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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1003

[Docket No. CFPB–2011–0020]

RIN 3170–AA06

Home Mortgage Disclosure (Regulation C)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interim final rule with request for public comment.

SUMMARY: Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) transferred rulemaking authority for a number of consumer financial protection laws from seven Federal agencies to the Bureau of Consumer Financial Protection (Bureau) as of July 21, 2011. The Bureau is in the process of republishing the regulations implementing those laws with technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. In light of the transfer to the Bureau of the Board of Governors of the Federal Reserve System's (Board's) rulemaking authority for the Home Mortgage Disclosure Act of 1975 (HMDA), as amended, the Bureau is publishing for public comment an interim final rule establishing a new Regulation C (Home Mortgage Disclosure). This interim final rule does not impose any new substantive obligations on persons subject to the existing Regulation C, previously published by the Board.

DATES: This interim final rule is effective on December 30, 2011. Comments must be received on or before February 17, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2011–0020 or RIN 3170–AA06, by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1500 Pennsylvania Avenue NW., (Attn: 1801 L Street), Washington, DC 20220.
- *Hand Delivery/Courier in Lieu of Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20006, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Mitchell E. Hochberg or Gregory Evans, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Background

The Home Mortgage Disclosure Act of 1975, as amended (HMDA; 12 U.S.C. 2801 *et seq.*) requires most mortgage lenders located in metropolitan areas to collect data about their housing-related lending activity. Annually, lenders must report those data to the appropriate Federal agencies and make the data available to the public. Historically, HMDA has been implemented by Regulation C of the Board of Governors of the Federal Reserve System (Board), 12 CFR Part 203.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] amended a number of consumer financial protection laws, including HMDA. In addition to various substantive amendments, the Dodd-Frank Act transferred rulemaking authority for HMDA to the Bureau of Consumer Financial Protection (Bureau), effective July 21, 2011. *See* sections 1061 and 1094 of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and HMDA, as amended, the Bureau is publishing for public comment an interim final rule establishing a new Regulation C (Home Mortgage Disclosure), 12 CFR Part 1003, implementing HMDA.

[1] Pub. L. 111–203,124 Stat. 1376 (2010).

II. Summary of the Interim Final Rule

A. General

The interim final rule substantially duplicates the Board's Regulation C as the Bureau's new Regulation C, 12 CFR Part 1003, making only certain non-substantive, technical, formatting, and stylistic changes. To minimize any potential confusion, the Bureau is preserving the past numbering of the Board's Regulation C, other than the new part number and the enumeration of the individual definitions in § 1003.2. While this interim final rule generally incorporates the Board's existing regulatory text, appendices (including model forms and clauses), and supplements, the rule has been edited as necessary to reflect nomenclature and other technical amendments required by the Dodd-Frank Act. Notably, this interim final rule does not impose any new substantive obligations on regulated entities. In future rulemakings, the Bureau expects to amend Regulation C to implement certain changes to HMDA made by the Dodd-Frank Act.

B. Specific Changes

The rule has been changed to effect technical, non-substantive changes to the Board's existing regulatory text of Regulation C. References to the Board and its administrative structure have been replaced with references to the Bureau. Conforming edits have been made to internal cross-references and addresses for filing documentation. Paragraph lettering for definitions has been removed. Conforming edits have been made to reflect the scope of the Bureau's authority pursuant to HMDA, as amended by the Dodd-Frank Act. Historical references that are no longer applicable, and references to effective

dates that have passed, have been removed.

Conforming edits have also been made to reflect new Office of Management and Budget (OMB) control numbers issued for information collections required by Regulation C. Specifically, Form FR HMDA–LAR, the Loan/Application Register Transmittal Sheet, has been edited to add OMB control numbers for the Bureau of Consumer Financial Protection and the National Credit Union Administration and to remove the control number formerly used by the Office of Thrift Supervision.

This interim final rule modifies the current regulatory text by including the Bureau of Consumer Financial Protection as an appropriate Federal agency for receiving reports and removes the Office of Thrift Supervision as an entity to whom financial institutions may be required to report data under HMDA. The Bureau is issuing guidance concurrently with the issuance of this interim rule regarding the appropriate Federal agency to which each financial institution should report 2011 data pursuant to HMDA.

The Dodd-Frank Act amended HMDA to require covered financial institutions to report data with respect to, among other things, the age of mortgagors and mortgage applicants, points and fees payable at origination in connection with a mortgage, the difference between the annual percentage rate associated with a loan and a benchmark rates or rates for all loans, the term in months of any prepayment penalty or other fee or charge payable on repayment of some portion of principal or the entire principal in advance of scheduled payment, the value of the real property pledged or proposed to be pledged as collateral, the actual or proposed term in months of any introductory period after which the rates of interest may change for a loan, the presence of contractual terms or proposed contract terms that would allow the mortgagor or applicant to make payments other than fully amortizing payments during any portion of the loan term, the actual or proposed term in months of the mortgage, the channel through which the mortgage application was made, and the credit score of mortgage applicants and mortgagors.[2] A change to the regulatory text to require collection of additional data pursuant to the Dodd-Frank Act is a substantive change that is beyond the scope of this interim final rule. Therefore, the Bureau will address those substantive amendments to the HMDA data elements in a future rulemaking.

Institutions are not required to report additional data required by section 304(b)(5) and (6) of HMDA, as amended, ''before the first January 1 that occurs after the end of the 9-month period beginning on the date on which regulations are issued by the Bureau in final form with respect to such disclosures.'' [3] Further, financial institutions are unable to comply with the obligation to report data regarding the age of mortgagors and mortgage applicants, which is required pursuant to section 304(b)(4) of HMDA, until the Bureau provides the necessary guidance on the manner of such reporting, including modification of the HMDA Loan/Application Register (HMDA–LAR) form to accommodate the reporting of age data. Therefore, the Bureau believes that the requirements to report all of the new data elements under HMDA section 304(b)(4)-(6) cannot be effective until the Bureau completes a future rulemaking with respect to the reporting of such data.

III. Legal Authority

A. Rulemaking Authority

The Bureau is issuing this interim final rule pursuant to its authority under HMDA and the Dodd-Frank Act. Effective July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies. The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.'' [4] The HMDA is a Federal consumer financial law.[5] Accordingly, effective July 21, 2011, the authority of the Board to issue regulations pursuant to HMDA transferred to the Bureau.[6]

B. Authority To Issue an Interim Final Rule Without Prior Notice and Comment

The Administrative Procedure Act (APA) [7] generally requires public notice and an opportunity to comment before promulgation of regulations.[8] The APA provides exceptions to notice-and-comment procedures, however, where an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest or when a rulemaking relates to agency organization, procedure, and practice.[9] The Bureau finds that there is good cause to conclude that providing notice and opportunity for comment would be unnecessary and contrary to the public interest under these circumstances. In addition, substantially all the changes made by this interim final rule, which were necessitated by the Dodd-Frank Act's transfer of HMDA authority from the Board to the Bureau, relate to agency organization, procedure, and practice and are thus exempt from the APA's notice-and-comment requirements.

The Bureau's good cause findings are based on the following considerations. As an initial matter, the Board's existing regulation was a result of notice-and-comment rulemaking to the extent required. Moreover, the interim final rule published today does not impose any new, substantive obligations on regulated entities. Rather, the interim final rule makes only non-substantive, technical changes to the existing text of the regulation, such as renumbering, changing internal cross-references, replacing appropriate nomenclature to reflect the transfer of authority to the Bureau, and changing the addresses for filing applications and notices. Given the technical nature of these changes, and the fact that the interim final rule does not impose any additional substantive requirements on covered entities, an opportunity for prior public comment is unnecessary. In addition, recodifying the Board's regulations to reflect the transfer of authority to the Bureau will help facilitate compliance with HMDA and its implementing regulations, and the new regulations will help reduce uncertainty regarding the applicable regulatory framework. Using notice-and-comment procedures would delay this process and thus be contrary to the public interest.

The APA generally requires that rules be published not less than 30 days

[2] Public Law 111–203, section 1094(3)(A).

[3] Public Law 111–203, section 1094(3)(F).

[4] Public Law 111–203, section 1061(a)(1). Effective on the designated transfer date, July 21, 2011, the Bureau was also granted ''all powers and duties'' vested in each of the Federal agencies, relating to the consumer financial protection functions, on the day before the designated transfer date. Until this and other interim final rules take effect, existing regulations for which rulemaking authority transferred to the Bureau continue to govern persons covered by this rule. *See* 76 FR 43569 (July 21, 2011).

[5] Public Law 111–203, section 1002(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws''); *id.* section 1002(12) (defining ''enumerated consumer laws'' to include HMDA).

[6] section 1066 of the Dodd-Frank Act grants the Secretary of the Treasury interim authority to perform certain functions of the Bureau. Pursuant to that authority, Treasury is publishing this interim final rule on behalf of the Bureau.

[7] 5 U.S.C. 551 *et seq.*

[8] 5 U.S.C. 553(b), (c).

[9] 5 U.S.C. 553(b)(3)(A), (B).

before their effective dates. *See* 5 U.S.C. 553(d). As with the notice and comment requirement, however, the APA allows an exception when ''otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). The Bureau finds that there is good cause for providing less than 30 days notice here. A delayed effective date would harm consumers and regulated entities by needlessly perpetuating discrepancies between the amended statutory text and the implementing regulation, thereby hindering compliance and prolonging uncertainty regarding the applicable regulatory framework.[10]

In addition, delaying the effective date of the interim final rule for 30 days would provide no practical benefit to regulated entities in this context and in fact could operate to their detriment. As discussed above, the interim final rule published today does not impose any new, substantive obligations on regulated entities. Instead, the rule makes only non-substantive, technical changes to the existing text of the regulation. Thus, regulated entities that are already in compliance with the existing rules will not need to modify business practices as a result of this rule. To the extent that one-time modifications to forms are required, the Bureau has provided an ample implementation period to allow appropriate advance notice and facilitate compliance without suspending the benefits of the interim final rule during the intervening period.

C. Section 1022(b)(2) of the Dodd-Frank Act

In developing the interim final rule, the Bureau has conducted an analysis of potential benefits, costs, and impacts.[11] The Bureau believes that the interim final rule will benefit consumers and covered persons by updating and recodifying Regulation C to reflect the transfer of authority to the Bureau and certain other changes mandated by the Dodd-Frank Act. This will help facilitate compliance with HMDA and its implementing regulations and help reduce any uncertainty regarding the applicable regulatory framework. The interim final rule will not impose any new substantive obligations on consumers or covered persons and is not expected to have any impact on consumers' access to consumer financial products and services.

Although not required by the interim final rule, financial institutions may incur some costs in updating compliance manuals and related materials to reflect the new numbering and other technical changes reflected in the new Regulation C. The Bureau has worked to reduce any such burden by preserving the existing numbering to the extent possible and believes that such costs will likely be minimal. These changes could be handled in the short term by providing a short, standalone summary alerting users to the changes and in the long term could be combined with other updates at the creditor's convenience. The Bureau intends to continue investigating the possible costs to affected entities of updating manuals and related materials to reflect these changes and solicits comments on this and other issues discussed in this section.

The interim final rule will have no unique impact on depository institutions or credit unions with $10 billion or less in assets as described in section 1026(a) of the Dodd-Frank Act. Also, the interim final rule will have no unique impact on rural consumers.

In undertaking the process of recodifying Regulation C, as well as regulations implementing thirteen other existing consumer financial laws,[12] the Bureau consulted the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, the Board of Governors of the Federal Reserve System, the Federal Trade Commission, and the Department of Housing and Urban Development, including with respect to consistency with any prudential, market, or systemic objectives that may be administered by such agencies.[13] The Bureau also has consulted with the Office of Management and Budget for technical assistance. The Bureau expects to have further consultations with the appropriate Federal agencies during the comment period.

