requiring entities to regularly test various stress scenarios unique to their own balance sheet and potential liabilities. The Council further stated that an institution with a relatively low level of liquidity risk might appropriately accept relatively more risk in its liquidity portfolio, while the opposite might be true for an institution with more liquidity risk. We agree generally with these statements and consider them to be generally consistent with our proposals in the area of stress testing.

In its evaluation of liquidity risk, § 652.10(f)(1)(iii)(C) would require Farmer Mac to consider the investment structure, the depth of the market, and Farmer Mac's ability to liquidate the position under a variety of economic scenarios and market conditions.

b. Section 652.10(f)(2)—Ongoing Value Determination

Proposed § 652.10(f)(2) retains the requirement from the existing provision that at least monthly, Farmer Mac must determine the fair market value of each investment in its non-program investment portfolio and the fair market value of its entire non-program investment portfolio.

c. Section 652.10(f)(3)—Quarterly Stress Testing

As discussed above, we propose moving our non-program investment quarterly stress-testing requirements into § 652.10(f)(3), as part of our due diligence requirements, and removing existing § 652.40 as a standalone stress testing regulation. As with the pre-purchase stress testing discussed above, the proposed rule would impose the quarterly stress testing requirement on all non-program investments, including Treasury securities.

Existing § 652.40 is limited to interest rate stress scenarios. Proposed § 652.10(f)(3)(ii) recognizes that there are stress scenarios other than interest rate risk that could also impact the value or marketability of investments including, at a minimum, changes in market conditions (including market perceptions of creditworthiness).

The revisions would also include a change to the requirement that all stress testing assumptions be supported by verifiable information; we propose to qualify this requirement with ''to the maximum extent practicable'' to recognize that modeling treatments could require assumptions for which insufficient supporting data or information exists, thus requiring management to apply reasonable judgment. Moreover, Farmer Mac would be required to document the basis for all assumptions used.

6. Section 652.10(g)—Reports to the Board of Directors

We propose revisions to § 652.10(g), which specifies information that executive management must report to the board or a board committee each quarter. The requirements would be fundamentally unchanged but the language would be modified to add clarifying detail to FCA expectations. The following would have to be reported:

- Plans and strategies for achieving the board's objective for the investment portfolio;
- Whether the investment portfolio effectively achieves the board's objectives;
- The current composition, quality, and liquidity profile of the investment portfolio;
- The performance of each class of investments and the entire investment portfolio, including all gains and losses incurred during the quarter on individual securities sold before maturity and why they were liquidated;
- Potential risk exposure to changes in market interest rates as identified through quarterly stress testing and any

[11] In the proposal, the quarterly stress testing requirement would be located at § 652.10(f)(3). We would delete § 652.40 as a stand-alone stress testing regulation. In addition, the proposed regulation would impose stress testing in § 652.30(c)(3), as part of interest rate risk management, and in § 652.35(e)(3)(v), as part of the contingency funding plan (CFP). We expect that Farmer Mac will integrate these stress testing requirements to the extent appropriate.

other factors that may affect the value of the investment holdings;

- How investments affect Farmer Mac's capital, earnings, and overall financial condition; and
- Any deviations from the board's policies. These deviations must be formally approved by the board of directors.

D. Section 652.15—Non-Program Investment Purposes and Limitation

We propose to renumber existing § 652.25 as § 652.15. We propose in paragraph (a) to add a new permissible purpose for non-program investments—investments that complement program business activities. This purpose would recognize that certain investments, such as investments with a rural focus that are backed by the full faith and credit of the United States Government, could advance Farmer Mac's mission. This provision would not add any new eligible investments to our authorized list; Farmer Mac would still need to seek FCA's prior approval for any investments not explicitly authorized on the list of eligible investments.

Section 8.3(c)(12) of the Act permits Farmer Mac to ''purchase or sell any securities or obligations * * * necessary and convenient to the business of the Corporation.'' We believe this proposed broadening of investment purposes is compatible with Farmer Mac's statutory mandate and consistent with congressional intent.

Neither the proposed purpose nor any of the three existing purposes authorize Farmer Mac to accumulate investment portfolios for arbitrage activities or to engage in trading for speculative or primarily capital gains purposes. Realizing gains on sales before investments mature is not a regulatory violation as long as the profits are incidental to the specified permissible investment purposes. Farmer Mac must ensure that its internal controls, required under § 652.10(e), ensure that eligible investments purchased under § 652.20(a) clearly fulfill one or more of the purposes authorized under § 652.15(a).

In addition, we propose to change the current regulatory maximum non-program investment parameters in paragraph (b) to delete the alternate maximum of a fixed $1.5 billion. While we continue to believe that excessive or inappropriate use of non-program investments is not consistent with the Corporation's statutory mission and status as a Government-sponsored enterprise (GSE), we believe the maximum investment parameter of 35 percent of program volume alone is sufficient and that there is no longer a need for the $1.5 billion ceiling on that maximum calculation. This proposed change is based on Farmer Mac's growth since the $1.5 billion ceiling was established in 2005.

We also propose to permit Farmer Mac to exclude investments pledged to meet margin requirements for derivative transactions (collateral) when calculating the 35-percent investment limit under paragraph (b).[12] We note that investments that are pledged as collateral do not count toward Farmer Mac's compliance with its liquidity reserve requirement.[13] We propose this change because the Dodd-Frank Act may result in additional margin requirements for Farmer Mac and we do not want to discourage the use of derivatives as an appropriate risk management tool.

E. Section 652.20—Eligible Non-Program Investments

Under the current rule, Farmer Mac may purchase and hold the eligible non-program investments listed in § 652.35(a). This list permits Farmer Mac to invest, within limits, in an array of highly liquid investments while providing a regulatory framework that can readily accommodate innovations in financial products and analytical tools.

The recent financial crisis resulted in substantial turmoil in the financial markets. Based on this experience, we now propose amendments that would clarify the characteristics of eligible investments, eliminate certain investments, and reduce portfolio limits where appropriate. In addition, we ask questions about the most effective way to comply with section 939A of the DFA. As discussed in greater detail below, that provision requires each Federal agency to revise all regulations that refer to or require reliance on credit ratings to assess creditworthiness of an instrument to remove the reference or requirement and to substitute other appropriate creditworthiness standards. We also propose to renumber this regulation as § 652.20.

1. Section 652.20(a)

We propose revisions to the language in the introductory paragraph of paragraph (a). The existing language authorizes Farmer Mac to hold only the types, quantities, and qualities of investments that are listed. Like our existing regulation, our proposal would permit institutions to purchase only those investments that satisfy the eligibility criteria in § 652.35 (which would be renumbered as § 652.20). An investment that does not satisfy the eligibility criteria would not be eligible for purchase and would be subject to the divestiture requirements of proposed § 652.25(a) if it were purchased.[14]

In a change from our existing approach, however, eligibility would be determined only at the time of purchase. An investment that satisfies the eligibility criteria at the time of purchase but that subsequently failed to satisfy the eligibility criteria would not become ineligible and would not have to be divested. Instead, Farmer Mac would be permitted to retain the investment subject to certain requirements. As discussed below, in our discussion of our proposed amendments to § 652.25, we believe this change would reduce regulatory burden without creating safety and soundness concerns.

In addition, existing § 652.35(a) states that all investments must be denominated in United States dollars. We propose to relocate this language to paragraph (b) of redesignated § 652.20.

The table in § 652.35(a) currently provides that a specified nationally recognized statistical rating organizations (NRSRO) credit rating is a criterion for eligibility for a number of asset classes, including municipal securities, money market instruments, mortgage securities, asset-backed securities, and corporate debt securities. Section 939A of the Dodd-Frank Act requires us to remove this criterion and to substitute other appropriate creditworthiness standards. Below, we discuss possible approaches as to how we can comply with this requirement. We do not propose any revisions to this criterion at this time.

Finally, we discuss general comments on the table, received in response to the ANPRM. In the ANPRM, we asked, ''Would the experience gained during the financial markets crisis of 2008 and 2009 justify adjustments to many of the portfolio limits in § 652.35 to add conservatism to them and improve diversification of the portfolio?'' We also invited comment on appropriate changes within each asset class regarding final maturity limit, credit rating requirement, portfolio

[12] Paragraph (b) permits Farmer Mac to hold eligible non-program investments, for specified purposes, up to 35 percent of program volume.

[13] Under existing § 652.20(b), all investments held for the purpose of meeting the liquidity reserve requirement must be free of liens or other encumbrances. As discussed below, we propose a more detailed version of this requirement at § 652.40(b).

[14] In this context, ''purchase'' would include an acquisition such as a swap of one security in exchange for another. This interpretation is consistent with our interpretation of the existing rule.

concentration limit, and other restrictions.

The Council suggested making ''limited changes'' to the portfolio limits, stating that the financial markets, and specifically the market for mortgage securities, have arguably suffered through severe crisis and System entities have emerged in a solid financial position. The Council believes that existing limits, particularly on non-Agency mortgage securities, arguably prevented System entities from focusing on higher return sectors that would have resulted in larger losses. The Council suggested that the Farmer Mac regulations should be ''closely aligned with existing limits for other Farm Credit entities.''

In our discussion below, we discuss the revisions we propose by eligible asset class, and we respond to the Council's general comments above as well as their specific comments on particular asset classes.

a. Section 652.20(a)(1)—Obligations of the United States

Existing § 652.35(a)(1)(which would become § 652.20(a)(1)) permits Farmer Mac to invest in Treasuries and other obligations (except mortgage securities) fully insured or guaranteed by the United States Government or a Government agency without limitation.[15] We note that Ginnie Mae securities fall under this provision.

In the ANPRM, we asked, ''Given that Farmer Mac might not always hold the 'on the run' (*i.e.,* highest liquidity) issuance of Treasury securities, would imposing maximum maturity limitations enhance the resale value of these investments in stressful conditions?'' In its comments, the Council stated that ''Treasury securities with longer dated maturities have the potential to provide less liquidity due to sensitivities to changes in interest rates.''

We propose no change to this regulation. Although we agree with the Council that the value of longer term Treasuries can vary due to interest rate risk, we deal with interest rate risk in a separate section of these regulations. In this section, our concern is focused on differences in liquidity due to differences in trading volume and bid/ask spreads between on-the-run and off-the-run Treasury securities.

b. Section 652.20(a)(2)—Obligations of Government-Sponsored Agencies

Existing § 652.35(a)(2)(which would become § 652.20(a)(2)) permits Farmer Mac to invest in obligations of Government-sponsored agencies,[16] including Government-sponsored agency securities and other obligations fully insured or guaranteed by Government-sponsored agencies (but not mortgage securities). The only limitation currently imposed on these non-mortgage security investments is found in § 652.35(d)(1), which precludes Farmer Mac from investing more than 100 percent of its regulatory capital in any one Government-sponsored agency.[17]

In the ANPRM we asked, ''In light of the recent financial instability of Government-sponsored agencies such as Fannie Mae and Freddie Mac, would it be appropriate to revise this section to put concentration limits on exposure to these entities in § 652.35(a)(2)?'' The Council stated that it is appropriate to maintain portfolio limits on securities issued by the Federal National Mortgage Corporation (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) and even Government National Mortgage Corporation (Ginnie Mae) securities, which enjoy explicit government backing. The Council noted that the Federal government is currently contemplating regulatory GSE reform through the legislative process in this area.

We do not propose concentration limits on exposures to Government-sponsored agencies based on historical experience, including that observed in recent years, that the value of GSE debt has not declined materially even when the GSE has been under significant stress.

Our proposal would limit investments in Government-sponsored agency obligations to senior debt securities. We believe counterparty exposures to Government-sponsored agencies should be confined only to the highest quality investments and should not include subordinated debt or hybrid equity issuances.

c. Section 652.20(a)(3)—Municipal Securities

Existing § 652.35(a)(3) (which would become § 652.20(a)(3)) authorizes investments in municipal securities. Currently, revenue bonds are limited to 15 percent or less of Farmer Mac's total investment portfolio, while general obligations have no such limitations. The maturity limit is also longer for general obligations.

In the ANPRM we asked whether it would be ''more appropriate for our regulation to limit both sub-categories [of municipal securities] equally?'' The Council stated that historically, general obligation bonds have been less risky than revenue bonds because of the taxing authority of the underlying issuer but also stated that in the recent economic downturn, the safety of many of these general obligation issues have been called into question due to the financial strains on many State and local governments. Accordingly, the Council commented that all municipal securities should carry similar limits.

We agree. We also believe, in light of the ongoing financial strain at the municipal level, that additional limitations on municipal securities, whether general obligations or revenue bonds, are warranted. Accordingly, we propose to authorize investment in municipal securities only if the securities have a maximum remaining maturity of 10 years or less at the time of purchase and the investments do not exceed 15 percent of the total non-program investment portfolio.

d. Section 652.20(a)(4)—International and Multilateral Development Bank Obligations

Section 652.35(a)(4) (which would become § 652.20(a)(4)) currently authorizes investments in obligations of international and multilateral development banks, provided the United States is a voting shareholder. Examples of eligible banks include the International Bank for Reconstruction and Development (World Bank), Inter-American Development Bank, and the North American Development Bank. Other highly rated banks working in concert with the World Bank to promote development in various countries are also eligible, subject to the shareholder-voting requirement above. There is no maturity limit or portfolio limit.

We propose to revise this provision to authorize investment in such obligations with similar constraints as those applied to municipal securities. The nature of the obligations in this asset class is similar to municipal obligations in that the ultimate creditors

[15] The proposed rule would make a minor, non-substantive change to the language in this provision to reflect the slightly revised definition of ''Government agency'' we propose in § 652.5. We intend no change in meaning with this proposed revision.

[16] Section 652.5 defines Government-sponsored agency as an agency, instrumentality, or corporation chartered or establish to serve public purposes specified by the United States Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the United States, including but not limited to any Government-sponsored enterprise. We propose a minor, technical change in this definition.

[17] In light of the proposed changes to this provision, we propose to delete the § 652.35(d)(1) limitation. We discuss that proposal below.

are a diverse group of governments with varying credit characteristics. While we view this asset class as generally strong credits, we do not believe its strength is equivalent to U.S. Treasuries, and therefore some limits are appropriate. On that basis, we propose a 10-year limit on their maximum maturity remaining at purchase and a portfolio concentration limit of 15 percent of Farmer Mac's total non-program investment portfolio.

e. Section 652.20(a)(5)—Money Market Instruments

Existing § 652.35(a)(5) (which would become § 652.20(a)(5)) permits institutions to invest in repurchase agreements that satisfy specified conditions. If the counterparty defaults, the regulation requires the institution to divest non-eligible securities in accordance with the divestiture requirements of § 652.45. Under our proposal, as discussed above, an eligible investment could not become ineligible, and would not be required to be divested. Accordingly, we propose to delete this divestiture requirement.

f. Section 652.20(a)(6)—Mortgage Securities

Existing § 652.35(a)(6) (which would become § 652.20(a)(6)) requires stress testing of all mortgage securities. As discussed above, proposed § 652.10(f) would require stress testing on all investments held in Farmer Mac's portfolio. Accordingly, we propose to delete the specific stress-testing requirement for mortgage securities.

The first asset class listed in existing § 652.25(a)(6) is mortgage securities that are issued or guaranteed by the United States or a Government agency. We propose to revise this asset class description to refer to mortgage securities that are fully guaranteed or fully insured by a Government agency. The deletion of ''United States'' is a technical, non-substantive change, because we propose to include ''United States'' in the definition of ''Government agency'' in § 652.5. The addition of the word ''fully'' makes clear that this asset class includes only mortgage securities that are fully backed by the full faith and credit of the United States. If the United States Government issues a mortgage security that is not fully guaranteed or fully insured by the full faith and credit of the United States Government, it is not eligible under this asset class.

The third asset class listed in existing § 652.35(a)(6) authorizes investments in non-Government agency or Government-sponsored agency securities that comply with 15 U.S.C. 77d(5) or 15 U.S.C. 78c(8)(41). These types of mortgage securities are typically issued by private sector entities and are mostly comprised of securities that are collateralized by ''jumbo'' mortgages with principal amounts that exceed the maximum limits of Fannie Mae or Freddie Mac programs. We propose technical, non-substantive changes to the language describing this asset class, for clarity. Furthermore, in this preamble we refer to these securities using the shorthand reference non-Agency mortgage securities.

In the ANPRM, we invited comment on whether it is appropriate to continue to include non-Agency mortgage securities collateralized by ''jumbo'' mortgages as an eligible liquidity investment. The Council commented that while these are not as liquid as agency collateralized mortgage obligations, and despite the fact that this sector is currently under stress, it believes the sector can provide viable diversification and should develop stronger credit quality over time with improved underwriting and increased credit enhancements. We do not propose to remove this asset class from the list of eligible investments at this time, but we will continue to evaluate the appropriateness of including this asset class.

However, to reduce credit default risk that may be associated with certain positions in non-Agency mortgage securities, we propose to require that a position in such a security would be eligible only if it is the senior-most position at the time of purchase. The FCA considers a position in a non-Agency mortgage security to be the senior-most position only if it currently meets both of the following criteria:

- No other remaining position in the securitization has priority in liquidation. Remaining positions that are the last to experience losses in the event of default and which share those losses pro rata meet this criterion.
- No other remaining position in the securitization has a higher priority claim to any contractual cash flows. Remaining positions that have the first priority claim to contractual cash flows (including planned amortization classes), as well as those that share on a pro rata basis a first priority claim to cash flows meet this criterion.

The tranche that is the senior-most position at the time Farmer Mac is considering purchase is not necessarily the same tranche that was in the senior-most position at the time of issue. Farmer Mac should be careful not to be misled by the labeling of tranches as ''super senior'' or ''senior'' in a prospectus (or on market reporting services). Farmer Mac may purchase non-Agency mortgage-backed securities (MBS) only if the securities satisfy the above two criteria at the time of purchase.

Further, the existing rule's concentration limit for non-Agency mortgage securities is 15 percent when combined with another asset class—commercial mortgage-backed securities. However, because of our belief that commercial mortgage-backed securities pose undue risk due to the nature of the underlying collateral and the particularly weak performance of this asset class during the financial crisis, we propose to delete these securities as an eligible asset class. Given the existing rule's combined portfolio concentration limit of 15 percent for these two asset classes, we propose to set the portfolio concentration limit for non-Agency securities at 10 percent.

g. Section 652.20(a)(7)—Asset-Backed Securities

Existing § 652.35(a)(7) (which would become § 652.20(a)(7)) authorizes Farmer Mac to invest in asset-backed securities (ABS) secured by credit card receivables; automobile loans; home equity loans; wholesale automobile dealer loans; student loans; equipment loans; and manufactured loans. The maximum weighted average life (WAL) [18] for fixed rate or floating rate ABS at their contractual interest rate caps is 5 years, and all ABS combined are limited to 25 percent of Farmer Mac's non-program investment portfolio.

In its comment letter, AgFirst noted that the existing 25-percent portfolio limit is higher than the 20 percent permitted for other System institutions.[19] AgFirst stated that there should be movement toward consistency. AgFirst further stated that ABS suffered from severe market deterioration during the recent credit crisis and that bringing the limit down to that in place for other System institutions would help reduce concentration risk.

Because we agree with AgFirst's comment, and because of the relative lack of liquidity of all ABS in the wake of the recent financial crisis, we propose to reduce the portfolio limit to no more than 15 percent (combined) of Farmer Mac's total investment portfolio and to

[18] Generally, the WAL is the average amount of time required for each dollar of invested principal to be repaid, based on the cashflow structure of an ABS and an assumed level of prepayments. Nearly all ABS are priced and traded on the basis of their WAL, not their final maturity dates.

[19] *See* § 615.5140(a)(6).

limit any single collateral type to no more than 5 percent.[20] In addition, given the significant instability in the ABS market in recent years, we propose a maximum WAL of 7 years for floating rate ABS with current coupon rates below their contractual interest rate cap.

h. Section 652.20(a)(8)—Corporate Debt Securities

Existing § 652.35(a)(8) (which would become § 652.20(a)(8)) authorizes investment in corporate debt securities, limited to 25 percent of Farmer Mac's total non-program investment portfolio. In its comment letter, AgFirst noted that the existing limit is higher than the 20 percent permitted for other System institutions.[21] AgFirst stated that there should be movement toward consistency. AgFirst further stated that corporate debt securities suffered from severe market deterioration during the recent credit crisis and that bringing the limit down to that in place for other System institutions would help reduce concentration risk.

Because we agree with this comment, we propose to reduce the portfolio limit to 20 percent in total. In addition, we propose to limit corporate debt securities in any one of the industry sectors defined by the Global Industry Classification Standard (GICS) to no more than 10 percent of Farmer Mac's total investment portfolio.[22] While financial services sector was not the only industry sector hit hard by the recent financial crisis, there were sectors, *e.g.,* utilities, that were not as severely impacted. Sector diversification limits provide enhanced guidance regarding the Agency's expectations for portfolio diversification.

In the ANPRM, we asked whether is it appropriate to allow investments in subordinated debt as the current rule does. The Council stated it does not think subordinated debt is an appropriate investment for purposes of liquidity. It based its comment on lack of liquid markets for subordinated debt as well as the lack of expertise in most financial institutions to research and evaluate the risk of individual issuers.

We generally agree with this comment and propose to limit eligible corporate debt securities to senior debt securities only. We note that, while we do not deem perfect consistency with regulations governing other System institutions to be appropriate in all cases, all of our proposed changes to investment in corporate debt securities are consistent with those recently proposed for other System institutions.[23]

i. Section 652.20(a)(9)—Diversified Investment Funds

Existing § 652.35(a)(9) (which would become § 652.20(a)(9)) authorizes investment in diversified investment funds with the stipulation that the funds' holdings must consist solely of eligible investments as defined by this section of the rule. The existing rule contains no portfolio concentration limit so long as the shares in each investment company comprise less than 10 percent of Farmer Mac's portfolio. If the shares comprise more than 10 percent, the fund's holdings are counted toward the limits for each asset class set forth in this section.

Under the existing rule, Farmer Mac could invest 100 percent of its non-program investment portfolio in 10 different funds. We believe this would not allow for sufficient diversification of the portfolio. Therefore, we propose to add a portfolio concentration limit with two components; no more than 50 percent of the total portfolio could be comprised of diversified investment funds and no more than 10 percent of the total portfolio could be in any single fund.

In addition, we believe that in the existing rule the term ''diversified investment funds'' could be interpreted to include closed-end funds, which are typically exchange-traded. We propose to add language stating that only open-end funds are eligible, in order to reduce the possibility that investments are purchased for potentially speculative purposes.

2. Dodd-Frank Act Compliance

In July 2010, the President signed into law the Dodd-Frank Act to strengthen regulation of the financial industry in the wake of the financial crisis that unfolded in 2007 and 2008. Section 939A of the DFA requires the following:

- Each Federal agency must review (i) all of its regulations that require the use of an assessment of the creditworthiness of a security or money market instrument, and (ii) any references to or requirements in its regulations regarding credit ratings.
- Each Federal agency must modify its regulations to remove any reference to or requirement of reliance on credit ratings and to substitute in the regulations such standards of creditworthiness as the agency determines is appropriate. In making this determination, the agency must seek to establish, to the extent feasible, uniform standards of creditworthiness.

We have completed our review of FCA regulations that impose creditworthiness requirements or that refer to or require the use of credit ratings. Existing § 652.35 is one such regulation; it requires minimum NRSRO credit ratings for many categories of investments—including municipal securities, certain money market instruments, non-Agency mortgage securities, asset-backed securities, and corporate debt securities—for them to be eligible.

We do not propose a method to replace NRSRO credit ratings in this rulemaking while we continue to focus our research on appropriate alternatives to them. We note that FCA has already published an ANPRM soliciting public input on the requirements of section 939A as it applies to the Agency's Risk-Based Capital Stress Test (RBCST) which sets regulatory minimum capital requirements for Farmer Mac.[24] FCA has also published a Notice of Proposed Rulemaking seeking comments on how section 939A should be applied to the eligibility regulation governing other System institutions [25]—a regulation that is very similar to this one. Moreover, several other Federal regulators have also issued ANPRMs on this topic.[26]

In the discussion below, we explore various approaches that could be considered for assessing creditworthiness as a determinant of eligibility.[27] We may want to propose several of these approaches in concert with one another.

First, our regulation could specify financial measurements, benchmark indexes, and other measurable criteria against which institutions could evaluate the creditworthiness of their

[20] These limits are consistent with those recently proposed for the other System institutions. *See* 76 FR 51289, Aug. 18, 2011.

[21] *See* § 615.5140(a)(7).

[22] GICS was developed by Morgan Stanley Capital International and Standard and Poor's. The GICS is an industry analysis framework for investment research portfolio management and asset allocation. The GICS structure consists of 10 sectors, 24 industry groups, 68 industries, and 154 sub-industries. More information can be found at *http://www.mscibarra.com/products/indices/gics.*

[23] 76 FR 51289, Aug. 18, 2011.

[24] 76 FR 35138, June 16, 2011.

[25] 76 FR 51289, Aug. 18, 2011.

[26] For example, the OCC, the Federal Reserve, the FDIC, and the OTS issued an ANPRM at 75 FR 52283, Aug. 25, 2010. The Federal Housing Finance Agency issued an ANPRM at 76 FR 5292, Jan. 31, 2011.

[27] In addition, existing § 652.35(b), which we propose to renumber as § 652.20(c), provides that whenever the obligor or issuer of an eligible investment is located outside the United States, the host country must maintain the highest sovereign rating for political and economic stability by an NRSRO. The DFA requires us to replace that NRSRO standard with an appropriate substitute. The following discussion also applies to that provision.

investments. For example, the regulation might specify certain ranges within the total range of those measurements to stratify or rank relative levels of creditworthiness using labels such as ''Highest'' and ''Second Highest''—and establish the level within that ranking below which investments would be deemed insufficiently creditworthy for investment by Farmer Mac. Farmer Mac would need to ensure that these criteria were met for an investment to be eligible at the time of purchase and continue to satisfy the eligibility requirements and otherwise remain a suitable investment over the period it is held. Some of the factors that could be considered in establishing these criteria are as follows:

- Credit spreads (*i.e.,* whether it is possible to demonstrate that a position in certain investments is subject to a minimal amount of credit risk based on the spread between the security's yield and the yield of Treasury or other securities, or based on credit default swap spreads that reference the security);
- Default statistics (*i.e.,* whether providers of credit information relating to securities express a view that specific securities have a probability of default consistent with other securities with a minimal amount of credit risk);
- Inclusion on an index (*i.e.,* whether a security or issuer of the security is commonly included as a component of a recognized index of instruments that are subject to a minimal amount of credit risk or are deemed by FCA to be sufficiently comparable to securities on an index based on specific criteria);
- Priorities and enhancements (*i.e.,* the extent to which a security includes credit enhancement features, along with an evaluation of the relative strength of the enhancements, such as overcollateralization and reserve accounts, or has priority under applicable bankruptcy or creditors' rights provisions);
- Price, yield and/or volume (*i.e.,* whether the price and yield of a security or a credit default swap that references the security are consistent with other securities that are subject to a minimal amount of credit risk and whether the price resulted from active trading); and
- Asset class-specific factors (*e.g.,* in the case of structured finance products, the risk characteristics of the specific underlying collateral).

Should FCA consider any of the above as useful sources from which to derive evaluative criteria that could replace NRSRO credit ratings? Are there other sources of information that should be included? More specifically, should the creditworthiness standard include specific standards for probability of default (PD) and loss given default (loss severity)? If so, why, and where could the agency source such data to derive such probabilities and loss severity standards? Also, should this vary by asset class and/or type of investment? Finally, would it be appropriate to combine this approach with one or more of the other approaches discussed below, and if so, which ones, and why?

As a second alternative (or in combination with the first approach), our regulation could require Farmer Mac to develop its own internal assessment process or system for evaluating the creditworthiness of investments. One way to structure such a system could be to quantify expected loss rates and stratify creditworthiness categories by range of expected loss. This would require Farmer Mac to provide convincing evidence that probability of default and loss given default estimates are reasonably accurate. Any such internal evaluation system might need to be frequently recalibrated based on changes in the marketplace.

Is this second approach—an FCA-approved internal Farmer Mac system—one that we should consider? If so, what principles should be applied in creating such a system, and why? Would the amount of resources needed to establish and maintain such a system potentially be overly burdensome to Farmer Mac? Would it be appropriate to combine this approach with one or more of the other approaches and if so, which ones, and why?

As a third alternative, FCA could develop regulations that would require Farmer Mac to use third party assessments to assess creditworthiness. Organizations other than NRSROs may have the capability to evaluate creditworthiness, and this evaluation could be considered in Farmer Mac's creditworthiness assessment. We also believe that the DFA does not prohibit Farmer Mac from looking to the NRSROs as a tool for assessing creditworthiness. If Farmer Mac does so, however, it should evaluate the quality of third party assessments, including consideration of whether issuers or investors pay the rating fees. In either case, as we have seen in the recent crisis, reliance on third party analysis can be problematic and cannot be used in isolation. Accordingly, if we were to require this approach, it would be in concert with one or more of the other approaches.

Is this third-party approach one that we should consider? What reliable third party sources exist? Should we distinguish between issuer-paid third party sources and investor-paid third party sources and, if so, how? How might we combine this approach with one or more of the other approaches to create an optimal regulatory structure?

Unlike the proposed regulations governing the RBCST,[28] this proposal's system of ranking investment creditworthiness need not be quantified in terms of specific expected loss rates. However, since a ranking based on expected loss rates could become available as a result of the rulemaking associated with the RBCST, we note that this system might also be applicable for purposes of these regulations governing liquidity and investment management. Moreover, if it were, it would add consistency to our regulations which, while not a necessity, is highly desirable.

3. Changes to Remainder of § 652.20

a. Section 652.20(b)—Dollar Denomination

As discussed above, we propose to relocate to paragraph (b) the requirement, currently contained in the introductory paragraph of § 652.35(a), that all investments must be denominated in United States dollars.

b. Section 652.20(d)—Obligor Limits

We have discussed the risks of investment concentrations and the benefits of a well-diversified and high quality investment portfolio. In § 652.35(d)(1) of the existing rule, we prohibit Farmer Mac from investing more than 25 percent of its regulatory capital in eligible investments issued by any single entity, issuer, or obligor. However, the obligor limit does not currently apply to Government agencies or Government-sponsored agencies. Instead, we currently prohibit Farmer Mac from investing more than 100 percent of its regulatory capital in any one Government-sponsored agency. There are no obligor limits for Government agencies.

In the ANPRM we asked whether the obligor limits provide for an adequate level of diversification and specifically whether, in light of the uncertainty associated with the current conservatorships of both Fannie Mae and Freddie Mac, it is appropriate to maintain a higher obligor limit for Government-sponsored agencies.

Both the Council and AgFirst stated that for obligors other than Government agencies or Government-sponsored agencies, obligor limits should be reduced to 20 percent of total capital to be consistent with the limits on other System institutions. In a recent NPRM

[28] 76 FR 35138, June 16, 2011.

governing the other System institutions, FCA proposed that these obligor limits should be reduced from 20 percent to 15 percent.[29] We agree that consistency with other System institutions is appropriate in this case. We also believe 15 percent would help to ensure sufficient diversification among obligors. Accordingly, we propose to reduce the current obligor limit for non-Government agencies and non-Government-sponsored agency obligors from 25 percent to 15 percent of regulatory capital.

For Government-sponsored agencies, the Council stated that investment limits should be set at 50 percent of the total portfolio, in alignment with the limits placed on the System. The Council stated that the government support recently provided to Fannie Mae and Freddie Mac is very similar to that which would be provided to a government agency and that, because of the importance to the Federal government of the role filled by Fannie Mae and Freddie Mac, it appears this strong support will continue. The Council states that if future legislation weakens the ''implicit'' guarantee, the investment limits can be revisited at that time. The Council also stated that restrictions on Fannie Mae and Freddie Mac securities under regulatory liquidity requirements may cause institutions to take additional prepayment and extension risk in return for lower spreads by forcing the institutions to purchase Ginnie Mae securities, which have weaker cashflow stability and lower spreads as compared to similar Fannie Mae and Freddie Mac securities.

While we may not agree with every detail of the supporting justification of the Council's position, we agree that our existing 50-percent investment portfolio limit for Government-sponsored agency mortgage securities in existing § 652.35(a)(6) is appropriate, and we propose no change to that limit.

In addition, we believe that that obligor limits for obligations that are issued or guaranteed as to principal and interest by Government-sponsored agencies are not warranted due to the relatively low credit risk of Fannie Mae and Freddie Mac mortgage securities. Accordingly, we propose to delete the prohibition on Farmer Mac's investment of more than 100 percent of its regulatory capital in any one Government-sponsored agency.[30]

c. Section 652.20(e)—Other Investments Approved by FCA

Under the current regulation at § 652.35(e), with our prior written approval, Farmer Mac may purchase non-program investments in preferred stock issued by other System institutions and in other non-program investments that are not listed in § 652.35(a). We propose to revise paragraph (e) to require prior FCA approval for all investments not listed in paragraph (a), with no separate mention of FCS preferred stock. As the safety and soundness regulator for Farmer Mac, we have concerns regarding concentration and systemic risk that arise from Farmer Mac investments in large amounts of preferred stock issued by System institutions, and Farmer Mac should not expect that we will approve such investments without a compelling reason.

No change is proposed from the existing rule's requirement that Farmer Mac's request for FCA approval to invest in other non-program investments must explain the risk characteristics of the investment and the Corporation's purpose and objective for making the investment. If we approve the investment, we would notify Farmer Mac of any conditions we would impose, as well as the appropriate discount on any such investments for purposes of complying with minimum liquidity standards set forth in proposed § 652.40.

F. Section 652.40—Stress Tests for Mortgage Securities

Because we propose to relocate our stress-testing requirements to § 652.10(f), we also propose to remove this standalone, stress-testing section from our regulations.

G. Section 652.25—Management of Ineligible and Unsuitable Investments

We propose to delete existing § 652.45, which is labeled ''Divestiture of Ineligible Non-Program Investments,'' and to replace it with § 652.25, which would be labeled ''Management of Ineligible and Unsuitable Investments.''