IV. Request for Comment

Although notice and comment rulemaking procedures are not required, the Bureau invites comments on this notice. Commenters are specifically encouraged to identify any technical issues raised by the rule. The Bureau is also seeking comment in response to a notice published at 76 FR 75825 (Dec. 5, 2011) concerning its efforts to identify priorities for streamlining regulations that it has inherited from other Federal agencies to address provisions that are outdated, unduly burdensome, or unnecessary.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities including small businesses, small governmental units, and small not-for-profit organizations.[14] The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule 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.[15] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business

[10] This interim final rule is one of 14 companion rulemakings that together restate and recodify the implementing regulations under 14 existing consumer financial laws (part III.C, below, lists the 14 laws involved). In the interest of proper coordination of this overall regulatory framework, which includes numerous cross-references among some of the regulations, the Bureau is establishing the same effective date of December 30, 2011 for those rules published on or before that date and making those published thereafter (if any) effective immediately.

[11] Section 1022(b)(2)(A) of the Dodd-Frank Act addresses the consideration of the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas. Section 1022(b)(2)(B) requires that the Bureau ''consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies.'' The manner and extent to which these provisions apply to interim final rules and to benefits, costs, and impacts that are compelled by statutory changes rather than discretionary Bureau action is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

[12] The fourteen laws implemented by this and its companion rulemakings are: the Consumer Leasing Act, the Electronic Fund Transfer Act (except with respect to section 920 of that Act), the Equal Credit Opportunity Act, the Fair Credit Reporting Act (except with respect to sections 615(e) and 628 of that act), the Fair Debt Collection Practices Act, Subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act, sections 502 through 509 of the Gramm-Leach-Bliley Act (except for section 505 as it applies to section 501(b)), the Home Mortgage Disclosure Act, the Real Estate Settlement Procedures Act, the S.A.F.E. Mortgage Licensing Act, the Truth in Lending Act, the Truth in Savings Act, section 626 of the Omnibus Appropriations Act, 2009, and the Interstate Land Sales Full Disclosure Act.

[13] In light of the technical but voluminous nature of this recodification project, the Bureau focused the consultation process on a representative sample of the recodified regulations, while making information on the other regulations available. The Bureau expects to conduct differently its future consultations regarding substantive rulemakings.

[14] 5 U.S.C. 601 *et seq.*

[15] 5 U.S.C. 603; 5 U.S.C. 604; 5 U.S.C. 605(b).

representatives regarding any rule for which an IRFA is required.[16]

The IRFA and FRFA requirements described above apply only where a notice of proposed rulemaking is required,[17] and the panel requirement applies only when a rulemaking requires an IRFA.[18] As discussed above in Part III, a notice of proposed rulemaking is not required for this rulemaking.

In addition, as discussed above, this interim final rule has only a minor impact on entities subject to Regulation C. The rule imposes no new, substantive obligations on covered entities. Accordingly, the undersigned certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities.

VI. Paperwork Reduction Act

The Bureau may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. This rule contains information collection requirements under the Paperwork Reduction Act (PRA), which have been previously approved by OMB, and the ongoing PRA burden for which is unchanged by this rule. There are no new information collection requirements in this interim final rule. The Bureau's OMB control number for this information collection is: 3170–0008.

List of Subjects in 12 CFR Part 1003

Banks, Banking, Credit unions, Mortgages, National banks, Savings associations, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection adds Part 1003 to Chapter X in Title 12 of the Code of Federal Regulations to read as follows:

PART 1003—HOME MORTGAGE DISCLOSURE (REGULATION C)

Sec.

1003.1 Authority, purpose, and scope.
1003.2 Definitions.
1003.3 Exempt institutions.
1003.4 Compilation of loan data.
1003.5 Disclosure and reporting.
1003.6 Enforcement.
Appendix A to Part 1003—Form and Instructions for Completion of HMDA Loan/Application Register
Appendix B to Part 1003—Form and Instructions for Data Collection on Ethnicity, Race, and Sex
Supplement I to Part 1003—Staff Commentary

Authority: 12 U.S.C. 2803, 2804, 2805, 5512, 5581.

§ 1003.1 Authority, purpose, and scope.

(a) *Authority.* This part, known as Regulation C, is issued by the Bureau of Consumer Financial Protection (Bureau) pursuant to the Home Mortgage Disclosure Act (HMDA) (12 U.S.C. 2801 *et seq.*), as amended. The information-collection requirements have been approved by the U.S. Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* and have been assigned OMB numbers for institutions reporting data to the Office of the Comptroller of the Currency (1557–0159), the Federal Deposit Insurance Corporation (3064–0046), the Federal Reserve System (7100–0247), the Department of Housing and Urban Development (HUD) (2502–0529), the National Credit Union Administration (3133–0166), and the Bureau of Consumer Financial Protection (3170–0008).

(b) *Purpose.* (1) This part implements the Home Mortgage Disclosure Act, which is intended to provide the public with loan data that can be used:

(i) To help determine whether financial institutions are serving the housing needs of their communities;

(ii) To assist public officials in distributing public-sector investment so as to attract private investment to areas where it is needed; and

(iii) To assist in identifying possible discriminatory lending patterns and enforcing antidiscrimination statutes.

(2) Neither the act nor this part is intended to encourage unsound lending practices or the allocation of credit.

(c) *Scope.* This part applies to certain financial institutions, including banks, savings associations, credit unions, and other mortgage lending institutions, as defined in § 1003.2. The regulation requires an institution to report data to the appropriate Federal agency about home purchase loans, home improvement loans, and refinancings that it originates or purchases, or for which it receives applications; and to disclose certain data to the public.

§ 1003.2 Definitions.

In this part:

Act means the Home Mortgage Disclosure Act (HMDA) (12 U.S.C. 2801 *et seq.*), as amended.

Application.—(1) *In general.* Application means an oral or written request for a home purchase loan, a home improvement loan, or a refinancing that is made in accordance with procedures used by a financial institution for the type of credit requested.

(2) *Preapproval programs.* A request for preapproval for a home purchase loan is an application under this section if the request is reviewed under a program in which the financial institution, after a comprehensive analysis of the creditworthiness of the applicant, issues a written commitment to the applicant valid for a designated period of time to extend a home purchase loan up to a specified amount. The written commitment may not be subject to conditions other than:

(i) Conditions that require the identification of a suitable property;

(ii) Conditions that require that no material change has occurred in the applicant's financial condition or creditworthiness prior to closing; and

(iii) Limited conditions that are not related to the financial condition or creditworthiness of the applicant that the lender ordinarily attaches to a traditional home mortgage application (such as certification of a clear termite inspection).

Branch office means:

(1) Any office of a bank, savings association, or credit union that is approved as a branch by a Federal or state supervisory agency, but excludes free-standing electronic terminals such as automated teller machines; and

(2) Any office of a for-profit mortgage-lending institution (other than a bank, savings association, or credit union) that takes applications from the public for home purchase loans, home improvement loans, or refinancings. A for-profit mortgage-lending institution is also deemed to have a branch office in an MSA or in a Metropolitan Division, if, in the preceding calendar year, it received applications for, originated, or purchased five or more home purchase loans, home improvement loans, or refinancings related to property located in that MSA or Metropolitan Division, respectively.

Dwelling means a residential structure (whether or not attached to real property) located in a state of the United States of America, the District of Columbia, or the Commonwealth of Puerto Rico. The term includes an individual condominium unit, cooperative unit, or mobile or manufactured home.

Financial institution means:

(1) A bank, savings association, or credit union that:

(i) On the preceding December 31 had assets in excess of the asset threshold established and published annually by

[16] 5 U.S.C. 603(d).

[17] 5 U.S.C. 603(a), 604(a); 5 U.S.C. 553(b)(B).

[18] 5 U.S.C. 609(b).

the Bureau for coverage by the act, based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each twelve month period ending in November, with rounding to the nearest million;

(ii) On the preceding December 31, had a home or branch office in an MSA;

(iii) In the preceding calendar year, originated at least one home purchase loan (excluding temporary financing such as a construction loan) or refinancing of a home purchase loan, secured by a first lien on a one-to four-family dwelling; and

(iv) Meets one or more of the following three criteria:

(A) The institution is Federally insured or regulated;

(B) The mortgage loan referred to in paragraph (1)(iii) of this definition was insured, guaranteed, or supplemented by a Federal agency; or

(C) The mortgage loan referred to in paragraph (1)(iii) of this definition was intended by the institution for sale to Fannie Mae or Freddie Mac; and

(2) A for-profit mortgage-lending institution (other than a bank, savings association, or credit union) that:

(i) In the preceding calendar year, either:

(A) Originated home purchase loans, including refinancings of home purchase loans, that equaled at least 10 percent of its loan-origination volume, measured in dollars; or

(B) Originated home purchase loans, including refinancings of home purchase loans, that equaled at least $25 million; and

(ii) On the preceding December 31, had a home or branch office in an MSA; and

(iii) Either:

(A) On the preceding December 31, had total assets of more than $10 million, counting the assets of any parent corporation; or

(B) In the preceding calendar year, originated at least 100 home purchase loans, including refinancings of home purchase loans.

Home-equity line of credit means an open-end credit plan secured by a dwelling as defined in Regulation Z (Truth in Lending), 12 CFR part 1026.

Home improvement loan means:

(1) A loan secured by a lien on a dwelling that is for the purpose, in whole or in part, of repairing, rehabilitating, remodeling, or improving a dwelling or the real property on which it is located; and

(2) A non-dwelling secured loan that is for the purpose, in whole or in part, of repairing, rehabilitating, remodeling, or improving a dwelling or the real property on which it is located, and that is classified by the financial institution as a home improvement loan.

Home purchase loan means a loan secured by and made for the purpose of purchasing a dwelling.

Manufactured home means any residential structure as defined under regulations of the Department of Housing and Urban Development establishing manufactured home construction and safety standards (24 CFR 3280.2).

Metropolitan Statistical Area or *MSA* and *Metropolitan Division* or *MD.* (1) *Metropolitan Statistical Area* or *MSA* means a metropolitan statistical area as defined by the U.S. Office of Management and Budget.

(2) *Metropolitan Division* or *MD* means a metropolitan division of an MSA, as defined by the U.S. Office of Management and Budget.

Refinancing means a new obligation that satisfies and replaces an existing obligation by the same borrower, in which:

(1) For coverage purposes, the existing obligation is a home purchase loan (as determined by the lender, for example, by reference to available documents; or as stated by the applicant), and both the existing obligation and the new obligation are secured by first liens on dwellings; and

(2) For reporting purposes, both the existing obligation and the new obligation are secured by liens on dwellings.

§ 1003.3 Exempt institutions.

(a) *Exemption based on state law.* (1) A state-chartered or state-licensed financial institution is exempt from the requirements of this part if the Bureau determines that the institution is subject to a state disclosure law that contains requirements substantially similar to those imposed by this part and that contains adequate provisions for enforcement.

(2) Any state, state-chartered or state-licensed financial institution, or association of such institutions, may apply to the Bureau for an exemption under paragraph (a) of this section.

(3) An institution that is exempt under paragraph (a) of this section shall use the disclosure form required by its state law and shall submit the data required by that law to its state supervisory agency for purposes of aggregation.

(b) *Loss of exemption.* An institution losing a state-law exemption under paragraph (a) of this section shall comply with this part beginning with the calendar year following the year for which it last reported loan data under the state disclosure law.

§ 1003.4 Compilation of loan data.

(a) *Data format and itemization.* A financial institution shall collect data regarding applications for, and originations and purchases of, home purchase loans, home improvement loans, and refinancings for each calendar year. An institution is required to collect data regarding requests under a preapproval program (as defined in § 1003.2) only if the preapproval request is denied or results in the origination of a home purchase loan. All reportable transactions shall be recorded, within thirty calendar days after the end of the calendar quarter in which final action is taken (such as origination or purchase of a loan, or denial or withdrawal of an application), on a register in the format prescribed in Appendix A of this part. The data recorded shall include the following items:

(1) An identifying number for the loan or loan application, and the date the application was received.

(2) The type of loan or application.

(3) The purpose of the loan or application.

(4) Whether the application is a request for preapproval and whether it resulted in a denial or in an origination.

(5) The property type to which the loan or application relates.

(6) The owner-occupancy status of the property to which the loan or application relates.

(7) The amount of the loan or the amount applied for.

(8) The type of action taken, and the date.

(9) The location of the property to which the loan or application relates, by MSA or by Metropolitan Division, by state, by county, and by census tract, if the institution has a home or branch office in that MSA or Metropolitan Division.

(10) The ethnicity, race, and sex of the applicant or borrower, and the gross annual income relied on in processing the application.

(11) The type of entity purchasing a loan that the institution originates or purchases and then sells within the same calendar year (this information need not be included in quarterly updates).

(12)(i) For originated loans subject to Regulation Z, 12 CFR part 1026, the difference between the loan's annual percentage rate (APR) and the average prime offer rate for a comparable transaction as of the date the interest rate is set, if that difference is equal to or greater than 1.5 percentage points for loans secured by a first lien on a

dwelling, or equal to or greater than 3.5 percentage points for loans secured by a subordinate lien on a dwelling.

(ii) ''Average prime offer rate'' means an annual percentage rate that is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage loans that have low-risk pricing characteristics. The Bureau publishes average prime offer rates for a broad range of types of transactions in tables updated at least weekly, as well as the methodology the Bureau uses to derive these rates.

(13) Whether the loan is subject to the Home Ownership and Equity Protection Act of 1994, as implemented in Regulation Z (12 CFR 1026.32).

(14) The lien status of the loan or application (first lien, subordinate lien, or not secured by a lien on a dwelling).

(b) *Collection of data on ethnicity, race, sex, and income.* (1) A financial institution shall collect data about the ethnicity, race, and sex of the applicant or borrower as prescribed in Appendix B of this part.

(2) Ethnicity, race, sex, and income data may but need not be collected for loans purchased by the financial institution.

(c) *Optional data.* A financial institution may report:

(1) The reasons it denied a loan application;

(2) Requests for preapproval that are approved by the institution but not accepted by the applicant; and

(3) Home-equity lines of credit made in whole or in part for the purpose of home improvement or home purchase.

(d) *Excluded data.* A financial institution shall not report:

(1) Loans originated or purchased by the financial institution acting in a fiduciary capacity (such as trustee);

(2) Loans on unimproved land;

(3) Temporary financing (such as bridge or construction loans);

(4) The purchase of an interest in a pool of loans (such as mortgage-participation certificates, mortgage-backed securities, or real estate mortgage investment conduits);

(5) The purchase solely of the right to service loans; or

(6) Loans acquired as part of a merger or acquisition, or as part of the acquisition of all of the assets and liabilities of a branch office as defined in § 1003.2.

(e) *Data reporting for banks and savings associations that are required to report data on small business, small farm, and community development lending under CRA.* Banks and savings associations that are required to report data on small business, small farm, and community development lending under regulations that implement the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) shall also collect the location of property located outside MSAs and Metropolitan Divisions in which the institution has a home or branch office, or outside any MSA.

§ 1003.5 Disclosure and reporting.

(a) *Reporting to agency.* (1) By March 1 following the calendar year for which the loan data are compiled, a financial institution shall send its complete loan/application register to the agency office specified in Appendix A of this part. The institution shall retain a copy for its records for at least three years.

(2) A subsidiary of a bank or savings association shall complete a separate loan/application register. The subsidiary shall submit the register, directly or through its parent, to the same agency as its parent.

(b) *Public disclosure of statement.* (1) The Federal Financial Institutions Examination Council (FFIEC) will prepare a disclosure statement from the data each financial institution submits.

(2) An institution shall make its disclosure statement (prepared by the FFIEC) available to the public at the institution's home office no later than three business days after receiving the disclosure statement from the FFIEC.

(3) In addition, an institution shall either:

(i) Make its disclosure statement available to the public, within ten business days of receiving it, in at least one branch office in each other MSA and each other Metropolitan Division where the institution has offices (the disclosure statement need only contain data relating to the MSA or Metropolitan Division where the branch is located); or

(ii) Post the address for sending written requests in the lobby of each branch office in other MSAs and Metropolitan Divisions where the institution has offices; and mail or deliver a copy of the disclosure statement within fifteen calendar days of receiving a written request (the disclosure statement need only contain data relating to the MSA or Metropolitan Division for which the request is made). Including the address in the general notice required under paragraph (e) of this section satisfies this requirement.

(c) *Public disclosure of modified loan/application register.* A financial institution shall make its loan/application register available to the public after removing the following information regarding each entry: The application or loan number, the date that the application was received, and the date action was taken. An institution shall make its modified register available following the calendar year for which the data are compiled, by March 31 for a request received on or before March 1, and within thirty calendar days for a request received after March 1. The modified register need only contain data relating to the MSA or Metropolitan Division for which the request is made.

(d) *Availability of data.* A financial institution shall make its modified register available to the public for a period of three years and its disclosure statement available for a period of five years. An institution shall make the data available for inspection and copying during the hours the office is normally open to the public for business. It may impose a reasonable fee for any cost incurred in providing or reproducing the data.

(e) *Notice of availability.* A financial institution shall post a general notice about the availability of its HMDA data in the lobby of its home office and of each branch office located in an MSA and Metropolitan Division. An institution shall provide promptly upon request the location of the institution's offices where the statement is available for inspection and copying, or it may include the location in the lobby notice.

(f) *Loan aggregation and central data depositories.* Using the loan data submitted by financial institutions, the FFIEC will produce reports for individual institutions and reports of aggregate data for each MSA and Metropolitan Division, showing lending patterns by property location, age of housing stock, and income level, sex, ethnicity, and race. These reports will be available to the public at central data depositories located in each MSA and Metropolitan Division. A listing of central data depositories can be obtained from the Federal Financial Institutions Examination Council, Washington, DC 20006.

§ 1003.6 Enforcement.

(a) *Administrative enforcement.* A violation of the Act or this part is subject to administrative sanctions as provided in section 305 of the Act, including the imposition of civil money penalties, where applicable. Compliance is enforced by the agencies listed in section 305 of the Act (12 U.S.C. 2804).

(b) *Bona fide errors.* (1) An error in compiling or recording loan data is not a violation of the act or this part if the error was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such errors.

(2) An incorrect entry for a census tract number is deemed a *bona fide* error, and is not a violation of the act or this part, provided that the institution maintains procedures reasonably adapted to avoid such errors.

(3) If an institution makes a good-faith effort to record all data concerning covered transactions fully and accurately within thirty calendar days after the end of each calendar quarter, and some data are nevertheless inaccurate or incomplete, the error or omission is not a violation of the act or this part provided that the institution corrects or completes the information prior to submitting the loan/application register to its regulatory agency.

Appendix A to Part 1003—Form and Instructions for Completion of HMDA Loan/Application Register

Paperwork Reduction Act Notice

This report is required by law (12 U.S.C. 2801–2810 and 12 CFR 1003). An agency may not conduct or sponsor, and an organization is not required to respond to, a collection of information unless it displays a valid Office of Management and Budget (OMB) Control Number. See 12 CFR 1003.1(a) for the valid OMB Control Numbers applicable to this information collection. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the respective agencies and to OMB, Office of Information and Regulatory Affairs, Paperwork Reduction Project, Washington, DC 20503. Be sure to reference the applicable agency and the OMB Control Number, as found in 12 CFR 1003.1(a), when submitting comments to OMB.

I. Instructions for Completion of Loan/Application Register

A. Application or Loan Information

1. Application or Loan Number. Enter an identifying loan number that can be used later to retrieve the loan or application file. It can be any number of your institution's choosing (not exceeding 25 characters). You may use letters, numerals, or a combination of both.

2. Date Application Received. Enter the date the loan application was received by your institution by month, day, and year. If your institution normally records the date shown on the application form you may use that date instead. Enter ''NA'' for loans purchased by your institution. For paper submissions only, use numerals in the form MM/DD/YYYY (for example, 01/15/2003). For submissions in electronic form, the proper format is YYYYMMDD.

3. Type of Loan or Application. Indicate the type of loan or application by entering the applicable Code from the following:

Code 1—Conventional (any loan other than FHA, VA, FSA, or RHS loans)
Code 2—FHA-insured (Federal Housing Administration)
Code 3—VA-guaranteed (Veterans Administration)
Code 4—FSA/RHS-guaranteed (Farm Service Agency or Rural Housing Service)

4. Property Type. Indicate the property type by entering the applicable Code from the following:

Code 1—One-to four-family dwelling (other than manufactured housing)
Code 2—Manufactured housing
Code 3—Multifamily dwelling

a. Use Code 1, not Code 3, for loans on individual condominium or cooperative units.

b. If you cannot determine (despite reasonable efforts to find out) whether the loan or application relates to a manufactured home, use Code 1.

5. Purpose of Loan or Application. Indicate the purpose of the loan or application by entering the applicable Code from the following:

Code 1—Home purchase
Code 2—Home improvement
Code 3—Refinancing

a. Do not report a refinancing if, under the loan agreement, you were unconditionally obligated to refinance the obligation, or you were obligated to refinance the obligation subject to conditions within the borrower's control.

6. Owner Occupancy. Indicate whether the property to which the loan or loan application relates is to be owner-occupied as a principal residence by entering the applicable Code from the following:

Code 1—Owner-occupied as a principal dwelling
Code 2—Not owner-occupied as a principal dwelling
Code 3—Not applicable

a. For purchased loans, use Code 1 unless the loan documents or application indicate that the property will not be owner-occupied as a principal residence.

b. Use Code 2 for second homes or vacation homes, as well as for rental properties.

c. Use Code 3 if the property to which the loan relates is a multifamily dwelling; is not located in an MSA; or is located in an MSA or an MD in which your institution has neither a home nor a branch office. Alternatively, at your institution's option, you may report the actual occupancy status, using Code 1 or 2 as applicable.

7. Loan Amount. Enter the amount of the loan or application. Do not report loans below $500. Show the amount in thousands, rounding to the nearest thousand (round $500 up to the next $1,000). For example, a loan for $167,300 should be entered as 167 and one for $15,500 as 16.

a. For a home purchase loan that you originated, enter the principal amount of the loan.

b. For a home purchase loan that you purchased, enter the unpaid principal balance of the loan at the time of purchase.

c. For a home improvement loan, enter the entire amount of the loan—including unpaid finance charges if that is how such loans are recorded on your books—even if only a part of the proceeds is intended for home improvement.

d. If you opt to report home-equity lines of credit, report only the portion of the line intended for home improvement or home purchase.

e. For a refinancing, indicate the total amount of the refinancing, including both the amount outstanding on the original loan and any amount of ''new money.''

f. For a loan application that was denied or withdrawn, enter the amount for which the applicant applied.

8. Request for Preapproval of a Home Purchase Loan. Indicate whether the application or loan involved a request for preapproval of a home purchase loan by entering the applicable Code from the following:

Code 1—Preapproval requested
Code 2—Preapproval not requested
Code 3—Not applicable

a. Enter Code 2 if your institution has a covered preapproval program but the applicant does not request a preapproval.

b. Enter Code 3 if your institution does not have a preapproval program as defined in § 1003.2.

c. Enter Code 3 for applications or loans for home improvement or refinancing, and for purchased loans.

B. Action Taken

1. Type of Action. Indicate the type of action taken on the application or loan by using one of the following Codes.

Code 1—Loan originated
Code 2—Application approved but not accepted
Code 3—Application denied
Code 4—Application withdrawn
Code 5—File closed for incompleteness
Code 6—Loan purchased by your institution
Code 7—Preapproval request denied
Code 8—Preapproval request approved but not accepted (optional reporting)

a. Use Code 1 for a loan that is originated, including one resulting from a request for preapproval.

b. For a counteroffer (your offer to the applicant to make the loan on different terms or in a different amount from the terms or amount applied for), use Code 1 if the applicant accepts. Use Code 3 if the applicant turns down the counteroffer or does not respond.

c. Use Code 2 when the application is approved but the applicant (or the loan broker or correspondent) fails to respond to your notification of approval or your commitment letter within the specified time. Do not use this Code for a preapproval request.

d. Use Code 4 only when the application is expressly withdrawn by the applicant before a credit decision is made. Do not use Code 4 if a request for preapproval is withdrawn; preapproval requests that are withdrawn are not reported under HMDA.

e. Use Code 5 if you sent a written notice of incompleteness under § 1002.9(c)(2) of Regulation B (Equal Credit Opportunity) and the applicant did not respond to your request for additional information within the period of time specified in your notice. Do not use this Code for requests for preapproval that are incomplete; these preapproval requests are not reported under HMDA.