Existing § 652.45(a)(2) requires Farmer Mac to dispose of an investment that is ineligible (under the existing § 652.35 criteria) within 6 months unless we approve, in writing, a plan that authorizes divestment over a longer period of time. An acceptable divestiture plan generally must require Farmer Mac to dispose of the ineligible investment as quickly as possible without substantial financial loss. Until it actually disposes of the ineligible investment, Farmer Mac must report on specified matters to its board of directors and to FCA at least quarterly.[31]

As part of effective risk management of investments, we expect the Corporation to exit its position or develop a strategy to reduce risk exposure stemming from investments that were eligible at purchase but are no longer suitable. As part of its risk management process we would expect Farmer Mac to evaluate the potential for additional unrealized losses or write-downs under expected and stressed conditions. The risk management process for investments should be dynamic and robust. Thus, we are modifying our approach to ensure the Corporation has sufficient flexibility to manage its position and mitigate losses which may not necessarily be achieved through a forced divesture during a specific time period.

Accordingly, proposed § 652.25(b) would no longer require Farmer Mac, for an investment that satisfied the eligibility criteria set forth in § 652.20 (renumbered from § 652.35) when purchased but that no longer satisfies them,[32] to divest of the investment within 6 months unless FCA approves a divesture plan authorizing a longer divestiture period. Rather, Farmer Mac would be required to notify the OSMO promptly, and the investment would be subject to specified requirements that are discussed below. These requirements would also apply to investments that become ineligible as result of changes to the investment eligibility regulations proposed herein.

Section 652.25(b) would also require prompt notification to the OSMO when an investment that satisfies the § 652.20(a) eligibility criteria is not suitable because it does not satisfy the risk tolerance established in the institution's board policy pursuant to § 652.10(c), and the investment would be subject to the same specified requirements discussed below.

Proposed § 652.25(a) provides that an investment that does not satisfy the § 652.20 eligibility criteria at the time of purchase is ineligible. Under the proposal (as under the existing regulation), Farmer Mac may not purchase ineligible investments. If Farmer Mac did purchase an ineligible investment, it would be required to notify us promptly and to divest of the

[29] 76 FR 51289, Aug. 18, 2011.

[30] We note that the other FCS institutions do not have an obligor limit for Government-sponsored agencies, and no such limit is proposed in the recent NPRM. *See* § 615.5140(d)(1) of our regulations and 76 FR 51289, Aug. 18, 2011.

[31] Existing § 652.45(a)(1) pertains to the divestiture requirements of investments that became ineligible when the divestiture regulation initially became effective in 2005. Because there is no longer a need for these initial divestiture requirements, we propose to delete them.

[32] These investments would no longer be considered ''ineligible.''

investment no later than 60 days after discovering that the investment is ineligible unless we approved, in writing, a plan that authorized divestiture over a longer period of time.[33]

Although it is not stated in the regulation, we clarify here that an acceptable divestiture plan would have to require Farmer Mac to dispose of the investment as quickly as possible without substantial financial loss. The plan would also have to contain sufficient analysis to support continued retention of the investment, including its impact on the institution's capital, earnings, liquidity, and collateral position. Our decision would not be based solely on financial loss and would include consideration of whether the investment was purchased by mistake or through the deliberate action of a Farmer Mac employee. Until Farmer Mac divested of the investment, it would be subject to the same specified requirements discussed below.

Furthermore, we emphasize that any purchase of an ineligible investment would indicate weaknesses in Farmer Mac's internal controls and due diligence and would trigger increased FCA oversight if it occurs. We expect such a purchase to occur extremely rarely, if ever.

The specified requirements that would apply to investments retained by Farmer Mac that are ineligible, that no longer satisfy the eligibility requirements, or that are unsuitable are specified in § 652.25(c). We believe these specified requirements are warranted by safety and soundness concerns.

Proposed § 652.25(c)(1) contains reporting requirements. Each quarter, Farmer Mac would be required to report to FCA and to its board on the status of all such investments. The report would have to demonstrate that impact that the investments may have on the Corporation's capital, earnings, and liquidity position. Additionally, the report would have to address how the Corporation planned to reduce its risk exposure from these investments or exit the position.

Proposed § 652.25(c)(2) contains other proposed requirements. We propose that the investments may not be used to fund Farmer Mac's liquidity reserve or supplemental liquidity required under § 652.40 and that they must continue to be included in the investment portfolio limit established in § 652.15(b).

Finally, proposed § 652.25(d) would reserve FCA's authority to require Farmer Mac to divest of any investment at any time for safety and soundness purposes. The timeframe FCA sets would consider the expected loss on the transaction (or transactions) and the impact on Farmer Mac's financial condition and performance. Because the proposed rule would not require divestiture of any investment that was eligible when purchased, FCA must reserve the authority to require divestiture of investments when necessary.

H. Section 652.30—Interest Rate Risk Management

We propose to reorganize the rule by moving provisions governing ''Interest Rate Risk Management and Requirements'' found in the existing rule at § 652.15 to new § 652.30. We propose to revise the name of this section by deleting ''and requirements'' because the words are unnecessary since all sections of the regulation either define or describe requirements. This same deletion and reasoning is proposed to several other section headings.

In this section, we propose in paragraph (a) two minor syntactical changes without any resulting substantive change. We propose to delete existing paragraph (b), which provides that Farmer Mac's management must ensure that interest rate risk is properly managed on both a long-range and a day-to-day basis, because we establish the ultimate responsibility for interest rate risk management at the board level in paragraph (a) and we believe it should be understood that the board would delegate proper interest rate risk management to management.

In paragraph (c)(2), we propose to require that the interest rate risk management policy identify the causes of interest rate risk and set appropriate quantitative limits consistent with a clearly articulated board risk tolerance. We believe this improves the clarity of requirements for board policy as compared with the existing corresponding regulation, at § 615.15(d)(2), which requires the policy to identify and analyze the cause of interest rate risks within Farmer Mac's existing balance sheet structure. In paragraph (c)(3), we propose to replace the word ''shock'' with ''stress'' to make it consistent with stress testing terminology used throughout this subpart and to remove any uncertainty about whether we intend interest rate stress testing to be somehow fundamentally different from other stress testing referred to in this subpart—we do not. In other words, board policies and risk tolerance thresholds for interest rate risk should be generally consistent with the levels applied to stress testing policies referenced in other sections of this subpart.

We further propose in this paragraph to enhance guidance on stress testing of interest rate risk by specifying that the results of stress tests must gauge the sensitivity of capital, earnings, and liquidity to interest rate stress scenarios. We further propose to specify that the methodology applied must be appropriate for the complexity of the structure and cash flows of the instruments held.

We also propose to require interest rate risk management policies to consider the nature and purpose of derivative contracts and establish counterparty concentration limits for derivatives. We propose this change in furtherance of the emphasis on derivatives counterparty risk management in Title VII of the Dodd-Frank Act and due to the significant use of derivatives by Farmer Mac to modify synthetically the term structure of its debt.

As with our quarterly stress testing requirement under § 650.10(f)(3), we propose to require that all assumptions applied in this stress test rely, to the maximum extent practicable, on verifiable information, in recognition that modeling treatments could require assumptions for which insufficient data or information exists. In addition, Farmer Mac would be required to document the basis for all assumptions.

We propose to clarify in proposed paragraphs (d)(4) and (d)(5) the appropriate roles of the board and of management.

We propose to delete existing paragraph (d)(5) because we propose to require Farmer Mac to document its objective when purchasing eligible investments in § 652.10(f)(1) of this subpart. We believe the placement of this requirement is more logical in that section.

Given that proposed deletion, we propose to re-number all paragraphs that follow in the existing § 652.15 accordingly with minor clarifying changes to their wording.

I. Section 652.35—Liquidity Management

As part of the proposed re-ordering of sections in this subpart, we propose to move and rename existing § 652.20 ''Liquidity Reserve Management and Requirements'' to § 652.35 ''Liquidity Management.''

[33] In this context, ''purchase'' would include an acquisition such as a swap of one ineligible security for another.

We also propose to reorganize the rule by moving provisions governing the minimum liquidity requirements found at existing § 652.20(a) to a new section, § 652.40, to be named ''Liquidity Reserve Requirement and Supplemental Liquidity.''

1. Section 652.35(a)—Liquidity Policy—Board Responsibilities

We propose to begin this section with paragraph (a) ''Liquidity Policy—Board Responsibilities'' (currently found at § 652.20(d)). We propose only minor revisions to that paragraph, none of which are substantive. One of these revisions is a proposed requirement that Farmer Mac's liquidity policy must be consistent with its investment management policies, including the level of the board's risk tolerance in these areas.

2. Section 652.35(b)—Policy Content

We propose to renumber existing § 652.20(e) as § 652.35(b). We propose to change the section heading from ''Liquidity Reserve Policy Content'' to ''Policy Content'' and to make several minor syntactical changes. We also propose to add paragraph (b)(10), a liability maturity management plan (LMMP), and paragraph (b)(11), a contingency funding plan (CFP). The rationale and expectations for the LMMP and CFP proposals are explained in detail in the discussions of § 652.35(d) and § 652.35(e), respectively, below.

3. Section 652.35(c)—Reporting Requirements

Newly proposed paragraphs (c)(1)(i) and (c)(1)(ii) of § 652.35 contain, with some minor revisions, the Farmer Mac periodic and special board reporting requirements currently found at paragraphs (f) and (g), respectively, of § 652.20(f). Newly proposed § 652.35(c)(2) contains the FCA special reporting requirement currently found at § 652.20(g).

4. Section 652.35(d)—Liability Maturity Management Plan

In the ANPRM, we asked if it would be appropriate to require Farmer Mac to establish a debt maturity management plan. The question was whether such a plan would be appropriate in light of the marginal funding instability that results from relying primarily on shorter term debt—even when the maturity is extended synthetically. Farmer Mac often synthetically extends the term of much of its short-funded debt using swap contracts, which results in a lower net cost of funds compared to simply issuing longer term debt (under normal yield curve conditions, as discussed in the ANPRM). The fact that these combinations of debt and derivative positions behave like longer term debt contributes to the stability and strength of its liquidity position. However, the practice adds counterparty risk on the swaps and short-term debt rollover risk to Farmer Mac's overall liquidity risk position compared to issuing long-term debt.

The minimum days-of-liquidity reserve requirement also includes incentives to this same end of diversifying the term structure of Farmer Mac's debt. This additional planning requirement would augment the days-of-liquidity measurement and reinforces the importance of management of the term structure of debt and other obligations as a key component of the liquidity risk management.[34]

The Council commented supportively, stating that each institution should have a funding strategy that provides for effective diversification of sources and tenors of funding and that maturity concentrations increase liquidity risk.

Because we agree that Farmer Mac should have such a funding strategy, we now propose a new paragraph § 652.35(d), which would require Farmer Mac's board to adopt a liability maturity management plan (LMMP) that establishes a funding strategy that provides for effective diversification of the sources and tenors of funding.[35]

This proposed § 652.35(d) sets forth specific contents and internal controls to be included in the LMMP. Under the proposal, the LMMP must:

- Include targets of acceptable ranges of the proportion of debt issuances maturing within specific time intervals;
- Reflect the Farmer Mac board's liquidity risk tolerance;[36] and
- Consider components of the Corporation's funding strategy that offset or contribute to liquidity risk associated with debt maturity concentrations.

The LMMP is intended to become a risk management tool that contributes to the management of, for example, targets for the term structure of debt. As the portion of total debt maturing within some appropriate short-term time interval increases, the amount of liquidity stress that would be experienced under a scenario of a disruption in Farmer Mac's access to debt markets (*i.e.,* refunding risk) would likely also increase. We would expect the LMMP to place appropriate limits on that risk consistent with the board's risk tolerance level as defined in other areas of investment and liquidity risk management.

We propose to refer to this plan as an LMMP rather than as a debt maturity management plan, as we discussed in the ANPRM, to make it more general, in contemplation of the possibility that Farmer Mac could use funding instruments that might not strictly take the form of debt. For example, the LMMP would have to address the use of swaps to synthetically extend debt tenors to offset liquidity risk. However, the LMMP would also have to recognize that the counterparty risk added through those swap positions contributes to liquidity risk due to the exposure to defaults of these counterparties generally (in terms of reduced expected cash inflows) as well as through the concentration of swap exposure to individual swap counterparties. The LMMP should also consider the potential expense (and even the potential infeasibility in certain scenarios) of replacing defaulted swap positions under stressful market conditions. Finally, if overall funding strategy also includes additional swap positions that synthetically shorten the effective maturity of debt positions, these positions and counterparty exposures too would have to be reflected in the LMMP.

5. Section 652.35(e)—Contingency Funding Plan

In the ANPRM, we asked whether it would be appropriate for our regulations to require a liquidity contingency funding plan (CFP). If so, we asked how specific the regulation should be regarding required components of the plan versus simply requiring that the plan reasonably reflect current standards, for example, those specified by the Basel Committee on Banking Supervision.[37]

The Council commented in support of such a requirement, stating that each institution should maintain, regularly update, and test a formal liquidity contingency funding plan that clearly sets out the strategies for addressing liquidity shortfalls in emergency situations. The Council stated that such

[34] We discussed this concept in our ANPRM at 75 FR 27953–27954.

[35] As discussed above, proposed § 652.35(b)(10) would require that the LMMP be contained in Farmer Mac's liquidity policy.

[36] Although not specified in the rule, guidance must be focused on the avoidance of maturity concentrations that would cause the Corporation to exceed the board's risk tolerance.

[37] ''Principles for Sound Liquidity Risk Management and Supervision,'' Basel Committee on Banking Supervision, September 2008 (or successor document, in the future). This document can be found at *http://www.bis.org/publ/bcbs144.htm.*

a plan should delineate policies to manage a range of stress environments, establish clear lines of responsibility, and articulate clear implementation and escalation procedures. Further, it should be regularly tested and updated to ensure that it is operationally sound.

We agree with this comment and we now propose a new § 652.35(e) imposing CFP requirements. We view these proposed CFP requirements as prudent and integral to an organized and systematic approach to managing liquidity risk and ensuring ongoing compliance with board policy pertaining to liquidity risk—as well as generally consistent with the spirit of the guidance issued in the Interagency Policy Statement and by the Basel Committee and, thus, with emerging industry best practices.[38]

In § 652.35(e)(1) we propose to require Farmer Mac to have a CFP to ensure sources of liquidity are sufficient to fund normal operating requirements under a variety of stress events, which we specify in paragraph (3)(v) and discuss below.[39]

Section 652.35(e)(2) would require Farmer Mac's board of directors to review and approve the CFP at least once each year and to make adjustments to reflect changes in the results of stress tests, the Corporation's risk profile, and market conditions. Under the CFP, Farmer Mac would have to maintain unencumbered and highly marketable assets as described in paragraphs (b) and (c) of § 652.40 in its liquidity reserve sufficient to meet its liquidity needs based on estimated cash inflows and outflows for a 30-day time horizon under a stress scenario that is sufficiently acute as to be consistent with the level of the board's risk tolerance.

This effectively creates an additional liquidity metric to the traditional days-of-liquidity metric in the existing rule—which is retained, though revised, in this proposed rule.[40] The difference between the two metrics lies in the stress scenario considered in each. The existing days-of-liquidity metric compares highly marketable assets (appropriately discounted) to actual maturing debt over a given time interval at the date of calculation. In essence the stress applied is a lack of access of debt markets. The requirement proposed in § 652.35(e)(2) is based on an appropriately estimated, more comprehensive, stress scenario specifically calibrated to the board's established risk tolerance level. We propose this additional regulatory standard to achieve better consistency with the objectives and recommendations envisioned under Basel III.[41]

Under § 652.35(e)(3), the CFP would have to:

- Be customized to the financial condition and liquidity risk profile of Farmer Mac, the board's liquidity risk tolerance, and the Corporation's business model;
- Identify funding alternatives that can be implemented as access to funding is reduced. For example, it would have to include, at a minimum, collateral pledging arrangements to secure funding and possible capital-raising initiatives;
- Establish a process for managing events that imperil the Corporation's liquidity. The process must assign appropriate personnel and executable action plans to implement the CFP; and
- Require periodic stress testing that analyzes the possible impacts on Farmer Mac's cash flows, liquidity position, profitability, and solvency for a wide variety of stress scenarios. Stress scenarios would have to be established and defined by the board and should be consistent with those applied in other areas of the Corporation's risk analysis, *i.e.,* those proposed in § 652.10 (Investment Management) and § 652.30 (Interest Rate Risk Management). The basis for assumptions must be documented and well-reasoned. The stress scenarios would have to be at a level of severity consistent with the board's risk tolerance and include scenarios such as market disruptions; rapid increase in contractually required loan purchases; unexpected requirements to fund commitments or revolving lines of credit or to fulfill guarantee obligations; difficulties in renewing or replacing funding with desired terms and structures; requirements to pledge collateral with counterparties; or reduced access to debt markets as a result of asset quality deterioration (including both program assets and non-program assets). FCA would also retain the discretion to require certain specific stress scenarios in response to changes in market and economic outlooks.

To satisfy these requirements, the CFP would have to set forth specific policies, procedures, and action steps (including which asset classes will be sold under specific scenarios) with designated responsibilities, to address a range of contingent scenarios that are internal to Farmer Mac or external, such as sector-wide or market-wide disruptions. For example, the CFP should include an external communications plan for how the Corporation will manage press inquiries during a liquidity event. Poor external communications during a liquidity event could directly, if inadvertently, increase the severity of the event. FCA could use its reservation of authority to require specific stress scenarios to be used, for example, in response to developments in the Agency's outlook for Farmer Mac's business environment.

J. Section 652.40—Liquidity Reserve Requirement and Supplemental Liquidity

Existing § 652.20(a) requires Farmer Mac to hold cash, eligible non-program investments, and/or Farmer Mac II assets (all subject to specified discounts) to maintain sufficient liquidity to fund a minimum of 60 days of maturing obligations, interest expense, and operating expenses. The purpose of this minimum liquidity requirement is to enable Farmer Mac to continue its operations if its access to the capital markets were impeded or otherwise disrupted.

As discussed in the ANPRM, we recognize that a drawback of the ''days-of-liquidity'' metric is that it provides no projected information; a large days-of-liquidity today provides little or no information about what the measurement might be even the following day. For example, a bank with 150 days-of-liquidity today might issue a very large volume of discount notes the following day that mature in 100 days. This issuance could significantly reduce the days-of-liquidity calculated only the day before. A well-managed financing operation will evaluate the days-of-liquidity metric against its short-term anticipated funding needs, *i.e.,* how that measurement might change in the very near future. A funding strategy that combines short-term debt with long-term swaps could make the days-of-liquidity measurement highly volatile under plausible scenarios.

Both the Council and AgFirst commented that that the days-of-liquidity approach to liquidity management is appropriate and widely used. We received no comments suggesting alternative metrics, and we do not propose any such alternative. We note, however, that the proposed LMMP

[38] 75 FR 13656, Mar. 22, 2010, and ''Principles for Sound Liquidity Risk Management and Supervision,'' Basel Committee on Banking Supervision, *http://www.bis.org/bcbs,* respectively.

[39] As discussed above, proposed § 652.35(b)(1) would require that the CFP be contained in Farmer Mac's liquidity policy.

[40] Days-of-liquidity is discussed below.

[41] Page 3 of ''Basel III: International Framework for Liquidity Risk Measurement, Standards and Monitoring'' Basel Committee on Banking Supervision, December 2010, *http://www.bis.org/bcbs.*

discussed above would contribute to management of the shortcomings in the days-of-liquidity metric.

1. Section 652.40(a)—General

In contrast to current regulation, proposed § 652.40(a) (which would replace existing § 652.20(a) in the existing regulations) would require Farmer Mac to maintain a liquidity reserve equal to at least 90 days of maturing obligations and other borrowings. In its comment letter, AgFirst suggested that a 90-day liquidity reserve would lead to improved liquidity risk management as well as to consistency with System bank practices.

We established the current 60-day minimum in 2005 as part of our first rulemaking governing Farmer Mac's liquidity risk management. We set the minimum lower than minimums discussed in the regulatory literature at the time, *e.g.,* regulations governing other Farm Credit System institutions, to avoid unintended consequences on Farmer Mac's operations as we introduced this regulation for the first time. Farmer Mac has since increased its liquidity position substantially and in our view a higher minimum would advance the Corporation's safety and soundness.

In addition to the proposed increase in the minimum requirement, we propose to simplify the components of the calculation of days-of-liquidity in proposed § 652.40(a) by including only obligations and other borrowings [42] and to no longer include interest obligations or operational expenses. While those obligations are deemed no less relevant, the increased minimum will, we believe, more than compensate for the exclusion of these obligations from the calculation while gaining the benefit of reduced complexity in the regulatory structure. Thus, while we do not suggest that the effects of the increased requirement and the simplified calculation are perfectly offsetting, we note that there is such an overall offsetting effect and that a net increase in the standard is intended.

The liquidity reserve could be comprised only of cash and of specified, highly marketable investments that are discussed below. Also as discussed below, the investments would have to be discounted as specified.

We also propose in § 652.40(a) to require Farmer Mac to maintain supplemental liquidity as required by the table in paragraph (d) of this section. As discussed below, the supplemental liquidity requirement in the table at paragraph (d) would require Farmer Mac to maintain assets to fund obligations maturing after 90 calendar days in an amount necessary to meet its board liquidity policy. As discussed below, supplemental liquidity could be comprised of cash, eligible investments, and qualifying securities backed by Farmer Mac program assets (loans); the investments and qualifying securities would have to be discounted as specified.

2. Section 652.40(b)—Unencumbered

In proposed § 652.40(b), we would require that all investments and qualifying securities used to meet the liquidity reserve and supplemental liquidity requirements must be unencumbered, and we propose a description of the term ''unencumbered.'' This requirement would replace the requirement in existing § 652.20(b) that investments held to meeting the liquidity reserve requirement must be free of liens or other encumbrances.

We propose this new terminology to bring greater clarity and precision to this requirement. We propose the term unencumbered to mean free of lien and not pledged either explicitly or implicitly in any way to secure, collateralize, or enhance the credit of any transaction. Investments held as a hedge against any other exposure would also not be unencumbered.

As noted throughout this preamble, FCA considers the guidance of other regulators in developing its policy proposals and evaluates their benefits and appropriateness for Farmer Mac. We note that the Liquidity Coverage Ratio standard recommended by Basel includes various forms of funding commitments and contingency funding commitments of the regulated entity.[43] We request comment on whether such commitments should be incorporated into the minimum liquidity reserve requirements in this rule. Specifically with regard to Farmer Mac, should Long-term Standby Purchase Commitments (LTSPC) be considered contingent obligations and some portion of the outstanding LTSPC volume be included in the days-of-liquidity calculation? Should its revolving lines of credit be included among these and, if so, what proportion? Should an estimated draw on its commitments on processing facilities, if any, be included in obligations?

3. Section 652.40(c)—Highly Marketable

In proposed § 652.40(c) we relocate and replace the requirement currently found at § 652.35(c) that non-program investments be readily marketable with the requirement that investments held for the purpose of meeting the liquidity reserve minimum must be highly marketable. An investment is considered to be highly marketable if it possesses the following characteristics:

- It is easily and immediately convertible to cash with little or no loss in value;
- It has low credit and market risk;
- It has ease and certainty of valuation; and
- Except for money market instruments, it is listed on a developed and recognized exchange market and is able to be sold or converted to cash through repurchase agreements in active and sizable markets.

The first three characteristics are consistent with the expectations of the other regulators concerning highly liquid investments.[44] The final characteristic is unchanged from the existing rule.

The newly proposed language clarifies that the requirement applies only to investments included in the liquidity reserve and not to all eligible investments generally. The relocation of this requirement to a regulation dealing with liquidity from one governing eligible investments generally further emphasizes the scope of the requirement. In addition, investments held to provide supplemental liquidity would not have to meet the ''highly marketable'' test. We note that our interpretation of the term ''immediate'' in the description of ''highly marketable'' will consider the overall quality of the investment. For example, if an investment is both backed by the full faith and credit of the United States Government but also thinly traded, its conversion at little or no loss in value may be uncertain within a single trading day, yet very certain within a very small number of days. Such very high credit-quality investments would qualify for Level 1 or Level 2 depending on a conservative estimate of the number of days required—and not be relegated to supplemental liquidity simply on the basis that liquidation could take a very small number of days.

[42] The term ''other borrowings'' is used to make clear that all forms borrowing should be included even if some do not technically take the form of debt, such as obligations under repurchase agreements.

[43] Page 12 of ''Basel III: International Framework for Liquidity Risk Measurement, Standards and Monitoring,'' *http://www.bis.org/bcbs.*

[44] *See* Interagency Policy Statement, 75 FR 13658, 13664, Mar. 22, 2010.

4. Section 652.40(d)—Composition of Liquidity Reserve and Supplemental Liquidity

The existing liquidity requirement, at § 652.20(a), requires Farmer Mac to hold sufficient cash, eligible non-program investments, and/or Farmer Mac II assets sufficient to fund at least 60 days of maturing obligations, interest expense, and operating expenses. The requirement does not currently differentiate among the relatively different liquidity characteristics of different types of investments.

We asked in the ANPRM whether it would be appropriate to establish a subcategory of the minimum days-of-liquidity requirement that would include assets that would not lose liquidity value in a market downturn, such as cash and Treasury securities, that would be sufficient to meet maturing obligations for a lesser number of days. In its comment letter, the Council stated that augmentation of liquidity through a short-term liquidity calculation contemplating cash and highly liquid investment securities is part of a prudent liquidity strategy. AgFirst commented that the days-of-liquidity approach to liquidity management can be enhanced by including subcategories of minimum days provided by different types of assets, and it noted that it and the other System banks have adopted a tiered liquidity system such as this.

We agree with these comments and propose to strengthen the existing days-of-liquidity requirement by adopting a tiered approach to the liquidity requirement.

Proposed § 652.65(d) would require Farmer Mac to continuously maintain Level 1 and Level 2 investments sufficient to meet the 90-day minimum liquidity requirement. It would also require Farmer Mac to maintain supplemental liquidity in an amount necessary to meet its board's liquidity policy.

Level 1 investments would be the most liquid investments. Investments that would qualify as Level 1 investment are cash, Treasury securities, other Government agency obligations, Government-sponsored agency securities (except mortgage securities) that mature within 60 days, and diversified investment funds comprised exclusively of Level 1 instruments.

Under the proposal, only Level 1 instruments could be used to fund obligations maturing in calendar days 1 through 30. In addition, at least 15 days must be comprised only of cash or instruments with remaining maturities of less than 3 years.

Level 2 investments, while still highly marketable, are deemed to be generally less liquid than Level 1 instruments. Investments that qualify as Level 2 instruments include Level 1 instruments to the extent Level 1 qualifying volume exceeds 30 days of maturing obligations, Government-sponsored agency securities (excluding mortgage securities) with maturities exceeding 60 days, Government-sponsored agency mortgage securities (excluding Farmer Mac's own securities), money market instruments maturing within 90 days, and diversified investments funds with holdings comprised entirely of Level 1 or Level 2 instruments.

Under the proposal, the third tier of liquidity investments are those that can be held for supplemental liquidity. Supplemental liquidity investments are used to fund obligations maturing after 90 calendar days, as necessary to meet the Farmer Mac board's liquidity policy.

Investments that can be held for supplemental liquidity include all eligible investments, as well as qualifying securities backed by Farmer Mac program assets (loans) guaranteed by the USDA, excluding the portion that would be necessary to satisfy obligations to creditors and equity holders in Farmer Mac II LLC. We consider this portion to be encumbered and therefore not appropriate for inclusion in supplemental liquidity under § 652.65(b). These are generally the investments that are counted toward the liquidity reserve requirement under existing § 652.20(a).

5. Section 652.40(e)—Discounts

Existing § 65.20(c) specifies discounts for various classes of investments in the liquidity reserve, including money market instruments, floating and fixed rate debt and preferred stock securities, diversified investment funds, and Farmer Mac II assets. In the ANPRM, we asked whether, in the wake of recent disruptions in financial markets, it would be appropriate to re-evaluate these discounts to reflect better the risk of diminished marketability of liquid investments under adverse conditions. We asked commenters to identify any changes they believed we should make. In addition, we specifically asked whether the discount currently applied to Farmer Mac II securities is appropriate. We also asked whether we should consider basing discounts on credit ratings.

We received no comments on our general question about discounts or on our question about Farmer Mac securities. The Council did comment that discounts should not be based on credit ratings, because the market value of a security (discounts applied to market values) is a timelier and more accurate reflection of liquidity and risk than credit ratings are. For this reason, and also because of section 939A of the DFA, we agree that discounts should not be based on credit ratings.

In proposed § 652.40(e), we propose discounts that better fit the proposed tiered structure of the minimum liquidity reserve requirement. We believe the proposed discounting structure results in reduced complexity in the regulation.

The proposed discounts are as follows:

- Multiply cash and overnight investments by 100 percent.
- Multiply Treasury securities by 97 percent of their market value. This would be a lessening of the current discount for Treasury securities which, along with all other fixed rate debt securities, are currently multiplied by 90 percent.[45] This level is reasonably consistent with discounts applied by the Federal Reserve;[46] and
- Multiply all other Level 1 qualifying investments by 95 percent of their market value (even if some of these instruments are counted toward the Level 2 liquidity reserve requirements due to a surplus of Level 1 qualifying instruments over the Level 1 liquidity reserve requirements). We believe this discount level is likely to be lower than the average discount applied to this portion of Farmer Mac's portfolio historically, but we believe it is warranted by the relative liquidity of these instruments;[47]
- Multiply all Level 2 investments by 93 percent of their market value, except the volume of Level 1 qualifying investments that exceed the Level 1 liquidity reserve requirement and is therefore applied to the Level 2 liquidity reserve requirement. This level is

[45] Section 652.20(c)(5).

[46] Information on Federal Reserve collateral margins can be found at *http://www.frbdiscountwindow.org.* Click on the link to Collateral Margins Table.

[47] The reason we use the term ''Level 1 qualifying instruments'' is to make clear that if Farmer Mac holds cash, Treasuries, and other Level 1 investments such that a portion of that Level 1 qualifying investment volume exceeds the 30 calendar days required of Level-1 investment volume and therefore is available to cover a portion of the 60-day Level 2 requirement, those Level 1 qualifying investments will not be discounted at seven percent as all other Level 2 investments but rather at the applicable Level 1 discount. This ensures equal discounting treatment regardless of whether Level 1 investments are applied to the Level 1 or Level 2 requirement. It also removes the potential incentive for Farmer Mac to reduce the proportion of higher liquidity assets that qualify as Level 1 instruments in excess of the Level 1 minimum requirement that it might prefer to hold absent this regulatory structure.

similar to the existing rule's treatment of such investments with similar cash flows; and

• Multiply all other investments held for supplemental liquidity by 85 percent of market value, except:

• Multiply the volume of Level 1-qualifying investments that exceed the Level 1 or Level 2 liquidity reserve requirement by 95 percent;

• Multiply the volume of Level 2 qualifying investments that exceed the Level 2 liquidity reserve requirements by 93 percent; and

• Multiply securities backed by Farmer Mac program assets (loans) guaranteed by the United States Department of Agriculture as described in section 8.0(9)(B) of the Act by 75 percent, the same as the existing discount.

We believe the 15-percent supplemental liquidity discount is warranted in light of our proposal not to require these investments to be ''highly marketable.'' Moreover, this requirement is also based on guidance in Basel III.[48]

The proposed 25-percent discount for Farmer Mac II assets is unchanged from the existing rule.

6. Section 652.40(f)—Reservation of Authority

In § 652.40(f), we propose to reserve the right, on a case-by-case basis, to require Farmer Mac to adjust its treatment of instruments (assets) in its liquidity reserve and supplemental liquidity so that it has liquidity that is sufficient and commensurate for the risks its faces. This reservation of authority enables FCA to respond to adverse financial, economic, or market conditions by requiring Farmer Mac, on a case-by-case basis, to:

• Increase the specified discounts that are applied to any individual security or any class of securities due to changes in market conditions or marketability of such securities;

• Shift individual or multiple securities from one level of the liquidity reserve to another, or between one of the levels of the liquidity reserve and supplemental liquidity, based on the performance of such asset(s), or based on financial, economic, or market conditions affecting the liquidity and solvency of Farmer Mac;

• Change portfolio concentration limits in § 652.20(a); or

• Take any other action that we deem necessary to ensure that Farmer Mac has sufficient liquidity to meet its financial obligations as they come due.

This reservation of authority would enable FCA to respond to adverse financial, economic, or market conditions by giving us the authority to require Farmer Mac to maintain liquidity that is sufficient and commensurate for the risks its faces.

K. Section 652.45—Temporary Regulatory Waivers or Modifications for Extraordinary Situations

We propose to relocate existing § 652.30, which authorizes FCA to modify or waive regulatory investment management and liquidity management requirements in extraordinary situations, to new § 652.45. We believe this location is more appropriate for this provision.

In addition to the existing specific modifications and waivers the provision authorizes, we propose to authorize FCA to take other actions as deemed appropriate. This added authority would give FCA additional flexibility to address extraordinary situations.

VI. Regulatory Flexibility Act

Farmer Mac has assets and annual income in excess of the amounts that would qualify it as a small entity. Therefore, Farmer Mac is not a ''small entity'' as defined in the Regulatory Flexibility Act. Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the FCA hereby certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 12 CFR Part 652

Agriculture, Banks, Banking, Capital, Investments, Rural areas.

For the reasons stated in the preamble, part 652 of chapter VI, title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 652—FEDERAL AGRICULTURAL MORTGAGE CORPORATION FUNDING AND FISCAL AFFAIRS

1. Subpart A, consisting of §§ 652.1 through 652.45, is revised to read as follows:

Subpart A—Investment Management

Sec.
652.1 Purpose.
652.2 Definitions.
652.10 Investment management.
652.15 Non-program investment purposes and limitation.
652.20 Eligible non-program investments.
652.25 Management of ineligible and unsuitable investments.
652.30 Interest rate risk management.
652.35 Liquidity management.
652.40 Liquidity reserve requirement and supplemental liquidity.
652.45 Temporary regulatory waivers or modifications for extraordinary situations.

Authority: Secs. 4.12, 5.9, 5.17, 8.11, 8.31, 8.32, 8.33, 8.34, 8.35, 8.36, 8.37, 8.41 of the Farm Credit Act (12 U.S.C. 2183, 2243, 2252, 2279aa–11, 2279bb, 2279bb–1, 2279bb–2, 2279bb–3, 2279bb–4, 2279bb–5, 2279bb–6, 2279cc); sec. 514 of Pub. L. 102–552, 106 Stat. 4102; sec. 118 of Pub. L. 104–105, 110 Stat. 168; sec. 939A of Pub. L. 11–203, 124 Stat. 1326, 1887.

Subpart A—Investment Management

§ 652.1 Purpose.