2. Date of Action. For paper submissions only, enter the date by month, day, and year,

using numerals in the form MM/DD/YYYY (for example, 02/22/2003). For submissions in electronic form, the proper format is YYYYMMDD.

a. For loans originated, enter the settlement or closing date.

b. For loans purchased, enter the date of purchase by your institution.

c. For applications and preapprovals denied, applications and preapprovals approved but not accepted by the applicant, and files closed for incompleteness, enter the date that the action was taken by your institution or the date the notice was sent to the applicant.

d. For applications withdrawn, enter the date you received the applicant's express withdrawal, or enter the date shown on the notification from the applicant, in the case of a written withdrawal.

e. For preapprovals that lead to a loan origination, enter the date of the origination.

C. Property Location

Except as otherwise provided, enter in these columns the applicable Codes for the MSA, or the MD if the MSA is divided into MDs, state, county, and census tract to indicate the location of the property to which a loan relates.

1. MSA or Metropolitan Division.—For each loan or loan application, enter the MSA, or the MD number if the MSA is divided into MDs. MSA and MD boundaries are defined by OMB; use the boundaries that were in effect on January 1 of the calendar year for which you are reporting. A listing of MSAs and MDs is available from the appropriate Federal agency to which you report data or the FFIEC.

2. State and County. Use the Federal Information Processing Standard (FIPS) two-digit numerical code for the state and the three-digit numerical code for the county. These codes are available from the appropriate Federal agency to which you report data or the FFIEC.

3. Census Tract.—Indicate the census tract where the property is located. Notwithstanding paragraph 6, if the property is located in a county with a population of 30,000 or less in the 2000 Census, enter ''NA'' (even if the population has increased above 30,000 since 2000), or enter the census tract number. County population data can be obtained from the U.S. Census Bureau.

4. Census Tract Number.—For the census tract number, consult the resources provided by the U.S. Census Bureau or the FFIEC.

5. Property Located Outside MSAs or Metropolitan Divisions.—For loans on property located outside the MSAs and MDs in which an institution has a home or branch office, or for property located outside of any MSA or MD, the institution may choose one of the following two options. Under option one, the institution may enter the MSA or MD, state and county codes and the census tract number; and if the property is not located in any MSA or MD, the institution may enter ''NA'' in the MSA or MD column. (Codes exist for all states and counties and numbers exist for all census tracts.) Under this first option, the codes and census tract number must accurately identify the property location. Under the second option, which is not available if paragraph 6 applies, an institution may enter ''NA'' in all four columns, whether or not the codes or numbers exist for the property location.

6. Data Reporting for Banks and Savings Associations Required To Report Data on Small Business, Small Farm, and Community Development Lending Under the CRA Regulations.—If your institution is a bank or savings association that is required to report data under the regulations that implement the CRA, you must enter the property location on your HMDA/LAR even if the property is outside the MSAs or MDs in which you have a home or branch office, or is not located in any MSA.

7. Requests for Preapproval. Notwithstanding paragraphs 1 through 6, if the application is a request for preapproval that is denied or that is approved but not accepted by the applicant, you may enter ''NA'' in all four columns.

D. Applicant Information—Ethnicity, Race, Sex, and Income

Appendix B contains instructions for the collection of data on ethnicity, race, and sex, and also contains a sample form for data collection.

1. Applicability. Report this information for loans that you originate as well as for applications that do not result in an origination.

a. You need not collect or report this information for loans purchased. If you choose not to report this information, use the Codes for ''not applicable.''

b. If the borrower or applicant is not a natural person (a corporation or partnership, for example), use the Codes for ''not applicable.''

2. Mail, Internet, or Telephone Applications.—All loan applications, including applications taken by mail, internet, or telephone must use a collection form similar to that shown in Appendix B regarding ethnicity, race, and sex. For applications taken by telephone, the information in the collection form must be stated orally by the lender, except for information that pertains uniquely to applications taken in writing. If the applicant does not provide these data in an application taken by mail or telephone or on the internet, enter the Code for ''information not provided by applicant in mail, internet, or telephone application'' specified in paragraphs I.D.3., 4., and 5. of this appendix. (See Appendix B for complete information on the collection of these data in mail, Internet, or telephone applications.)

3. Ethnicity of Borrower or Applicant. Use the following Codes to indicate the ethnicity of the applicant or borrower under column ''A'' and of any co-applicant or co-borrower under column ''CA.''

Code 1—Hispanic or Latino
Code 2—Not Hispanic or Latino
Code 3—Information not provided by applicant in mail, internet, or telephone application
Code 4—Not applicable
Code 5—No co-applicant

4. Race of Borrower or Applicant. Use the following Codes to indicate the race of the applicant or borrower under column ''A'' and of any co-applicant or co-borrower under column ''CA.''

Code 1—American Indian or Alaska Native
Code 2—Asian
Code 3—Black or African American
Code 4—Native Hawaiian or Other Pacific Islander
Code 5—White
Code 6—Information not provided by applicant in mail, internet, or telephone application
Code 7—Not applicable
Code 8—No co-applicant

a. If an applicant selects more than one racial designation, enter all Codes corresponding to the applicant's selections.

b. Use Code 4 (for ethnicity) and Code 7 (for race) for ''not applicable'' only when the applicant or co-applicant is not a natural person or when applicant or co-applicant information is unavailable because the loan has been purchased by your institution.

c. If there is more than one co-applicant, provide the required information only for the first co-applicant listed on the application form. If there are no co-applicants or co-borrowers, use Code 5 (for ethnicity) and Code 8 (for race) for ''no co-applicant'' in the co-applicant column.

5. Sex of Borrower or Applicant. Use the following Codes to indicate the sex of the applicant or borrower under column ''A'' and of any co-applicant or co-borrower under column ''CA.''

Code 1—Male
Code 2—Female
Code 3—Information not provided by applicant in mail, internet, or telephone application
Code 4—Not applicable
Code 5—No co-applicant or co-borrower

a. Use Code 4 for ''not applicable'' only when the applicant or co-applicant is not a natural person or when applicant or co-applicant information is unavailable because the loan has been purchased by your institution.

b. If there is more than one co-applicant, provide the required information only for the first co-applicant listed on the application form. If there are no co-applicants or co-borrowers, use Code 5 for ''no co-applicant'' in the co-applicant column.

6. Income. Enter the gross annual income that your institution relied on in making the credit decision.

a. Round all dollar amounts to the nearest thousand (round $500 up to the next $1,000), and show in thousands. For example, report $35,500 as 36.

b. For loans on multifamily dwellings, enter ''NA.''

c. If no income information is asked for or relied on in the credit decision, enter ''NA.''

d. If the applicant or co-applicant is not a natural person or the applicant or co-applicant information is unavailable because the loan has been purchased by your institution, enter ''NA.''

E. Type of Purchaser

Enter the applicable Code to indicate whether a loan that your institution originated or purchased was then sold to a secondary market entity within the same calendar year:

Code 0—Loan was not originated or was not sold in calendar year covered by register
Code 1—Fannie Mae
Code 2—Ginnie Mae
Code 3—Freddie Mac
Code 4—Farmer Mac
Code 5—Private securitization
Code 6—Commercial bank, savings bank, or savings association
Code 7—Life insurance company, credit union, mortgage bank, or finance company
Code 8—Affiliate institution
Code 9—Other type of purchaser

a. Use Code 0 for applications that were denied, withdrawn, or approved but not accepted by the applicant; and for files closed for incompleteness.

b. Use Code 0 if you originated or purchased a loan and did not sell it during that same calendar year. If you sell the loan in a succeeding year, you need not report the sale.

c. Use Code 2 if you conditionally assign a loan to Ginnie Mae in connection with a mortgage-backed security transaction.

d. Use Code 8 for loans sold to an institution affiliated with you, such as your subsidiary or a subsidiary of your parent corporation.

F. Reasons for Denial

1. You may report the reason for denial, and you may indicate up to three reasons, using the following Codes. Leave this column blank if the ''action taken'' on the application is not a denial. For example, do not complete this column if the application was withdrawn or the file was closed for incompleteness.

Code 1—Debt-to-income ratio
Code 2—Employment history
Code 3—Credit history
Code 4—Collateral
Code 5—Insufficient cash (downpayment, closing costs)
Code 6—Unverifiable information
Code 7—Credit application incomplete
Code 8—Mortgage insurance denied
Code 9—Other

2. If your institution uses the model form for adverse action contained in Appendix C to Regulation B (Form C–1, Sample Notification Form), use the foregoing Codes as follows:

a. Code 1 for: Income insufficient for amount of credit requested, and Excessive obligations in relation to income.

b. Code 2 for: Temporary or irregular employment, and Length of employment.

c. Code 3 for: Insufficient number of credit references provided; Unacceptable type of credit references provided; No credit file; Limited credit experience; Poor credit performance with us; Delinquent past or present credit obligations with others; Garnishment, attachment, foreclosure, repossession, collection action, or judgment; and Bankruptcy.

d. Code 4 for: Value or type of collateral not sufficient.

e. Code 6 for: Unable to verify credit references; Unable to verify employment; Unable to verify income; and Unable to verify residence.

f. Code 7 for: Credit application incomplete.

g. Code 9 for: Length of residence; Temporary residence; and Other reasons specified on notice.

G. Pricing-Related Data

1. Rate Spread. a. For a home-purchase loan, a refinancing, or a dwelling-secured home improvement loan that you originated, report the spread between the annual percentage rate (APR) and the average prime offer rate for a comparable transaction if the spread is equal to or greater than 1.5 percentage points for first-lien loans or 3.5 percentage points for subordinate-lien loans. To determine whether the rate spread meets this threshold, use the average prime offer rate in effect for the type of transaction as of the date the interest rate was set, and use the APR for the loan, as calculated and disclosed to the consumer under §§ 1026.6 or 1026.18, as applicable, of Regulation Z (12 CFR part 1026). Current and historic average prime offer rates are set forth in the tables published on the FFIEC's Web site (*http://www.ffiec.gov/hmda*) entitled ''Average Prime Offer Rates-Fixed'' and ''Average Prime Offer Rates-Adjustable.'' Use the most recently available average prime offer rate. ''Most recently available'' means the average prime offer rate set forth in the applicable table with the most recent effective date as of the date the interest rate was set. Do not use an average prime offer rate before its effective date.

b. If the loan is not subject to Regulation Z, or is a home improvement loan that is not dwelling-secured, or is a loan that you purchased, enter ''NA.''

c. Enter ''NA'' in the case of an application that does not result in a loan origination.

d. Enter the rate spread to two decimal places, and use a leading zero. For example, enter 03.29. If the difference between the APR and the average prime offer rate is a figure with more than two decimal places, round the figure or truncate the digits beyond two decimal places.

e. If the difference between the APR and the average prime offer rate is less than 1.5 percentage points for a first-lien loan and less than 3.5 percentage points for a subordinate-lien loan, enter ''NA.''

2. Date the interest rate was set. The relevant date to use to determine the average prime offer rate for a comparable transaction is the date on which the loan's interest rate was set by the financial institution for the final time before closing. If an interest rate is set pursuant to a ''lock-in'' agreement between the lender and the borrower, then the date on which the agreement fixes the interest rate is the date the rate was set. If a rate is re-set after a lock-in agreement is executed (for example, because the borrower exercises a float-down option or the agreement expires), then the relevant date is the date the rate is re-set for the final time before closing. If no lock-in agreement is executed, then the relevant date is the date on which the institution sets the rate for the final time before closing.

3. HOEPA Status. a. For a loan that you originated or purchased that is subject to the Home Ownership and Equity Protection Act of 1994 (HOEPA), as implemented in Regulation Z (12 CFR 1026.32), because the APR or the points and fees on the loan exceed the HOEPA triggers, enter Code 1.

b. Enter Code 2 in all other cases. For example, enter Code 2 for a loan that you originated or purchased that is not subject to the requirements of HOEPA for any reason; also enter Code 2 in the case of an application that does not result in a loan origination.

H. Lien Status

Use the following Codes for loans that you originate and for applications that do not result in an origination:

Code 1—Secured by a first lien.
Code 2—Secured by a subordinate lien.
Code 3—Not secured by a lien.
Code 4—Not applicable (purchased loan).

a. Use Codes 1 through 3 for loans that you originate, as well as for applications that do not result in an origination (applications that are approved but not accepted, denied, withdrawn, or closed for incompleteness).

b. Use Code 4 for loans that you purchase.

II. Appropriate Federal Agencies for HMDA Reporting

A. You are strongly encouraged to submit your loan/application register via email. If you elect to use this method of transmission and the appropriate Federal agency for your institution is the Bureau of Consumer Financial Protection, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the National Credit Union Administration, then you should submit your institution's files to the email address dedicated to that purpose by the Bureau, which can be found on the Web site of the FFIEC. If one of the foregoing agencies is the appropriate Federal agency for your institution and you elect to submit your data by regular mail, then use the following address: HMDA, Federal Reserve Board, Attention: HMDA Processing, (insert name of the appropriate Federal agency for your institution), 20th & Constitution Ave NW., MS N502, Washington, DC 20551–0001.

B. If the Federal Reserve System (but not the Bureau of Consumer Financial Protection) is the appropriate Federal agency for your institution, you should use the email or regular mail address of your district bank indicated on the Web site of the FFIEC. If the Department of Housing and Urban Development is the appropriate Federal agency for your institution, then you should use the email or regular mail address indicated on the Web site of the FFIEC.

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Form FR HMDA-LAR
OMB Nos. 1557-0159 (OCC), 3064-0046 (FDIC), 7100-0247 (FRB), 2502-0529 (HUD), 3133-0166 (NCUA), and 3170-0008 (CFPB).

LOAN/APPLICATION REGISTER TRANSMITTAL SHEET

You must complete this transmittal sheet (please type or print) and attach it to the Loan/Application Register, required by the Home Mortgage Disclosure Act, that you submit to your supervisory agency.

Reporter's Identification Number	Agency Code	Reporter's Tax Identification Number	Total line entries contained in attached Loan/Application Register
_____	__	___ - _____	_____

The Loan/Application Register that is attached covers activity during the year_____ and contains a total of _____ pages.

Enter the name and address of your institution. The disclosure statement that is produced by the Federal Financial Institutions Examination Council will be mailed to the address you supply below:

_____
Name of Institution

_____
Address

_____
City, State, ZIP

Enter the name and address of any parent company:

_____
Name of Parent Company

_____
Address

_____
City, State, ZIP

Enter the name, telephone number, facsimile number, and e-mail address of a person who may be contacted about questions regarding your register:

Name	Telephone Number	Facsimile Number	E-Mail Address
_____	( ) _____	( ) _____	_____

An officer of your institution must complete the following section.

I certify to the accuracy of the data contained in this register.

Name of Officer	Signature	Date
_____	_____	_____

LOAN/APPLICATION REGISTER Page___of___

Name of Reporting Institution

City, State, ZIP

Form FR HMDA–LAR

Reporter's Identification Number

Agency Code

All columns (except Reasons for Denial) must be completed for each entry. See the instructions for details.

Application or Loan Information								Action Taken		Property Location				Applicant Information A = Applicant CA = Co-Applicant									Other Data		
														Ethnicity		Race		Sex							
Application or Loan Number	Date Application Received (mm/dd/ccyy)	Loan Type	Property Type	Purpose	Owner Occupancy	Loan Amount in Thousands	Preapproval	Type	Date (mm/dd/ccyy)	Five Digit MSA/MD Number	Two Digit State Code	Three Digit County Code	Six Digit Census Tract	A	CA	A	CA	A	CA	Gross Annual Income in thousands	Type of Purchaser of Loan	Reasons for Denial (optional)	Rate Spread	HOEPA Status	Lien Status
Example of Loan Originated Following Preapproval																									
L B - 6 8 7 4 3 9	01/15/2004	1	1	1	1	65	1	1	02/22/2004	47894	51	059	4 2 1 9 . 8 5	2	5	3 5	8	1	5	24	7		N A .	2	1
Example of Preapproval Request Denied																									
5 6 7 8 9 0 4 3 2 1 - 1 2 3 4 0 9 8 7 6 5	06/01/2004	1	1	1	1	125	1	7	06/20/2004	NA	NA	NA	N A .	2	2	3	2	1	2	40	0	1,3	N A .	2	1
Example of Application Denied Following Preapproval																									
0 1 2 3 4 5 6 7 8 9 - 9 8 7 6 5 4 3 2 1 0	03/20/2004	1	1	1	1	50	1	3	04/30/2004	11500	01	015	0 0 2 1 . 0 0	1	1	5	3	2	1	30	0	4,5	N A .	2	1

LOAN/APPLICATION REGISTER CODE SHEET

Use the following codes to complete the Loan/Application Register. The instructions to the HMDA-LAR explain the proper use of each code.

Application or Loan Information

Loan Type:
1—Conventional (any loan other than FHA, VA, FSA, or RHS loans)
2—FHA-insured (Federal Housing Administration)
3—VA-guaranteed (Veterans Administration)
4—FSA/RHS (Farm Service Agency or Rural Housing Service)

Property Type:
1—One to four-family (other than manufactured housing)
2—Manufactured housing
3—Multifamily

Purpose of Loan:
1—Home purchase
2—Home improvement
3—Refinancing

Owner-Occupancy:
1—Owner-occupied as a principal dwelling
2—Not owner-occupied
3—Not applicable

Preapproval (home purchase loans only):
1—Preapproval was requested
2—Preapproval was not requested
3—Not applicable

Action Taken:
1—Loan originated
2—Application approved but not accepted
3—Application denied by financial institution
4—Application withdrawn by applicant
5—File closed for incompleteness
6—Loan purchased by financial institution
7—Preapproval request denied by financial institution
8—Preapproval request approved but not accepted (optional reporting)

Applicant Information

Ethnicity:
1—Hispanic or Latino
2—Not Hispanic or Latino
3—Information not provided by applicant in mail, Internet, or telephone application
4—Not applicable (see App. A, I.D.)
5—No co-applicant

Race:
1—American Indian or Alaska Native
2—Asian
3—Black or African American
4—Native Hawaiian or Other Pacific Islander
5—White
6—Information not provided by applicant in mail, Internet, or telephone application
7—Not applicable (see App. A, I.D.)
8—No co-applicant

Sex:
1—Male
2—Female
3—Information not provided by applicant in mail, Internet, or telephone application
4—Not applicable (see App. A, I.D.)
5—No co-applicant

Type of Purchaser

0—Loan was not originated or was not sold in calendar year covered by register
1—Fannie Mae
2—Ginnie Mae
3—Freddie Mac
4—Farmer Mac
5—Private securitization
6—Commercial bank, savings bank or savings association
7—Life insurance company, credit union, mortgage bank, or finance company
8—Affiliate institution
9—Other type of purchaser

Reasons for Denial (optional reporting)

1—Debt-to-income ratio
2—Employment history
3—Credit history
4—Collateral
5—Insufficient cash (downpayment, closing costs)
6—Unverifiable information
7—Credit application incomplete
8—Mortgage insurance denied
9—Other

Other Data

HOEPA Status (only for loans originated or purchased):
1—HOEPA loan
2—Not a HOEPA loan

Lien Status (only for applications and originations):
1—Secured by a first lien
2—Secured by a subordinate lien
3—Not secured by a lien
4—Not applicable (purchased loans)

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Appendix B to Part 1003—Form and Instructions for Data Collection on Ethnicity, Race, and Sex

I. Instructions on Collection of Data on Ethnicity, Race, and Sex

You may list questions regarding the ethnicity, race, and sex of the applicant on your loan application form, or on a separate form that refers to the application. (See the sample form below for model language.)

II. Procedures

A. You must ask the applicant for this information (but you cannot require the applicant to provide it) whether the application is taken in person, by mail or telephone, or on the internet. For applications taken by telephone, the information in the collection form must be stated orally by the lender, except for that information which pertains uniquely to applications taken in writing.

B. Inform the applicant that the Federal government requests this information in order to monitor compliance with Federal statutes that prohibit lenders from discriminating against applicants on these bases. Inform the applicant that if the information is not provided where the application is taken in person, you are required to note the data on the basis of visual observation or surname.

C. You must offer the applicant the option of selecting one or more racial designations.

D. If the applicant chooses not to provide the information for an application taken in person, note this fact on the form and then note the applicant's ethnicity, race, and sex on the basis of visual observation and surname, to the extent possible.

E. If the applicant declines to answer these questions or fails to provide the information on an application taken by mail or telephone or on the internet, the data need not be provided. In such a case, indicate that the application was received by mail, telephone, or Internet, if it is not otherwise evident on the face of the application.

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SAMPLE DATA-COLLECTION FORM
INFORMATION FOR GOVERNMENT MONITORING PURPOSES

The following information is requested by the federal government for certain types of loans related to a dwelling in order to monitor the lender's compliance with equal credit opportunity, fair housing, and home mortgage disclosure laws. You are not required to furnish this information, but are encouraged to do so. You may select one or more designations for "Race." The law provides that a lender may not discriminate on the basis of this information, or on whether you choose to furnish it. However, if you choose not to furnish the information and you have made this application in person, under federal regulations the lender is required to note ethnicity, race, and sex on the basis of visual observation or surname. If you do not wish to furnish the information, please check below.

APPLICANT:

☐ I do not wish to furnish this information

Ethnicity:

☐ Hispanic or Latino
☐ Not Hispanic or Latino

Race:

☐ American Indian or Alaska Native
☐ Asian
☐ Black or African American
☐ Native Hawaiian or Other Pacific Islander
☐ White

Sex:

☐ Female
☐ Male

CO-APPLICANT:

☐ I do not wish to furnish this information

Ethnicity:

☐ Hispanic or Latino
☐ Not Hispanic or Latino

Race:

☐ American Indian or Alaska Native
☐ Asian
☐ Black or African American
☐ Native Hawaiian or Other Pacific Islander
☐ White

Sex:

☐ Female
☐ Male

BILLING CODE 4810–AM–C

Supplement I to Part 1003—Staff Commentary

Introduction

1. *Status.* The commentary in this supplement is the vehicle by which the Bureau of Consumer Financial Protection issues formal staff interpretations of Regulation C (12 CFR part 1003).

Section 1003.1—Authority, Purpose, and Scope

1(c) *Scope.*

1. *General.* The comments in this section address issues affecting coverage of institutions and exemptions from coverage.

2. *The broker rule and the meaning of ''broker'' and ''investor.''* For the purposes of the guidance given in this commentary, an institution that takes and processes a loan application and arranges for another institution to acquire the loan at or after closing is acting as a ''broker,'' and an institution that acquires a loan from a broker at or after closing is acting as an ''investor.'' (The terms used in this commentary may have different meanings in certain parts of the mortgage lending industry, and other terms may be used in place of these terms, for example in the Federal Housing Administration mortgage insurance programs.) Depending on the facts, a broker may or may not make a credit decision on an application (and thus it may or may not have reporting responsibilities). If the broker makes a credit decision, it reports that decision; if it does not make a credit decision, it does not report. If an investor reviews an application and makes a credit decision prior to closing, the investor reports that decision. If the investor does not review the application prior to closing, it reports only the loans that it purchases; it does not report the loans it does not purchase. An institution that makes a credit decision on an application prior to closing reports that decision regardless of whose name the loan closes in.

3. *Illustrations of the broker rule.* Assume that, prior to closing, four investors receive the same application from a broker; two deny it, one approves it, and one approves it and acquires the loan. In these circumstances, the first two report denials, the third reports the transaction as approved but not accepted, and the fourth reports an origination (whether the loan closes in the name of the broker or the investor). Alternatively, assume that the broker denies a loan before sending it to an investor; in this situation, the broker reports a denial.

4. *Broker's use of investor's underwriting criteria.* If a broker makes a credit decision based on underwriting criteria set by an investor, but without the investor's review prior to closing, the broker has made the credit decision. The broker reports as an origination a loan that it approves and closes, and reports as a denial an application that it turns down (either because the application does not meet the investor's underwriting guidelines or for some other reason). The investor reports as purchases only those loans it purchases.