The purpose of this subpart is to ensure safety and soundness, continuity of funding, and appropriate use of non-program investments considering the Federal Agricultural Mortgage Corporation's (Farmer Mac or Corporation) special status as a Government-sponsored enterprise (GSE). The subpart contains requirements for Farmer Mac's board of directors to adopt policies covering the management of non-program investments, funding and liquidity risk, and interest rate risk. The subpart also requires Farmer Mac to comply with various reporting requirements.

§ 652.5 Definitions.

For purposes of this subpart, the following definitions will apply:

Affiliate means any entity established under authority granted to the Corporation under section 8.3(c)(14) of the Farm Credit Act of 1971, as amended.

Asset-backed securities (ABS) mean investment securities that provide for ownership of a fractional undivided interest or collateral interests in specific assets of a trust that are sold and traded in the capital markets. For the purposes of this subpart, ABS exclude mortgage securities that are defined below.

Cash means cash balances held at Federal Reserve Banks, proceeds from traded-but-not-yet-settled debt, and the insured amount of balances held in deposit accounts at Federal Deposit Insurance Corporation-insured banks.

Contingency Funding Plan (CFP) is described in § 652.35(e).

Eurodollar time deposit means a non-negotiable deposit denominated in United States dollars and issued by an overseas branch of a United States bank or by a foreign bank outside the United States.

Farmer Mac, Corporation, you, or your means the Federal Agricultural Mortgage Corporation and its affiliates.

FCA, our, us, or we means the Farm Credit Administration.

[48] Page 9 of ''Basel III: International Framework for Liquidity Risk Measurement, Standards and Monitoring,'' December 2010, *http://www.bis.org/bcbs.*

Final maturity means the last date on which the remaining principal amount of a security is due and payable (matures) to the registered owner. It does not mean the call date, the expected average life, the duration, or the weighted average maturity.

General obligations of a state or political subdivision mean:

(1) The full faith and credit obligations of a state, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, or a political subdivision thereof that possesses general powers of taxation, including property taxation; or

(2) An obligation that is unconditionally guaranteed by an obligor possessing general powers of taxation, including property taxation.

Government agency means the United States Government or an agency, instrumentality, or corporation of the United States Government whose obligations are fully and explicitly insured or guaranteed as to the timely repayment of principal and interest by the full faith and credit of the United States Government.

Government-sponsored agency means an agency, instrumentality, or corporation chartered or established to serve public purposes specified by the United States Congress but whose obligations are not explicitly insured or guaranteed by the full faith and credit of the United States Government, including but not limited to any Government-sponsored enterprise.

Liability Maturity Management Plan (LMMP) is described in § 652.35(d).

Liquidity reserve is described in § 652.40.

Long-Term Standby Purchase Commitment (LTSPC) is a commitment by Farmer Mac to purchase specified eligible loans on one or more undetermined future dates. In consideration for Farmer Mac's assumption of the credit risk on the specified loans underlying an LTSPC, Farmer Mac receives an annual commitment fee on the outstanding balance of those loans in monthly installments based on the outstanding balance of those loans.

Market risk means the risk to your financial condition because the value of your holdings may decline if interest rates or market prices change. Exposure to market risk is measured by assessing the effect of changing rates and prices on either the earnings or economic value of an individual instrument, a portfolio, or the entire Corporation.

Maturing obligations mean maturing debt and other obligations that may be expected, such as buyouts of LTSPCs or repurchases of agricultural mortgage securities.

Mortgage securities mean securities that are either:

(1) Pass-through securities or participation certificates that represent ownership of a fractional undivided interest in a specified pool of residential (excluding home equity loans), multifamily or commercial mortgages, or

(2) A multiclass security (including collateralized mortgage obligations and real estate mortgage investment conduits) that is backed by a pool of residential, multifamily or commercial real estate mortgages, pass-through mortgage securities, or other multiclass mortgage securities.

(3) This definition does not include agricultural mortgage-backed securities guaranteed by Farmer Mac itself.

Nationally recognized statistical rating organization (NRSRO) means a rating organization that the Securities and Exchange Commission recognizes as an NRSRO.

Non-program investments mean investments other than those in:

(1) ''Qualified loans'' as defined in section 8.0(9) of the Farm Credit Act of 1971, as amended; or

(2) Securities collateralized by ''qualified loans.''

OSMO means FCA's Office of Secondary Market Oversight.

Program assets mean on-balance sheet ''qualified loans'' as defined in section 8.0(9) of the Farm Credit Act of 1971, as amended.

Program obligations mean off-balance sheet ''qualified loans'' as defined in section 8.0(9) of the Farm Credit Act of 1971, as amended.

Regulatory capital means your core capital plus an allowance for losses and guarantee claims, as determined in accordance with generally accepted accounting principles.

Revenue bond means an obligation of a municipal government that finances a specific project or enterprise, but it is not a full faith and credit obligation. The obligor pays a portion of the revenue generated by the project or enterprise to the bondholders.

Weighted average life (WAL) means the average time until the investor receives the principal on a security, weighted by the size of each principal payment and calculated under specified prepayment assumptions.

§ 652.10 Investment management.

(a) *Responsibilities of the board of directors.* Your board of directors must adopt written policies for managing your non-program investment activities. Your board must also ensure that management complies with these policies and that appropriate internal controls are in place to prevent loss. At least annually, your board, or a designated committee of the board, must review and affirmatively validate the sufficiency of these investment policies. Any changes to the policies must be adopted by the board. You must report any changes to these policies to the OSMO within 10 business days of adoption.

(b) *Investment policies—general requirements.* Your investment policies must address the purposes and objectives of investments, risk tolerance, delegations of authority, internal controls, due diligence, and reporting requirements. Furthermore, the policies must include reporting requirements and approvals needed for exceptions to the board's policies. Investment policies must be sufficiently detailed, consistent with, and appropriate for the amounts, types, and risk characteristics of your investments. You must document in the Corporation's records or minutes any analyses used in formulating your policies or amendments to the policies.

(c) *Investment policies—risk tolerance.* Your investment policies must establish risk limits for the various types, classes, and sectors of eligible investments. These policies must ensure that you maintain prudent diversification of your investment portfolio and that your asset allocations and investment portfolio strategies do not expose the Corporation's capital or earnings to excessive risk of loss. Risk limits must be based on the Corporation's objectives, capital position, and risk tolerance. Your policies must identify the types and quantity of investments that you will hold to achieve your objectives and control credit, market, liquidity, and operational risks. Your policies must establish risk limits for the following four types of risk:

(1) *Credit risk.* Your investment policies must establish:

(i) Credit quality standards, limits on counterparty risk, and risk diversification standards that limit concentrations as follows:
Concentration limits must be based on a single or related counterparty(ies). Concentration limits must also be based on geographical area, industry sectors, or asset classes or obligations with similar characteristics.

(ii) Criteria for selecting brokers, dealers, and investment bankers (collectively, securities firms). You must buy and sell eligible investments with more than one securities firm. As part of your review of your investment policies required under paragraph (a) of

this section, your board of directors, or a designated committee of the board, must review the criteria for selecting securities firms. Any changes to the criteria must be approved by the board. Also, as part of your review required under paragraph (a) of this section, the board, or a designated committee of the board, must review existing relationships with securities firms and determine whether to continue your relationships with them. Any changes to the existing relationships with securities firms must be approved by the board.

(iii) Collateral margin requirements on repurchase agreements. You must regularly mark the collateral to market and ensure appropriate controls are maintained over collateral held.

(2) *Market risk.* Your investment policies must set market risk limits for specific types of investments and for the investment portfolio.

(3) *Liquidity risk.* Your investment policies must describe the liquidity characteristics of eligible investments that you will hold to meet your liquidity needs and the Corporation's objectives.

(4) *Operational risk.* Investment policies must address operational risks, including delegations of authority and internal controls in accordance with paragraphs (d) and (e) of this section.

(d) *Delegation of authority.* All delegations of authority to specified personnel or committees must state the extent of management's authority and responsibilities for investments.

(e) *Internal controls.* You must:

(1) Establish appropriate internal controls to detect and prevent loss, fraud, embezzlement, conflicts of interest, and unauthorized investments.

(2) Establish and maintain a separation of duties and supervision between personnel who execute investment transactions and personnel who post accounting entries, reconcile trade confirmations, report compliance with investment policy, and approve, revalue, and oversee investments.

(3) Maintain records and management information systems that are appropriate for the level and complexity of your investment activities.

(4) Implement an effective internal audit program to review, at least annually, your investment controls, processes, and compliance with FCA regulations and other regulatory guidance. Your internal audit program must specifically include a review of your process for ensuring all investments are eligible and suitable for purchase under your board's investment policies.

(f) *Due diligence*—(1) *Pre-purchase analysis*—

(i) *Objective, eligibility, and suitability.* Before you purchase an investment, you must document your investment objective. In addition, you must conduct sufficient due diligence to determine whether the investment is eligible under § 652.20 and suitable under your board-approved investment policies, and you must document the investment's eligibility and suitability. Your investment policies must fully address the extent of pre-purchase analysis that management must perform for various types, classes, and structure of investments.

(ii) *Valuation.* Prior to purchase, you must verify the value of the investment (unless it is a new issue) with a source that is independent of the broker, dealer, counterparty or other intermediary to the transaction.

(iii) *Risk assessment.* You must document your risk assessment of each investment. Your risk assessment must at a minimum include an evaluation of:

(A) *Credit risk.* As applicable, you must consider the nature and type of underlying collateral, credit enhancements, complexity of the structure, and any other available indicators of the risk of default.

(B) *Market risk.* You must consider how various market stress scenarios including, at a minimum, potential changes in interest rates and market conditions (such as changes in market perceptions of creditworthiness), are likely to affect the cash flow and price of the instrument, using reasonable and appropriate methodologies for stress testing for the type or class of instrument to ensure the investment complies with risk limits established in your investment and interest rate risk policies.

(C) *Liquidity risk.* Your evaluation of liquidity risk must consider the investment structure, depth of the market, and ability to liquidate the position under a variety of economic scenarios and market conditions.

(2) *Monthly fair value determination.* At least monthly, you must determine the fair market value of each investment in your portfolio and the fair market value of your whole investment portfolio.

(3) *Quarterly stress testing.*

(i) You must stress test your entire investment portfolio on a quarterly basis. If your portfolio risk exceeds your investment policy limits, you must develop a plan to reduce risk and comply with your investment policy limits.

(ii) Your stress tests must be comprehensive and appropriate for the risk profile of your investment portfolio and the Corporation. At a minimum, the stress tests must consider how potential changes in interest rates and market conditions (including market perceptions of creditworthiness) are likely to affect the cash flow and price of the instrument. The methodology that you use to analyze investment securities must be appropriate for the complexity, structure, and cash flows of the investments in your portfolio. The stress tests must enable you to determine that your investment securities, either individually or on a portfolio-wide basis, do not expose your capital, earnings, or liquidity to excessive risks. You must rely to the maximum extent practicable on verifiable information to support all your assumptions, including prepayment and interest rate volatility assumptions, when you apply your stress tests. Your assumptions must be conservative and you must document the basis for all assumptions that you use to evaluate the security and its underlying collateral. You must also document all subsequent changes in your assumptions.

(4) *Presale value verification.* Before you sell an investment, you must verify its value with a source that is independent of the broker, dealer, counterparty, or other intermediary to the transaction.

(g) *Reports to the board of directors.* At least quarterly, executive management must report on the following to the board of directors or a designated committee of the board:

(1) Plans and strategies for achieving the board's objectives for the investment portfolio;

(2) Whether the investment portfolio effectively achieves the board's objectives;

(3) The current composition, quality, and liquidity profile of the investment portfolio;

(4) The performance of each class of investments and the entire investment portfolio, including all gains and losses that you incurred during the quarter on individual securities that you sold before maturity and why they were liquidated;

(5) Potential risk exposure to changes in market interest rates as identified through quarterly stress testing and any other factors that may affect the value of your investment holdings;

(6) How investments affect your capital, earnings, and overall financial condition;

(7) Any deviations from the board's policies. These deviations must be formally approved by the board of directors.

§ 652.15 Non-program investment purposes and limitation.

(a) Farmer Mac is authorized to hold eligible non-program investments listed under § 652.20 for the purposes of enterprise risk management, including complying with the interest rate risk requirements in § 652.30 and the liquidity requirements in § 652.40; managing surplus short-term funds; and complementing program business activities.

(b) Non-program investments cannot exceed 35 percent of program assets and program obligations, excluding qualifying securities that are both guaranteed by the United States Department of Agriculture and included as a potential source of supplemental liquidity in § 652.40(d). When calculating the total amount of non-program investments under this section, exclude investments pledged to meet margin requirements on derivative transactions.

§ 652.20 Eligible non-program investments.

(a) You may purchase only the investments that satisfy the eligibility criteria in this section. An investment that does not satisfy the eligibility criteria at the time of purchase is not eligible for purchase and is subject to the requirements of § 652.20(a) if purchased. An investment that satisfies the eligibility criteria at the time of purchase but subsequently fails to satisfy the eligibility criteria is subject to the requirements of § 652.25(b).

Asset class	Final maturity limit	NRSRO Issue or issuer credit rating requirement	Other requirements	Maximum percentage of total non-program investment portfolio
(1) Obligations of the United States	None	NA	None	None.
• Obligations (except mortgage securities) fully insured or guaranteed by a Government agency.				
(2) Obligations of Government-sponsored agencies.	None	NA	Senior debt securities only.	None.
• Government-sponsored agency securities (except mortgage securities).				
• Other obligations (except mortgage securities) fully insured or guaranteed by Government-sponsored agencies.				
(3) Municipal Securities				
• General obligations	10 years	One of the two highest.	None	15%.
• Revenue bonds	10 years	Highest	None	15%.
(4) International and Multilateral Development Bank Obligations.	10 years	None	The United States must be a voting shareholder.	15%.
(5) Money Market Instruments				
• Federal funds	1 day or continuously callable up to 100 days.	One of the two highest short-term.	None	None.
• Negotiable certificates of deposit	1 year	One of the two highest short-term.	None	None.
• Bankers acceptances	None	One of the two highest short-term.	Issued by a depository institution.	None.
• Prime commercial paper	270 days	Highest short-term	None	None.
• Non-callable term Federal funds and Eurodollar time deposits.	100 days	Highest short-term	None	20%.
• Master notes	270 days	Highest short-term	None	20%.
• Repurchase agreements collateralized by eligible investments or marketable securities rated in the highest credit rating category by an NRSRO.	100 days	NA		None.
(6) Mortgage Securities				
• Fully insured or guaranteed by a Government agency.	None	NA		None.
• Government-sponsored agency mortgage securities.	None	One of the two highest.		50%.
• Securities that are not fully insured or fully guaranteed by a Government agency or Government-sponsored agency and that comply with 15 U.S.C. 77d(5) or 15 U.S.C. 78c(a)(41).	None	Highest	Senior-most position only.	10%.

Asset class	Final maturity limit	NRSRO Issue or issuer credit rating requirement	Other requirements	Maximum percentage of total non-program investment portfolio
(7) Asset-Backed Securities secured by: • Credit card receivables • Automobile loans • Home equity loans • Wholesale automobile dealer loans • Student loans • Equipment loans • Manufactured housing loans	None	Highest	Maximum of 5-year WAL for fixed rate or floating rate ABS at their contractual interest rate caps. Maximum of 7-year WAL for floating rate ABS that remain below their contractual interest rate caps.	15% in total, and no more than 5% of any single collateral type.
(8) Corporate Debt Securities	5 years	One of the highest two for maturities greater than 3 years, and one of the highest three for maturities of three years or less.	Senior debt securities only. Cannot be convertible to equity securities.	20% in total, and no more than 10% in any one of the 10 industry sectors as defined by the Global Industry Classification Standard (GICS).
(9) Diversified Investment Funds Shares of an investment company registered under section 8 of the Investment Company Act of 1940.	NA	NA	Open-end funds only The portfolio of the investment company must consist solely of eligible investments authorized by this section. The investment company's risk and return objectives and use of derivatives must be consistent with FCA guidance and your investment policies.	50% in total. No more than 10% in any single fund.

Note: You must also comply with requirements of paragraphs (b), (c), and (d) of this section. "NA" means not applicable.

(b) *Denomination.* All investments must be denominated in United States dollars.

(c) *Rating of foreign countries.* Whenever the obligor or issuer of an eligible investment is located outside the United States, the host country must maintain the highest sovereign rating for political and economic stability by an NRSRO.

(d) *Obligor limits.*

(1) You may not invest more than 15 percent of your regulatory capital in eligible investments issued by any single entity, issuer or obligor, except that there are no obligor limits on obligations (including mortgage securities) that are issued or guaranteed as to principal and interest by Government agencies or Government-sponsored agencies.

(2) *Obligor limits for your holdings in an investment company.* You must count securities that you hold through an investment company toward the obligor limits of this section unless the investment company's holdings of the security of any one issuer do not exceed 5 percent of the investment company's total portfolio.

(e) *Other investments approved by the FCA.*

(1) You may purchase and hold other non-program investments only with our prior written approval. Your request for our approval must explain the risk characteristics of the investment and your purpose and objectives for making the investment.

§ 652.25 Management of ineligible and unsuitable investments.

(a) *Investments ineligible when purchased.* Investments that do not satisfy the eligibility criteria set forth in § 652.20 at the time of purchase are ineligible. You may not purchase ineligible investments. If you determine that you have purchased an ineligible investment, you must notify the OSMO promptly after such determination and must divest of the investment no later than 60 calendar days after the determination unless we approve, in writing, a plan that authorizes you to divest of the investment over a longer period of time.

(b) *Investments that no longer satisfy eligibility criteria or are unsuitable.* If an investment (that satisfied the eligibility criteria set forth in § 652.20 when purchased) no longer satisfies the eligibility criteria, or if an investment is unsuitable under your board's policy, you must notify the OSMO promptly.

(c) *Requirements for investments that are ineligible, no longer satisfy eligibility criteria, or are unsuitable.*

(1) *Reporting requirements.* Each quarter, you must report to the OSMO and your board on the status of investments identified in paragraph (a) or (b). Your report must demonstrate the impact that these investments may have on the Corporation's capital, earnings, and liquidity position. Additionally, the report must address how the Corporation plans to reduce its risk exposure from these investments or exit the position(s).

(2) *Other requirements.* Investments identified in paragraph (a) or (b) may not be used to fund your liquidity reserve or supplemental liquidity required under § 652.40. These investments must continue to be

included the investment portfolio limit established in § 652.15(b).

(d) *Reservation of authority.* FCA retains the authority to require you to divest of any investment at any time for safety and soundness reasons. The timeframe set by FCA for such required divestiture will consider the expected loss on the transaction (or transactions) and the impact on the Corporation's financial condition and performance.

§ 652.30 Interest rate risk management.

(a) The board of directors of Farmer Mac must provide effective oversight (direction, controls, and supervision) of interest rate risk management and must be knowledgeable of the nature and level of interest rate risk taken by Farmer Mac.

(b) The board of directors of Farmer Mac must adopt an interest rate risk management policy that establishes appropriate interest rate risk exposure limits based on the Corporation's risk-bearing capacity and reporting requirements in accordance with paragraphs (c) and (d) of this section. At least annually, the board of directors, or a designated committee of the board, must review the policy. Any changes to the policy must be approved by the board of directors. You must report any changes to the policy to the OSMO within 10 business days of adoption.

(c) The interest rate risk management policy must, at a minimum:

(1) Address the purpose and objectives of interest rate risk management;

(2) Identify the causes of interest rate risk and set appropriate quantitative limits consistent with a clearly articulated board risk tolerance;

(3) Require management to establish and implement comprehensive procedures to measure the potential impact of these risks on the Corporation's projected earnings and market values by conducting interest rate stress tests and simulations of multiple economic scenarios at least quarterly. Your stress tests must gauge how interest rate fluctuations affect the Corporation's capital, earnings, and liquidity position. The methodology that you use must be appropriate for the complexity of the structure and cash flows of your on- and off-balance sheet positions, including the nature and purpose of derivative contracts, and establish counterparty risk thresholds and limits for derivatives. It must also ensure an appropriate level of consistency with the stress-test scenarios considered under § 652.10(f)(3). Assumptions applied in stress tests must be conservative and, to the maximum extent practicable, must rely on verifiable information. You must document the basis for all assumptions that you use.

(4) Describe and authorize management to implement actions needed to achieve Farmer Mac's desired risk management objectives;

(5) Ensure procedures are established to evaluate and document, at least quarterly, whether actions taken have actually met the Corporation's desired risk management objectives;

(6) Identify exception parameters and approvals needed for any exceptions to the policy's requirements;

(7) Describe delegations of authority; and,

(8) Describe reporting requirements, including exceptions to policy limits.

(d) At least quarterly, management must report to the Corporation's board of directors, or a designated committee of the board, describing the nature and level of interest rate risk exposure. Any deviations from the board's policy on interest rate risk must be specifically identified in the report and approved by the board, or a designated committee of the board.

§ 652.35 Liquidity management.

(a) *Liquidity policy—board responsibilities.* Farmer Mac's board of directors must adopt a liquidity policy, which may be integrated into a comprehensive asset-liability management or enterprise-wide risk management policy. The risk tolerance embodied in the liquidity policy must be consistent with the investment management policies required by § 652.10 of this part. The board must ensure that management uses adequate internal controls to ensure compliance with its liquidity policy. At least annually, the board of directors or a designated committee of the board must review and affirmatively validate the sufficiency of the liquidity policy. The board of directors must approve any changes to the policy. You must provide a copy of the revised liquidity policy to the OSMO within 10 business days of adoption.

(b) *Policy content.* Your liquidity policy must contain at a minimum the following:

(1) The purpose and objectives of liquidity reserves;

(2) A listing of specific asset classes and characteristics that can be used to meet liquidity objectives;

(3) Diversification requirements for your liquidity reserve portfolio;

(4) Maturity limits and credit quality standards for non-program investments used to meet the minimum liquidity requirements of § 652.40 (d);

(5) The minimum and target (or optimum) amounts of liquidity that the board has established for Farmer Mac, expressed in days of maturing obligations;

(6) The maximum amount of non-program investments that can be held for meeting Farmer Mac's liquidity needs, expressed as a percentage of program assets and program obligations;

(7) Exception parameters and post approvals needed with respect to the liquidity reserve;

(8) Delegations of authority pertaining to the liquidity reserve;

(9) Reporting requirements which must comply with the requirements under paragraph (c) of this section;

(10) A liability maturity management plan (LMMP), as described in § 652.35(d); and,

(11) A contingency funding plan (CFP), as described in § 652.35(e).

(c) *Reporting requirements*—(1) *Board reporting*—

(i) *Periodic.* At least quarterly, Farmer Mac's management must report to the Corporation's board of directors or a designated committee of the board describing, at a minimum, the status of the Corporation's compliance with board policy and the performance of the liquidity reserve portfolio.

(ii) *Special.* Management must report any deviation from the bank's liquidity policy, or failure to meet the board's liquidity targets immediately to the board.

(2) *OSMO reporting.* Farmer Mac must report, in writing, to the OSMO no later than the next business day following the discovery of any breach of the minimum liquidity reserve requirement at § 652.40.

(d) *Liability maturity management plan.* Your board must adopt a LMMP that establishes a funding strategy that provides for effective diversification of the sources and tenors of funding. The LMMP must:

(1) Include targets of acceptable ranges of the proportion of debt issuances maturing within specific time periods;

(2) Reflect the board's liquidity risk tolerance; and

(3) Consider components of the Corporation's funding strategy that offset, or contribute to, liquidity risk.

(e) *Contingency funding plan*—

(1) *General.* Farmer Mac must have a CFP to ensure sources of liquidity are sufficient to fund normal operating requirements under a variety of stress events described in paragraph (e)(3)(iv) of this section.

(2) *CFP requirements.* The board of directors must review and approve the CFP at least once each year and must make adjustments to reflect changes in the results of stress tests, the

Corporation's risk profile, and market conditions. Under the CFP, Farmer Mac must maintain unencumbered and highly marketable assets as described in paragraphs (b) and (c) of § 652.40 in its liquidity reserve sufficient to meet its liquidity needs based on estimated cash inflows and outflows for a 30-day time horizon under a stress scenario that is sufficiently acute as to be consistent with the level of the board's risk tolerance.

(3) The CFP must:

(i) Be customized to the financial condition and liquidity risk profile of Farmer Mac, the board's liquidity risk tolerance, and the Corporation's business model;

(ii) Identify funding alternatives that can be implemented as access to funding is reduced;

(iii) Establish a process for managing events that imperil Farmer Mac's liquidity. The process must assign appropriate personnel and executable action plans to implement the CFP; and,

(iv) Require periodic stress testing that analyzes the possible impacts on Farmer Mac's cash flows, liquidity position, profitability, and solvency for a wide variety of stress scenarios. Stress scenarios must be established and defined by the board and consistent with those applied in other areas of the Corporation's risk analysis. Assumptions applied must be conservative and their basis documented. The stress scenarios must be at a level of severity consistent with the board's risk tolerance and include scenarios such as market disruptions; rapid increase in contractually required loan purchases; unexpected requirements to fund commitments or revolving lines of credit or to fulfill guarantee obligations; difficulties in renewing or replacing funding with desired terms and structures; requirements to pledge collateral with counterparties; or reduced access to debt markets as a result of asset quality deterioration (including both program assets and non-program assets). FCA may, at its discretion, require certain specific stress scenarios in response to changes in market and economic outlooks.

§ 652.40 Liquidity reserve requirement and supplemental liquidity.

(a) *General.* Farmer Mac must maintain a liquidity reserve in accordance with paragraph (d) of this section sufficient to fund 90 days of the principal portion of maturing obligations and other borrowings at all times. The liquidity reserve must be comprised only of cash and investments, eligible under § 652.20, that are specified under paragraph (d) of this section. Farmer Mac must also maintain supplemental liquidity as required by paragraph (d) of this section. Supplemental liquidity must be comprised of cash, investments that are eligible under § 652.20, and qualifying securities backed by Farmer Mac program assets (loans) as specified in paragraph (d) of this section. Investments and qualifying securities comprising the liquidity reserve and supplemental liquidity must be discounted in accordance with paragraph (e) of this section.

(b) *Unencumbered.* All investments and qualifying securities held for the purpose of meeting the liquidity reserve and supplemental liquidity requirements of this section must be unencumbered, meaning free of lien, not pledged either explicitly or implicitly in any way to secure, collateralize, or enhance the credit of any transaction, and not held as a hedge against any other exposure.

(c) *Highly marketable.* All investments that Farmer Mac holds for the purpose of meeting the liquidity reserve minimum requirements of this section must be highly marketable. For purposes of this section, an investment is highly marketable if it possesses the following characteristics:

(1) It is easily and immediately convertible to cash with little or no loss in value;

(2) It has low credit and market risk;

(3) It has ease and certainty of valuation; and

(4) Except for money market instruments, it is listed on a developed and recognized exchange market and is able to be sold or converted to cash through repurchase agreements in active and sizable markets.

(e) *Composition of liquidity reserve and supplemental liquidity.* Farmer Mac must continuously maintain Level 1 and Level 2 investments described in the table below sufficient to meet the 90-day minimum liquidity requirement in paragraph (a) of this section. Farmer Mac must also maintain supplemental liquidity as required by the table below.

Level 1 Investments: Instruments used to fund obligations maturing in calendar days 1 through 30. At least 15 days of the Level 1 requirement must be comprised of cash or instruments with remaining maturities of less than 3 years.	• Cash. • Treasury securities. • Other Government agency obligations. • Government-sponsored agency securities (excluding mortgage securities) that mature within 60 days. • Diversified Investment Funds comprised exclusively of Level 1 instruments.
Level 2 Investments: Instruments used to fund obligations maturing in calendar days 31 through 90.	• Additional amounts of Level 1 Instruments. • Government-sponsored agency securities (excluding mortgage securities) with maturities exceeding 60 days. • Government-sponsored agency mortgage securities (excluding Farmer Mac securities). • Money Market instruments maturing within 90 days. • Diversified Investment Funds comprised of Level 1 or 2 instruments.
Supplemental Liquidity: Assets to fund obligations maturing after 90 calendar days in an amount necessary to meet board liquidity policy in accordance with § 652.35.	• Eligible investments under § 652.20. • Qualifying securities backed by Farmer Mac program assets (loans) guaranteed by the United States Department of Agriculture (excluding the portion that would be necessary to satisfy obligations to creditors and equity holders in Farmer Mac II LLC).

(e) *Discounts.* The liquid assets of the liquidity reserve and supplemental liquidity are discounted as follows:

(1) Multiply cash and overnight investments by 100 percent;

(2) Multiply Treasury securities by 97 percent of the market value;

(3) Multiply all other Level 1 qualifying instruments by 95 percent of their market value, even if some of these instruments are counted toward the

Level 2 liquidity reserve requirements due to a surplus of Level 1 qualifying instruments over the Level 1 liquidity reserve requirements.

(4) Multiply all Level 2 Instruments by 93 percent of the market value, except the volume of Level 1 qualifying instruments that exceeds the Level 1 liquidity reserve requirement and is therefore applied to the Level 2 liquidity reserve requirement, as described in paragraph (e)(3) of this section; and

(5) Multiply all other investments held for supplemental liquidity by 85 percent of market value, except:

(i) The volume of Level 1 qualifying instruments that exceeds the Level 1 or Level 2 liquidity reserve requirements, as described in paragraph (e)(3) of this section; and

(ii) The volume of Level 2 qualifying instruments that exceeds the Level 2 liquidity reserve requirements, as described in paragraph (e)(4) of this section; and,

(iii) Multiply securities backed by Farmer Mac program assets (loans) guaranteed by the United States Department of Agriculture as described in section 8.0(9)(B) of the Act by 75 percent.

(f) *Reservation of authority.* FCA reserves the right, on a case-by-case basis, to require Farmer Mac to adjust its treatment of instruments (assets) in its liquidity reserve and supplemental liquidity so that it has liquidity that is sufficient and commensurate for the risks it faces. This reservation of authority enables FCA to respond to adverse financial, economic, or market conditions by requiring Farmer Mac, on a case-by-case basis, to:

(1) Increase the discounts specified in paragraph (e) of this section that are applied to any individual security or any class of securities due to changes in market conditions or marketability of such securities;

(2) Shift individual or multiple securities from one level of the liquidity reserve to another, or between one of the levels of the liquidity reserve and supplemental liquidity based on the performance of such asset(s), or based on financial, economic, or market conditions affecting the liquidity and solvency of Farmer Mac;

(3) Change portfolio concentration limits in § 652.20(a); or

(4) Take any other action that the Farm Credit Administration deems necessary to ensure that Farmer Mac has sufficient liquidity to meet its financial obligations as they come due.

§ 652.45 Temporary regulatory waivers or modifications for extraordinary situations.

Whenever the FCA determines that an extraordinary situation exists that necessitates a temporary regulatory waiver or modification, the FCA may, in its sole discretion:

(a) Modify or waive the minimum liquidity reserve requirement in § 652.40 of this subpart;

(b) Modify the amount, qualities, and types of eligible investments that you are authorized to hold pursuant to § 652.20 of this subpart; and/or

(c) Take other actions as deemed appropriate.

Dated: November 10, 2011.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2011–29690 Filed 11–17–11; 8:45 am]

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Part V

Department of Defense

Defense Acquisition Regulation System
48 CFR Parts 202, 203, 211, *et al.*
Defense Federal Acquisition Regulation Supplements; Final Rules

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 245

RIN 0750–AG94

Defense Federal Acquisition Regulation Supplement: Responsibility and Liability for Government Property (DFARS Case 2010–D018)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to extend the Government self-insurance policy to Government property provided under negotiated fixed-price contracts that are awarded on a basis other than submission of certified cost or pricing data.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Meredith Murphy, telephone (703) 602–1302.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule at 76 FR 21852 on April 19, 2011. Twenty comments were received from one respondent in response to the proposed rule. None of the comments took issue with the regulatory flexibility analysis in the proposed rule.

II. Discussion and Analysis of the Public Comments

DoD reviewed the public comments in the formation of the final rule. A discussion of the comments is provided below. No changes were made in the rule as a result of those comments.

A. Change Should Be Made at the FAR Level

Comment: The respondent concluded that the proposed revision is being improperly undertaken at the agency level and should instead be undertaken by the FAR Council.

Response: FAR subpart 1.3 authorizes agency regulations that supplement the FAR. These agency regulations may provide additional policies to satisfy the specific needs of the agency. Further, FAR 1.404 authorizes DoD to deviate from the FAR in accordance with the DFARS. DoD has complied with the requirements of FAR subparts 1.3 and 1.4 and DFARS subparts 201.3 and 201.4.

B. The Proposed Rule Is Inconsistent With the FAR

Comment: According to the respondent, the proposed rule violates FAR 16.202–1 and 1.304. The respondent stated that FAR 45.104(a) and FAR 45.201(b) are clearly coupled, while the proposed rule uncouples them.

Response: FAR 16.202–1 states that a firm-fixed-price contract places maximum risk on the contractor and full responsibility for all costs and resulting profit and loss. The FAR already provides that contractors are not liable for loss of Government property under fixed-price contracts awarded on the basis of submission of certified cost or pricing data. The purpose of the DFARS rule is to standardize policy for negotiated fixed-price contracts, whether or not the contract involved the submission of certified cost or pricing data. DoD does not intend to eliminate the need for Alternate I of the clause at FAR 52.245–1. The Government's general practice of self-insuring its risks of loss or damage to Government-furnished property is based on policy, not statute (55 Comp Gen 1321 (1976)), and Government self-insurance of Government property is not universal. There are many examples of contractors retaining responsibility and liability for property loss, *e.g.,* property acquired by contractors by virtue of progress payments is tied to the Government's financing of the contract under the provisions of FAR part 32. It is a well-established and acceptable practice for contractors to retain responsibility and liability for progress payment inventory, because it would make little sense for the Government to both finance the contract and self-insure against property loss.

There is no regulation that affirmatively prohibits the purchase of insurance. The Government Accountability Office (GAO) has held that exceptions to the general rule can be made when (1) the economy sought to be obtained under this policy would be defeated; (2) sound business practice indicates that a savings can be effected; or (3) services or benefits not otherwise available can be obtained by purchasing insurance (see GAO–04–261SP, Principles of Appropriations Law, Volume I, section 10a, ''The Self-Insurance Rule''). The DFARS language is not inconsistent with established practice; *i.e.,* to self-insure Government property where it makes sense to do so. To the extent that 245.104 may be inconsistent with FAR 45.104, such inconsistency is authorized by FAR 1.304, in accordance with FAR subpart 1.4 and DFARS subpart 201.4.

With regard to the comment on ''coupling'' FAR 45.104(a) and FAR 45.201(b), the former reference reads as follows:

(a) Generally, contractors are not held liable for ''loss, theft, damage or destruction of Government property'' under the following types of contracts:

(1) Cost-reimbursement contracts.