5. *Insurance and other criteria.* If an institution evaluates an application based on the criteria or actions of a third party other than an investor (such as a government or private insurer or guarantor), the institution must report the action taken on the application (loan originated, approved but not accepted, or denied, for example).

6. *Credit decision of agent is decision of principal.* If an institution approves loans through the actions of an agent, the institution must report the action taken on the application (loan originated, approved but not accepted, or denied, for example). State law determines whether one party is the agent of another.

7. *Affiliate bank underwriting (250.250 review).* If an institution makes an independent evaluation of the creditworthiness of an applicant (for example, as part of a preclosing review by an affiliate bank under 12 CFR 250.250, a regulation of the Board of Governors of the Federal Reserve System that interprets section 23A of the Federal Reserve Act), the institution is making a credit decision. If the institution then acquires the loan, it reports the loan as an origination whether the loan closes in the name of the institution or its affiliate. An institution that does not acquire the loan but takes some other action reports that action.

8. *Participation loan.* An institution that originates a loan and then sells partial interests to other institutions reports the loan as an origination. An institution that acquires only a partial interest in such a loan does not report the transaction even if it has participated in the underwriting and origination of the loan.

9. *Assumptions.* An assumption occurs when an institution enters into a written agreement accepting a new borrower as the obligor on an existing obligation. An institution reports an assumption (or an application for an assumption) as a home purchase loan in the amount of the outstanding principal. If a transaction does not involve a written agreement between a new borrower and the institution, it is not an assumption for HMDA purposes and is not reported.

Section 1003.2—Definitions

Application.

1. *Consistency With Regulation B.* Bureau interpretations that appear in the official staff commentary to Regulation B (Equal Credit Opportunity, 12 CFR part 1002, Supplement I) are generally applicable to the definition of an application under Regulation C. However, under Regulation C the definition of an application does not include prequalification requests.

2. *Prequalification.* A prequalification request is a request by a prospective loan applicant (other than a request for preapproval) for a preliminary determination on whether the prospective applicant would likely qualify for credit under an institution's standards, or for a determination on the amount of credit for which the prospective applicant would likely qualify. Some institutions evaluate prequalification requests through a procedure that is separate from the institution's normal loan application process; others use the same process. In either case, Regulation C does not require an institution to report prequalification requests on the HMDA/LAR, even though these requests may constitute applications under Regulation B for purposes of adverse action notices.

3. *Requests for preapproval.* To be a covered preapproval program, the written commitment issued under the program must result from a full review of the creditworthiness of the applicant, including such verification of income, resources and other matters as is typically done by the institution as part of its normal credit evaluation program. In addition to conditions involving the identification of a suitable property and verification that no material change has occurred in the applicant's financial condition or creditworthiness, the written commitment may be subject only to other conditions (unrelated to the financial condition or creditworthiness of the applicant) that the lender ordinarily attaches to a traditional home mortgage application approval. These conditions are limited to conditions such as requiring an acceptable title insurance binder or a certificate indicating clear termite inspection, and, in the case where the applicant plans to use the proceeds from the sale of the applicant's present home to purchase a new home, a settlement statement showing adequate proceeds from the sale of the present home.

Branch office.

1. *Credit union.* For purposes of Regulation C, a ''branch'' of a credit union is any office where member accounts are established or loans are made, whether or not the office has been approved as a branch by a Federal or state agency. (See 12 U.S.C. 1752.)

2. *Depository institution.* A branch of a depository institution does not include a loan-production office, the office of an affiliate, or the office of a third party such as a loan broker. (But see Appendix A, paragraph I.C.6, which requires certain depository institutions to report property location even for properties located outside those MSAs or Metropolitan Divisions in which the institution has a home or branch office.)

3. *Nondepository institution.* For a nondepository institution, ''branch office'' does not include the office of an affiliate or other third party such as a loan broker. (But note that certain nondepository institutions must report property location even in MSAs or Metropolitan Divisions where they do not have a physical location.)

Dwelling.

1. *Coverage.* The definition of ''dwelling'' is not limited to the principal or other residence of the applicant or borrower, and thus includes vacation or second homes and rental properties. A dwelling also includes a multifamily structure such as an apartment building.

2. *Exclusions.* Recreational vehicles such as boats or campers are not dwellings for purposes of HMDA. Also excluded are transitory residences such as hotels, hospitals, and college dormitories, whose occupants have principal residences elsewhere.

Financial institution.

1. *General.* An institution that met the test for coverage under HMDA in year 1, and then

ceases to meet the test (for example, because its assets fall below the threshold on December 31 of year 2) stops collecting HMDA data beginning with year 3. Similarly, an institution that did not meet the coverage test for a given year, and then meets the test in the succeeding year, begins collecting HMDA data in the calendar year following the year in which it meets the test for coverage. For example, a for-profit mortgage lending institution (other than a bank, savings association, or credit union) that, in year 1, falls below the thresholds specified in the definition of Financial institution in § 1003.2, but meets one of them in year 2, need not collect data in year 2, but begins collecting data in year 3.

2. *Adjustment of exemption threshold for depository institutions.* For data collection in 2011, the asset-size exemption threshold is $40 million. Depository institutions with assets at or below $40 million as of December 31, 2010 are exempt from collecting data for 2011.

3. *Coverage after a merger.* Several scenarios of data-collection responsibilities for the calendar year of a merger are described below. Under all the scenarios, if the merger results in a covered institution, that institution must begin data collection January 1 of the following calendar year.

i. Two institutions are not covered by Regulation C because of asset size. The institutions merge. No data collection is required for the year of the merger (even if the merger results in a covered institution).

ii. A covered institution and an exempt institution merge. The covered institution is the surviving institution. For the year of the merger, data collection is required for the covered institution's transactions. Data collection is optional for transactions handled in offices of the previously exempt institution.

iii. A covered institution and an exempt institution merge. The exempt institution is the surviving institution, or a new institution is formed. Data collection is required for transactions of the covered institution that take place prior to the merger. Data collection is optional for transactions taking place after the merger date.

iv. Two covered institutions merge. Data collection is required for the entire year. The surviving or resulting institution files either a consolidated submission or separate submissions for that year.

4. *Originations.* HMDA coverage depends in part on whether an institution has originated home purchase loans. To determine whether activities with respect to a particular loan constitute an origination, institutions should consult, among other parts of the staff commentary, the discussion of the broker rule under §§ 1003.1(c) and 1003.4(a).

5. *Branches of foreign banks—treated as banks.* A Federal branch or a state-licensed insured branch of a foreign bank is a ''bank'' under section 3(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(a)), and is covered by HMDA if it meets the tests for a depository institution found in § 1003.2 of Regulation C.

6. *Branches and offices of foreign banks—treated as for-profit mortgage lending institutions.* Federal agencies, state-licensed agencies, state-licensed uninsured branches of foreign banks, commercial lending companies owned or controlled by foreign banks, and entities operating under section 25 or 25A of the Federal Reserve Act, 12 U.S.C. 601 and 611 (Edge Act and agreement corporations) are not ''banks'' under the Federal Deposit Insurance Act. These entities are nonetheless covered by HMDA if they meet the tests for a for-profit nondepository mortgage lending institution found in § 1003.2 of Regulation C.

Home improvement loan.

1. Classification requirement for loans not secured by a lien on a dwelling. An institution has ''classified'' a loan that is not secured by a lien on a dwelling as a home improvement loan if it has entered the loan on its books as a home improvement loan, or has otherwise coded or identified the loan as a home improvement loan. For example, an institution that has booked a loan or reported it on a ''call report'' as a home improvement loan has classified it as a home improvement loan. An institution may also classify loans as home improvement loans in other ways (for example, by color-coding loan files).

2. *Improvements to real property.* Home improvements include improvements both to a dwelling and to the real property on which the dwelling is located (for example, installation of a swimming pool, construction of a garage, or landscaping).

3. *Commercial and other loans.* A home improvement loan may include a loan originated outside an institution's residential mortgage lending division (such as a loan to improve an apartment building made through the commercial loan department).

4. *Mixed-use property.* A loan to improve property used for residential and commercial purposes (for example, a building containing apartment units and retail space) is a home improvement loan if the loan proceeds are used primarily to improve the residential portion of the property. If the loan proceeds are used to improve the entire property (for example, to replace the heating system), the loan is a home improvement loan if the property itself is primarily residential. An institution may use any reasonable standard to determine the primary use of the property, such as by square footage or by the income generated. An institution may select the standard to apply on a case-by-case basis. If the loan is unsecured, to report the loan as a home improvement loan the institution must also have classified it as such.

5. *Multiple-category loans.* If a loan is a home improvement loan as well as a refinancing, an institution reports the loan as a home improvement loan.

Home purchase loan.

1. *Multiple properties.* A home purchase loan includes a loan secured by one dwelling and used to purchase another dwelling.

2. *Mixed-use property.* A dwelling-secured loan to purchase property used primarily for residential purposes (for example, an apartment building containing a convenience store) is a home purchase loan. An institution may use any reasonable standard to determine the primary use of the property, such as by square footage or by the income generated. An institution may select the standard to apply on a case-by-case basis.

3. *Farm loan.* A loan to purchase property used primarily for agricultural purposes is not a home purchase loan even if the property includes a dwelling. An institution may use any reasonable standard to determine the primary use of the property, such as by reference to the exemption from Regulation X (Real Estate Settlement Procedures, 12 CFR 1024.5(b)(1)) for a loan on property of 25 acres or more. An institution may select the standard to apply on a case-by-case basis.

4. *Commercial and other loans.* A home purchase loan may include a loan originated outside an institution's residential mortgage lending division (such as a loan for the purchase of an apartment building made through the commercial loan department).

5. *Construction and permanent financing.* A home purchase loan includes both a combined construction/permanent loan and the permanent financing that replaces a construction-only loan. It does not include a construction-only loan, which is considered ''temporary financing'' under Regulation C and is not reported.

6. *Second mortgages that finance the downpayments on first mortgages.* If an institution making a first mortgage loan to a home purchaser also makes a second mortgage loan to the same purchaser to finance part or all of the home purchaser's downpayment, the institution reports each loan separately as a home purchase loan.

7. *Multiple-category loans.* If a loan is a home purchase loan as well as a home improvement loan, or a refinancing, an institution reports the loan as a home purchase loan.

Manufactured home.

1. *Definition of a manufactured home.* The definition in § 1003.2 refers to the Federal building code for factory-built housing established by the Department of Housing and Urban Development (HUD). The HUD code requires generally that housing be essentially ready for occupancy upon leaving the factory and being transported to a building site. Modular homes that meet all of the HUD code standards are included in the definition because they are ready for occupancy upon leaving the factory. Other factory-built homes, such as panelized and pre-cut homes, generally do not meet the HUD code because they require a significant amount of construction on site before they are ready for occupancy. Loans and applications relating to manufactured homes that do not meet the HUD code should not be identified as manufactured housing under HMDA.

Metropolitan Statistical Areas and Metropolitan Divisions.

1. *Use of terms ''Metropolitan Statistical Area'' and ''Metropolitan Division.''* The U.S. Office of Management and Budget defines Metropolitan Statistical Areas and Metropolitan Divisions to provide nationally consistent definitions for collecting, tabulating, and publishing Federal statistics for a set of geographic areas. OMB divides every Metropolitan Statistical Area (MSA) with a population of 2.5 million or more into Metropolitan Divisions (MDs); MSAs with populations under 2.5 million population are not so divided. 67 FR 82228 (December 27,

2000). For all purposes under Regulation C, if an MSA is divided by OMB into MDs, the appropriate geographic unit to be used is the MD; if an MSA is not so divided by OMB into MDs, the appropriate geographic unit to be used is the MSA.

Section 1003.4—Compilation of Loan Data

4(a) Data format and itemization.