(2) Time-and-material contracts.

(3) Labor-hour contracts.

(4) Fixed-price contracts awarded on the basis of submission of certified cost or pricing data.

FAR 45.201(b) states that, (w)hen Government property is offered for use in a competitive acquisition, solicitations should specify that the contractor is responsible for all ''costs related to making the property available for use, such as payment of all transportation, installation, or rehabilitation costs.'' The latter paragraph makes no reference to liability for loss or damage to Government property and is, therefore, not coupled or inconsistent with the former reference, FAR 45.104(a). Each FAR subpart describes policy for different aspects of procurement.

C. The Change Would Eliminate the $700,000 Threshold

Comment: The respondent stated that ''(c)learly the wording indicates that the proposed rule would only apply additionally to negotiated fixed-price contracts awarded below the current certified cost/price data submittal threshold of $700,000.'' Therefore, according to the respondent, ''the intent of FAR 45.104(a)(4) is that contractors awarded fixed-price contracts on the basis * * * of submission of certified cost or pricing data (all awards over $700,000) will not be held liable for loss, theft, damage, destruction of Government property.''

Response: The intent of the proposed rule was to standardize Government-property policy for negotiated fixed-price contracts, whether or not the submission of certified cost or pricing data was required. The rule does not impact the threshold for submission of certified cost or pricing data either positively or negatively.

D. The Proposed Rule Would Revise Applicability

Comment: According to the respondent, the proposed policy change omitted ''all of the competitively awarded contracts that may include Government property.'' The respondent said that ''it should not be assumed that these contracts will require 'negotiation'

and therefore fall under the proposed rule. Contracts may in fact be awarded without discussion (negotiations) if so stipulated in the solicitation even if Government property is included in the solicitation and anticipated contract.''

Response: Whether or not discussions are held, a contract awarded using FAR part 15 procedures is still a negotiated contract. Reference is made to (1) The title of FAR part 15, ''Contracting by Negotiation,'' and (2) the instructions at FAR 15.209, particularly paragraph (a) of that section: ''When contracting by negotiation * * * the contracting officer shall insert the provision at 52.215–1, Instructions to Offerors—Competitive Acquisition, in all competitive solicitations where the Government intends to award a contract without discussions.''

Comment: According to the respondent, it ''would make more sense if this proposed rule banned provision of Government property under firm-fixed-price contracts, thereby upholding the integrity of the contact type and being more consistent with FAR * * * 45.102(a) & (b).''

Response: The respondent proposed prohibiting the use of Government-furnished property on all firm-fixed-price contracts, which is outside the scope of this rule. The proposed rule did not address the provision of, or need for, Government-furnished property, but rather whether responsibility and liability for loss of, or damage to, Government property should be treated differently depending on whether a negotiated fixed-price contract was awarded with, or without, submission of certified cost or pricing data. Regardless of contract type, contracting officers are still required to consider the risk of loss or damage prior to providing Government-furnished property (see PGI 245.103–70).

E. The Proposed Rule Would Shift Risk to the Government

Comment: The respondent stated that the proposed rule shifted risk away from the contractor and onto the Government by requiring that DoD competitive fixed-price contracts bearing Government property would be required to convey Limited Risk of Loss, thereby shifting this risk to the Government.

Response: The intent of this rule is to standardize the treatment of negotiated fixed-price contracts, whether or not certified cost or pricing data was required. The contract type used can never completely eliminate the Government's inherent risk of providing property to contractors. Contracting officers are still required to consider risks prior to providing Government-furnished property.

The Government retains the option of revoking its assumption of risk under FAR 45.105(b)(1). DoD's policy, consistent with FAR 45.104 (see PGI 245.103–70), is to provide Government property only after determining that (1) It is in the Government's best interest and (2) providing the property does not substantially increase the Government's risk.

F. The Change Would Increase the Government's Administrative Burden

Comment: The respondent stated that the proposed rule would increase administrative burden rather than minimize it, as conceptualized in FAR 16.202–1, Description (of fixed-price contracts). Further, according to the respondent, the proposed rule is outside of, and therefore inconsistent with, the intent of a firm-fixed price contract instrument.

Response: The intent of this rule is to standardize policy treatment for negotiated FAR part 15 fixed-price contracts. This change decreases the administrative burden associated with the current non-standard treatment of negotiated fixed-price contracts.

G. Insurance Is an Unallowable Cost

Comment: The respondent stated that the cost of insurance is an unallowable cost unless otherwise agreed to in the contract, and, by the very nature of a fixed-price contract, this fact would minimize, if not negate, insurance costs passed on to the Government.

Response: Paragraph (d) of the cost principle at FAR 31.205–19, Insurance and indemnification, states that purchased insurance costs are allowable, subject to certain limitations.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* and is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address the inclusion of negotiated fixed-price contracts awarded on the basis of adequate competition to the list of contract types in which contractors are not held liable for loss, damage, destruction, or theft of Government property. The Government generally self-insures against contractor loss, damage, destruction, or theft of Government-furnished property acquired or provided under Government contracts (''assumption of risk''). The current exception to this policy (see FAR 45.104) is for negotiated fixed-price contracts awarded based on adequate competition, i.e., without submission of certified cost or pricing data. For negotiated fixed-price competitive contracts, the contractor, in the past, has been held liable for loss (except for reasonable fair wear and tear). This policy was invoked by use of the clause at FAR 52.245–1, Government Property, with its Alternate I. Government Accountability Office (GAO) decisions (see GAO–04–261SP, Principles of Appropriations Law, Volume I, section 10a, ''The Self-Insurance Rule'') support the basic premise that the Government should self-insure Government-furnished property. Any impact to small entities is expected to be beneficial in the form of lower insurance costs and higher deductibles.

No public comments were received in response to the publication of the initial regulatory flexibility analysis. No comments were received from the Chief Counsel for Advocacy of the Small Business Administration in response to the rule. There are no reporting, recordkeeping, or other compliance requirements associated with this rule. This rule will align DoD policy on assumption of risk with the GAO policy. There are no known alternatives to this final rule. The rule will not have a significant economic impact on a substantial number of small entities.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 245

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 245 is amended as follows:

PART 245—GOVERNMENT PROPERTY

■ 1. The authority citation for 48 CFR part 245 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Add section 245.104 to read as follows:

245.104 Responsibility and liability for Government property.

In addition to the contract types listed at FAR 45.104, contractors are not held liable for loss of Government property under negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data.

■ 3. Amend section 245.107 by redesignating paragraphs (a) through (e) as paragraphs (1) through (5) and adding paragraph (6) to read as follows:

245.107 Contract clauses.

* * * * *

(6) For negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data for which Government property is provided, use the clause at FAR 52.245–1, Government Property, without its Alternate I.

[FR Doc. 2011–29416 Filed 11–17–11; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750–AG99

Defense Federal Acquisition Regulation Supplement: Representation Relating to Compensation of Former DoD Officials (DFARS Case 2010–D020)

AGENCIES: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is amending the DFARS to require offerors to represent whether former DoD officials who are employees of the offeror are in compliance with post-employment restrictions.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, 703–602–1302.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule at 76 FR 32846 on June 6, 2011, that proposed adding a requirement for offerors submitting proposals to DoD to represent whether former DoD officials employed by the offeror are in compliance with post-employment restrictions. Four respondents submitted public comments on the proposed rule.

A. Post-Employment Statutory Restrictions and Regulatory Implementation

The principal statutory restrictions concerning post-Government employment for DoD officials after leaving Government employment are at 18 U.S.C. 207 and 41 U.S.C. 2104 (formerly 41 U.S.C. 423) and 5 CFR parts 2637 and 2641.

1. FAR 3.104 implements 41 U.S.C 2104 and 18 U.S.C. 207.

2. DFARS 203.104 implements the Procurement Integrity Act for DoD.

3. DFARS 203.171–3 implements section 847 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008.

B. General Accountability Office (GAO) Study GAO–08–485

The Congress included a provision in the NDAA for FY 2007 (section 851 of Pub. L. 109–364) requiring the GAO to report on recent employment of former DoD officials by major defense contractors. In May 2008, the GAO issued its report, entitled ''Defense Contracting: Post-Government Employment of Former DoD Officials Needs Greater Transparency'' (GAO–08–485). The GAO found that contractors significantly under-reported the employment of former DoD officials and concluded that defense contractors may employ a substantial number of former DoD officials on assignments related to their former positions. GAO further concluded that greater transparency is needed by DoD with respect to former senior and acquisition executives to ensure compliance with applicable post-employment restrictions. The GAO recommended that DoD ask potential offerors to certify that the former DoD officials employed by the offeror are in compliance with post-employment restrictions when contracts are being awarded and that contracting officers consider continuing certifications throughout the performance of the contract.

C. DFARS Rule

This DFARS rule implements the recommendation of the GAO by adding a new representation for offerors to complete and provide as part of each proposal, including proposals for commercial items. DoD elected to employ a representation rather than a certification and have the representation submitted by offerors as part of the proposal process. The representation will be required only one time rather than continuously throughout contract performance. The provision will not be included in the annual representations and certifications.

The solicitation provision at DFARS 252.203–7005, entitled ''Representation Relating to Compensation of Former DoD Officials,'' is a representation that all of the offeror's employees who are former DoD officials are in compliance with the post-employment restrictions at 18 U.S.C. 207, 41 U.S.C. 2101–2107, and 5 CFR parts 2637 and 2641, as well as FAR 3.104–2.

II. Discussion and Analysis of the Public Comments

DoD reviewed the public comments received in response to the proposed rule in the formation of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments follows.

A. Contractor Compliance Responsibility

Comment: Two respondents noted that compliance with ethics rules is the responsibility of the covered officials, not the contractor employing them. According to the respondents, although contractors instruct and train employees to observe all post-government employment restrictions, contractors have no official compliance responsibility regarding employees' post-government employment restrictions.

Response: FAR subpart 3.10, entitled ''Contractor Code of Business Ethics and Conduct,'' requires, among other things, that contractors exercise due diligence to prevent and detect criminal conduct and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. Contractors must also timely disclose to the Government any credible evidence of a violation of criminal law, which would include, for example, a violation of 18 U.S.C. 207 (post-Government employment restrictions). Accordingly, contractors, as employers of covered officials, have an affirmative compliance responsibility regarding employees'

post-Government employment restrictions. Contractors must ensure their employees avoid engaging in criminal conduct while carrying out duties on the contractor's behalf. Stated individuals' resumes generally do not include every particular matter on which they worked. Hiring contractors have a duty to interview their new hires who formerly worked for DoD and screen their work experiences for relevant particular matters.

Comment: Two respondents asserted that implementation of the proposed rule would require contractors to establish compliance systems to identify, track, educate, and require periodic certifications from employees and consultants across their businesses (rather than those specific to a contract) to identify former DoD covered officials. According to the respondents, such systems would require additional compliance mechanisms and personnel to design, implement, execute, test, and evaluate, thereby raising overhead costs for contractors, which could ultimately increase costs to the Government.

Response: Contractors should know on what particular matters covered officials worked and already ensure employees are not assigned to work on those matters because there are current requirements to maintain and track this information. FAR subpart 3.10 requires contractors to be aware of employees who are covered officials and any existing prohibitions and requirements relating to their employment. In addition, when contractors hire covered DoD officials, DFARS 252.203–7000(b) requires them to determine whether the covered officials sought and received advice regarding post-employment restrictions on behalf of the contractor. This rule does not require the creation of new compliance systems, and additional costs should not be incurred.

Comment: Two respondents asserted that the proposed rule would require contractors to certify compliance involving matters unrelated and unknown to the offeror, because the proposed regulation provides no limitation related to the contractors' business and the covered officials' other activities or employment. Respondents suggested limiting the proposed representation to ''work related to this offer'' or ''activities that the official is expected to undertake on behalf of the contractor.''

Response: DFARS 252.203–7000(b) provides ''(t)he Contractor shall not knowingly provide compensation to a covered DoD official within 2 years after the official leaves DoD service, without first determining that the official has sought and received, or has not received after 30 days of seeking, a written opinion from the appropriate DoD ethics counselor regarding the applicability of post-employment restrictions to the activities that the official is expected to undertake on behalf of the Contractor.'' It would be reasonable to include a similar limitation in the representation, e.g., ''that all covered DoD officials employed by, or otherwise receiving compensation from the offeror, and who are expected to undertake activities on behalf of the offeror for any resulting contract, are presently in compliance with—* * *.'' Appropriate revision has been made in the final rule to the DFARS provision at 252.203–7005(b).

B. Contractor Identification of ''Covered Officials'' and ''Particular Matters''

Comment: One respondent stated that ''identifying which job applicants are 'covered officials' is not trivial.'' This respondent explained that ''resumes are often tailored to the job being sought: Certain items are highlighted, others omitted entirely. Consequently, while it is usually simple to tell if a potential candidate was a 'senior official,' it is often difficult to identify if he or she was an 'acquisition executive'.''

Response: The term ''covered DoD official'' is defined in DFARS 252.203–7000(a) as an individual who ''left DoD service on or after January 28, 2008,'' and either ''participated personally and substantially in an acquisition as defined in 41 U.S.C. 131 with a value in excess of $10 million'' and who served in specifically highlighted positions or served within DoD as ''program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of $10 million.'' Contractors need to seek clarification with job applicants and employees as to whether the applicant meets the DFARS definition in order to ensure employees are in compliance with DoD post-employment restrictions.

Comment: A respondent highlighted potential difficulties in identifying ''particular matters'' on which the job applicant worked. The respondent stated that ethics opinions rarely identify the ''particular matters'' upon which the former DoD official worked and to which post-employment restrictions apply. The respondent concluded that failure to identify ''particular matters'' is ''a significant problem for individuals (and their employers) whose government portfolio was substantially broader'' than simply working on one program during their Government career.

Response: It is not feasible or practicable to expect that a Government ethics official list all ''particular matters'' for a Government employee. The most likely, and probably only, source for this type of information is the Government official requesting the post-employment restrictions opinion from the ethics official. Failure of the Government employee to provide a comprehensive list would inappropriately limit the scope of the ethics opinion to those items listed. The former Government official is in the best position to (1) recall the particular matters that he or she worked during his or her Government tenure and (2) advise future employers of his or her involvement in ''particular matters'' when the employer provides work assignments. The Code of Federal Regulations contains a definition of ''particular matter,'' as well as examples of what a ''particular matter'' is. The examples provide guidance for the types of situations and circumstances covered by the term. It is unrealistic to expect a finite set of examples listed in the regulations to cover all possible circumstances and situations that could arise regarding what constitutes a ''particular matter''.

C. Contractor Certification ''to the Best of Its Knowledge and Belief''

Comment: A respondent stated that there is no generally accepted definition of ''to the best of its knowledge or belief.'' This respondent explained that ''(s)ometimes it means simply that the person making the representation has no information to the contrary and is not willfully refusing to see a problem. At other times, it has been held to imply a duty to investigate before making the representation.''

Response: The standard, ''to the best of its knowledge and belief,'' is a recognized legal term of art, and one that has been used in numerous statutes over decades, e.g., The Truth in Negotiations Act has been in effect since 1963. (''A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) * * * shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.'' (10 U.S.C. 2306a, paragraph (a)(2)).

D. Consequences of the Rule

Comment: Two respondents suggested that the rule may have several adverse effects, including deterring: (1) Small companies from competing for

Government contracts; (2) contractors from hiring ''covered DoD officials;'' and (3) Federal employees who would be subject to the rule from seeking employment with DoD.

Response: This rule requires offerors to verify compliance with existing laws and regulations and, therefore, is unlikely to have the suggested deterrent effects unless the business was not otherwise ensuring compliance and/or did not intend to comply in the future. In that event, deterring non-compliance is consistent with the purposes underlying the rule. Further, to the extent one of the respondents was suggesting that small business concerns be exempted from the rule, such an exemption would substantially undermine its purpose of improving compliance, as available data indicates that small business concerns are likely to hire a large majority of ''covered DoD officials'' (see Regulatory Flexibility Act section).

E. Relationship to Existing Statutes and Regulations, Including the Clinger/Cohen Act Ban on New Certifications That Are Not Required by Law

Comment: Two respondents concluded that there was no need for this rule because (1) the Congress already addressed the concerns underlying the GAO report by enacting section 847 of the NDAA for FY 2009 (Pub. L. 110–417, enacted October 14, 2008); (2) FAR subpart 3.10, Contractor Code of Business Ethics and Conduct, already requires contractors to monitor post-employment compliance with 18 U.S.C. 207; and (3) the responsibility for post-employment compliance should rest primarily with former DoD employees. One of these respondents stated that the representation violates the Clinger/Cohen Act ban on new contractor certifications that are not required by law.

Response: (1) Section 847 of the NDAA for FY 2008 is entitled ''Requirements for Senior Department of Defense Officials Seeking Employment with Defense Contractors.'' The provision applies to defense contractors by prohibiting such contractors from knowingly providing compensation to a former DoD official ''within two years after such former official leaves (DoD), without first determining that the former official has sought and received (or has not received after 30 days of seeking) a written opinion from the appropriate ethics counselor regarding the applicability of post-employment restrictions to the activities that the former official is expected to undertake on behalf of the contractor.'' While there is some relationship to section 847, the representation in the rule addresses the broader arena of post-employment restrictions (see paragraph A in the Background section of this notice for the listing). Further, the prohibition against providing compensation (section 847) was implemented by adding the clause at DFARS 252.203–7000, Requirements Relating to Compensation of Former DoD Officials (see the interim rule at 74 FR 2408, dated January 15, 2009, and the final rule at 74 FR 59913, dated November 19, 2009; DFARS Case 2008–D007).

(2) There is some relationship to FAR subpart 3.10. However, the FAR policy (FAR 3.1002(b)) states that contractors ''should have a written code of business ethics and conduct'' and ''should have an internal control system.'' (A contractor is not required to have an internal control system unless the procurement is over $5 million and it is not a small business concern (see FAR 3.1004(a) and 52.203–13(c)(2)). Further, the proposed rule is applicable exclusively to DoD procurements, and it is narrower than FAR subpart 3.10, in that it is concerned exclusively with post-employment restrictions for former DoD officials.

(3) The former DoD employee should be primarily responsible for his or her compliance with post-employment restrictions. However, businesses should support the highest ethical standards (see FAR 3.1002(a)) and should not hire former DoD officials who have not complied with the law or assign them to work on projects that are barred to them by the nature of their DoD assignments. The representation at DFARS 252.203–7005 in the final rule is intended to ensure that DoD does business with companies that are committed to the highest ethical standards.

(4) The Clinger/Cohen Act prohibited the creation of contractor certifications that are not required by law. The FAR and DFARS regularly employ the distinction between a representation and a certification, and representations have regularly been deemed not subject to the Clinger/Cohen Act ban.

F. Strengthen the Rule by Adding Five Requirements

Comment: One respondent expressed support for the proposed rule, but suggested that it be strengthened by adding the following five requirements for—

(1) The offeror to expressly state, when true, that it is compensating former DoD employees who have not received a written ethics opinion within the 30-day timeframe;

(2) The DoD IG to audit annually a stratified random sample of contracts and the contractor's list of former employees to determine whether contractors are in full compliance with post-employment restrictions asserted, whether former Government employees are in full compliance with post-employment restrictions, and whether DoD ethics officers have issued said written opinions within 30 days of being sought;

(3) DoD to sanction contractors and former DoD employees identified by the DoD IG as having violated the requirements;

(4) DoD to take appropriate action to ensure ethics opinions are issued within the 30-day timeframe; and

(5) DoD to make public the following information: (a) The database of ethics opinions required pursuant to section 847(b)(1); (b) the names of contractors and former DoD officials identified by the DoD IG as not being in compliance with the requirements of the proposed rule; (c) the actions taken by DoD to seek sanctions for each non-compliant contractor and former DoD official; and (d) what, if any, sanctions were actually imposed on the identified contractors and former DoD officials.

Response: All of the above recommendations are outside the scope of the GAO study and this rule.

G. Scope

Comment: A respondent stated that ''due to its broad scope'', implementation of substantial compliance programs is required.

Response: Contractors should already have programs in place that comply with standards of conduct and ethics program requirements as described in FAR 3.10 and more specifically, in DFARS clause 252.203–7000, included in all DoD solicitations and contracts. All companies, whether large or small, should have knowledge of the former defense employees that are proposed to work on specific solicitations.

H. Application to New Task or Delivery Orders

Comment: One respondent stated that the proposed rule does not specify whether contracts would need to include the post-employment representation in task and delivery orders and proposed the rule ''be amended to clarify that such representation would only be required at the time the umbrella indefinite-delivery, indefinite-quantity contract is awarded, and not for each task or delivery order.''

Response: The final rule clarifies the requirement. The prescription, at

DFARS 203.171–4, requires the provision at DFARS 252.203–7005, Representation Relating to Compensation of Former DoD Officials, ''in all solicitations, including solicitations for task and delivery orders.''

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* and is summarized as follows:

This rule is being issued in response to a study by the General Accountability Office (GAO), entitled ''Defense Contracting: Post-Government Employment of Former DoD Officials Needs Greater Transparency'' (GAO–08–485), issued in May 2008. The GAO found that contractors under-reported the employment of former DoD officials to the extent that the contractors employed almost twice as many former DoD officials as had been reported. The GAO report showed that major defense contractors are not currently ensuring that former DoD senior officials and acquisition executives working on contracts are complying with post-employment restrictions.

The final rule requires offerors to submit, as part of the proposal, a representation that all former DoD officials who will be working on any resultant contract are in compliance with post-employment restrictions at 18 U.S.C. 207, 41 U.S.C. 2101–2107, and 5 CFR parts 2637 and 2641, as well as FAR 3.104–2.

The rule requires a representation from all offerors responding to a DoD solicitation, including commercial item acquisitions. A ''covered DoD official'' is already defined in the clause at DFARS 252.203–7000, Requirements Relating to Compensation of Former DoD Employees. That same clause also implements section 847 of the National Defense Authorization Act for Fiscal Year 2008 by prohibiting any DoD contractor from knowingly providing compensation to a covered DoD official within two years after the official leaves DoD service. There is no impact on an offeror from this new representation unless the contractor has not been monitoring its employees who are former covered DoD officials to ensure compliance with DFARS 252.203–7000.

No comments from small entities were received in response to the **Federal Register** Notice of the proposed rule, published June 6, 2011, at 76 FR 32846. However, a ''think tank'' requested the ''addition of language making it clear that the offeror has no duty to establish systems and procedures to police and define compliance * * *'' No language has been added in response to this request. Companies are prohibited, pursuant to subsection 3 of DFARS 203.171, entitled ''Senior DoD officials seeking employment with defense contractors,'' from ''knowingly provid(ing) compensation to a covered DoD official within two years after the official leaves DoD service unless the contractor first determines that the official has received * * * the post-employment ethics opinion'' pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181).

In the period of 2001–2006, 1.85 million former military and civilian personnel left DoD service. A ''covered DoD official'' is defined to include former DoD officials who held certain positions and who left DoD within the past two years (see DFARS 203.171–3(a) and 252.203–7000). The GAO found that the 1.85 million personnel who had left DoD service over a six-year period included only 35,192 who had served in the type of senior or acquisition official positions that made them subject to post-Government employment restrictions, if they were subsequently hired by defense contractors. Dividing 35,192 by three (to reduce the six-year period to a two-year period), we estimate that 11,730 of those officials would have left within the last two years. We estimate that 7,635 of these former officials may accept employment with a defense contractor (about 65 percent). The GAO study found that 2,435 of these covered officials were employed by 52 major defense contractors. Of the remaining 5,200 former officials covered by the Procurement Integrity Act, we estimate that 3,900 (75 percent) of them may work for small business concerns.

There were no comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the rule.

There is no reporting, recordkeeping, or other compliance requirement associated with this rule. Offerors make the representation by submission of an offer. By the terms of the representation, an offeror is prohibited from submitting an offer if it cannot make the representation. In order to submit an offer, small entities that hire a former DoD official covered by the Procurement Integrity Act will have to check the compliance of such employees with various applicable post-employment restrictions. DFARS clause 252.203–7000, Requirements Relating to Compensation of Former DoD Officials, already requires contractors to determine that a covered DoD official has sought and received, or has not received after 30 days of seeking, a written opinion from the appropriate DoD ethics counselor, regarding the applicability of post-employment restrictions to the activities that the official is expected to undertake on behalf of the contractor. This representation of compliance does not impose an additional burden on the offeror.

There were no known significant alternatives identified that would achieve the objectives of the rule.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 203 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 203 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Revise section 203.171–4 to read as follows:

203.171–4 Solicitation provision and contract clause.

(a) Use the clause at 252.203–7000, Requirements Relating to Compensation of Former DoD Officials, in all solicitations and contracts.

(b) Use the provision at 252.203–7005, Representation Relating to Compensation of Former DoD Officials, in all solicitations, including solicitations for task and delivery orders.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Add section 252.203–7005 to read as follows:

252.203–7005 Representation Relating to Compensation of Former DoD Officials.

As prescribed in 203.171–4(b), insert the following provision:

REPRESENTATION RELATING TO COMPENSATION OF FORMER DOD OFFICIALS (NOV 2011)

(a) *Definition. Covered DoD official* is defined in the clause at 252.203–7000, Requirements Relating to Compensation of Former DoD Officials.

(b) By submission of this offer, the offeror represents, to the best of its knowledge and belief, that all covered DoD officials employed by or otherwise receiving compensation from the offeror, and who are expected to undertake activities on behalf of the offeror for any resulting contract, are presently in compliance with all post-employment restrictions covered by 18 U.S.C. 207, 41 U.S.C. 2101–2107, and 5 CFR parts 2637 and 2641, including Federal Acquisition Regulation 3.104–2.

(End of provision)

[FR Doc. 2011–29421 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 242

RIN 0750–AH41

Defense Federal Acquisition Regulation Supplement: Administering Trafficking in Persons Regulations (DFARS Case 2011–D051)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add to the list of contract administration functions a requirement to maintain surveillance over contractor compliance with duties and responsibilities pertaining to trafficking in persons when they are incorporated in contracts.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Meredith Murphy, telephone (703) 602–1302.

SUPPLEMENTARY INFORMATION:

I. Background

The current FAR, at section 22.1705, entitled ''Contract clause,'' prescribes use of the clause at FAR 52.222–50, Combating Trafficking in Persons, in all solicitations and contracts. When the contract will be performed outside the United States, the clause must be used with its Alternate I, as prescribed in FAR 22.1705(b). The clause requires contractors to inform employees of the Government's zero-tolerance policy and the actions that will be taken against them for violations of the policy. In addition, contractors are required to notify the contracting officer immediately of any information received about an employee's conduct that violates this policy and also of actions taken against an employee as a result of the violation.

While the clause at FAR 52.222–50, Combating Trafficking in Persons, has been in effect since February 2009, the listing of Government contract administration functions was not modified at that time to add surveillance of a contractor's compliance with the clause requirements. Because the addition of this contract administration function is internal to DoD and will not impact current contract requirements or contract clauses, this is not a significant revision as defined at FAR 1.501–1. Therefore, under the authority at FAR 1.501–3(a), this rule can be published as a final rule without first obtaining public comment.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because an initial regulatory flexibility analysis is only required for proposed or interim rules that require publication for public comment (5 U.S.C. 603) and a final regulatory flexibility analysis is only required for final rules that were previously published for public comment, and for which an initial regulatory flexibility analysis was prepared (5 U.S.C. 604).

This final rule does not constitute a significant DFARS revision as defined at FAR 1.501–1 because this rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of the Government. Therefore, publication for public comment under 41 U.S.C. 1707 is not required.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 242

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 242 is amended as follows:

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 1. The authority citation for 48 CFR part 242 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 242.302 by adding paragraph (a)(S–73) to read as follows:

242.302 Contract administration functions.

(a) * * *

(S–73) Maintain surveillance over contractor compliance with trafficking in persons requirements for all DoD contracts for services incorporating the clause at FAR 52.222–50, Combating Trafficking in Persons, and, when necessary, its Alternate I, as identified

in the clause prescription at FAR 22.1705. (See PGI 222.1703.)

[FR Doc. 2011–29426 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 211 and 225

RIN 0750–AH22

Defense Federal Acquisition Regulation Supplement: Fire-Resistant Fiber for Production of Military Uniforms (DFARS Case 2011–D021)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the section of the National Defense Authorization Act for Fiscal Year 2011 that prohibits specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 703–602–0328.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 76 FR 32843 on June 6, 2011, to implement section 821 of the National Defense Authorization Act for Fiscal Year 2011. Section 821 prohibits specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015.

Ten respondents submitted public comments in response to the interim rule. Nine of the respondents (manufacturers, suppliers, or distributors of fire-resistant fibers, yarns, fabrics, or military uniforms) submitted comments that were essentially the same.

II. Discussion and Analysis of the Public Comments

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Implements Law as Written

Comment: One respondent stated that the DFARS interim rule implements the statute as written.

Response: Noted.

B. Selection of Fire-Resistant Rayon Fiber

Comment: Nine respondents stated that the law only requires that DoD solicitations prior to January 1, 2015, not specify the use of fire-resistant rayon fiber. The law does not restrict DoD's selection and use of fabrics containing fire-resistant rayon fiber. The respondents recommended that the DFARS final rule make clear that the rule does not prohibit DoD from selecting fabrics that include fire-resistant rayon fibers.

Response: These responses have correctly stated the requirements of the law. The DFARS interim rule correctly reflected the statute. However, DoD has added clarification to the title and text of section 225.7016, that it is the requirement that is prohibited, not the voluntary offer and use.

C. Specification of Other Fire-Resistant Fibers

Comment: Nine respondents stated that the law is narrow in its application only to fire-resistant rayon fibers. According to the respondents, the law does not address DoD's ability to specify inherently flame-resistant cellulosic fibers; this broader category includes any manmade cellulosic fiber that has fire resistance added to its slurry before fiber extrusion, such as acetate, rayon, lyocell, *etc.* The respondents recommended that the DFARS final rule make it clear that the prohibition applies only to DoD's ability to specify the use of fire-resistant rayon fibers, and not to any other categories of fibers.

Response: The DoD interim rule clearly reflected the statutory prohibition on requiring the use of fire-resistant rayon fiber in a specification. However, it would be contrary to the intent of the statute to state the requirements of the solicitation in such a way as to exclude categories of fire-resistant fiber (such as polymers) from consideration.

D. Specification of Branded Products

Comment: Eight respondents stated that the law does not restrict the specification of branded products. The respondents recommended that the DFARS rule not include any mention of branded commercial products.

Response: The interim DFARS rule did not make any mention of branded commercial products. However, if a solicitation specifies the use of a branded commercial product that contains fire-resistant rayon fibers, then it would be in violation of the prohibition not to specify the use of fire-resistant rayon fiber.

E. Domestic Nonavailability Determinations (DNADs) or Waivers

Comment: Nine respondents recommended that the DFARS rule should make clear that it does not prohibit DoD's ability to source foreign fibers under its DNAD authority or a legislated waiver to the Berry Amendment.

Response: There is nothing in the interim or final rule that would, in any way, affect DoD's ability to source foreign fibers under its DNAD authority or a legislated waiver to the Berry Amendment.

F. Inequity in the Treatment of Foreign Fibers

Comment: Nine respondents stated that the law produces inequity in the treatment of foreign fibers that are specified by DoD and are purchased under DoD's authority to waive the Berry Amendment. The respondents cited various foreign fibers, none of which are ''restricted for specification.''

Response: Noted. However, the DFARS rule must implement the statute as enacted.

G. Impact on Small Business

Comment: Nine respondents disagreed with the statement in the initial regulatory flexibility analysis that the impact on small businesses will be minimal. The respondents cited two points on which they disagree with the analysis:

1. According to the respondents, Nomex is not a substitute for fire-resistant rayon fiber for the manufacture of all types of military uniforms. The respondents stated that Nomex is widely used in flight suits, but not in ground troop uniforms, unless used with cotton. Cotton requires topical fire resistant treatment, which is not permanent for the life of the fiber. According to the respondents, the alternatives to the use of fire-resistant rayon are ''next best'' as a permanent fire-resistant solution in hot and humid environments and are also more expensive.

2. Dozens of small businesses currently supply DoD with uniforms made using fire-resistant rayon fibers. The impact on small business can be significant if designing new products and producing existing programs becomes restrained by availability of raw materials.

Response: Although small businesses may be involved in providing military uniforms using fire-resistant rayon fibers, there is nothing in this rule that prohibits the use of fire-resistant rayon fibers. If fire-resistant rayon is as superior to the alternative fire-resistant fibers as stated by the respondents, then competition from alternative fibers should have little impact on small business because there will likely be small businesses engaged in the manufacture of the military uniforms containing an alternative fiber. Furthermore, there is nothing in this final rule that would restrain the availability of raw materials. See also section V of this **Federal Register** notice.

H. End of Statutory Restriction

Comment: One respondent expressed concern over what will happen when the statutory restriction ends in January 2015. The respondent requested a dialog regarding extension of this date, as the date does not seem relevant to the ability of the military textile industrial base to meet DoD demand for flame-resistant protective apparel products. Furthermore, the respondent noted that performance-based specifications are already required to the maximum extent possible pursuant to FAR section 11.002(a)(2)(i)(A)–(B).

Response: This comment is outside the scope of this case, which is for the purpose of implementing the existing statute.

I. Continued Collaboration

Comment: All respondents recommended continued collaboration with DoD. One respondent stated that DoD should continue to pursue strategies to create continuous collaboration between industry and the acquiring service/agencies. According to the respondent, DoD should also ensure that all expertise available within the Program Executive Office, as well as the RDT&E commands, is incorporated into the drafting of purchase descriptions to avoid over reliance on industry partners for the drafting of purchase descriptions. The other respondents stated that clarifying and simplifying the DFARS rule will result in greater collaboration and investment on behalf of the needs of the U.S. military.

Response: Noted.

III. Other Changes

Comment: One DoD respondent recommended that the coverage should be moved from part 225 (Foreign Acquisition) to part 211 (Describing Agency Needs).

Response: Because of the implication of the rule for foreign acquisition and the inter-relationship with the Berry Amendment and the DNAD and statutory waiver authority for rayon fiber, DoD has decided to retain the coverage in part 225. However, a cross reference has been added in part 211.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* and is summarized as follows:

The need for this rule is to implement section 821 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383). Section 821 prohibits specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015.

The objectives of this rule are to prohibit specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015, as required by the statute. This will provide opportunity for offerors to propose alternative solutions to meet DoD requirements.

The legal basis for this rule is section 821 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383).

Nine respondents disagreed with the statement in the initial regulatory flexibility analysis that the impact on small businesses will be minimal. The respondents cited two points on which they disagree with the analysis:

According to the respondents, Nomex is not a substitute for fire-resistant rayon fiber for the manufacture of all types of military uniforms. The respondents stated that Nomex is widely used in flight suits, but not in ground troop uniforms, unless used with cotton. Cotton requires topical fire resistant treatment, which is not permanent for the life of the fiber. According to the respondents, the alternatives to the use of fire-resistant rayon are ''next best'' as a permanent fire-resistant solution in hot and humid environments and are also more expensive.

The respondents stated further that dozens of small businesses currently supply DoD with uniforms made using fire-resistant rayon fibers. The impact on small business can be significant if designing new products and producing existing programs becomes restrained by availability of raw materials.

Although small businesses may be involved in providing military uniforms using fire-resistant rayon fibers, there is nothing in this rule that prohibits the use of fire-resistant rayon fibers. If fire-resistant rayon is as superior to the alternative fire-resistant fibers as stated by the respondents, then competition from alternative fibers should have little impact on small business because there will likely be small businesses engaged in the manufacture of the military uniforms containing an alternative fiber. Furthermore, there is nothing in this final rule that would restrain the availability of raw materials.

The two major sources of fire-resistant fiber used in DoD products either come from DuPont (product called Nomex) or The Lenzing Group, Austria (product called Fire Resistant Rayon). In order to manufacture a fire-resistant uniform currently being sourced by the services, three products are blended together to meet desired cost, availability, and performance criteria:

- Nylon.
- Para-aramid (Kevlar by DuPont or Twaron by Teijin (The Netherlands)).
- Either Nomex (DuPont) or Fire Resistant Rayon (Lenzing).

DuPont is a domestic large business and the other manufacturers of fire-resistant fiber are foreign. However, small businesses are involved in the supply of the military uniforms that utilize the foreign fire-resistant rayon.

There were no comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the rule.

There are no reporting or recordkeeping requirements.

The requirements of the rule are the minimum requirements necessary to meet the requirements of the statute. Although small businesses are involved in manufacture of the uniforms, there is nothing in this rule that prohibits the continued acquisition of military uniforms containing fire-resistant rayon fiber or that would hinder acquisition of that fire-resistant fiber from Austria. Further, if another type of fire-resistant

fiber is competitively selected (such as Nomex from DuPont), there will probably still be small businesses engaged in the manufacture of the military uniforms containing that fiber.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 211 and 225

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Accordingly, the interim rule amending 48 CFR parts 211 and 225, which was published at 76 FR 32843 on June 6, 2011, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 211 and 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 211—DESCRIBING AGENCY NEEDS

■ 2. Add section 211.170 to read as follows:

211.170 Requiring the use of fire-resistant rayon fiber.

See 225.7016 for the statutory prohibition on requiring the use of fire-resistant rayon fiber.

PART 225—FOREIGN ACQUISITION

■ 3. Revise section 225.7016 to read as follows:

225.7016 Prohibition on requiring the use of fire-resistant rayon fiber.

In accordance with section 821 of the National Defense Authorization Act for Fiscal Year 2011, do not include in any solicitation issued before January 1, 2015, a requirement that proposals submitted pursuant to such solicitation shall include the use of fire-resistant rayon fiber. However, this does not preclude issuing a solicitation that allows offerors to propose the use of fire-resistant rayon fiber.

[FR Doc. 2011–29428 Filed 11–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202 and 218

RIN 0750–AH29

Defense Federal Acquisition Regulation Supplement: Simplified Acquisition Threshold for Humanitarian or Peacekeeping Operations (DFARS Case 2011–D032)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the statutory authority to invoke a simplified acquisition threshold that is two times the normal amount to support a humanitarian or peacekeeping operation.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, telephone 703–602–1302.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 76 FR 44280 on July 25, 2011, to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the authority at 10 U.S.C. 2302(7) to invoke a simplified acquisition threshold that is two times the amount specified at 41 U.S.C 134, as amended by section 807 of the National Defense Authorization Act for Fiscal Year 2005, for the purpose of supporting a humanitarian or peacekeeping operation. The current simplified acquisition threshold is $150,000, as specified in Federal Acquisition Regulation 2.101. No respondents submitted public comments in response to the interim rule.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule does not impose any requirements on small businesses. The statute applies only to purchases made outside the United States and only to those purchases that directly support a humanitarian or peacekeeping operation. For the definition of ''small business,'' the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: ''(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.''

IV. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 202 and 218

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 202 and 218, which was published at 76 FR 44280 on July 25, 2011, is adopted as a final rule without change.

[FR Doc. 2011–29433 Filed 11–17–11; 8:45 am]

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FEDERAL REGISTER

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Part VI

Department of Energy

10 CFR Part 430

Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket Number EERE–2011–BT–STD–0047]

RIN 1904–AC56

Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment

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

ACTION: Final rule.

SUMMARY: The Energy Policy and Conservation Act of 1975 (EPCA), as amended, prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including residential direct heating equipment. In this final rule, the U.S. Department of Energy (DOE) is amending its definitions pertaining to direct heating equipment. Specifically, through this final rule, DOE is amending the definition of ''vented hearth heater,'' a type of direct heating equipment, to clarify the scope of the current exclusion for those vented hearth heaters that are primarily decorative hearth products. The amendment to the existing exclusion shifts the focus from a maximum input capacity limitation (*i.e.,* 9,000 Btu/h) to a number of other factors, including the absence of a standing pilot light or other continuously-burning ignition source. DOE has concluded that these amendments would result in increased energy savings overall, as well as for the types of units under the exclusion.

DATES: The effective date of this rule is December 19, 2011. Compliance with the amended standards established for direct heating equipment in today's final rule is required on April 16, 2013, except for the exclusion criterion related to the elimination of a standing pilot light or other continuously-burning ignition source, which has a compliance date of January 1, 2015. The incorporation by reference of certain publications in the rule is approved by the Director of the Federal Register as of December 19, 2011.

ADDRESSES: The docket for this rulemaking is available for review at *http://www.regulations.gov,* including **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *http://www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: *http://www.regulations.gov.* The *http://www.regulations.gov* Web page contains simple instructions on how to access all documents, including public comments, in the docket.

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SUPPLEMENTARY INFORMATION: This final rule incorporates by reference into part 430, the following industry standards:

(1) ANSI Z21.50–2007 (CSA 2.22–2007), (''ANSI Z21.50''), ''Vented Gas Fireplaces,'' Approved February 22, 2007.

(2) ANSI Z21.88–2009 (CSA 2.33–2009), (''ANSI Z21.88''), Vented Gas Fireplace Heaters,'' Approved March 26, 2009.

Copies of these standards are available from the American National Standards Institute, 11 West 42nd Street, New York, New York 10036, (212) 642–4936, or at *http://webstore.ansi.org/.* You can also view copies of these standards at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza SW., 6th Floor, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

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I. Summary of the Final Rule and Its Benefits

Title III, Part B [1] of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, which includes the types of direct heating equipment that are the subject of this rulemaking. (42 U.S.C. 6292(a)(9)) Pursuant to EPCA, any new or amended energy conservation standard that DOE prescribes for certain products, such as direct heating equipment, shall be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B)) On April 16, 2010 DOE published a final rule (hereafter

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

referred to as the April 2010 final rule) in accordance with these and other statutory provisions discussed in that final rule, which, in relevant part, promulgated definitions and energy conservation standards for vented gas hearth direct heating equipment. 75 FR 20112.

In establishing the definitions pertaining to direct heating equipment in the April 2010 final rule, DOE recognized the aesthetic appeal of certain gas hearth products and included a provision in its definition of ''vented hearth heater'' that considered certain gas hearth products to be primarily decorative in nature, and excluded them from having to comply with DOE's minimum energy conservation standard otherwise applicable to vented gas hearth direct heating equipment. The April 2010 final rule did not address vented gas log sets. DOE clarified its position on vented gas log sets in a document published on DOE's Web site titled ''*Frequently Asked Questions: 'Vented Hearth Heater' Definition.*'' [2] However, based upon manufacturer concerns expressed subsequent to the publication of the April 2010 final rule, DOE commenced the current rulemaking to consider changes to the scope of the exclusion in order to achieve greater energy savings, promote consumer product choice, and ease manufacturer burdens.

Accordingly, in this final rule, DOE further amends its definitions pertaining to direct heating equipment. Specifically, DOE is amending its definition of ''vented hearth heater'' to modify the conditions contained in the existing definition for the subset of such products to be considered primarily decorative in nature and, therefore, not subject to the DOE's minimum energy conservation standards for vented hearth heaters. As an initial matter, DOE is providing clarification that vented gas log sets are included in the definition of ''vented hearth heater''; DOE has reached this conclusion because of the similarities between vented gas log sets and other types of gas hearth products. Vented gas log sets and other vented hearth products provide heat for consumers, and they have certain similar characteristics, such as the presence of a flame and ceramic logs. These products may also have an aesthetic appeal. However, due to ambiguity in the gathered data for vented gas log sets indentified by stakeholders at the public meeting for this rulemaking and in subsequent written comments, DOE has decided not to subject vented gas log sets to the energy conservation standards for vented hearth heaters at this time. Commenters also suggested that further consideration would need to be given to the applicability of the test procedure for vented home heating equipment and the potential for test procedure provisions tailored to vented gas log sets. Consequently, DOE has determined that additional analysis would be necessary to address vented gas log sets, a topic which DOE may address in a new proceeding in the context of a future rulemaking.

Turning to the matter of vented hearth products, the definition of ''vented hearth heater'' in the April 2010 final rule stated that ''[t]hose heaters with a maximum input capacity less than or equal to 9,000 British thermal units per hour (Btu/h), as measured using DOE's test procedure for vented home heating equipment (10 CFR part 430, subpart B, appendix O), are considered purely decorative and are excluded from DOE's regulations.'' 75 FR 20112, 20234 (April 16, 2010). In this final rule, DOE is amending the definition for ''vented hearth heater'' to explicitly provide that vented gas log sets are not being made subject to standards at this time, and to base the exclusion for primarily decorative vented hearth products on several criteria, including the American National Standards Institute (ANSI) standard to which the product is certified. The amended definition at 10 CFR 430.2 being adopted by today's final rule is set forth in the regulatory text. More specifically, the amended definition states that the standards for vented hearth heaters are not applicable to vented gas log sets at this time. It also provides that vented hearth products are excluded from the vented hearth heat standards if they are: (1) Certified to ANSI Standard Z21.50, but not to ANSI Standard Z21.88; (2) sold without a thermostat and with a warranty provision expressly voiding all manufacturer warranties in the event the product is used with a thermostat; (3) expressly and conspicuously identified on its rating plate and in all manufacturer's advertising and product literature as a ''Decorative Product: Not For Use As A Heating Appliance''; and (4) with respect to products sold after January 1, 2015, not equipped with a standing pilot light or other continuously-burning ignition source.

DOE believes the amended definition of ''vented hearth heater'' will provide benefits to both consumers and the gas hearth products industry in terms of energy savings and product choice, by allowing manufacturers to continue to offer primarily decorative hearth products across a broad range of input ratings, rather than limiting primarily decorative hearth products to input ratings below the current limitation of 9,000 Btu/h. By eliminating the use of standing pilot lights in all primarily decorative vented gas hearth products under the exclusion beginning on January 1, 2015, DOE believes the amended definition will result in a significant increase in overall energy savings, including for those types of units eligible for the primarily decorative products exclusion. At the same time, this rule will lessen the impacts and burden on manufacturers of vented hearth heaters, while promoting a variety of available models for consumers. For vented gas log sets, the amended definition classifies this product as a type of vented hearth heater because of the similarities to other vented hearth products (primarily because they provide some amount of heat to the living space). However, the amended definition does not require manufacturers of vented gas log sets to meet a minimum energy conservation standard at this time or to meet any criteria to qualify for exclusion from the standards for gas hearth direct heating equipment (*i.e.,* vented hearth heaters). DOE estimates that the elimination of standing pilot lights in primarily decorative vented hearth heater products would result in an additional 0.04 quads of additional energy savings over the 30-year period from 2015 through 2044, beyond those savings already achieved by the April 2010 final rule. (See section III.C for details on DOE's energy savings estimates.) Manufacturers of vented hearth products who choose not to avail themselves of the exclusion will be subject to the energy conservation standards for vented hearth heaters promulgated in the April 2010 final rule. (As noted above, these amendments clarify that manufacturers of vented gas log sets will not be subject to the energy conservation standards for vented hearth heaters promulgated in the April 2010 final rule.)

Therefore, DOE has concluded that the amended definition of ''vented hearth heater'' will improve the existing definitions pertaining to direct heating equipment and will further clarify the scope of the current exclusion from the energy conservation standards for those vented hearth heaters that are primarily decorative hearth products. In addition, the rule will result in significant additional energy savings, preserve consumer choice, and reduce the

[2] This document is available on DOE's Web site at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/htgp_finalrule_faq.pdf.*

burden on industry. For these reasons, DOE has concluded that the amendments to DOE's definition of ''vented hearth heater'' provide substantial benefits that outweigh the burden of the new requirements for products to be considered primarily decorative hearth products, and accordingly, DOE adopts them in this rule. DOE's rationale is presented in further detail immediately below.

II. History of the Energy Conservation Standards Rulemaking and Current Standards

Prior to being amended in 1987, EPCA included home heating equipment as covered products. The amendments to EPCA effected by the National Appliance Energy Conservation Act of 1987 (NAECA; Pub. L. 100–12) included replacing the term ''home heating equipment'' with ''direct heating equipment,'' establishing standards for the direct heating equipment, and requiring that DOE determine whether these standards should be amended. (42 U.S.C. 6295(e)(3)–(4)) Nowhere in the statute is the term ''direct heating equipment'' defined. DOE amended the statutorily-prescribed standards for direct heating equipment for the first time in the April 2010 final rule by prescribing the current energy conservation standards for direct heating equipment manufactured on or after April 16, 2013. 75 FR 20112 (April 16, 2010). Of particular relevance here, the April 2010 final rule created a definition for ''vented hearth heater,'' established product classes for gas hearth direct heating equipment (*i.e.,* vented hearth heaters), and amended the minimum standards for direct heating equipment, including gas hearth direct heating equipment. The April 2010 final rule defined ''vented hearth heater'' as currently set out in 10 CFR 430.2. The definition adopted in the April 2010 final rule provided a description of the characteristics of vented hearth heaters, and also provided that vented hearth products with a maximum input capacity less than or equal to 9,000 British thermal units per hour would be excluded from DOE's regulations due to their primarily decorative nature.

In addition, the April 2010 final rule amended the definition of ''vented home heating equipment or vented heater'' to include vented hearth heaters, along with the other types of heaters (*i.e.,* vented wall furnace, vented floor furnace, and vented room heater) that were already defined as vented home heating equipment. *Id.*

The amended standards established in the April 2010 final rule for gas hearth direct heating equipment are set forth in Table II.1.

TABLE II.1—FEDERAL ENERGY EFFICIENCY STANDARDS FOR GAS HEARTH DIRECT HEATING EQUIPMENT

Product class	Standard level (compliance date: 4/16/2013)
Gas hearth up to 20,000 Btu/h	AFUE* = 61%.
Gas hearth over 20,000 Btu/h and up to 27,000 Btu/h	AFUE = 66%.
Gas hearth over 27,000 Btu/h and up to 46,000 Btu/h	AFUE = 67%.
Gas hearth over 46,000 Btu/h	AFUE = 68%.

* Annual Fuel Utilization Efficiency.

Following DOE's adoption of the April 2010 final rule, the Hearth, Patio & Barbecue Association (HPBA) sued DOE in the United States Court of Appeals for the District of Columbia Circuit to invalidate the rule as it pertained to vented gas hearth products. Statement of Issues to Be Raised, *Hearth, Patio, & Barbecue Association* v. *Department of Energy, et al.,* No. 10–1113 (DC Cir. filed June 1, 2010). Litigation is pending; however, this final rule may make it unnecessary for the Court to resolve some of the issues surrounding the April 2010 final rule.

DOE commenced this latest round of rulemaking for residential direct heating equipment on July 22, 2011 by publishing in the **Federal Register** a notice of public rulemaking (NOPR) and announcement of a public meeting to discuss the document. The NOPR proposed to amend the definition of ''vented hearth heater'' to clarify that vented gas log sets are covered products, and to specify a set of criteria for vented hearth products and vented gas log sets that would allow them to be considered primarily decorative units and thereby excluded from having to comply with the standards for gas hearth direct heating equipment adopted in the April 2010 final rule. DOE held a public meeting on September 1, 2011, in which it: (1) Presented the contents of the NOPR; (2) sought comments from interested parties on these subjects; and (3) in general, sought to inform interested parties about, and facilitate their involvement in, the rulemaking. Major issues discussed at the public meeting included: (1) The proposed exclusion requirements for gas log sets; (2) the physical and performance differences between gas log sets and other vented hearth heaters; (3) the compliance date for the energy conservation standards set forth in the April 2010 final rule; (4) the proposed compliance date for eliminating standing pilot lights under the proposed exclusion; (5) DOE's authority to cover primarily decorative hearth products; and (6) DOE's national energy savings (NES) analysis. At the meeting and during the comment period on the NOPR, DOE received many comments that helped it identify and resolve issues pertaining to the direct heating equipment relevant to this rulemaking. The comments received and DOE's responses are discussed in the section immediately below.

III. Discussion

A. Scope of Coverage of Vented Hearth Products

1. Description of Vented Hearth Products

Vented hearth products include gas-fired products such as fireplaces, fireplace inserts, stoves, and log sets that typically include aesthetic features (*e.g.,* yellow flame, large flame) and that provide space heating. Vented hearth products such as fireplaces, fireplace inserts, and stoves typically consist of ceramic logs and a gas burner that is surrounded by an enclosure, whereas vented gas log sets consist only of ceramic logs and a gas burner intended for installation in an existing masonry fireplace. Vented hearth products generally have a dual heating and aesthetic function, as consumers derive benefit from both the heat provided and the aesthetic appeal of a product that simulates a wood-burning appliance. Characteristic of this duality of purpose, units intended for use as a heating appliance and those units intended

primarily to be used as a decorative product often share very similar external appearances, unit construction, and input capacities, thereby making it difficult to differentiate between the two types of hearth products. DOE notes that the primary difference between the two types of vented hearth heaters is that primarily decorative units focus on ambiance and aesthetic utility associated with a solid fuel (*e.g.,* wood-burning) fireplace in addition to heat output to the living space, whereas heating hearth products tend to focus on providing heat to the living space, but also provide some amount of ambiance not provided by a utilitarian heating device. Products intended for use as a heater are often shipped with or designed to be easily retrofitted with additional accessories that primarily decorative products do not have, such as thermostats to control the heat output. However, DOE research has shown that such accessories are typically optional and, thus, not definitive in distinguishing between heaters and primarily decorative units. In the July 2011 NOPR, DOE concluded that all vented hearth products constitute direct heating equipment where a gas-consuming device that generates a flame and gives off heat is inserted into the residential living space. 76 FR 43941, 43944–45 (July 22, 2011). Many interested parties have noted that decorative products are intended primarily for aesthetic use (as discussed in section III). However, DOE believes that regardless of whether the product is intended to provide only aesthetic appeal, by design, the product will generate heat due to the presence of the flame, and some of that heat will be transferred to the space. Indeed (as discussed further in section III), many interested parties have conceded that vented hearth products intended primarily for decorative use and vented gas log sets are an effective supplemental or emergency heat source, providing further justification for their inclusion as a type of covered direct heating equipment.

In response to DOE's interpretation of its authority under EPCA regarding direct heating equipment, several interested parties stated that decorative hearth products and vented gas log sets are outside the scope of DOE's authority under EPCA. DOE's interpretation of its authority under EPCA, as well as the comments on DOE's authority as it pertains to EPCA's and DOE's definitions related to direct heating equipment, are discussed in the sections that immediately follow.

2. Definitions for ''Direct Heating Equipment''

As discussed in section II, before the enactment of NAECA, EPCA included ''home heating equipment'' in DOE's appliance standards program. EPCA did not define ''home heating equipment,'' however. NAECA's amendments to EPCA replaced the term ''home heating equipment'' with ''direct heating equipment,'' and specified energy conservation standards for ''direct heating equipment,'' but once again, the statute did not define the term ''direct heating equipment.'' In the absence of an unambiguous statutory term, DOE has discretion to establish a reasonable regulatory definition. With that said, Congress's use of such broad terminology signals that the definition is open to accommodate future technological changes in the marketplace in keeping with DOE's energy-saving mandate under EPCA.

Prior to the April 2010 final rule, DOE had previously defined ''home heating equipment'' and related terms in its regulations, which can be found at 10 CFR 430.2. In the April 2010 final rule, DOE added a new definition of ''direct heating equipment,'' defining the term in the same manner that it had previously defined ''home heating equipment.'' 75 FR 20112, 20128, 20234 (April 16, 2010). DOE defines both ''home heating equipment'' and ''direct heating equipment'' as meaning ''vented home heating equipment and unvented home heating equipment.'' In its definitions at 10 CFR 430.2, DOE goes on to define both ''vented home heating equipment'' and ''unvented home heating equipment.'' Prior to being amended in the April 2010 final rule, the definition of ''vented home heating equipment,'' relevant here, read as set out in 10 CFR, parts 200–499, revised as of January 1, 2010, and did not explicitly include vented hearth heaters.

In the April 2010 final rule, DOE concluded that vented hearth products (*i.e.,* gas-fired products such as fireplaces, fireplace inserts, and stoves) meet its definition of ''vented home heating equipment,'' because their designs furnish heat to the living space of a residence. DOE also concluded, therefore, that they are covered products under EPCA and are properly classified as direct heating equipment. 75 FR 20112, 20128 (April 16, 2011). Accordingly, DOE adopted a new definition of ''vented hearth heater'' and amended its definition of ''vented home heating equipment or vented heater'' at 10 CFR 430.2 to explicitly include vented hearth heaters, reading as currently set out in 10 CFR 430.2.

In the April 2010 final rule, DOE did not specifically address vented gas log sets under the broader classification of direct heating equipment. However, given their primarily decorative nature, DOE published a document on DOE's Web site titled ''Frequently Asked Questions: 'Vented Hearth Heater' Definition.'' [3] In that document, DOE stated that because gas log sets are not constructed as part of an entire enclosure (*i.e.,* there is no surrounding box or viewing pane) or a sealed system, they do not provide the same heating function as gas fireplaces, gas fireplace inserts, and gas stoves, which are constructed as enclosed systems. Due to these differences, DOE stated that vented gas log sets are intended to be installed for primarily decorative purposes, and as a result, are not subject to the standards for vented hearth heaters. Upon reconsidering the definitions of ''direct heating equipment,'' ''vented home heating equipment,'' and ''vented hearth heater,'' DOE determined in the July 2011 NOPR that vented gas log sets are heating appliances and proposed to explicitly include them under DOE's definitions. 76 FR 43941, 43945 (July 22, 2011). DOE noted in the July 2011 NOPR that this approach is consistent with DOE's treatment of vented hearth products that provide both heat and aesthetic appeal. *Id.*

Further, in the July 2011 NOPR, DOE noted that the terminology ''designed to furnish warmed air'' in the definition of ''vented home heating equipment'' is not limited to furnishing warmed air through mechanical means by expelling or discharging such air, but can also refer to furnishing heat which warms the living space air through any method of heat transfer. Because of the very nature of hearth products (*i.e.,* the presence of a flame), all hearth products create heat, and hearth products provide some amount of that heat to the surrounding living space, including radiant heat. As a result, DOE concluded that all vented hearth products and vented gas log sets are designed to furnish heat, regardless of whether they have a mechanical means for furnishing the air (such as a blower) or grills through which the warm air can be circulated via natural convection. Because vented gas log sets and primarily decorative vented hearth products will provide some amount of heat to the living space, DOE concluded in the July 2011 NOPR that all primarily

[3] This document is available on DOE's Web site at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/htgp_finalrule_faq.pdf.*

decorative vented hearth products and vented gas log sets are designed to furnish heat and, thus, are a subset of vented hearth heaters. 76 FR 42941, 43944–45 (July 22, 2011).

DOE received several comments related to its authority to cover hearth products as direct heating equipment under EPCA. Lennox stated that it did not believe DOE has established its statutory authority to regulate decorative gas fireplaces, and requested that DOE substantiate its authority. (Lennox, No. 6 at p. 1) The National Propane Gas Association (NPGA) stated that decorative hearth products existed at the time both EPCA and NAECA were enacted, and these products were not intended to be covered. Further, NPGA stated that EPCA specifically identifies which products are within the scope of the term ''direct heating equipment'' and that neither decorative hearth products nor decorative gas log sets are within the scope, and the commenter asserted EPCA only provided DOE with the authority to amend the current standards and not to impose standards on decorative gas log sets. (NPGA, No. 209 at pp. 1–3) The American Public Gas Association (APGA) concurred with NPGA's statements. (APGA, No. 223 at p. 1) Similarly, HPBA stated that DOE cannot lawfully categorize decorative hearth products as direct heating equipment because at the time these categorizations were made, fireplaces and gas log sets existed but were recognized as entirely different categories of products. HPBA commented that when interpreting a statute, DOE must give effect to the unambiguously expressed intent of Congress, and that the suggestion that the definition of ''direct heating equipment'' should be open to accommodate future technological changes in the marketplace does not apply here, since both decorative vented gas fireplaces and gas log sets existed at the time Congress addressed direct heating equipment in the statute. (HPBA, No. 201 at pp. 12–14) The American Gas Association (AGA) also stated that they did not believe that decorative hearth products and gas log sets were included in the original intent of Congress when establishing authority for direct heating equipment products designed to furnish warm air. (AGA, Public Meeting Transcript, No. 14 at pp. 85–86) AGA elaborated that decorative products were not included in the negotiations and discussions for amending the standards for direct heating equipment at the time leading up to the enactment of NAECA. (AGA, Public Meeting Transcript, No. 14 at pp. 94–95) The Air-conditioning, Heating, and Refrigeration Institute (AHRI) stated that even though there was not a formal definition created for ''direct heating equipment'' in NAECA, decorative hearth products and gas log sets were purposefully not identified as being a part of the direct heating equipment standards, even though the products existed at the time. (AHRI, Public Meeting Transcript, No. 14 at pp. 91–92)

In contrast, the Natural Resources Defense Council (NRDC) and EarthJustice stated that EPCA does not define the term ''direct heating equipment,'' although it directs DOE to regulate the efficiency of such equipment, and that EPCA's silence on the precise meaning of the term leaves it to DOE's discretion to interpret the scope of products that constitute direct heating equipment. Further, NRDC and EarthJustice commented that there is no basis in the language of EPCA for asserting that Congress intended to restrict DOE's authority when applying standards to vented hearth heaters. (NRDC and EarthJustice, No. 216 at p. 1)

DOE cannot attempt to interpret the intent of Congress based on unsubstantiated assertions of what individual parties may have believed. Rather, DOE must interpret its authority with respect to direct heating equipment under EPCA based on what is written in the statute. As discussed above, EPCA does not define the term ''direct heating equipment.'' Thus, the statute is ambiguous regarding what Congress may have intended to include as direct heating equipment. DOE had previously defined ''direct heating equipment'' as a class of home heating equipment that is designed to furnish warmed air to the living space of a residence. Given the lack of a statutory definition for ''direct heating equipment'' in EPCA, DOE provided its interpretation in the April 2010 final rule and established its authority to cover hearth products as direct heating equipment (*i.e.,* as a class of home heating equipment that is designed to furnish warmed air to the living space of a residence). 75 FR 20112, 20128–30 (April 16, 2010). To restate its earlier conclusion, because virtually all hearth products (including those identified as ''decorative'' by industry) supply some amount of heat to the living space, DOE believes it is eminently reasonable to conclude that these products are direct heating equipment under EPCA. As a result, DOE maintains its position that these are covered products.

DOE also received several comments from interested parties in response to the July 2011 NOPR regarding the definitions of ''direct heating equipment'' as they apply to primarily decorative hearth products and vented gas log sets based on the characteristics and use of those products.

HPBA stated that DOE's proposed interpretation that decorative vented hearth products are direct heating equipment is unreasonable, because they are not heating products and their appeal is aesthetic. Furthermore, HPBA contended that the NOPR's statement that it is ''difficult to differentiate between'' the two is misleading. HPBA pointed to the fact that heating hearth products are designed and sold as aesthetically-appealing products that can also serve as efficient utilitarian heating appliances. HPBA elaborated that these products are designed for heating efficiency, are heater-rated, and are sold on the basis of heating efficiency as well as aesthetic appeal. The commenter stated decorative hearth products, on the other hand, are designed and sold for aesthetic appeal and not for heating efficiency. HPBA stated that many such products—including both gas log sets and decorative vented gas fireplaces—are not a significant source of heat and would not be effective for utilitarian heating use. Additionally, HPBA asserted DOE's statement that products are to be classified as direct heating equipment if they ''provide some amount of heat to the living space'' is confusing, since many products (such as kitchen ovens, refrigerators, and desktop computers) provide heat but are not considered direct heating equipment, and that classifying gas logs as such is particularly unreasonable since it conflicts with DOE's prior interpretation. (HPBA, No. 201 at pp. 17–18) R.H. Peterson stated that their gas log sets are designed to provide a realistic simulation of a wood burning fire in a wood burning fireplace, not to provide heat. (R.H. Peterson, Public Meeting Transcript, No. 14 at p. 39) Similarly, a number of other interested parties commented that decorative hearth products should not be considered heating products because they are designed for ambiance and/or their primary purpose is not to provide heat. (Small Business Administration (SBA), No. 96 at p. 2; Big Woods, No. 3 at p. 1; Lennox Hearth Products, No. 6 at p. 1; Homefires, No. 10 at p. 1; Advantage, No. 13 at p. 1; Empire, Public Meeting Transcript, No. 14 at p. 60 and No. 221 at p. 2; Crick-IT, No. 15 at p. 1; Sun Dance Leisure, No. 17 at pp. 1–2; Mazzeos, No. 16 at p. 1; Dealers LP Equipment, No. 20 at p. 1; Creekside Hearth and Patio, No. 21 at p. 1; Barbara Jenkins, No. 22 at p. 1; Fairview, No. 25

at p. 1; HWAM, No. 43 at p. 1; American Gas Log, No. 49 at p. 1; LF Pugh and Associates, No. 76 at p. 1; Siouxland No. 85 at p. 1; Thompson Gas, No. 95 at p. 1; Percy Guidry Hearth and Patio, No. 18 at p. 1; Perfection, No. 115 at p. 2; Penn Valley, No. 116 at p. 2; Sheldon Skolnick Associates, No. 118 at p. 1; Hearth & Home, Inc., No. 144 at p. 2, Gas-fired Products, No. 155 at p. 1; Oahu Gas Service, No. 166 at p. 1; Short's Stoves, No. 174 at p. 1; Thompson Gas, No. 191 at p. 1; Plumbing-Heating-Cooling Contractors Association (PHCC), No. 199 at p. 1; Hearth & Home Technologies, No. 204 at p. 3; Hearth and Home Shoppe, No. 207 at p. 1; Rasmussen, No. 208 at p. 1; Golden Blount, No. 210 at p. 1; Independence Marketing, No. 214 at p. 1; Hearth and Home Technologies, No. 204 at p. 3; Mike Rogers, No. 225 at p. 1; Fred Pierce, No. 219 at p. 1; Form Letter Comments; [4] Jack's Butane Service, No. 23 at p. 1; NPGA, Public Meeting Transcript, No. 14 at pp. 30–31) AGA stated that the current statutory provisions for direct heating equipment do not cover hearth products as vented hearth heaters, because the primary purpose of hearth products is ambiance. (AGA, No. 217 at p. 1) Firelight Services, Top Hat Chimney Sweeps, and East Texas Brick Company stated that vented gas log sets are not sold or advertised as heaters and should not be treated as such. (East Texas Brick Co., No. 135 at p. 1; Top Hat, No. 168 at p. 1; Firelight, No. 206 at p. 1; Arizona Gas, No. 98 at p. 3)

Empire stated that it is not reasonable for DOE to assume that because a product uses energy and has heat as a byproduct, that it can be regulated the same as another product which is designed, certified, and currently regulated as a direct heating product. (Empire, Public Meeting Transcript, No. 14 at p. 60) Similarly, HPBA stated that decorative hearth products cannot be classified as direct heating equipment simply because such units provide some amount of heat to the living space, because many other products such as kitchen stoves, refrigerators, and incandescent light bulbs also provide some amount of heat to the living space, and clearly, they are not direct heating equipment. (HPBA, Public Meeting Transcript, No. 14 at p. 19) Heritage Propane commented that decorative hearth products produce heat indirectly like blenders or refrigerators that produce incidental heat by their operation. (Heritage Propane, No. 33 at p. 1) HPBA stated that DOE's interpretation that a product may be classified as direct heating equipment independent of the manufacturer's principle intention in designing, manufacturing, and marketing the product, is irrational in the context of efficiency regulation because, by definition, the efficiency of a product can be determined only in reference to how efficiently it serves its intended purpose. (HPBA, Public Meeting Transcript, No. 14 at p. 19)

Specifically regarding vented gas log sets, Jeff Simmons stated that vented gas logs should not be considered direct heating equipment, because they do not generate a net gain of heat since any heat produced by the fire is balanced by the heat going up the vent or chimney (Simmons, No. 24 at p. 1) Big Woods stated that vented gas log sets cannot be made to be an efficient heater. (Big Woods, No. 3 at p. 1) Rasmussen stated that gas log sets should not be categorized as gas fireplace appliances, a term which encompasses heater-rated and decorative fireplaces, because gas log sets have the distinguishing characteristic of not being constructed as part of an entire enclosure with a surrounding box, viewing pane, or sealed system, as noted by DOE in the Frequently Asked Questions (FAQ) published for hearth products after the April 2010 final rule. (Rasmussen, Public Meeting Transcript, No. 14 at p. 68) U.S. Congresswoman Grace Napolitano stated that DOE was correct in the April 2010 rulemaking that interpreted the definition of vented hearth heater as not covering vented gas log sets. (Grace Napolitano, No. 224 at p. 1) NRDC and EarthJustice stated that there is no rational basis for treating gas log sets differently than vented gas fireplace, because both types of products are designed to furnish warmed air to the living space of a residence, and noted that during the September 1, 2011 hearing, manufacturers of gas log sets conceded that one of the functions of their products was to convey heat to the living space. (NRDC and EarthJustice, No. 216 at pp.1–2)

DOE also received a number of comments describing the heating aspect of primarily decorative hearth products and vented gas log sets. Intertek commented that primarily decorative hearth products are designed for ambiance and produce heat indirectly, and explained that although primarily decorative products are usually designed to produce as little heat as possible, some customers do use primarily decorative products as secondary or back-up heat sources. (Intertek, No. 198 at p. 2) Intertek stated that gas log sets designed to be installed in wood burning fireplaces produce low but highly variable net heat output, which depends on the specific fireplace geometry, materials, chimney and damper, duration of operation, and outdoor temperature. (Intertek, No. 198 at p. 2) Rasmussen stated that the heat emitted by gas log sets is not solely under the control of the manufacturer, but also depends on the efficiency of the fireplace in which it is installed, the ambient temperature inside and outside the house, the level at which the consumer burns the gas log, and the height of the flame. (Rasmussen, Public Meeting Transcript, No. 14 at p. 75) Rasmussen also stated that consumers use gas log sets in vented wood-burning fireplaces as appliances for ambiance with a secondary function of warmth, and that gas log sets can be used as a source of emergency warmth in case of power outages, which disable electric heat pumps. (Rasmussen, Public Meeting Transcript, No. 14 at p. 76) Rasmussen stated that the residual heat benefit is an extra feature that sometimes helps out in times of power outages during ice storms, but that people are not going to use these feature as the primary means of warming. (Rasmussen, Public Meeting Transcript, No. 14 at p. 160) Bradley Hughes of AmeriGas stated that primarily decorative vented gas appliances are for ambiance and only used as supplements for the main heat source in the home. (Bradley Hughes, No. 117 at p. 2) Similarly, Don Leonard of AmeriGas remarked that many customers used primarily decorative direct vent fireplaces to augment other sources of heating, and that primarily decorative fireplaces work nicely as an area heater. (Don Leonard, No. 52 at p. 1) C.J. Ellson of AmeriGas commented that thousands of Arizonans use gas log sets and fireplaces to offset their primary furnaces. (C.J. Ellson, No. 47 at p. 1) Titan commented that primarily decorative hearth products are useful as a back-up source of heat in the case of power outages. (Titan Propane, No. 220 at p. 1)

NRDC and EarthJustice stated that it may be appropriate for DOE to recognize an exclusion from the standards for direct heating products that are designed and marketed to provide a decorative amenity; however, the

[4] DOE received a large number of comments from AmeriGas and Ferrellgas employees, which DOE refers to collectively as the ''Form Letter Comments.'' Although each comment was slightly different, these comments generally expressed the same ideas. Therefore, DOE cites them all together, when the same thought is contained in more than one comment. If a commenter from AmeriGas or Ferrellgas made a point that was unique to their comment, DOE cited that comment individually.

existence of this decorative aspect does not eliminate the fact that these products also serve a heating function and are accordingly classified as direct heating equipment. (NRDC and EarthJustice, No. 216 at pp. 1–2) The Appliance Standards Awareness Project (ASAP) stated that with the exclusion criteria, DOE is trying to close loopholes in which non-decorative products could qualify for the exclusion. (ASAP, Public Meeting Transcript, No. 14 at p. 113) EarthJustice stated that since DOE already had an efficiency standard in place for vented hearth heaters, it needed to find a way to distinguish units that should follow those standards versus primarily decorative ones that are not required to follow the standards. (EarthJustice, Public Meeting Transcript, No. 14 at pp. 96–97)

As noted previously, DOE recognizes that certain vented hearth products may be intended to be primarily decorative in nature. However, DOE also believes that intended product use is not a dispositive factor in determining whether the product is direct heating equipment. By their nature, all gas hearth products have a flame and are installed in the living space. As a result, they will give off heat to the living space, meaning they meet the applicable definitions for ''direct heating equipment'' and qualify as direct heating equipment under the statute regardless of the duality of function (*i.e.,* providing an aesthetic aspect in addition to a heating benefit). As noted by several interested parties within the industry, products such as vented gas log sets and primarily decorative hearth products are often used by consumers as a supplemental, secondary, or emergency heat source. Regarding assertions that other products in the living space (such as refrigerators, light bulbs, *etc.*) provide heat to the space, but are not regulated as direct heating equipment, DOE notes that many of these products are already regulated for energy efficiency under EPCA, and offer ready metrics for quantifying energy efficiency. Further, DOE notes that none of the ''analogous'' products seek to avoid regulation as heating equipment, while claiming to simulate a product (wood-burning fireplace) that is itself a heater (even if not regulated).