1. *Reporting requirements.* i. An institution reports data on loans that it originated and loans that it purchased during the calendar year described in the report. An institution reports these data even if the loans were subsequently sold by the institution.

ii. An institution reports the data for loan applications that did not result in originations—for example, applications that the institution denied or that the applicant withdrew during the calendar year covered by the report.

iii. In the case of brokered loan applications or applications forwarded through a correspondent, the institution reports as originations the loans that it approved and subsequently acquired per a pre-closing arrangement (whether or not they closed in the institution's name). Additionally, the institution reports the data for all applications that did not result in originations—for example, applications that the institution denied or that the applicant withdrew during the calendar year covered by the report (whether or not they would have closed in the institution's name). For all of these loans and applications, the institution reports the required data regarding the borrower's or applicant's ethnicity, race, sex, and income.

iv. Loan originations are to be reported only once. If the institution is the loan broker or correspondent, it does not report as originations the loans that it forwarded to another lender for approval prior to closing, and that were approved and subsequently acquired by that lender (whether or not they closed in the institution's name).

v. An institution reports applications that were received in the previous calendar year but were acted upon during the calendar year covered by the current register.

vi. A financial institution submits all required data to the appropriate Federal agency in one package, with the prescribed transmittal sheet. An officer of the institution certifies to the accuracy of the data.

vii. The transmittal sheet states the total number of line entries contained in the accompanying data transmission.

2. *Updating—agency requirements.* Certain state or Federal regulations, such as the Federal Deposit Insurance Corporation's regulations, may require an institution to update its data more frequently than is required under Regulation C.

3. *Form of quarterly updating.* An institution may maintain the quarterly updates of the HMDA/LAR in electronic or any other format, provided the institution can make the information available to its regulatory agency in a timely manner upon request.

Paragraph 4(a)(1).

1. *Application date—consistency.* In reporting the date of application, an institution reports the date the application was received or the date shown on the application. Although an institution need not choose the same approach for its entire HMDA submission, it should be generally consistent (such as by routinely using one approach within a particular division of the institution or for a category of loans).

2. *Application date—application forwarded by a broker.* For an application forwarded by a broker, an institution reports the date the application was received by the broker, the date the application was received by the institution, or the date shown on the application. Although an institution need not choose the same approach for its entire HMDA submission, it should be generally consistent (such as by routinely using one approach within a particular division of the institution or for a category of loans).

3. *Application date—reinstated application.* If, within the same calendar year, an applicant asks an institution to reinstate a counteroffer that the applicant previously did not accept (or asks the institution to reconsider an application that was denied, withdrawn, or closed for incompleteness), the institution may treat that request as the continuation of the earlier transaction or as a new transaction. If the institution treats the request for reinstatement or reconsideration as a new transaction, it reports the date of the request as the application date.

4. *Application or loan number.* An institution must ensure that each identifying number is unique within the institution. If an institution's register contains data for branch offices, for example, the institution could use a letter or a numerical code to identify the loans or applications of different branches, or could assign a certain series of numbers to particular branches to avoid duplicate numbers. Institutions are strongly encouraged not to use the applicant's or borrower's name or social security number, for privacy reasons.

5. *Application—year action taken.* An institution must report an application in the calendar year in which the institution takes final action on the application.

Paragraph 4(a)(3).

1. *Purpose—statement of applicant.* An institution may rely on the oral or written statement of an applicant regarding the proposed use of loan proceeds. For example, a lender could use a check-box, or a purpose line, on a loan application to determine whether or not the applicant intends to use loan proceeds for home improvement purposes.

2. *Purpose—multiple-purpose loan.* If a loan is a home purchase loan as well as a home improvement loan, or a refinancing, an institution reports the loan as a home purchase loan. If a loan is a home improvement loan as well as a refinancing, an institution reports the loan as a home improvement loan.

Paragraph 4(a)(6).

1. *Occupancy—multiple properties.* If a loan relates to multiple properties, the institution reports the owner occupancy status of the property for which property location is being reported. (See the comments to paragraph 4(a)(9)).

Paragraph 4(a)(7).

1. *Loan amount—counteroffer.* If an applicant accepts a counteroffer for an amount different from the amount initially requested, the institution reports the loan amount granted. If an applicant does not accept a counteroffer or fails to respond, the institution reports the loan amount initially requested.

2. *Loan amount—multiple-purpose loan.* Except in the case of a home-equity line of credit, an institution reports the entire amount of the loan, even if only a part of the proceeds is intended for home purchase or home improvement.

3. *Loan amount—home-equity line.* An institution that has chosen to report home-equity lines of credit reports only the part that is intended for home-improvement or home-purchase purposes.

4. *Loan amount—assumption.* An institution that enters into a written agreement accepting a new party as the obligor on a loan reports the amount of the outstanding principal on the assumption as the loan amount.

Paragraph 4(a)(8).

1. *Action taken—counteroffers.* If an institution makes a counteroffer to lend on terms different from the applicant's initial request (for example, for a shorter loan maturity or in a different amount) and the applicant does not accept the counteroffer or fails to respond, the institution reports the action taken as a denial on the original terms requested by the applicant.

2. *Action taken—rescinded transactions.* If a borrower rescinds a transaction after closing, the institution may report the transaction either as an origination or as an application that was approved but not accepted.

3. *Action taken—purchased loans.* An institution reports the loans that it purchased during the calendar year, and does not report the loans that it declined to purchase.

4. *Action taken—conditional approvals.* If an institution issues a loan approval subject to the applicant's meeting underwriting conditions (other than customary loan commitment or loan-closing conditions, such as a clear-title requirement or an acceptable property survey) and the applicant does not meet them, the institution reports the action taken as a denial.

5. *Action taken date—approved but not accepted.* For a loan approved by an institution but not accepted by the applicant, the institution reports any reasonable date, such as the approval date, the deadline for accepting the offer, or the date the file was closed. Although an institution need not choose the same approach for its entire HMDA submission, it should be generally consistent (such as by routinely using one approach within a particular division of the institution or for a category of loans).

6. *Action taken date—originations.* For loan originations, an institution generally reports the settlement or closing date. For loan originations that an institution acquires through a broker, the institution reports either the settlement or closing date, or the date the institution acquired the loan from the broker. If the disbursement of funds takes place on a date later than the settlement or closing date, the institution may use the date

of disbursement. For a construction/permanent loan, the institution reports either the settlement or closing date, or the date the loan converts to the permanent financing. Although an institution need not choose the same approach for its entire HMDA submission, it should be generally consistent (such as by routinely using one approach within a particular division of the institution or for a category of loans). Notwithstanding this flexibility regarding the use of the closing date in connection with reporting the date action was taken, the year in which an origination goes to closing is the year in which the institution must report the origination.

7. *Action taken—pending applications.* An institution does not report any loan application still pending at the end of the calendar year; it reports that application on its register for the year in which final action is taken.

Paragraph 4(a)(9).

1. *Property location—multiple properties (home improvement/refinance of home improvement).* For a home improvement loan, an institution reports the property being improved. If more than one property is being improved, the institution reports the location of one of the properties or reports the loan using multiple entries on its HMDA/LAR (with unique identifiers) and allocating the loan amount among the properties.

2. *Property location—multiple properties (home purchase/refinance of home purchase).* For a home purchase loan, an institution reports the property taken as security. If an institution takes more than one property as security, the institution reports the location of the property being purchased if there is just one. If the loan is to purchase multiple properties and is secured by multiple properties, the institution reports the location of one of the properties or reports the loan using multiple entries on its HMDA/LAR (with unique identifiers) and allocating the loan amount among the properties.

3. *Property location—loans purchased from another institution.* The requirement to report the property location by census tract in an MSA or Metropolitan Division where the institution has a home or branch office applies not only to loan applications and originations but also to loans purchased from another institution. This includes loans purchased from an institution that did not have a home or branch office in that MSA or Metropolitan Division and did not collect the property-location information.

4. *Property location—mobile or manufactured home.* If information about the potential site of a mobile or manufactured home is not available, an institution reports using the Code for ''not applicable.''

Paragraph 4(a)(10).

1. *Applicant data—completion by applicant.* An institution reports the monitoring information as provided by the applicant. For example, if an applicant checks the ''Asian'' box the institution reports using the ''Asian'' Code.

2. *Applicant data—completion by lender.* If an applicant fails to provide the requested information for an application taken in person, the institution reports the data on the basis of visual observation or surname.

3. *Applicant data—application completed in person.* When an applicant meets in person with a lender to complete an application that was begun by mail, internet, or telephone, the institution must request the monitoring information. If the meeting occurs after the application process is complete, for example, at closing, the institution is not required to obtain monitoring information.

4. *Applicant data—joint applicant.* A joint applicant may enter the government monitoring information on behalf of an absent joint applicant. If the information is not provided, the institution reports using the Code for ''information not provided by applicant in mail, internet, or telephone application.''

5. *Applicant data—video and other electronic-application processes.* An institution that accepts applications through electronic media with a video component treats the applications as taken in person and collects the information about the ethnicity, race, and sex of applicants. An institution that accepts applications through electronic media without a video component (for example, the internet or facsimile) treats the applications as accepted by mail.

6. *Income data—income relied on.* An institution reports the gross annual income relied on in evaluating the creditworthiness of applicants. For example, if an institution relies on an applicant's salary to compute a debt-to-income ratio but also relies on the applicant's annual bonus to evaluate creditworthiness, the institution reports the salary and the bonus to the extent relied upon. Similarly, if an institution relies on the income of a cosigner to evaluate creditworthiness, the institution includes this income to the extent relied upon. But an institution does not include the income of a guarantor who is only secondarily liable.

7. *Income data—co-applicant.* If two persons jointly apply for a loan and both list income on the application, but the institution relies only on the income of one applicant in computing ratios and in evaluating creditworthiness, the institution reports only the income relied on.

8. *Income data—loan to employee.* An institution may report ''NA'' in the income field for loans to its employees to protect their privacy, even though the institution relied on their income in making its credit decisions.

Paragraph 4(a)(11).

1. *Type of purchaser—loan-participation interests sold to more than one entity.* An institution that originates a loan, and then sells it to more than one entity, reports the ''type of purchaser'' based on the entity purchasing the greatest interest, if any. If an institution retains a majority interest, it does not report the sale.

2. *Type of purchaser—swapped loans.* Loans ''swapped'' for mortgage-backed securities are to be treated as sales; the purchaser is the type of entity receiving the loans that are swapped.

Paragraph 4(a)(12)(ii).

1. *Average prime offer rate.* Average prime offer rates are annual percentage rates derived from average interest rates, points, and other loan pricing terms offered to borrowers by a representative sample of lenders for mortgage loans that have low-risk pricing characteristics. Other pricing terms include commonly used indices, margins, and initial fixed-rate periods for variable-rate transactions. Relevant pricing characteristics include a consumer's credit history and transaction characteristics such as the loan-to-value ratio, owner-occupant status, and purpose of the transaction. To obtain average prime offer rates, the Bureau uses a survey of lenders that both meets the criteria of § 1003.4(a)(12)(ii) and provides pricing terms for at least two types of variable-rate transactions and at least two types of non-variable-rate transactions. An example of such a survey is the Freddie Mac Primary Mortgage Market Survey®.

2. *Comparable transaction.* The rate spread reporting requirement applies to a reportable loan with an annual percentage rate that exceeds by the specified margin (or more) the average prime offer rate for a comparable transaction as of the date the interest rate is set. The tables of average prime offer rates published by the Bureau (*see* comment 4(a)(12)(ii)–3) indicate how to identify the comparable transaction.

3. *Bureau tables.* The Bureau publishes on the FFIEC's Web site (*http://www.ffiec.gov/hmda*), in table form, average prime offer rates for a wide variety of transaction types. The Bureau calculates an annual percentage rate, consistent with Regulation Z (*see* 12 CFR 1026.22 and Part 1026, Appendix J), for each transaction type for which pricing terms are available from the survey described in comment 4(a)(12)(ii)–1. The Bureau estimates annual percentage rates for other types of transactions for which direct survey data are not available based on the loan pricing terms available in the survey and other information. The Bureau publishes on the FFIEC's Web site the methodology it uses to arrive at these estimates.

Paragraph 4(a)(14).