As noted above, a manufacturer's stated intent for the use of a product is not dispositive in determining whether that product is a covered product under EPCA. Even if such intent were to be considered, DOE examined the marketing literature for these products and, contrary to HPBA's assertions, found that it is often ambiguous about whether a product is intended for use as a heater or is solely decorative equipment. For example, DOE found that Rasmussen markets a line of gas log sets named the *Chillbuster ''Heat Effect'' Gas Log Heaters* under the trade name ''Nice and Warm.'' [5] DOE found that the product literature for this particular product indicates that these gas log sets can be used either as an unvented or vented gas log set. In unvented gas log sets, most of the heat will go into the space in which the product is installed (because none of the heat is vented up the flue as with vented products), while vented gas log sets are recognized as more decorative in nature because some percentage of the heat energy escapes through the flue; however, the product literature and installation manual do not clearly indicate that the gas log set will only provide a heating function when it is used as an unvented set, and is not achieved when the product is used as a vented gas log set. The literature points out that the product is a good source of supplemental heat and seems to suggest a potential method to configure the damper of the chimney, to allow it to maximize the maintenance of heat when operating in a vented mode. Further, DOE notes that the installation manual for this product refers to it as a ''heater'' when providing instructions for both vented and unvented installation.[6] DOE also reviewed the product literature for the *Mantis* by Empire Comfort Systems, which is a high-efficiency hearth heater and is obviously intended to be used as a heater.[7] In fact, the manufacturer promotes the fact that this product has an annual fuel utilization efficiency applicable to other types of vented home heating equipment. However, DOE found that this product is marketed similarly to many ''decorative'' products, in that the product literature shows the product installed in the living space, with many optional decorative features such as a mantle surround or copper metallic wall surround. Moreover, the marketing materials for this heating product made direct statements about the ''ambiance'' that the unit achieves. Such ambiguities in product marketing literature make it difficult to determine whether the hearth products are intended for heating or are intended to be used for ambiance. Further, given that both ''heating'' and ''decorative'' vented hearth products are capable of providing both heat and ambiance, it is often difficult to determine which function is primary and which is secondary when reviewing manufacturer literature.

DOE's proposed definition provides a clear distinction that will allow manufacturers and consumers to differentiate between products that are primarily heaters and products that are primarily decorative. Due to the fact that even those products deemed ''decorative'' by industry (including vented gas log sets) often generate enough heat to be considered as a secondary heat source (as explained above), and are typically marketed by the manufacturers to promote that fact, DOE believes they are appropriately categorized as direct heating equipment. However, in recognizing the primarily decorative nature of certain products that are intended to be used primarily as a decorative product rather than a heating product, DOE provided the exclusion in the April 2010 final rule to identify the primarily decorative products that should not be subject to the standards for vented hearth heaters. Today's notice, while recognizing that hearth heating products have a duality of purpose, improves the previous definition by providing a clear, objective distinction between those hearth heating products that are primarily decorative and those that are primarily used for utilitarian heating (both of which are direct heating equipment under EPCA) and allows manufacturers of primarily decorative hearth products to continue manufacturing primarily decorative products that would not be subject to the standards for direct heating equipment.

In addition, DOE believes that the exclusion being adopted in today's notice improves upon the previous exclusion adopted in the April 2010 final rule, because that exclusion may have allowed heater-type products to qualify for the decorative inclusion. For example, Empire's *Mantis,* which is intended for use as a space heater, is available in a configuration where it can be operated with an input rating of 9,000 Btu/h. If this was the only operational mode, this unit would have qualified for the exclusion in the April 2010 final rule, even though it is clearly intended to be a heater. (DOE notes that the Mantis demonstrates that manufacturers possess the technological capability to produce vented hearth products at relatively low gas input levels (*i.e.,* below 9,000 Btu/h) which are also aesthetically pleasing.) Under the new exclusion criteria, this product

[5] For more information, see: *http://www.rasmussen.biz/logs/chill.html* (last accessed 11/8/2011).

[6] For more information, see: *http://www.rasmussen.biz/logs/pdf/C1.DFC1.203.pdf* (last accessed 11/8/2011).

[7] For more information, see: *http://www.empirecomfort.com/empirecomfort/Fireplaces/mantis.asp* and *http://www.mantisbyempire.com/assets/MANTIS/brochures/Mantis_Brochure.pdf* (last accessed 11/8/2011).

would not qualify for the exclusion unless it met the four criteria, which would clearly identify it as a decorative product.

B. Amended Definition for ''Vented Hearth Heater''

DOE is amending the definition for ''vented hearth heater'' to read as set forth in the regulatory text of this final rule. Specifically, the amended definition explicitly states that the energy conservation standards for vented hearth heaters are not applicable for vented gas log sets at this time. The amended definition also provides that vented gas hearth products are excluded from the energy conservation standards for vented hearth heaters if they are: (1) Certified to ANSI Standard Z21.50, but not to ANSI Standard Z21.88; (2) sold without a thermostat and with a warranty provision expressly voiding all manufacturer warranties in the event the product is used with a thermostat; (3) expressly and conspicuously identified on its rating plate and in all manufacturer's advertising and product literature as a ''Decorative Product: Not For Use As A Heating Appliance''; and (4) with respect to products sold after January 1, 2015, not equipped with a standing pilot light or other continuously-burning ignition source.

The amendments to the definition of ''vented hearth heater'' being adopted in this final rule are related to the scope of the exclusion for the subset of such heaters that DOE has determined should not be subject to the current energy conservation standards otherwise applicable to vented hearth heaters. In the April 2010 final rule, DOE defined the exclusion for primarily decorative vented hearth products as those with input ratings below 9,000 Btu/h. 75 FR 20112, 20129, 20234 (April 16, 2010). Further, vented gas log sets were not addressed in that rulemaking. The changes to the definition that DOE is adopting in this notice are twofold and are discussed in the paragraphs that follow.

First, DOE has determined that the definitions of direct heating equipment are inclusive of vented gas log sets, given the fact that these are gas-burning appliances that generate heat, and some of that heat is transferred to the living space. Under DOE's previous interpretation, these products were not subject to standards for direct heating equipment; however, as noted in section III.A.2, DOE now clarifies that these products should be classified as vented hearth products. As noted by interested parties, despite their decorative nature, vented gas log sets can be used by consumers as a secondary heat source, demonstrating that they are appropriately categorized as direct heating equipment. However, DOE is excluding vented gas log sets from being subject to the energy conservation standards for vented hearth heaters at this time. Based on the comments received on the proposed exclusion criteria for vented gas log sets contained in the NOPR (which are summarized below) DOE believes that additional research and subsequent rulemaking are warranted on these products prior to adopting standards or exclusion criteria.

Second, DOE is adopting a specific set of criteria (rather than the 9,000 Btu/h input rating limitation) for establishing whether a vented hearth product should be excluded from the energy conservation standards because such product is primarily decorative in nature. DOE believes that the conditions outlined in the definition for classifying a vented hearth product as decorative will create a clear, objective division between vented hearth products, which will be subject to DOE's standards for gas hearth direct heating equipment, and those vented hearth products that focus primarily on providing ambiance and aesthetic utility, which will not be subject to DOE's standards. DOE also expects that the amendments to the definition will lessen the burden on manufacturers and allow DOE to achieve greater energy savings than under the previous definition, while still achieving the energy efficiency mandate of EPCA, primarily through elimination of standing pilot lights or other continuously-burning ignition sources. DOE's analysis suggests that amendments associated with the amended definition will result in significant energy savings that will be greater than the savings under the definition adopted in the April 2010 final rule, both overall as well as for the types of units eligible for the exclusion. (See section III.C of this notice for details on the estimated energy savings.)

1. Description of Criteria for Classification as Decorative Vented Hearth Products

As noted above, DOE's amendments to the definition of ''vented hearth heater'' provides an exclusion clause for products that are primarily decorative in nature, provided that they are either a vented gas log set, or meet the four criteria to be considered primarily decorative that are outlined in the definition. In the July 2011 NOPR, DOE proposed that both vented gas log sets and primarily decorative hearth products meet a set of four criteria to be considered as primarily decorative products that are not subject to the standards for gas hearth DHE. 76 FR 43941, 43945–46 (July 22, 2011). The criteria, as well as public comments received on the proposed NOPR criteria, are explained below.

DOE also received a number of comments that stated generally that the exclusion criteria are unnecessary and not justifiable on the basis of energy savings. These interested parties also stated that there is no need for an exclusion, because heating efficiency standards should not apply to primarily decorative products. (Form Letter Comments; Creekside Hearth and Patio, No. 21 at p. 1; American Gas Log, No. 49 at p. 2; Hearth and Home, Inc., No. 144 at p. 2; Crik-IT, No. 15 at p. 3; Dealers LP Equipment, No. 20 at p. 2; Sun Dance Leisure, No. 17 at p. 3; Hearth and Home Shoppe, No. 207 at p. 1; Sheldon Skolnick Associates, No. 118 at p. 1; Penn Valley, No. 116 at p. 2; Perfection, No. 115 at p. 2; Heritage Propane, No. 33 at p. 1)

In response, DOE believes that the exclusion criteria are an essential part of setting energy conservation standards for ''heating'' type hearth products in order to clearly and effectively differentiate them from primarily ''decorative'' type products that are not subject to standards. This distinction will allow manufacturers of primarily decorative products to continue to manufacture their products, and allow consumers to continue to utilize them for both their ambiance and heating properties.

In the sections that follow, DOE discusses the exclusion criteria for vented gas log sets and decorative vented hearth products, and the comments received regarding the exclusion criteria for each type of product. Where an interested party raised an issue for both vented gas log sets and decorative vented hearth products, that issue is summarized and addressed separately for each type of product.

a. Vented Gas Log Sets

In the NOPR, DOE proposed exclusion criteria for vented gas log sets similar to the criteria proposed (and being adopted in this notice) for primarily decorative hearth products. 76 FR 43941, 43945–46 (July 22, 2011). In response to the proposed criteria, DOE received the following comments for vented gas log sets. After considering the comments, DOE believes additional research is warranted, and as a result, is not adopting at this time any criteria for these products to meet in order to be excluded from the direct heating equipment standards. Because DOE is not adopting any such criteria in this

rulemaking, comments raising issues with the proposed criteria are no longer at issue; however, for completeness DOE presents the comments below.

In the July 2011 NOPR, DOE proposed that gas log sets certify to ANSI Z21.60 in order to be considered primarily decorative equipment and, therefore, exempt for an efficiency standard. 76 FR 43941, 43953 (July 22, 2011) Many stakeholders submitted comments opposing the proposed certification requirement, because not all gas log sets are currently certified or able to certify to ANSI Z21.60. (NPGA, No. 209 at p. 8; Creekside Hearth and Patio, No. 21 at p. 1; Crik-IT, No, 15 at p. 3; Sun Dance Leisure, No. 17 at p. 3; Hearth & Home, No. 144 at p. 2; American Gas Log, No. 146 at p. 2; American Gas Log, No. 49 at p. 2; Heritage Propane, No. 33 at p. 1; Form Letter Comments; Perfection, No. 115 at p. 2; Sheldon Skolnick, No. 118 at p. 1; Dealers LP Equipment, No. 20 at p. 2; Penn Valley, No. 116 at p. 2; HPBA, Public Meeting Transcript, No. 14 at pp. 20–21; Hearth and Home Shoppe, No. 207 at p. 1) R.H. Peterson stated that there is no universal certification for gas log sets and that they are regulated differently by different cities and States. R.H. Peterson also commented that only 21 percent of their products are certified to ANSI Z21.60, compared to over 75 percent that are certified to another standard or left uncertified. (R.H. Peterson, Public Meeting Transcript, No. 14 at pp. 49–50) Further, R.H. Peterson stated that ANSI Z21.60 only covers gas log burners up to 30 inches, but they sell larger sizes to accommodate large wood burning fireplaces. (R.H. Peterson, Public Meeting Transcript, No. 14 at p. 51) R.H. Peterson also commented that DOE's requirement of ANSI Z21.60 certification would eliminate custom units because they are, by definition, not certified to any particular standard. (R.H. Peterson, No. 218 at p. 3) AGA stated that the proposed certification requirement for gas log sets would prohibit thermostats except for fireplaces installed in bedrooms or bedsitting rooms in Canada, thereby preventing the Canadian and U.S. standards from aligning. (AGA, No. 217 at p. 2) Rasmussen stated that many gas log sets are not certified because their size or design is not covered by an existing standard or because not enough sets are sold to justify the cost of testing, certification, and listing. Rasmussen also explained that this does not mean the unit is unsafe, because uncertified sets are built to the same standard of quality as their certified sets. Rasmussen estimated that ANSI Z21.60 accounts for less than 20 percent of total gas log sales, and recommended this provision to either be struck from the exclusion or the provision be broadened to include other standards and uncertified sets. (Rasmussen, Public Meeting Transcript, No. 14 at pp. 72–74) AGA and NPGA commented that manufacturers that do not comply with ANSI Z21.60 or manufacturers that certify to another standard would not be excluded from the direct heating equipment standards, yet would not be able to demonstrate compliance with the current test procedures. (AGA, No. 217 at p. 2; NPGA, No. 209 at p. 7)

Manufacturers were also concerned because match lit gas log sets would not be able to certify to ANSI Z21.60 and achieving that certification for such units would be unduly burdensome for manufacturers. HPBA stated that forcing gas log sets to be certified to ANSI Z21.60 would result in match light systems, which do not use a standing pilot light, being outlawed. (HBPA, Public Meeting Transcript, No. 14 at p. 23) R.H. Peterson commented that 50 percent of all vented gas log sets are sold as match lit systems, and match lit systems cannot be certified to ANSI Z21.60 because the standard requires a pre-assembled pilot on the gas log burner. Additionally, R.H. Peterson noted that only 20 percent of the current market is certified to ANSI Z21.60. (R.H. Peterson, No. 218 at pp. 2–3; Public Meeting Transcript, No. 14 at pp. 51–52) R.H. Peterson stated that the certification requirements (*e.g.,* a gas regulator, warning and rating plates) would increase the cost of gas log sets by three times the current amount. (R.H. Peterson No. 218 at p. 3) SBA stated that most gas log sets are not currently certified to ANSI Z21.60, and that match lit sets (which are a large percentage of log sets sold) cannot be certified under ANSI Z21.60, thereby eliminating the market for match lit log sets. (SBA, No. 96 at p. 45) NRDC and EarthJustice commented that the ANSI standard for gas log sets is unwarranted, and if manufacturers do not have to certify to ANSI Z21.60, then match light systems can be used instead of standing pilot lights. (NRDC and EarthJustice, No. 216 at p. 2) Rasmussen noted that match-lighted sets do not fall under the requirements of the ANSI Z21.60 certification that require gas logs to be equipped with a safety system to shut down the flow of gas to the burner in the event of an interruption of the gas supply or a flame out. (Rasmussen, Public Meeting Transcript, No. 14 at p. 74)

The second criterion DOE proposed was that gas log sets must be sold without a thermostat and with a warranty provision expressly voiding all manufacturer warranties in the event the product is used with a thermostat. 76 FR 43941, 43953 (July 22, 2011) DOE received comments from Rasmussen and R.H. Peterson specifically about thermostats on gas log sets. Rasmussen described consumer use of gas logs with and without a thermostat as follows: using a thermostat, the consumer sets a temperature at which the gas log set cuts off the flame; without a thermostat, consumers usually set the unit too high for a short period of time, then lower the flame height and leave it at the lower setting for the duration of the evening. (Rasmussen, Public Meeting Transcript, No. 14 at p. 75) Rasmussen stated that having a thermostat on a gas log set is a minor feature and does not mean that the product is designed to supply heat, and further stated that thermostats are used with a very small proportion gas log set products. Rasmussen pointed out that a thermostat helps the elderly turn the gas log set on and off without having to reach down into the fireplace to do so. (Rasmussen, Public Meeting Transcript, No. 14 at pp. 116–117) Rasmussen concluded that, although the thermostat provision may not impact a big part of the gas log set market, its elimination would limit consumer choice, especially for less-mobile elderly; therefore, Rasmussen recommended the thermostat provision be stricken from the final rule for gas log sets. (Rasmussen, Public Meeting Transcript, No. 14 at p. 77) R.H. Peterson commented that they do not sell gas log sets with thermostats. (R.H. Peterson, Public Meeting Transcript, No. 14 at p. 119)

The third criterion is that the product must expressly and conspicuously be identified on its rating plate and in all manufacturer advertising and product literature as a ''Decorative Product: Not For Use As A Heating Appliance.'' DOE received comments from R.H. Peterson and Rasmussen about labeling requirements for gas log sets. R.H. Peterson commented that labeling would impose few additional costs and is a more efficient way of reducing the small energy usage from the low BTU standing pilots used in vented gas logs. R.H. Peterson suggested that rather than triple the cost of vented gas logs products, DOE could achieve very similar energy savings, however limited they are, by simply adopting labeling requirements. (R.H. Peterson, No. 218 at p. 10) Rasmussen commented that all warnings and labels are printed on stickers which are applied to a metal plate that accompanies the gas log set,

and more stickers may require a larger plate. (Rasmussen, No. 208 at p. 5) Further, Rasmussen objected to DOE's proposal to categorize gas log sets as a ''decorative product, not for use as a heating appliance.'' Rasmussen stated that classifying the products as vented hearth heaters, but stating they are not heating appliances, is confusing and that the label will likely be ignored by consumers. (Rasmussen, Public Meeting Transcript, No. 14 at p. 77)

The final criterion DOE proposed was that products manufactured on or after July 1, 2014 must not be equipped with a standing pilot light or other continuously-burning ignition source in order to qualify for exclusion from the energy conservation standards for vented hearth heaters.

DOE received comments from stakeholders opposing this restriction. Intertek commented that most gas log sets are manually lit and do not have an automatic ignition system, and that banning standing pilot lights would eliminate the lowest-cost, safe alternative. Further, Intertek stated that eliminating pilot lights would be problematic for gas log systems that are dual certified and can be used as either a vented or unvented appliance and require an oxygen depletion safety shutoff, which is a specialized form of a standing pilot. (Intertek, No. 198 at pp. 4–5) Similarly, Homefires stated that banning a safety control like the standing pilot light is a bad idea because it could lead to consumers using match light systems, which do not have a safety control. (Homefires, No. 10 at p. 1) R.H. Peterson stated that customers do not want intermittent ignition systems because: (1) It will triple the cost of the most common gas log set sizes; (2) there is no significant savings; and (3) they are difficult to install (due to lack of space). (R.H. Peterson, Public Meeting Transcript, No. 14 at pp. 47–48) Empire did not agree with the exclusion criterion for gas log sets, because they would have to incorporate an ignition system that would double the cost of the gas log set. (Empire, No. 221 at p. 2) Mr. Simmons commented that matchless ignition should be required for decorative gas logs that have standing pilots because typically, customers with matchless ignition turn off the pilot when the log set is not in use for long periods of time. (Mr. Simmons, No. 24 at p. 1) NPGA commented that DOE cannot exclude decorative log sets from coverage of the performance standard as not being intended as heating appliances and then ban standing pilot lights because EPCA does not provide DOE with the authority to impose design requirements for direct heating equipment under 42 U.S.C. 6291(6). (NPGA, No. 209 at p. 5)

Many stakeholders had concerns that elimination of standing gas pilot lights would significantly increase the cost of gas log sets. R.H. Peterson calculated that DOE's proposal would add $600 per unit to the cost of a gas log set. (R.H. Peterson, Public Meeting Transcript, No. 14 at p. 47) San Bernardino Fireplace & Woodstove stated that the certification requirements and the mandatory electronic ignition system would increase gas log prices from $300–$500 to $800–$1000, and that less than 1 percent of their current sales include piloted or remote ready systems because the high cost. (San Bernardino, No. 11 at p. 1) Percy Guidry Hearth & Patio noted that propane and liquefied petroleum vented gas logs are required to have safety pilot light kits and that requiring manufacturers to have a more advanced starter system would increase the cost of the product. (Percy Guidry Hearth & Patio, No. 18 at p. 3) SBA remarked that eliminating standing gas pilot lights would be costly to the industry because the majority of gas log sets have standing gas pilot lights and would have to be redesigned and recertified if this feature were eliminated; SBA stated that using electronic ignition systems as an alternative to standing gas pilot lights would increase the average price from $400 to over $1,000, thereby reducing sales and profit margin for small businesses or even eliminating the market if consumers choose not to purchase sets. (SBA, No. 96 at p. 6) Rasmussen stated that if match lit sets and standing pilots are prohibited, it leaves only the option of electronic ignition systems, which Rasmussen argued might eliminate gas log sets from the marketplace entirely, since electronic ignition systems add more than $650 to the retail price of match lit sets. Further, Rasmussen stated that propane is used in rural areas and requires a safety shutdown because it is a more dangerous fuel than natural gas, and that mandating electronic ignitions for those sets could make gas log sets unaffordable for the rural poor. (Rasmussen, Public Meeting Transcript, No. 14 at p. 79) NPGA commented that banning standing gas pilots in propane units would require redesign for over 95 percent of propane units, which would be burdensome and costly. (NPGA, No. 209 at p. 8)

Several stakeholders also opposed eliminating standing pilot lights from gas log sets because of installation limitations associated with this product. Rasmussen commented that gas log sets with electronic ignition systems are hard to install because gas logs do not have side and under floor spaces to hide the electronic ignition components. Rasmussen further explained that the majority of gas log set installations are not new construction or extensive remodels, meaning electronic ignition components must be installed in the existing firebox. Given that electronic ignition components are greater in number and size than standing pilots and are more heat-sensitive, Rasmussen stated that improper location can lead to heat damage, which poses a safety hazard. Rasmussen noted that since most fireplaces do not have a power source nearby, the electronic ignition system must rely on batteries which are very heat sensitive. Rasmussen stated that the size of electronic ignition systems means the gas log set must usually be downsized in order to accommodate the necessary control, which can detract from the aesthetic appeal. (Rasmussen, Public Meeting Transcript, No. 14 at pp. 80–81) American Gas Log commented that gas log sets with electronic ignition are hard to install, because most gas log sets are retrofitted into wood-burning fireplaces, and typical wood-burning fireplaces do not have compartments to shield the electrical components from the heat. American Gas Log stated that it has not been able to develop a safe and reliable retrofit gas log set with electronic ignition. (American Gas Log, No. 49 at p. 2)

Stakeholders also commented about the compliance dates for vented gas log sets related to both the April 2010 final rule and the July 1, 2014 proposed date by which manufacturers would have had to equip their products with non-continuously-burning ignition systems. Rasmussen stated that component manufacturers of electronic ignition systems will have difficulty adjusting within three years to the new demands of gas log set manufacturers, which include no standing pilot, battery operation, and small BTU footprint. (Rasmussen, Public Meeting Transcript, No. 14 at p. 107) NPGA commented that the April 2010 final rule did not apply to gas log sets, so therefore, the compliance dates from that rule cannot apply to gas log sets, and asserted that the standards applicable to gas log sets would have to be at least five years from date of promulgation of a standard for gas log sets. (NPGA, No. 209 at p. 6) R.H. Peterson argued that the statute requires DOE to give manufactures three years from any final rule and asserted that to make the ANSI certification requirement applicable in April 2013 is wrong, because before this rulemaking,

DOE had considered gas log sets not to be vented hearth heaters subject to this requirement. (R.H. Peterson, Public Meeting Transcript, No. 14 at pp. 55–56) HBPA stated that the current proposed compliance dates are illegal and non-achievable, and elaborated that since the April 16, 2010 final rule did not apply to gas log sets, the April 2013 deadline should not apply. (HBPA, Public Meeting Transcript, No. 14 at pp. 19–20)

As previously stated, DOE is not adopting any exclusion criteria for vented gas log sets at this time. Rather, in light of the comments received, DOE has determined that it must conduct additional research into the gas log set market prior to adopting any specific criteria for exclusion from the direct heating equipment standard, which would be done through subsequent rulemaking. DOE appreciates the comments received from the interested parties, as they raised significant issues for DOE to address and lead DOE to exclude all vented gas log sets from the standard. As a result, DOE is not addressing each comment in detail.

b. Vented Hearth Products

For vented hearth products (other than vented gas log sets), the first criterion that a product must meet to be considered a primarily decorative vented hearth product is that it must be certified to a certain ANSI standard. 76 FR 43941, 43953 (July 22, 2011) Specifically, for vented hearth products, it must be certified to ANSI Standard Z21.50–2007, *Vented Gas Fireplaces,* but not be certified to ANSI Standard Z21.88–2009, *Vented Gas Fireplace Heaters.* (A unit could not be certified to both standards and still qualify for the exclusion.) DOE is incorporating by reference both of these standards into the DOE's definitions at 10 CFR 430.2 and the incorporation by reference provisions at 10 CFR 430.3. DOE recognizes that the hearth products industry has attempted to distinguish between heater and primarily decorative products using the certification under one of these standards as the criterion for classification into one category or the other. However, although this is a general practice in industry, DOE notes that not all manufacturers apply this criterion consistently to differentiate their heating hearth products from their primarily decorative products. As such, DOE has determined that this criteria, although an important part of DOE's definition, cannot be used alone to differentiate between the two types of products. In addition, ANSI Standard Z21.88 contains provisions that allow the main burners to be thermostatically-controlled, which ANSI Standard Z21.50 does not allow. Therefore, DOE believes this criterion will be helpful in differentiating, at least in part, between vented hearth heaters and vented hearth products that are primarily decorative in nature.

In response to this proposed criterion in the NOPR, DOE received comments from several stakeholders. HPBA stated that there are decorative gas fireplaces that are not certified to ANSI Z21.50 (the standard covering decorative gas fireplaces) and that it has submitted this information to DOE. (HPBA, Public Meeting Transcript, No. 14 at pp. 20–21) AGA remarked that ANSI Z21.50 prohibits thermostats except for fireplaces installed in bedrooms or bedsitting rooms in Canada, and this rulemaking would prevent alignment of Canadian and U.S. standards. However, Rasmussen agreed with DOE that ANSI Z21.88 and ANSI Z21.50 differentiate decorative and heater-rated fireplaces, but noted that not all jurisdictions on the eastern seaboard require ANSI Z21.88 or ANSI Z21.50 certification. (Rasmussen, Public Meeting Transcript, No. 14 at p. 72)

In response, DOE notes that although Canadian and U.S. standards may not align, DOE believes that this criterion provides an important and necessary means of distinguishing vented hearth heaters and vented hearth products that are primarily decorative in nature, because it is the method of differentiation that industry has traditionally used. However, as provided by HPBA, DOE found that some products asserted to be primarily decorative were certified to the heater standard and some products were certified to both ANSI standards. In response to HPBA's concerns about products that are not certified to ANSI Z21.50, DOE believes that the burden manufacturers incur by certifying that small subset of products would be less than burdens that would have been incurred under the conditions of the April 2010 final rule. As a result, DOE believes that the first exclusion criterion is reasonable and essential in differentiating between primarily decorative and heating hearth products.

The second criterion in the definition is that the product must be sold without a thermostat and with a warranty provision expressly voiding all manufacturer warranties in the event the product is used with a thermostat. 76 FR 43941, 43953 (July 22, 2011) Hearth products intended for heating sometimes use thermostats to automatically turn on and off based on the temperature of the surrounding space. Often, thermostats are optional equipment that may be installed in the field. DOE believes that products intended to be used primarily for decorative purposes would not need to employ a thermostat. A thermostat cycles the appliance on and off based on the temperature of the room. If a consumer is concerned with ambiance (which should be the case for primarily decorative appliances), then there is no reason why a thermostat would be required to automatically control the operation based on the room temperature. DOE believes that a provision in the warranty that voids it if a thermostat is installed will discourage the misuse of vented hearth products that are intended primarily to be decorative and discourage the evasion of energy conservation standards by those who purchase primarily decorative products and seek to use them as heaters.

In response to DOE's proposal of this criterion in the NOPR, DOE received several comments from interested parties. Intertek remarked that primarily decorative gas appliances are not allowed, under applicable codes and safety standards, to be supplied or installed to operate under thermostatic control, and that such products are supplied with an on/off control which may be a knob or valve of the appliance. Intertek stated that DOE has correctly identified thermostatic control as a key distinguishing feature of heating appliances. (Intertek, No. 0198 at pp. 2–3) Rasmussen stated that it does not take issue with removing thermostats, but noted that the issue of banning thermostats on primarily decorative fireplaces was confusing, since the thermostat acts as an automatic shutoff device that prevents the consumer from over-using a primarily decorative appliance for heating purposes. Rasmussen asserted that DOE has focused too much on the startup function of thermostats rather than on the shut-down of the flame. (Rasmussen, Public Meeting Transcript, No. 14 at p. 120; Rasmussen, Public Meeting Transcript, No. 14 at p. 75) Many stakeholders opposed banning thermostats for safety reasons. AmeriGas, Heritage Propane, Siouxland, Penn Valley, Gas-Fired Products, and Gresham Petroleum commented that eliminating thermostats would decrease safety and increase energy consumption because the decorative products would not have a trigger for automatic shutoff and would be left on by the consumer. (Form Letter Comments; Heritage Propane; No. 33 at p. 1; Siouxland, No. 85 at p. 1; Penn Valley, No. 116 at p. 1; Gas-Fired Products, No. 155 at p. 1; Gresham Petroleum, No. 165 at p. 1)

In response, DOE believes that this criterion is important to help differentiate between primarily decorative and heating appliances, and to discourage the misuse of primarily decorative vented hearth products. In response to the comments about safety, DOE finds that eliminating thermostats has not been proven to have a significant effect on the products safety. DOE notes that many hearth products are available on the market without thermostats, and there is no indication in the manufacturer literature, nor have the stakeholders provided any substantiation, that a hearth product without a thermostat is either unsafe or poses safety risks.

The third criterion is that the product must expressly and conspicuously be identified on its rating plate and in all manufacturer advertising and product literature as a ''Decorative Product: Not for use as a Heating Appliance.'' 76 FR 43941, 43953 (July 22, 2011). This requirement will provide additional clarification for consumers and installers and make it obvious that the product is intended primarily for decorative purposes. DOE received several comments on this criterion in response to the July 2011 NOPR.

R.H. Peterson commented that, in the NOPR, DOE recognized the importance of the role consumers played, and considered DOE's suggestion on better labeling requirements for primarily decorative fireplaces an attractive option for energy savings. (R.H. Peterson, No. 218 at p. 10) AGA stated that the product was not considered in the Federal Trade Commission's labeling discussion, and that primarily decorative products should not be required to have a label. (AGA, Public Meeting Transcript, No. 14 at pp. 85–86)

DOE disagrees with AGA's comment and notes that the exclusion criterion for manufacturers to disclose when their products are decorative in nature is not mandated for all hearth products, but rather, it is optional for those manufacturers who elect to pursue the exclusion for products that are decorative in nature. If such labeling is deemed to be overly burdensome, manufacturers have the choice to redesign products in order to meet the standards for gas hearth direct heating equipment established by the April 2010 final rule. As noted above, these products, although primarily decorative in nature, provide heat and are appropriately classified as direct heating equipment under the statute. Therefore, DOE believes it has the authority to require this criterion and believes this criterion is essential to help inform consumers about the intended use of the product.

The final criterion proposed would require that products manufactured on or after July 1, 2014, must not be equipped with a standing pilot light or other continuously-burning ignition source in order to qualify for exclusion from energy conservation standards for vented hearth heaters. 76 FR 43941, 43953 (July 22, 2011) According to DOE's market research, more than half of the primarily decorative hearth product market would not be impacted by this limitation because the products already utilize alternatives to a standing pilot light, such as an intermittent pilot or electronic ignition. However, DOE notes that some products on the market would have needed to be: (1) Redesigned to eliminate the use of standing pilot lights or other continuously-burning ignition source; (2) redesigned by April 16, 2013 to meet the required energy conservation standard level for gas hearth direct heating equipment established by the April 2010 final rule; or (3) removed from the market prior to July 1, 2014. DOE believes that given the prevalence and ease of availability of the technological alternatives to standing pilot lights and other continuously-burning ignition sources (*e.g.,* electronic ignition, intermittent pilot) and the experience of manufacturers in implementing these alternatives, a compliance date of July 1, 2014 would have likely allowed a reasonable amount of time for manufacturers to redesign or remove from the market their products with standing pilots or shift production to product lines without a standing pilot or other continuously-burning ignition source. However, in consideration of the comments discussed below, DOE has revised the July 1, 2014 compliance date to January 1, 2015, in order to provide manufacturers with more than three full years from the time of publication of the final rule to implement changes to remove standing pilots or other continuously-burning ignition sources from products that would require it.

In response to this proposed requirement, Short's Stoves stated that most manufacturers are already introducing electronic ignition on their fireplaces and gas log sets, which will save energy by turning off the pilot when not in use. (Short's Stoves, No. 174 at p. 1) NPGA commented that DOE cannot ban standing pilot lights because EPCA (42 U.S.C 6291(6)) does not provide DOE with the authority to impose design requirements. (NPGA, No. 209 at p. 5) Intertek stated that standing pilot lights are an important safety feature that may not be readily replaced with electronic ignition systems or other intermittent alternatives, and suggested DOE consider the benefit of allowing primarily decorative gas appliances to include standing pilot lights, because the secondary heating function can provide sufficient backup heating during a power outage, and it reduces the risk of large explosive ignitions. (Intertek, No. 198 at pp. 3–4)

In response to NPGA's comment about DOE's authority, DOE notes that it is not mandating a design requirement for primarily decorative hearth products, because meeting the exclusion criteria is completely optional and at the manufacturers' discretion. If manufacturers do not certify their product to ANSI Z21.50, then the product will not be considered primarily decorative, and the product may have a standing pilot light; however, if the product does not meet the criteria for the decorative exclusion, then it must comply with the energy conservation standards applicable to gas hearth direct heating equipment. DOE appreciates Intertek's comment about product safety, but it finds that eliminating standing pilot lights does not significantly reduce product safety, because products with alternative ignition systems are ubiquitously available on the market today. In the event of a power outage, DOE notes that electronic ignition systems are commonly equipped with a battery backup system that can provide power. Given the prevalence of alternatives to continuously-burning ignition systems in the market, DOE does not find there is adequate evidence of safety concerns related to replacing standing pilot ignitions or other continuously-burning ignition sources.

Barbara Jenkins, Percy Guidry Hearth & Patio, Arizona Gas, and San Bernardino Fireplace & Woodstove stated that eliminating the standing pilot light is unreasonable, because the alternative is electronic ignition which is expensive and requires more maintenance. (Barbara Jenkins, No. 22 at p. 1; Percy Guidry, No. 18 at p. 2; Arizona Gas, No. 98 at p. 2 ; San Bernardino, No. 11 at p. 1) San Bernardino Fireplace & Woodstove explained that electronic ignition systems are unreliable, and that 9 out of the 10 electronic ignition systems the company has sold did not work well and had to be bought back. (San Bernardino, No. 11 at p. 1) Exotic Flames and Arizona Gas stated that electronic ignition systems are cost-prohibitive and would impact small distributer businesses. (Exotic Flames,

No. 19 at p. 1; Arizona Gas, No. 98 at p.2) Intertek commented that electronic ignitions systems are more expensive that standing pilot lights, because they require an electrician to install a circuit. (Intertek, No. 198 at p. 4) Hearth and Home Shoppe commented that banning standing pilot lights is unreasonable, because electronic ignitions will not work effectively at very cold temperatures and electronic pilots are extremely expensive. (Hearth and Home Shoppe, No. 207 at p. 1) Golden Blount stated that eliminating standing gas pilot lights does not promote safety and that the energy savings do not outweigh the increased cost of an electronic ignition system. (Golden Blount, No. 210 at p. 1)

In its analysis for the April 2010 final rule, in examining design changes between a baseline heating unit and a unit at efficiency level 1 (which DOE assumed would be met through upgrading a baseline unit with an electronic ignition), DOE examined the differences between the components included in an electronic ignition system and a standing pilot ignition. In the analysis for the April 2010 final rule, DOE found the efficiency benefits associated with removing the standing pilot to be cost-effective (75 FR 20112, 20219 (April 16, 2010)), and believes that the same is true for primarily decorative hearth products given the similarities between the two in terms of components and construction. In response to the Hearth and Home Shoppe's comment about the effective operational temperature limit of electronic ignition, DOE finds that this concern is mitigated by the fact that only primarily decorative products will not be allowed to have a standing pilot light, and such products will not be used as the primary heat source of the residence.

Interested parties also submitted comments about the July 1, 2014, compliance date DOE proposed for the elimination of standing pilot lights, and the April 16, 2013, date by which manufacturers must meet the other exclusion criteria or the standard for gas hearth direct heating equipment. HBPA stated that: (1) The proposed July 1, 2014 compliance date for pilot restrictions contradicts the law; (2) DOE does not provide justification for the deadline; and (3) the deadline fails to consider the pressure it places of testing laboratories and their capacity. (HPBA, No. 201 at p. 20) Conversely, NRDC and EarthJustice commented that the proposed compliance dates are reasonable, because there are several low-cost options available to manufacturers seeking to replace standing pilot light systems, including manual and electronic spark ignitions systems. (NRDC and EarthJustice, No. 216 at p. 2)

Several interested parties commented that compliance deadlines for primarily decorative vented gas fireplaces and gas log sets are arbitrary and unreasonable and cannot be met by the industry, because most manufacturers do not have the funds to meet the deadline. (Crik-IT, No. 15 at p. 2; Sun Dance Leisure, No. 17 at p. 2; Dealers LP Equipment, No. 20 at p. 1; Creekside, No. 21 at p. 1; HWAM, No. 43 at p. 1; American Gas Log, No. 49 at p. 1; Perfection, No. 115 at p. 2; Penn Valley, No. 16 at p. 2; Sheldon Skolnick, No. 118 at p. 1; Hearth and Home, No. 144 at p. 2; American Gas Log, No. 146 at p. 2; Form Letter Comments, Hearth and Home Shoppe, No. 207 at p. 1; New Jersey Propane Gas Association, No. 212 at p. 1; Mr. Pierce, No. 219 at p. 1; Advantage, No. 13 at p. 1; Empire, No. 221 at p. 2) NPGA commented that certification would be extremely burdensome to manufacturers. (NPGA, No. 209 at p. 8) Empire stated that manufacturers need time for research and development, and also the volume of certifications will increase, making 2014 too aggressive for an industry made up of small businesses with limited resources. (Empire, Public Meeting Transcript, No. 14 at p. 62) HBPA stated that according to Executive Order 13563, DOE needs to consider the cumulative impact of regulations, and since burdensome regulations have already been imposed on the hearth industry, adding more regulations would create a backlog on the few independent testing labs that certify hearth products. They believe that labs will not be able to handle the surge of new equipment that needs to be tested from the EPA New Source Performance Standards for wood-burning products (expected in the first quarter of 2013) and the current DOE regulations for heater-rated hearth products. (HPBA, Public Meeting Transcript, No. 14 at pp. 20–21) Modern Gas commented that the industry is not ready to implement new standards by the proposed compliance deadline. (Modern Gas, No. 0213 at p. 1) Short's Stoves stated that DOE's compliance timeline will be detrimental to the industry, because most small manufacturers do not have the funds to meet the regulations and redesign their equipment. (Short's stoves, No. 174 at p. 1) Lennox stated that the proposed date violates the established precedent allowing at least three years for industries to implement new energy conservation standards, and requests DOE justify the accelerated effective date. Lennox explained that the current timeline places tremendous burden on the manufacturers. (Lennox, No. 6 at pp. 1–2) Empire suggested DOE consider extending the compliance date to be effective three years after the publication of the final rule. Empire explained that 70 percent of the industry shipments are primarily decorative hearth products and that the manufacturers, which are mostly small businesses, need more time for research and development and certification. (Empire, No. 4 at p. 2; Empire, Public Meeting Transcript, No. 14 at p. 61)

As explained below, DOE believes that the compliance date of April 16, 2013 for meeting the first three exclusion criteria is reasonable, because the exclusion criteria adopted by this rulemaking for primarily decorative vented hearth products are both achievable and optional. The April 2010 final rule would require most primarily decorative equipment covered by this rulemaking to comply with the energy conservation standards for vented hearth products by April 16, 2013, giving manufacturers three full years lead time contemplated under EPCA to upgrade their products to meet the energy conservation standards, if they choose to do so. Today's final rule amends the April 2010 final rule to reduce the difficulty of meeting the exclusion. DOE notes that beyond statements of their opinion, the commenters have provided no data or other information to show why they could not meet the deadlines DOE has proposed. DOE does not believe that certification, elimination of thermostats, and proper labeling could not be accomplished by April 16, 2013, and DOE believes that it is important to implement these changes to the exclusion for decorative products by the time compliance is required with the direct heating equipment standards, so as to prevent consumer confusion and disruptions in the marketplace. Moreover, DOE notes that it is no longer requiring gas log sets to comply with exclusion criteria nor the energy conservation standard, which will reduce the burden on test labs performing certification testing. DOE recognizes that elimination of the standing pilot light or other continuously-burning ignition source would likely require a more substantial change to manufacturers' affected product lines. Accordingly, for this criterion DOE is changing the compliance date from July 1, 2014, as proposed in the NOPR, to January 1, 2015 to provide more than three years

before the compliance date for removing continuously-burning ignition sources. DOE believes the January 1, 2015 compliance date for this criterion is reasonable, particularly given that the alternatives to continuously-burning ignition sources are readily available and currently used in a number of hearth products available on the market.

C. National Energy Savings

As noted above, in the NOPR, DOE proposed that to qualify for an exclusion from the current energy conservation standards for products that are primarily decorative in nature, vented gas hearth products and vented gas log sets manufactured on or after July 1, 2014, must not be equipped with a standing pilot light or other continuously-burning ignition source. 76 FR 43941, 43944–45 (July 22, 2011). For the NOPR, DOE analyzed the energy savings expected to result from exclusion of the standing pilot light or other continuously-burning ignition source in the amended ''vented hearth heater'' definition. Based on information about vented hearth product models available in the market,[8] DOE estimated that about 38 percent of the vented decorative hearth models on the market would need to be redesigned to eliminate the use of standing pilot lights or other continuously-burning ignition sources. DOE also estimated that 20 percent of vented gas logs would have standing pilot lights or other continuously-burning ignition sources, based on a 1997 GTI study.[9] The remaining portion of the market is assumed to already utilize ignition-based alternatives, such as an intermittent pilot, electronic ignition, or match light ignition system (gas logs only).

Several parties criticized DOE's estimate of the fraction of vented gas logs that would have standing pilot lights or other continuously-burning ignition sources. (HPBA, No. 0014 at p. 26; RH Peterson, No. 0218 at p. 2; Rasmussen, No. 0208 at p. 6) DOE acknowledges the above comments. However, DOE is not adopting in this final rule a standing pilot removal requirement for this product.

To estimate the energy savings, in the NOPR, DOE assumed that all primarily decorative hearth products and vented gas log models with standing pilot lights or other continuously-burning ignition sources would be replaced with an intermittent pilot ignition, and would have an average duration of the pilot operation of about 37.5 h/yr (the same as the main burner operating hours [10]). On average, continuous pilot energy use is about 350 Btu/h [11] for primarily decorative vented hearth products [12] and 1,250 Btu/h for vented gas logs.[13] For both vented hearth products and vented gas log sets, DOE assumed that pilot lights operate year round (*i.e.,* 8,760 h/yr) for 75 percent of the installations and that for the remaining 25 percent, the consumer operates the pilot for about one-fourth of the year (*i.e.,* 2,190 h/yr). The average annual energy savings amount to 2.67 million Btu per unit for primarily decorative vented hearth products and 9.53 million Btu per unit for vented gas logs. DOE assumed an average lifetime of 15 years for both primarily decorative vented hearth and vented gas logs units and average annual shipments of 460,000 primarily decorative vented hearth units and 103,000 vented gas log units.

Using the above assumptions, in the NOPR, DOE calculated the national energy savings over the analysis period to be 0.17 quads for primarily decorative hearth products and 0.07 quads for vented gas log sets under the proposed revised definition of ''vented hearth heater'' with an exclusion that would eliminate the standing pilot lights on those units. In the NOPR, DOE estimated that the elimination of standing pilots or other continuously-burning ignition sources in primarily decorative vented hearth products and gas log sets would result in an additional 0.12 quads of energy savings over the 30-year period from 2014 through 2043, beyond the savings estimated by the April 2010 final rule. 76 FR 43941, 43943 (July 22, 2011).

Commenting on the NOPR, several parties stated that DOE overestimated the national energy savings for primarily decorative hearth products and vented gas log sets under the proposed revised definition of ''vented hearth heater.'' (NPGA, No. 0209 at p. 9; SBA, No. 0096 at p. 6; RH Peterson, No. 0218 at p. 3) Commenters criticized DOE's assumptions in three main areas: (1) Product operating hours; (2) pilot light usage; and (3) pilot light gas input rate.

Regarding product operating hours, Rasmussen commented that the operating hours for primarily decorative hearth products and vented gas logs are highly variable. (Rasmussen, No. 0208 at p. 6) Homefires commented that for primarily decorative vented gas appliances, the typical system is only in use for 20 hours per year. (Homefires, No. 0010 at p. 1) DOE agrees that the operating hours for primarily decorative hearth products and vented gas logs are highly variable, but for the current national energy savings analysis, it was only necessary to use an average value. For primarily decorative hearth products, DOE used 35 hour per years based on a report prepared for HPBA.[14]

Regarding pilot light usage, several parties stated that DOE overestimated the number of customers that leave their standing pilot light on during the non-heating season. (Rasmussen, No. 0208 at p. 7; Intertek, No. 0198 at p. 4) Exotic Flames and SBA stated that most standing pilot lights are not left on all the time, and Independence Marketing commented that most pilot lights are only left on during the winter. (Exotic Flames, No. 0019 at p. 1; SBA, No. 0096 at p. 6; Independence Marketing Ltd, No. 0214 at p. 1) Homefires stated that the pilot light is generally turned off after the customer uses the system. (Homefires, No. 0010 at p. 1) Arizona Gas stated that most standing pilot lights are lit at most 4 to 5 months or, for propane systems, are only lit for each use to conserve fuel. (Arizona Gas, No. 0098 at p. 2) HPBA stated that DOE's assumption that 75 percent of all standing pilots are left on all year, while 25 percent are left on for a quarter of the year, lacks evidence. (HPBA, No. 0201 at p. 2) NPGA stated that 75 percent of consumers keep their pilot lights on for

[8] U.S. Department of Energy—Office of Codes and Standards, Analytical Tools: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters (April 27, 2010). (*http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/htgp_finalrule_correction.pdf*).

[9] Menkedick, J., Hartford, P., Collins, S., Chumaker, S., Wells, D. Topic Report: Hearth Products Study (1995–1997). Gas Research Institute (GRI). September 1997. GRI–97/0298.

[10] Houck, James, ''Residential Decorative Gas Fireplace Usage Characteristics'' (Report prepared for HPBA) (2010).

[11] U.S. Department of Energy—Office of Codes and Standards, Technical Support Document: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters (April 27, 2010).

[12] U.S. Department of Energy—Office of Codes and Standards, Technical Support Document: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters (April 27, 2010).

[13] This value was derived from data collected on the following manufacturer Web sites:

Pittsburg Gas Grill and Heater Co. Frequently Asked Questions. (URL: *http://www.pittsburghgasgrill.com/faq.html*).

Hargrove Hearth Products. Frequently Asked Questions. (URL: *http://www.hargrovegaslogs.com/faq.htm*).

Leonard's Stone & Fireplace. Frequently Asked Questions. (URL: *http://www.leonardsstoneandfireplace.net/faq.html*).

Fireside Hearth & Home. Frequently Asked Questions. (URL: *http://www.firesidehearthandhome.com/faq.php*).

Heatilator. Common Questions. (URL: *http://www.heatilator.com/customerCare/searchFaq.asp?c=Gas*).

[14] Houck, James, ''Residential Decorative Gas Fireplace Usage Characteristics'' (Report prepared for HPBA) (2010).

three months of the year, and only 25 percent remain on year-round. (NPGA, No. 0209 at p. 9)

For primarily decorative hearth products, DOE conducted further review in response to the comments, and accordingly revised its analysis as follows: Namely, that 50 percent of consumers keep their pilot lights on for three months of the year, 25 percent keep them on only when the equipment is being used, and 25 percent keep them on year-round. The fraction that keeps pilot lights on only when the equipment is being used is to address the pilot operation of propane systems [15] and other situations when the user chooses to turn off the pilot after each use.

Regarding the gas log set pilot light gas input rate, a number of parties stated that DOE's assumption that gas log pilot systems use 1,250 Btu/hr was too high. (Rasmussen, No. 0208 at p. 6; RH Peterson, No. 0218 at p. 3; SBA, No. 0096 at p. 6) DOE acknowledges the information provided on vented gas log pilot systems. However, DOE did not include energy savings for vented gas log sets in its current analysis, because the standing pilot removal requirement for this product is not covered under today's rule. For primarily decorative hearth products, Intertek commented that on average, most pilot lights use 800 Btu/hr. For primarily decorative hearth products, DOE revised its analysis based upon the data provided by Intertek, which is similar to the data reported by manufacturers and distributors of hearth products and Natural Resources Canada (NRCAN) Web sites, as well as an EER Consulting report and a GRI study.[16]

As a result of revising the assumptions for primarily decorative vented hearth products about the number of customers that leave their standing pilot light on and the pilot light gas input rate, DOE calculated that if all manufacturers of vented hearth products who could do so availed themselves of the exclusion, the national energy savings over the analysis period would be 0.17 quads for primarily decorative vented hearth products (not including gas log sets). According to DOE's estimates, elimination of standing pilots and other continuously-burning ignition sources in primarily decorative vented hearth products would result in an additional 0.04 quads of energy savings over the 30-year period from 2015 through 2044, beyond the savings estimated by the April 2010 final rule. DOE did not include the energy savings for vented gas log sets in its revised NES calculation, because the standing pilot elimination requirement for gas log sets has been removed from the exclusion for these products in today's final rule. In conclusion, even with modifications to DOE's National Energy Savings analysis based upon public comments (where substantiated), DOE has determined that the amendments in today's final rule would continue to provide substantial additional energy savings beyond those attributable to the April 2010 final rule.

D. Other Comments

1. Test Procedures

In response to the definition of ''vented hearth heater'' proposed by DOE in the July 2011 NOPR, DOE received a number of comments regarding the applicability of the DOE test procedures for primarily decorative hearth products and vented gas log sets.

HPBA stated that the AFUE methodology is inapplicable to primarily decorative gas fireplaces and cannot even be conducted on gas log sets; therefore, there is no applicable efficiency test method for these products. (HPBA, Public Meeting Transcript, No. 14 at pp. 21–22) NPGA stated that there is not an applicable test procedure to measure the efficiency of these products. (NPGA, No. 209 at p. 5) Further, NPGA stated that the current DOE test procedure cannot be applied to vented primarily decorative hearth products, because the test procedure measures convective heat transfer, rather than radiative heat transfer. (NPGA, No. 209 at pp. 6–7) SBA and AGA made similar comments. (SBA, No. 96 at p. 4; AGA, No. 217 at pp. 1–2) Several interested parties stated that there are no test standards to determine whether DOE's interpretation of the primarily decorative hearth products definition is appropriate, and that primarily decorative hearth products are different from direct heating equipment because they produce heat indirectly by their operation. (Form Letter Comments; Oahu Gas Service, No. 166 at p. 1; Heritage Propane, No 33 at p. 1; American Gas Log, No. 146 at p. 1; Penn Valley, No. 116 at p. 1; Gresham Petroleum, No. 165 at p. 1; HWAM, No. 43 at p. 1; Slate Spring, No. 92 at p. 1; Perfection, No. 115 at p. 1; Hearth and Home, Inc., No. 144 at p. 1; American Gas Log, No. 49 at p. 1; Sheldon Skolnick Associates, No. 118 at p. 1) R.H. Peterson commented specifically that gas log sets are not able to be tested using the standard AFUE test method. (R.H. Peterson, Public Meeting Transcript, No. 14 at pp. 36–37) Similarly, Short's Stoves commented that there is no sure way to test gas log sets, because they are installed into existing wood-burning fireplace which are not uniform. (Short's Stove, No. 174 at p. 1) R.H. Peterson commented that: (1) No vented gas log sets can or ever will be able to meet the 68-percent heating efficiency standard; (2) DOE knows there is no approved test; and (3) the only approved test does not work on vented gas logs. (R.H. Peterson, No. 218 at p. 5)

Intertek stated that there currently is no recognized test method for evaluation of the efficiency of gas log sets and that it is difficult to adapt the test procedure for vented hearth products to primarily decorative products, because the basic premise of the vented hearth product test procedure is that the appliance is operated to satisfy a heating load. (Intertek, No. 198 at pp. 2–3) NPGA stated that the efficiency of a product can be determined only in reference to how efficiently it serves its intended purpose, so the DOE test procedure does not apply to primarily decorative hearth products. (NPGA, No. 209 at p. 4) NPGA stated that to measure energy efficiency and stack losses, it is critical to have a test procedure that can account for the high and variable amount of dilution air, especially for gas log sets, and explained that based on testing by the Gas Technology Institute (GTI), the amount of CO_2 required to account for stack losses creates too large an error

[15] According to Energy Information Administration's 2009 Residential Energy Consumption Survey, 23 percent of secondary fireplaces use propane. For more information see: *http://www.eia.gov/consumption/residential/data/2009/.*

[16] This value was derived from data collected on the following manufacturer Web sites:

GRI 1997 Study: Menkedick, J., Hartford, P., Collins, S., Chumaker, S., Wells, D. ''Topic Report: Hearth Products Study (1995–1997)''. Gas Research Institute (GRI). September 1997. GRI–97/0298.

EER Consulting: Mullen, J. ''Input Rate of Pilot Burners on Gas Fireplaces'' (Consultant Report). EER Consulting. November 6, 2011.

NRCAN Web site. NRCAN. ''Personal: Residential: Chapter 3—All About Gas Fireplaces'' (URL: *http://oee.nrcan.gc.ca/Publications/infosource/Pub/home/all_about_gas_fireplaces_chapter3.cfm?text=N&printview=N*).

Pittsburg Gas Grill and Heater Co. Frequently Asked Questions. (URL: *http://www.pittsburghgasgrill.com/faq.html*).

Leonard's Stone & Fireplace. Frequently Asked Questions. (URL: *http://www.leonardsstoneandfireplace.net/faq.html*).

Fireside Hearth & Home. Frequently Asked Questions. (URL: *http://www.firesidehearthandhome.com/faq.php*).

Heatilator. Common Questions. (URL: *http://www.heatilator.com/customerCare/searchFaq.asp?c=Gas*).

Fireplace Professionals. Frequently Asked Questions. (URL: *http://www.fireplaceprofessionals.com/faqs.htm*).

band to produce accurate results. (NPGA, No. 209 at p. 7) AGA stated that products designed and certified to ANSI Z21.50 or ANSI Z21.60 have been included, though they have no applicable test procedure. Further, AGA stated that when the test procedures for home heating equipment (not including furnaces) were developed, the ANSI Z21.50 or ANSI Z21.60 products were not considered part of the developed test method. (AGA, Public Meeting Transcript, No. 14 at pp. 21–22) AGA also stated that manufacturers that do not comply with ANSI Z21.50 or manufacturers who certify to a different standard would not be excluded from the direct heating equipment standards, but would not be able to demonstrate compliance under the current test procedures. (AGA, No. 217 at p. 2)

In considering the test procedures for vented home heating equipment as they apply to hearth products, DOE recognizes that the test procedures may not be applicable for gas log sets. Because DOE is not requiring the vented gas log sets to meet the standards for gas hearth direct heating equipment and is not requiring the products to meet any criteria for exclusion, the applicability of test procedures for those products is no longer relevant. However, as covered products, DOE may develop a test procedure for vented gas log sets in the future.

In the December 2009 NOPR, DOE proposed that its test procedures for vented direct heating equipment be applied to establish the efficiencies of vented gas hearth direct heating equipment. 74 FR 65852, 65861 (Dec. 11, 2009). In the April 2010 final rule, DOE noted that it received no comments from interested parties raising any concern in response to the NOPR about the application of the DOE test procedures for vented direct heating equipment to gas hearth direct heating equipment. 75 FR 20112, 20123 (April 16, 2010). DOE believes, therefore, that the test procedures for vented home heating equipment are generally applicable to gas hearth direct heating equipment. DOE believes that heating products can be tested using the vented home heating equipment test procedures, even though the test procedure may not be tailored specifically to these products. However, DOE is considering modifications to the direct heating equipment test procedures in a test procedure rulemaking for heating products (*i.e.,* water heaters, direct heating equipment, and pool heaters). DOE published a request for information in the **Federal Register** on October 12, 2011, which has a 45-day comment period that is open until November 28, 2011. 76 FR 63211. DOE is considering potential changes to the test procedure for vented home heating equipment that would clarify the procedure with respect to hearth heating products to reduce ambiguity and ensure that it is applied uniformly to vented hearth heating products. DOE encourages interested parties to comment on any test procedure issues as a part of that ongoing rulemaking. Additionally, DOE notes that if there is adequate evidence that a certain subset of products exists that have characteristics that prevent them from being tested according to the prescribed test procedures, manufacturers have the option of submitting a petition of waiver in accordance with 10 CFR 430.27.

2. DOE Analysis and Public Meeting Conduct

DOE received comments generally about the September 1, 2011 public meeting and its analysis for the July 2011 NOPR. HPBA stated that public meeting was not conducted in accordance with law, because DOE did not provide any substantive response to questions from interested parties. (HPBA, No. 201 at p. 6) Similarly, R.H. Peterson stated that DOE offered only non-responsive answers during the public meeting. (R.H. Peterson, No. 218 at p. 10) NPGA stated that DOE violated EPCA by refusing to participate in questioning at the public meeting and by not providing adequate information upon which to comment. (NPGA, No. 209 at pp. 5–6) Further, NPGA asserted that DOE is imposing a performance and design standard in the current rulemaking and has not undergone the appropriate rulemaking process by not fully considering the standards' technological feasibility and economic justification. (NPGA, No. 209 at pp. 5–6) NPGA stated that because the underlying final rule was in error, the July 2011 NOPR proposing to amend the April 2010 final rule, is also in error. (NPGA, Public Meeting Transcript, No. 14 at p. 31) In addition, HPBA stated that DOE has not submitted relevant data, documentation, or research to explain, support, or clarify the NOPR, and that these materials must be made publicly available in advance of the comment period. (HPBA, No. 128 at p. 1) HPBA also stated that DOE failed to fulfill its obligation to consider other less-costly alternatives to the prohibition of standing pilot lights, and asserted that simply providing information for the public to make informed energy conservation decisions would achieve equal or greater energy conservation benefits. (HPBA, Public Meeting Transcript, No. 14 at pp. 23–24) HPBA stated that there is a disconnect in this proposal, because DOE did not look at whether applying heating standards to primarily decorative products was technologically feasible or economically justified when the original standards were put in place. (HPBA, Public Meeting Transcript, No. 14 at p. 112) Further, HPBA stated that the heating efficiency standards are not technologically feasible for gas log sets and many primarily decorative gas fireplaces. (HPBA, Public Meeting Transcript No. 14 at p. 22) R.H. Peterson stated that it would be impossible for them to redesign and certify their products that would need to be recertified with the new pilot light restriction. (R.H. Peterson, Public Meeting Transcript, No. 14 at p. 56)

In response, DOE notes that an extremely detailed analysis was done by DOE in promulgation of the April 2010 final rule. Because the NOPR proposals were definitional changes only to that fully analyzed rule and given the temporal proximity of the two rulemakings, DOE was able to rely on that prior analysis and to analyze the incremental changes that were being proposed in the July 2011 NOPR. Further, in this rulemaking proceeding, DOE is not imposing any mandatory burdens on manufacturers. Rather, in this rulemaking, DOE is providing manufacturers of primarily decorative hearth products with an alternative to meeting the standards promulgated by the April 2010 final rule for gas hearth direct heating equipment. Regarding conduct at the public meeting, DOE notes that the primary purpose of the meeting was to facilitate stakeholder involvement and allow an opportunity for feedback on the positions presented by DOE in the July 2011 NOPR. DOE respectfully listened to the statements and opinions voiced by the participants at the public meeting. In fact, much of the comment related to gas log sets received by DOE at the public meeting was extremely helpful in leading DOE to withdraw in this final rule the proposed exclusion criteria for that product and to exclude at this time all gas log sets from the gas hearth direct heating equipment energy conservation standards.

3. Impacts of Proposed Definition

a. Consumer Choice

Several interested parties stated that the proposed definition would impact consumer choice. In particular, these interested parties stated that the proposed definition would force them to change the products they sell and distribute, which would impose a burden on consumer choice. (Perfection,

No. 115 at p. 1; Sheldon Skolnick Associates, No. 118 at p. 1; Hearth and Home, Inc., No. 144 at p. 1; American Gas Log, No. 49 at p. 1; Modern Gas, No. 213 at p. 1) Rasmussen stated that the new standard would limit consumer choice and drastically increase prices for gas log sets. (Rasmussen, Public Meeting Transcript, No. 14 at p. 84) R.H. Peterson stated that the standard would limit consumer alternatives and deprive consumers of gas log sets which are more efficient than existing wood-burning fireplaces. (R.H. Peterson, Public Meeting Transcript, No. 14 at p. 37) AGA voiced concern over the replacement market and what the product availability would be if the July 2011 NOPR proposal went into effect. (AGA, Public Meeting Transcript, No. 14 at p. 86)

Several interested parties stated that this rulemaking is compounding problems caused by the April 2010 final rule, which defined all hearth products with input over 9,000 BTUs as direct heating equipment. (Thompson Gas, No. 95 at p. 1; Short's Stoves, No. 174 at p. 1; Hearth and Home, Inc., No. 144 at p. 1; Sheldon Skolnick Associates, No. 118 at p. 1; New Jersey Propane Gas Association, No. 212 at p. 1; Form Letter Comments; Penn Valley, No. 116 at p. 1; HWAM, No. 43 at p. 1; Perfection, No. 115 at p. 1)

In contrast to the views expressed by the stakeholders in the preceding paragraph, DOE believes that the amended definition will increase consumer choice and product availability by better defining those vented hearth products that are primarily intended for heating purposes and those that are primarily intended for decorative purposes. Additionally, DOE notes that this rule eliminates the previous exclusion criteria of having an input capacity at or below 9,000 Btu/h. DOE believes that many of the comments made in reference to consumer choice related to the elimination of match lit gas log sets that would have occurred under the July 2011 proposal. Because this final rule does not adopt exclusion criteria for vented gas log sets and excludes them from energy conservation standards for gas hearth direct heating equipment, the concern about limiting consumer choice with respect to gas log sets is no longer an issue.

b. Energy Savings

Several interested parties expressed their belief that this rulemaking would save little to no energy. (Heritage Propane, No. 33 at p. 1; Nevada Propane Dealers Association, No. 30 at p. 1; Barbara Jenkins; No. 22 at p. 1; HWAM, No. 43 at p. 1; LF Pugh and Associates, No. 76 at p. 1) Other interested parties elaborated that the amendments proposed in the July 2011 NOPR would cause consumers to use heating products for decorative effects, resulting in an overall increase in energy use. (Perfection, No. 115 at p. 1; Hearth and Home, Inc., No. 144 at p. 1; Form Letter Comments; Sheldon Skolnick Associates, No. 118 at p. 1) Thomas McGinnis of AmeriGas commented that he believes the rulemaking will not save energy because direct heating equipment produces more heat, which they believe will cause consumers to turn on air conditioning equipment, run fans, or open windows to get rid of unwanted heat. (Thomas McGinnis (AmeriGas), No. 26 at p. 1) Empire Comfort Systems stated that vented hearth products is the smallest energy user of all products targeted for regulation. (Empire, Public Meeting Transcript, No. 14 at p. 62) Similarly, Independence Marketing remarked that primarily decorative fireplaces consume 0.005 percent of the nearly 25,000 trillion BTUs of annual U.S. gas consumption, and of that, pilot lights consume 0.00165 percent. (Independence Marketing Ltd, No. 214 at p. 1)

As noted above in section III.C, DOE calculated the energy savings that would result from switching from standing pilot lights to other non-continuously-burning ignition sources for primarily decorative hearth products. Based upon the analysis described in section III.C, DOE found that this change would result in 0.17 quads of energy savings over the analysis period. DOE believes these potential energy savings are significant, despite the commenters' anecdotal statements to the contrary.

c. Environmental Impacts

Several interested parties stated that the proposed regulations in the July 2011 NOPR would promote the use of wood-burning fireplaces for decorative purpose. (Form Letter Comments; Fairview, No. 25 at p. 1; New Jersey Propane Gas Association, No. 212 at p. 1; Perfection, No. 115 at p. 1; Oahu Gas Service, No. 166 at p. 1; Penn Valley, No. 116 at p. 1; Siouxland, No. 85 at p. 1; Hearth and Home, Inc., No. 144 at p. 1; Sheldon Skolnick Associates, No. 118 at p. 1; Gas-fired products, No. 155 at p. 1) Other interested parties stated that the proposed regulation would promote use of wood-burning fireplaces, and that this would have a negative environmental impact because gas hearth products burn cleaner than wood-burning appliances. (Rasmussen, No. 208 at p. 13; R.H. Peterson, Public Meeting Transcript, No. 14 at p. 43; Jack's Butane Service, No. 23 at p. 1; Big Woods, No. 3 at p. 1; San Bernardino Fireplace and Woodstove, No. 11 at p. 2; Arizona Gas, No. 98 at p. 2m). Further, R.H. Peterson noted that a number of entities, including the NRDC and American Lung Association, support the transition from wood-burning fireplaces to gas log sets and that there is a program in Los Angeles that encourages and pays consumers to switch to gas log sets. (R.H. Peterson, Public Meeting Transcript, No. 14 at p. 42)

In response, DOE notes that definition adopted in this final rule would exclude vented gas log sets from having to comply with gas hearth direct heating equipment standards, without requiring that they meet any criteria for exclusion. Therefore, consumers would not be discouraged from replacing their wood-burning fireplaces with a gas log set as a result of this rule. DOE believes, therefore, that this rulemaking will not promote wood burning fireplaces and there will be no negative environmental impacts.

d. Impacts on Manufacturers

(i) Employment Impacts

DOE received a number of comments stating that the hearth industry and employment would be negatively impacted by the proposals in the July 2011 NOPR. Empire Comfort Systems commented that DOE is not considering the economic condition of the hearth industry, which is a stressed industry directly affected by the housing market downturn, and that these regulations will likely promote more job losses for a minor energy savings. (Empire, Public Meeting Transcript, No. 14 at pp. 63–64) Several other interested parties commented that the proposed regulations would have a significant negative impact on the hearth industry and would eliminate jobs. (Firelight, No. 206 at p. 1; Homefires, No. 10 at p. 1; Top Hat, No. 168 at p. 1; NPGA, No. 209 at p. 2; Sheldon Skolnick Associates, No. 118 at p. 1; H&S Oil, No. 125 at p. 1; East Texas Brick Co., No. 135 at p. 1; Nevada Propane Dealers Association, No. 30 at p. 1; Percy Guidry Hearth and Patio, No. 18 at p.4; Big Woods, No. 3 at p. 1; Mazzeo, No. 16 at p. 1; Independence Marketing Ltd, No. 214 at p. 2) APGA commented that natural gas distributors would be adversely impacted by this rulemaking as well. (AGPGA, No. 223 at p. 1)

Numerous interested parties stated that the impact of the proposed standards on small business

manufacturers, distributors, and marketers would be significant, because the industry cannot meet the requirements and products would be too expensive to be viable in the marketplace. (Penn Valley, No. 116 at p. 2; Perfection, No. 115 at p. 2; American Gas Log, No. 49 at p. 2; Hearth and Home, Inc., No. 209 at p. 2; Sheldon Skolnick Associates, No. 118 at p. 1; Slate Spring, No. 92 at p. 1; Short's Stoves, No. 174 at p. 1) Other interested parties stated that the rulemaking would place an unnecessary and onerous burden on their company. (American Gas Log, No. 49 at p. 1; Sheldon Skolnick Associates, No. 118 at p. 1; Perfection, No. 115 at p. 1; Hearth and Home, Inc., No. 144 at p. 1; Form Letter Comments; Thompson Gas, No. 191 at p. 1; Oahu Gas Service, No. 166 at p. 1)

DOE disagrees with these comments and believes that today's final rule will have positive employment benefits, because the exclusion criteria being adopted in today's notice, as compared to the criteria in the April 2010 final rule, will reduce manufacturer burden, and that the exclusion criteria adopted in today's rule are less likely than the original exclusion criteria to cause job losses in the hearth industry. Furthermore, DOE believes that the impacts of today's rule are mitigated because DOE is not adopting exclusion requirements or an energy conservation standard for gas log sets in today's rule. It is important to remember that this final rule merely provides manufacturers with a choice in terms of either complying with the energy conservation standards or availing themselves of the exclusion from those standards.

(ii) Small Business Impacts

DOE received several comments relating to how small businesses producing vented hearth products and gas log sets would be impacted. Multiple interested parties stated that a significant price increase associated with the proposed requirements would have a negative impact on small business entities. (R.H. Peterson, Public Meeting Transcript, No. 14 at p. 55; Form Letter Comments; Advantage, No. 13 at p. 1; Independence Marketing Ltd, No. 214 at p. 1; Creekside Hearth & Patio, No. 21 at p. 1; Sundance Leisure, No. 17 at p. 4; Crik-IT, No. 15 at p. 3;) In contrast, NRDC commented that the impact on small businesses is not significant enough to sacrifice the anticipated energy savings. (NRDC, No. 216 at p. 3)

In response, DOE believes that this final rule lessens the impacts as compared to the proposed standard and to the April 2010 final rule. For today's rule, DOE is not adopting exclusion requirements or minimum energy efficiency standards for gas log set manufacturers, thereby eliminating all burden related to those products. Additionally, DOE believes this rule reduces the burden on small manufacturers of primarily decorative hearth products when considered in comparison to meeting the April 2010 energy conservation standards. DOE acknowledges that the exclusion criteria would still have impacts on small business manufacturers of primarily decorative hearth products. DOE estimates industry conversion costs totaling $90,000 to $1.8 million for the four exclusion criteria. The full analysis of the number of small businesses and of the impacts on small businesses can be found in section IV.B.

SBA stated that DOE significantly underestimated the number of small businesses producing gas log sets and, consequently, the cost to the industry of complying with the rule. SBA estimated that there are between twenty and fifty manufacturers of primarily decorative gas fireplaces and/or gas log sets, almost all of which are small businesses. (SBA, No. 96 at p. 4) HPBA stated that the NOPR estimate of 14 small businesses (for both vented hearth and gas log set products) being impacted is low by a wide margin, and does not take into account distributors and retailers who are small businesses. (HPBA, No. 201 at p. 24)

For gas lost set products, public comments helped make DOE aware that it had not identified all of the relevant small manufacturers at the NOPR stage. However, for the final rule, DOE is not adopting exclusion requirements or minimum energy efficiency standards for gas log set manufacturers, thereby eliminating all burden related to those products. For vented hearth products that are subject to the exclusion criteria, DOE conducted an additional round of investigation to identify small manufacturers of primarily decorative hearths. Consistent with SBA's finding, DOE identified thirty-six manufacturers of decorative hearth products (excluding gas log set manufactures). However, out of these thirty-six companies, only ten qualified as small domestic manufacturers of products covered by this rule. DOE believes this rule reduces the burden on these small manufacturers of primarily decorative hearth products by providing the exclusion criteria as an alternative to meeting energy conservation standards.

(iii) Cost of Compliance

DOE received several comments regarding the cost to comply with the exclusion criteria. American Gas Log stated that the dollar estimate for testing, redesigning, and recertifying their gas log set product lines would be in excess of $350,000. (American Gas Log, No. 146 at p. 2) Rasmussen commented that the conversion costs would be extremely high and could force them to leave the gas log set business. (Rasmussen, No. 208 at p. 11) HPBA stated that DOE's assumption that there would be no regulatory burdens associated with certification is not correct, because there are significant numbers of vented hearth products and vented gas log sets that are not certified to ANSI Z21.50 and Z21.60. Furthermore, HPBA stated that a number of gas log sets cannot be certified to ANSI Z21.60. (HPBA, Public Meeting Transcript, No. 14 at pp. 24–25) HPBA also stated that the NOPR mischaracterizes the impacts the rule would have by assuming no regulatory burdens associated with the certification of primarily decorative products (most are not certified or cannot be), and that there will be no burdens associated with modifying product labeling and literature. Further, HPBA stated that the elimination of standing pilot lights would require redesign work, and would affect pricing. (HPBA, No. 201 at p. 24) Plumbing-Heating-Cooling Contractors Association commented that DOE estimated an average of $9,000 per unit for modifying and recertifying primarily decorative hearth products, which PHCC considers too low. (PHCC, No. 199 at p. 1) NPGA stated that research and development would be a huge financial burden to manufacturers which DOE has underestimated. NPGA stated that certification would cost between $1,500 and $2,000 per model. (NPGA, No. 209 at p. 10) Similarly, Empire stated that the proposed amendments would cause expenditures in research and development, engineering, marketing, and inventory. (Empire, No. 2 at p. 2)

Incorporating feedback from gas log set manufacturers, this final rule does not set exclusion criteria or energy conservation standards for gas log set manufacturers, thereby reducing burden on the industry. DOE presents an analysis of the costs of compliance for small business manufacturers of primarily decorative hearths in section IV.B of this notice. While PHCC states that DOE's conversion costs are too low, the trade association does not provide or justify revised estimates. Alternatively, NPGA recommended a certification cost

that is below DOE's estimate. However, based on interviews with gas hearth heater manufacturers during the April 2010 rulemaking, DOE believes its original estimates of compliance costs for hearth products are correct.

4. Procedural Requirements

NPGA stated that this rulemaking does not comply with Executive Order 12988, ''Civil Justice Reform,'' because key terms are not adequately defined and the April 2010 rule and this rulemaking have not minimized litigation, as required by the Executive Order. (NPGA, No. 209 at p. 11) NPGA also commented that DOE violated Executive Order 13563, ''Improving Regulation and Regulatory Review,'' because the energy savings for both vented hearth products and vented gas log sets were erroneously skewed. (NPGA, No. 209 at p. 5) HPBA commented that the NOPR was issued without adequate basis, in violation of Executive Order 13563, because it did not provide a reasoned determination that the benefits justify its costs. (HPBA, No. 201 at p. 2) NPGA also stated that this rulemaking did not meet the requirements of the Administrative Procedure Act, because the April 2010 final rule promulgated a definition that was not included in the December 2009 NOPR and the public did not have an opportunity to comment on that definition. (NPGA, Public Meeting Transcript, No. 14 at p. 31) Congressman Mike Rogers remarked that DOE did not request comments on regulatory requirements for decorative vented gas fireplaces in the December 2009 NOPR and that this rulemaking runs counter to President Obama's Executive Order aimed at improving agency rulemakings. (Mike Rogers, No. 225 at p. 1)

SBA stated that DOE must use the statutorily-prescribed process for imposing an energy efficiency standard upon manufacturers of vented gas log sets and cannot redefine ''vented hearth heater'' to cover vented gas log sets, thereby circumventing the required procedure for establishing a standard. (SBA, No. 96 at p. 3)

In response, DOE first notes that in response to comments DOE is not requiring gas log sets to meet the standards for gas hearth direct heating equipment, or to meet any criteria for exclusion from the standards at this time. Regarding primarily-decorative hearth products, DOE notes that these products were explicitly considered in the April 2010 final rule. The April 2010 final rule was preceded by the December 2009 NOPR (74 FR 65852 (Dec. 11, 2009)) which allowed for public comment on the proposed standards and definitions related to vented hearth products. The issue of an exclusion for decorative products and how to differentiate between products that are heaters and products that are primarily decorative was raised in comments at the NOPR public meeting (Public Meeting Transcript for Heating Products NOPR Public Meeting held on January 7, 2010, No. EERE–2006–STD–0129–0089 at pp. 48–52), so DOE's definitional changes at the time of the final rule were a logical outgrowth of public comments. As discussed in sections IV.A and IV.F, DOE believes this final rule satisfies the requirements of Executive Order 13563 and 12988, respectively.

5. Product Characteristics

R.H. Peterson argued that DOE incorrectly assumed that gas logs have similar characteristics to primarily decorative fireplaces, and instead, the commenter stated that gas log sets can only be used in wood-burning fireplaces and have different characteristics than primarily decorative gas fireplaces. (R.H. Peterson, Public Meeting Transcript, No. 14 at p. 38) Rasmussen stated that DOE had previously recognized that there is a difference between gas log sets and other gas hearth products, that there is a difference in construction between the two types of products, and that the two types of products have different heating capabilities. Rasmussen elaborated that fireplaces are designed as a completed system where removing the logs would compromise safety, but vented gas log sets in wood-burning fireplaces can be changed out. (Rasmussen, Public Meeting Transcript, No. 14 at p. 71)

As noted in the *Frequently Asked Questions: 'Vented Hearth Heater' Definition* that was published on DOE's Web site after the April 2010 final rule, DOE agrees that there are differences between gas log sets and primarily decorative hearth products, both in construction and heating ability. Given those constructional and operational differences of the products, DOE is not requiring at this time that vented gas log sets meet any criteria to be exempt from the standards for gas hearth direct heating equipment that were promulgated in the April 2010 final rule, while DOE is establishing criteria for primarily decorative hearth products to meet to qualify to be excluded from the direct heating equipment energy conservation standards. However, DOE also notes that there are basic similarities, in that both units are inserted in the living space and provide heat. Therefore, as explained previously, DOE believes both types of products are properly classified as direct heating equipment.

6. Requests To Delay or Discontinue Rulemaking

DOE received a number of comments requesting that DOE reconsider or withdraw this rulemaking, and abandon regulating primarily decorative hearth products. (Empire, Public Meeting Transcript, No. 14 at p. 64; Hearth and Home, Inc., No. 144 at pp. 1–2; Hearth and Home Shoppe, No. 207 at p. 2; Sheldon Skolnick Associates, No. 118 at p. 1; Gas-fired Products, No. 155 at p. 1; Short's Stoves, No. 174 at p. 1; Penn Valley, No. 116 at p. 3; APGA, No. 223 at p. 1; NPGA, No. 209 at pp. 2 and 12; Thompson Gas, No. 95 at p. 1; Gresham Petroleum, No. 165 at p. 1; L.E. Klein, No. 162 at p. 1; New Jersey Propane Gas Association, No. 212 at p. 1; Rasmussen, No. 208 at p. 13; Jack's Butane Service, No. 23 at p. 1; Perfection, No. 115 at pp. 1–2; Modern Gas, No. 213 at p. 1; Fairview, No. 25 at p. 1; Form Letter Comments; Nevada Propane Dealers Association, No. 30 at p. 1; American Gas Log, No. 49 at p. 1; Siouxland, No. 85 at p. 1; Thompson; LF Pugh and Associates, No. 76 at p. 1; Slate Spring, No. 92 at p. 1; Heritage Propane, No. 33 at p. 1; Hearth & Home Technologies, No. 204 at p. 3; H&S Oil, No. 125 at p. 1; Arizona Gas, No. 98 at p. 1; HWAM, No. 43 at p. 1; Fred Pierce, No. 219 at p. 2; Mike Rogers (U.S. Congressman), No. 225 at p. 1)

Several interested parties urged DOE to request that Congress enact a corrective statutory definition that states that primarily decorative vented gas fireplaces and gas log sets are not direct heating equipment. (Hearth and Home, Inc., No. 144 at p. 2; Sheldon Skolnick Associates, No. 118 at p. 1; Russo, No. 56 at p. 1) Congressman Mike Rogers requested that DOE issue a stay of the effective date of the April 2010 Final Rule as related to primarily decorative hearth products until Congress can enact legislation to clarify the definitional distinction between primarily decorative vented gas fireplaces and gas log sets. (Mike Rogers, No. 225 at p. 2)

In response, DOE believes that the exclusion criteria included in the April 2010 final rule have several limitations, which will be improved through the rulemaking process. The HPBA (a major trade association for hearth manufacturers) and several manufacturers expressed concerns about being able to meet the exclusion criteria in the April 2010 final rule and still produce products that consumers will want to buy. Additionally, as noted

previously, the limit on input capacity could have allowed certain heating hearth products to qualify for the primarily decorative exclusion. For these reasons, DOE believes that, while ensuring energy conservation, it should assist both industry and consumers with a clear, objective set of criteria to distinguish those vented hearth heaters that are primarily intended as heaters and all agree should be subject to energy conservation standards from those vented hearth heaters that are primarily intended for decorative purposes. Accordingly, DOE is issuing today's final rule amending the definition of ''vented hearth heater.''

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Today's regulatory action has been determined to not be a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) is not required to review this rule.

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, DOE believes that today's final rule is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs, and in choosing among alternative regulatory approaches, those approaches maximize net benefits.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a final regulatory flexibility analysis (FRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (*http://www.gc.doe.gov*).

DOE reviewed the impacts of the proposed amendments in today's final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies discussed above. As a result of this review, DOE has prepared a FRFA for vented hearth products, a copy of which DOE will transmit to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b). As presented and discussed below, the FFRA describes potential impacts on small manufacturers of vented hearth products associated with the required capital and product conversion costs from the proposed amended definition for ''vented hearth heater,'' which would change the scope of the exclusion from the applicable energy conservation standard.

1. Statement of the Need for, and Objectives of, the Rule

The reasons why DOE is amending the definition of ''vented hearth heater'' in today's final rule and the objectives of this and other related amendments are provided elsewhere in the preamble and not repeated here.

2. Description and Estimated Number of Small Entities Regulated

For manufacturers of direct heating equipment, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30848 (May 15, 2000), as amended at 65 FR 53533, 53544 (Sept. 5, 2000) and codified at 13 CFR part 121. The size standards are listed by North American Industry Classification System (NAICS) code and industry description, which are available at: *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.* Direct heating equipment manufacturing is classified under NAICS 333414, ''Heating Equipment (except Warm Air Furnaces) Manufacturing.'' The SBA sets a threshold of 500 employees or less for an entity to be considered as a small business for this category.

In preparation for the April 2010 final rule, DOE conducted a market survey using available public information to identify potential small manufacturers of the type of products that are the subject of this rulemaking. DOE asked stakeholders and industry representatives if they were aware of any small manufacturers during manufacturer interviews and at previous DOE public meetings. DOE reviewed publicly-available data and contacted various companies, as necessary, to determine whether they met the SBA's definition of a small business manufacturer of covered residential direct heating equipment. DOE screened out companies that did not offer products covered by this rulemaking, did not meet the definition of a ''small business,'' or are foreign owned and operated. Additionally, DOE conducted a second round of research based on the HPBA membership directory, AHRI product databases, SBA databases, and individual company Web sites to find potential small business manufacturers for this rulemaking. In total, DOE identified 36 companies that manufactured hearth products (*e.g.,*

fireplaces and/or fireplace inserts). Of those 36 companies, 26 manufactured gas vented hearth products that are covered by this rulemaking. Of those 26 companies, five were large manufacturers. Of the 21 small businesses, 11 were foreign owned and operated and 10 were domestically owned and operated. Therefore, DOE identified 10 small domestic manufacturers of vented gas hearth products that are subject to the energy conservation standard.

Before issuing the NOPR that lead to the April 2010 final rule, DOE attempted to contact the small business manufacturers of vented hearth products. One of the small businesses consented to being interviewed during the MIA interviews, and DOE received feedback from an additional two small businesses through survey responses. DOE also obtained information about small business impacts while interviewing manufacturers that exceed the small business size threshold of 500 employees in this industry.

3. Description and Estimate of Compliance Requirements

For the April 2010 final rule, DOE calculated the anticipated capital and product development costs for vented hearth heaters by estimating per-line cost and average number of product lines for a typical small business manufacturer. DOE used certification databases, product catalogs, interviews with manufacturers, and sources of public information to estimate the impacts of the rule on small business manufacturers. In the final rule, DOE concluded that because a typical manufacturer of vented hearth products already offers multiple product lines that meet and exceed the required efficiencies and because most product lines that did not meet the proposed standard could be upgraded with relatively minor changes, manufacturers, including the small business manufacturers, would be able to maintain a viable number of product offerings. 75 FR 20112, 20231 (April 16, 2010).

In order to comply with the energy conservation standards promulgated in the April 2010 final rule, manufacturers of primarily decorative hearth products with efficiencies lower than the minimum allowable standard would need to either: (1) Redesign their products to meet the required standard level for gas hearth direct heating equipment; (2) redesign their products to ensure that input ratings are below 9,000 Btu/h; or (3) discontinue manufacturing those products. In the April 2010 final rule, DOE assumed manufacturers would redesign their products with input rating below 9,000 Btu/h with relatively minor changes to existing primarily decorative products. 75 FR 20112, 20129 (April 16, 2010). Under the amended definition of ''vented hearth heater'' in this notice, the 9,000 Btu/h limitation would no longer apply for purposes of exclusion from the energy conservation standard. Instead, vented hearth products (regardless of input rating) would not be subject to the minimum standard for vented hearth heaters if they comply with the four criteria outlined above (*i.e.,* (1) certified to ANSI Standard Z21.50, but not to ANSI Standard Z21.88); (2) sold without a thermostat and with a warranty provision expressly voiding all manufacturer warranties in the event the product is used with a thermostat; (3) expressly and conspicuously identified on its rating plate and in all manufacturer's advertising and product literature as a ''Decorative Product: Not For Use As A Heating Appliance''; and (4) with respect to products sold after January 1, 2015, not equipped with a standing pilot light or other continuously-burning ignition source). Under the April 2010 final rule, vented gas log sets were not addressed. However, today's final rule explicitly provides that vented gas log sets are not subject to the energy conservation standard at this time.

Each of the exclusion criteria for primarily decorative gas hearth products would have impacts on small business manufacturers. The first criterion (that the product must be certified to ANSI Standard Z21.50, but not ANSI Standard Z21.88 for decorative hearth products) would likely impose minimal new conversion costs on small businesses, but has the potential to impose costs up to $1.7 million. According to industry representatives, products that are primarily decorative in nature are generally certified to ANSI Standard Z21.50 (vented hearth products) while products that are heaters by nature are generally certified to ANSI Standard Z21.88 by manufacturers. Products that are certified to the appropriate ANSI standard today will not incur additional product conversion costs. However, for some hearth heating product lines, manufacturers may choose to eliminate optional thermostat features and certify to ANSI Z21.50 rather than meet the energy conservation standard for hearth heaters, which would require them to recertify products if they are currently certified to ANSI Z21.88. Under this scenario, the exclusion criteria could lead to product conversion costs. Based on publicly-available product information from the 10 small domestic manufacturers, DOE identified 189 vented hearth product lines certified to ANSI Z21.88. While manufacturers are not likely to recertify all these products to ANSI Z21.50, the total ANSI recertification cost of all 189 product lines provides an upper bound on the product conversion costs. This upper bound for this first exclusion criterion is estimated to total $1.7 million. DOE expects the actual conversion cost to be lower than this figure.

Regarding the second criterion that eliminates the option for manufacturers to offer a thermostat with any primarily decorative hearths, DOE does not believe that this would impose any capital conversion costs because thermostats are optional features on primarily decorative products. Thus, their removal would not require redesign of existing manufacturing lines.

The third criteria would require manufacturers to clearly identify the decorative nature of the vented hearth product, as well as further detail the warranty provisions of the hearth product. These provisions would require an update of the product and marketing literature and product labeling, which DOE believes would result in added product conversion costs. However, DOE notes that product conversion costs to update manufacturer literature and labels are also required under the definition and standards for gas hearth direct heating equipment (*i.e.,* vented hearth heaters) set forth by the April 2010 final rule, due to the requirements for making representations of the AFUE as well as certifying compliance to the Department. Under the April 2010 final rule, all of the product and marketing materials would have to have been revised to reflect the test AFUE. Because the compliance date for the standards promulgated in the April 2010 final rule is April 2013, DOE believes that manufacturers have likely not already updated product literature in preparation for compliance with those standards. Consequently, DOE estimated that all manufacturers, including small businesses, would incur product conversion costs for new labels and literature under the 2010 final rule. DOE believes the third criteria would result in similar updates to product specifications, marketing materials, and products labels to make clear the intended use of primarily decorative hearths. This would not impose a product conversion cost beyond the cost associated with the April 2010 final rule. Thus, DOE concludes the labeling requirement would have a minimal

impact additional on manufacturers, including small businesses.

Lastly, DOE considered the criterion that requires manufacturers to eliminate standing pilot lights and other continuously-burning ignition devices from primarily decorative vented hearth products by January 1, 2015. This would likely cause manufacturers to incur conversion costs to qualify for the proposed exclusion from the energy conservation standards. To calculate the conversion costs for primarily decorative hearth products to remove standing pilots, DOE used publicly-available information for the 10 domestic small business manufacturers to identify all vented hearth products certified to the ANSI Z21.50 standard. DOE found the total number of product lines manufactured by small businesses for primarily decorative vented hearth products to be 20. Based on a review of all small business manufacturers' products, DOE estimated that 47 percent of primarily decorative gas hearth products would have to remove standing pilots. Therefore, 10 of these product lines would have to be upgraded by January 1, 2015.

DOE believes that the elimination of standing pilot would only result in product conversion costs associated with testing and recertification to the ANSI safety standards for the newly designed products. If all 10 product lines need to be retested and recertified as a result of the elimination of standing pilots or other continuously-burning ignition sources from the system, the estimated product conversion cost would be approximately $90,000 for the set of small businesses to comply with the January 1, 2015 exclusion criteria for the primarily decorative gas hearth products. DOE recognizes that not all decorative products are currently certified to ANSI Z21.50 and that the $90,000 represents a lower bound in conversion costs. However, DOE did not find a significant number of decorative hearth products that were not certified to either ANSI Z21.50 or ANSI Z21.88.

Based on the engineering analysis performed for the April 2010 final rule, DOE does not believe any capital conversion costs would be needed for manufacturers of primarily decorative hearth products to comply with the criterion for elimination of the standing pilot, because for these products the addition of an electronic ignition system primarily consists of component additions that would not require new capital investment or significant changes to the manufacturing line.

In considering the impacts of this requirement, DOE compared the impacts of meeting the exclusion criteria to the alternative of meeting the efficiency requirements in the April 2010 final rule. Under the newly-proposed exclusion criteria, instead of completely redesigning primarily decorative hearth products to improve energy efficiency, manufacturers could make a comparatively minor engineering change of replacing the standing pilot or other continuously-burning ignition with an alternative technology such as an electronic ignition or interrupted ignition device. DOE believes that replacing the standing pilot or other continuously-burning ignition device with an alternative technology would be less burdensome to manufacturers than a complete redesign of primarily decorative hearth products to meet the minimum efficiency standard. Moreover, a redesign to comply with the energy conservation standard would likely necessitate elimination of any standing pilot on units so equipped anyway, along with additional engineering changes to improve efficiency. In addition, manufacturers would be required to test and certify their equipment to DOE efficiency's standards along with the ANSI safety standards, further increasing the cost and burden of compliance with the energy conservation standard in comparison to simply replacing the standing pilot or continuously-burning ignition with an alternative technology. Based on this analysis of the four exclusion criteria, DOE anticipates industry conversion costs of $90,000 to update primarily decorative hearth products that are currently certified to ANSI Z21.50 and have a continuously-burning ignition to meet the exclusion criteria, as these products would need to be recertified once the continuously-burning ignition was removed. If manufacturers chose to reclassify a significant portion of their hearth heating products that are currently certified to ANSI Z21.88 as decorative hearth products, which would require recertifying them to ANSI Z21.50, conversion costs for the four criteria could reach an upper bound of $1.8 million. However, manufacturers have indicated that this is not a likely scenario.

As a result of the considerations discussed above, DOE has concluded that today's final rule would not disproportionately impact small manufacturers of vented hearth products.

4. Duplication, Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the rule being considered today.

5. Significant Alternatives to the Rule

The discussion above analyzes impacts on small businesses that would result from the amended definition for ''vented hearth heater,'' due to its effect on which units will be subject to energy conservation standards. DOE believes that the amended definition in this notice represents a similar burden on industry, including small business manufacturers, in comparison to the definition included in the April 2010 final rule. In that rule, DOE rejected the other alternatives to the rule because of the lower energy savings associated with those alternatives.

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of direct heating equipment must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for direct heating equipment, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including direct heating equipment. (76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). (44 U.S.C. 3501 *et seq.*) This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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

D. Review Under the National Environmental Policy Act of 1969

DOE has prepared a draft environmental assessment (EA) of the impacts of the proposed rule pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the

regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and DOE's regulations for compliance with the National Environmental Policy Act of 1969 (10 CFR part 1021). This assessment, which has been placed in the docket for this rulemaking, includes an examination of the potential effects of emission reductions likely to result from the rule in the context of global climate change, as well as other types of environmental impacts. The estimated additional cumulative CO_2 and NO_X emissions reductions for these proposed amendments to the energy conservation standards are 0.79 million metric tons (Mt) for CO_2 and 0.63 thousand metric tons (kt) for NO_X. DOE found that the environmental effects associated with the amended standards for direct heating equipment are not significant. Therefore, after consideration of the public comments received on the NOPR, DOE issued a finding of no significant impact (FONSI) as part of the final EA. The FONSI is available in the docket for this rulemaking at *http://www.regulations.gov.*

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism.'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

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

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, section 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause 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 (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *http://www.gc.doe.gov.*

Today's final rule does not contain a Federal intergovernmental mandate, because it will not require expenditures of $100 million or more by State, local, and Tribal governments, in the aggregate, or by the private sector. DOE has considered expenditures that will result from updating manufacturer literature, product labels, and making design changes to primarily decorative hearth products to eliminate the standing pilot light or other continuously-burning ignition source, and concluded that these expenditures will total less than $100 million. Accordingly, no further action is required under the UMRA.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that

it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that today's regulatory action, which sets forth amended definitions for direct heating equipment, is not a significant energy action the rule is not a significant regulatory action under Executive Order 12866 and because the amended standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on the final rule.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' *Id.* at 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The ''Energy Conservation Standards Rulemaking Peer Review Report'' dated February 2007 has been disseminated and is available at the following Web site: *http://www1.eere.energy.gov/buildings/appliance_standards/peer_review.html.*

M. Congressional Notification

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

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by Reference, Intergovernmental relations, Reporting and recordkeeping requirements, and Small businesses.

Issued in Washington, DC, on November 8, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE amends part 430 of Chapter II, Subchapter D, of Title 10 of the Code of Federal Regulations, to read as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Section 430.2 is amended by revising the definition for ''Vented hearth heater'' to read as follows:

§ 430.2 Definitions.

* * * * *

Vented hearth heater means a vented appliance which simulates a solid fuel fireplace and is designed to furnish warm air, with or without duct connections, to the space in which it is installed. The circulation of heated room air may be by gravity or mechanical means. A vented hearth heater may be freestanding, recessed, zero clearance, or a gas fireplace insert or stove. The following products are not subject to the energy conservation standards for vented hearth heaters:

(1) Vented gas log sets and

(2) Vented gas hearth products that meet all of the following four criteria:

(i) Certified to ANSI Z21.50 (incorporated by reference; see § 430.3), but not to ANSI Z21.88 (incorporated by reference; see § 430.3);

(ii) Sold without a thermostat and with a warranty provision expressly voiding all manufacturer warranties in the event the product is used with a thermostat;

(iii) Expressly and conspicuously identified on its rating plate and in all manufacturer's advertising and product literature as a ''Decorative Product: Not for use as a Heating Appliance''; and

(iv) With respect to products sold after January 1, 2015, not equipped with a standing pilot light or other continuously-burning ignition source.

* * * * *

■ 3. Section 430.3 is amended by adding new paragraphs (c)(18) and (c)(19) to read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(c) * * *

(18) ANSI Z21.50–2007 (CSA 2.22–2007), (''ANSI Z21.50''), Vented Gas Fireplaces, Fifth Edition, Approved February 22, 2007, IBR approved for § 430.2.

(19) ANSI Z21.88–2009 (CSA 2.33–2009), (''ANSI Z21.88''), Vented Gas Fireplace Heaters, Fifth Edition, Approved March 26, 2009, IBR approved for § 430.2.

* * * * *

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Part VII

The President

Proclamation 8754—America Recycles Day, 2011

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Presidential Documents

Title 3—

The President

Proclamation 8754 of November 15, 2011

America Recycles Day, 2011

By the President of the United States of America

A Proclamation

As Americans, we have a responsibility to ensure future generations benefit from an abundance of natural resources and a healthy planet. To meet this obligation, we must take steps to consume carefully, recycle a wide variety of products and materials, and reuse whenever possible. On America Recycles Day, we celebrate the commitment of individuals across our country to live sustainably, and we rededicate ourselves to thoughtful resource management at home and in the workplace.

For decades, American families have advanced the common good of our Nation by recycling regularly and promoting conservation. During the First and Second World Wars, families participated in scrap drives, gathering cloth, paper, and metals for reuse in manufacturing that helped fuel our military and our economic growth. Since then, we have bolstered recycling programs through individual action, community engagement, and national initiatives, and we have broadened our efforts to include a vast array of pioneering industrial processes that will drive our clean economy and create green jobs. These advances cut waste, preserve our natural bounty, and spur the robust and sustainable economic growth that will carry us through this century and into the next.

To meet the economic and environmental challenges that confront our country today, we must update and expand existing recycling programs and dedicate ourselves to devising new strategies to accommodate emerging technologies. Our Nation generates over two million tons of used electronics annually, and without following proper recycling and management practices, the disposal of our old computers, monitors, and cell phones can release toxic materials into our environment, endanger human health, and prevent the recovery and reuse of valuable resources. For the well-being of our people and our planet, we must consider the full lifecycle impacts of our products and strive to manage our resources in a sustainable way.

To ensure America remains a global leader in developing new, sustainable electronics technologies, my Administration launched the National Strategy for Electronics Stewardship earlier this year. The strategy establishes a framework for responsible electronics design, purchasing, management, and recycling that will accelerate our burgeoning electronics recycling market and create jobs for the future here at home. To lead by example, my Administration is committed to efficient use, reuse, and proper disposal of electronics within the Federal Government, and we are collaborating with certified recycling centers to handle and dispose of used electronics safely and effectively. We are also forging new partnerships with the private sector that will advance electronics recycling across our country. Through collaboration and shared responsibility, we are protecting public health, preserving environmental quality, and laying the foundation for a 21st-century economy.

America Recycles Day offers us an opportunity to reflect on the remarkable strides we have made in the pursuit of sustainability, and to challenge ourselves to do even more. As we rise to meet this challenge, we fulfill a promise to our children that they will inherit a world more beautiful and prosperous than the one we received.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 15, 2011, as America Recycles Day. I call upon the people of the United States to observe this day with appropriate programs and activities, and I encourage all Americans to continue their recycling efforts throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of November, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.

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