1. *Determining lien status for applications and loans originated.* i. Lenders are required to report lien status for loans they originate and applications that do not result in originations. Lien status is determined by reference to the best information readily available to the lender at the time final action is taken and to the lender's own procedures. Thus, lenders may rely on the title search they routinely perform as part of their underwriting procedures—for example, for home purchase loans. Regulation C does not require lenders to perform title searches solely to comply with HMDA reporting requirements. Lenders may rely on other information that is readily available to them at the time final action is taken and that they reasonably believe is accurate, such as the applicant's statement on the application or the applicant's credit report. For example, where the applicant indicates on the application that there is a mortgage on the property or where the applicant's credit report shows that the applicant has a mortgage—and that mortgage is not going to be paid off as part of the transaction—the lender may assume that the loan it originates is secured by a subordinate lien. If the same application did not result in an origination—for example, because the application is denied or withdrawn—the lender would

report the application as an application for a subordinate-lien loan.

ii. Lenders may also consider their established procedures when determining lien status for applications that do not result in originations. For example, a consumer applies to a lender to refinance a $100,000 first mortgage; the consumer also has a home equity line of credit for $20,000. If the lender's practice in such a case is to ensure that it will have first-lien position—through a subordination agreement with the holder of the mortgage on the home equity line—then the lender should report the application as an application for a first-lien loan.

Paragraph 4(c)(3).

1. An institution that opts to report home-equity lines reports the disposition of all applications, not just originations.

4(d) Excluded data.

1. *Mergers, purchases in bulk, and branch acquisitions.* If a covered institution acquires loans in bulk from another institution (for example, from the receiver for a failed institution) but no merger or acquisition of the institution, or acquisition of a branch, is involved, the institution reports the loans as purchased loans.

Section 1003.5(a)—Disclosure and Reporting

5(a) Reporting to agency.

1. *Submission of data.* Institutions submit data to the appropriate Federal agencies in an automated, machine-readable form. The format must conform to that of the HMDA/LAR. An institution should contact the appropriate Federal agency for information regarding procedures and technical specifications for automated data submission; in some cases, agencies also make software available for automated data submission. The data are edited before submission, using the edits included in the agency-supplied software or equivalent edits in software available from vendors or developed in-house.

2. *Submission in paper form.* Institutions that report twenty-five or fewer entries on their HMDA/LAR may collect and report the data in paper form. An institution that submits its register in non-automated form sends two copies that are typed or computer printed and must use the format of the HMDA/LAR (but need not use the form itself). Each page must be numbered along with the total number of pages (for example, ''Page 1 of 3'').

3. *Procedures for entering data.* The required data are entered in the register for each loan origination, each application acted on, and each loan purchased during the calendar year. The institution should decide on the procedure it wants to follow—for example, whether to begin entering the required data, when an application is received, or to wait until final action is taken (such as when a loan goes to closing or an application is denied).

4. *Options for collection.* An institution may collect data on separate registers at different branches, or on separate registers for different loan types (such as for home purchase or home improvement loans, or for loans on multifamily dwellings). Entries need not be grouped on the register by MSA or Metropolitan Division, or chronologically, or by census tract numbers, or in any other particular order.

5. *Change in appropriate Federal agency.* If the appropriate Federal agency for a covered institution changes (as a consequence of a merger or a change in the institution's charter, for example), the institution must report data to the new appropriate Federal agency beginning with the year of the change.

6. *Subsidiaries.* An institution is a subsidiary of a bank or savings association (for purposes of reporting HMDA data to the same agency as the parent) if the bank or savings association holds or controls an ownership interest that is greater than 50 percent of the institution.

7. *Transmittal sheet—additional data submissions.* If an additional data submission becomes necessary (for example, because the institution discovers that data were omitted from the initial submission, or because revisions are called for), that submission must be accompanied by a transmittal sheet.

8. *Transmittal sheet—revisions or deletions.* If a data submission involves revisions or deletions of previously submitted data, it must state the total of all line entries contained in that submission, including both those representing revisions or deletions of previously submitted entries, and those that are being resubmitted unchanged or are being submitted for the first time. Depository institutions must provide a list of the MSAs or Metropolitan Divisions in which they have home or branch offices.

5(b) Public disclosure of statement.

1. *Business day.* For purposes of § 1003.5, a business day is any calendar day other than a Saturday, Sunday, or legal public holiday.

2. *Format.* An institution may make the disclosure statement available in paper form or, if the person requesting the data agrees, in electronic form.

5(c) Public disclosure of modified loan/application register.

1. *Format.* An institution may make the modified register available in paper or electronic form. Although institutions are not required to make the modified register available in census tract order, they are strongly encouraged to do so in order to enhance its utility to users.

5(e) Notice of availability.

1. *Poster—suggested text.* An institution may use any text that meets the requirements of the regulation. Some of the Federal agencies that receive HMDA data provide HMDA posters that an institution can use to inform the public of the availability of its HMDA data, or the institution may create its own posters. If an institution prints its own, the following language is suggested but is not required:

Home Mortgage Disclosure Act Notice

The HMDA data about our residential mortgage lending are available for review. The data show geographic distribution of loans and applications; ethnicity, race, sex, and income of applicants and borrowers; and information about loan approvals and denials. Inquire at this office regarding the locations where HMDA data may be inspected.

2. *Additional language for institutions making the disclosure statement available on request.* An institution that posts a notice informing the public of the address to which a request should be sent could include the following sentence, for example, in its general notice: ''To receive a copy of these data send a written request to [address].''

Section 1003.6—Enforcement

6(b) Bona fide errors.

1. *Bona fide error—information from third parties.* An institution that obtains the property-location information for applications and loans from third parties (such as appraisers or vendors of ''geocoding'' services) is responsible for ensuring that the information reported on its HMDA/LAR is correct.

Dated: October 24, 2011.

Alastair M. Fitzpayne,

Deputy Chief of Staff and Executive Secretary, Department of the Treasury.

[FR Doc. 2011–31712 Filed 12–20–11; 8:45 am]

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1007 and 1008

[Docket No. CFPB–2011–0023]

RIN 3170–AA06

S.A.F.E. Mortgage Licensing Act (Regulations G & H)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interim final rule with request for public comment.

SUMMARY: Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) transferred rulemaking authority for a number of consumer financial protection laws from seven Federal agencies to the Bureau of Consumer Financial Protection (Bureau) as of July 21, 2011. The Bureau is in the process of republishing the regulations implementing those laws with technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. In light of the transfer to the Bureau of the rulemaking authority of the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the National Credit Union Administration, the Federal Deposit Insurance Corporation, and the Department of Housing and Urban Development for the Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E. Act), the Bureau is publishing for public comment an interim final rule establishing a new Regulation G (S.A.F.E. Mortgage Licensing Act—Federal Registration of Residential Mortgage Loan Originators) and a new

Regulation H (S.A.F.E. Mortgage Licensing Act—State Compliance and Bureau Registration System). This interim final rule also covers employees of institutions regulated by the Farm Credit Administration. This interim final rule does not impose any new substantive obligations on persons subject to the existing S.A.F.E. Act regulations.

DATES: This interim final rule is effective on December 30, 2011. Comments must be received on or before February 17, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2011–0023 or RIN 3170–AA06, by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1500 Pennsylvania Avenue NW., (Attn: 1801 L Street), Washington, DC 20220.
- *Hand Delivery/Courier in Lieu of Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20006, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Mitchell E. Hochberg or Joseph Devlin, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Background

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act) provides for the licensing and/or registration of mortgage loan originators. The S.A.F.E. Act requires employees of depository institutions, employees of subsidiaries that are owned and controlled by a depository institution and regulated by a Federal banking agency, or employees of institutions regulated by the Farm Credit Administration who act as residential mortgage loan originators to register with the Nationwide Mortgage Licensing System and Registry, obtain a unique identifier, and maintain this registration. The S.A.F.E. Act further requires states to adopt minimum standards for licensing residential mortgage loan originators.

Historically, the Federal registration requirements of the S.A.F.E. Act have been implemented through a coordinated rulemaking of the Federal banking agencies and the Farm Credit Administration with authority over Federal registration requirements under the S.A.F.E. Act (collectively, the Federal registry agencies).[1] Further, prior to July 21, 2011, the S.A.F.E. Act charged the Department of Housing and Urban Development (HUD) with evaluation of states' compliance with the S.A.F.E. Act and with establishing and maintaining a licensing and registration system for a state or territory that does not have a system in place for licensing loan originators that meets the requirements of the S.A.F.E. Act.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[2] amended a number of consumer financial protection laws, including the S.A.F.E. Act. In addition to minor amendments, the Dodd-Frank Act transferred rulemaking authority for the S.A.F.E. Act from the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the National Credit Union Administration, the Federal Deposit Insurance Corporation, and the Department of Housing and Urban Development to the Bureau of Consumer Financial Protection (Bureau), effective July 21, 2011.[3] *See* sections 1061 and 1100 of the Dodd-Frank Act. The Dodd-Frank Act also granted the Bureau rulemaking authority pursuant to the S.A.F.E. Act with respect to employees of institutions regulated by the Farm Credit Administration. *See* section 1100 of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and the S.A.F.E. Act, as amended, the Bureau is publishing for public comment an interim final rule establishing a new Regulation G, S.A.F.E. Mortgage Licensing Act—Federal Registration of Residential Mortgage Loan Originators, 12 CFR part 1007, implementing the Federal registration requirements of the S.A.F.E. Act and a new Regulation H, S.A.F.E. Mortgage Licensing Act—State Compliance and Bureau Registration System, 12 CFR Part 1008, implementing the requirements with respect to states' compliance with the S.A.F.E. Act and the maintenance of a licensing and registration system for a state or territory that does not have a system in place for licensing loan originators that meets the requirements of the S.A.F.E. Act.

II. Summary of the Interim Final Rule

A. General

The interim final rule substantially duplicates the Federal registry agencies' largely identical coordinated rules as the Bureau's new Regulation G, 12 CFR part 1007, making only certain non-substantive, technical, formatting, and stylistic changes. The interim final rule also substantially duplicates HUD's rule as the Bureau's new Regulation H, 12 CFR part 1008. To minimize any potential confusion, the Bureau is preserving the past numbering systems of the Federal registry agencies and HUD, other than the new part numbers and, with respect to Regulation G, the enumeration of the individual definitions in section 1007.102. While this interim final rule generally incorporates and consolidates the largely identical rules of the Federal registry agencies and HUD, the rule has been edited as necessary to reflect nomenclature and other technical amendments required by the Dodd-Frank Act. Notably, this interim final rule does not impose any new substantive obligations on regulated entities. Regulated entities and their employees that were registered with the Nationwide Mortgage Licensing System and Registry and had obtained unique identifiers pursuant to the regulations of the Federal registry agencies as of the effective date of this Regulation G will be considered by the Bureau to have registered pursuant to the new Regulation G.

B. Specific Changes

The new Regulation G consolidates the regulations of the Office of the Comptroller of the Currency (12 CFR part 34); the Federal Reserve System (12

[1] 75 FR 44656 (July 28, 2010). The rules were promulgated by the Office of the Comptroller of the Currency (12 CFR part 34); the Federal Reserve System (12 CFR parts 208 and 211); the Federal Deposit Insurance Corporation (12 CFR part 365); the Office of Thrift Supervision (12 CFR part 563); the Farm Credit Administration (12 CFR part 610); and the National Credit Union Administration (12 CFR parts 741 and 761).

[2] Public Law 111–203, 124 Stat. 1376 (2010).

[3] Dodd-Frank section 1029 generally excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

CFR parts 208 and 211); the Federal Deposit Insurance Corporation (12 CFR part 365); the Office of Thrift Supervision (12 CFR part 563); the Farm Credit Administration (12 CFR part 610); and the National Credit Union Administration (12 CFR parts 741 and 761) pursuant to the conforming changes in section 1100 of the Dodd-Frank Act. Further, the new Regulation H has been changed to effect technical, non-substantive changes to HUD's existing regulatory text of 24 CFR part 3400.

For both Regulations G and H, references to the respective banking agencies and HUD have been replaced with references to the Bureau in the new regulations. Conforming edits have been made to internal cross-references. Conforming edits have also been made to reflect the scope of the Bureau's authority pursuant to the requirements of the S.A.F.E. Act, as amended by the Dodd-Frank Act. For example, references to the Federal registry agencies and HUD and their respective administrative structures have been replaced with references to the Bureau and its administrative structure. Conforming edits have been made to internal cross-references and addresses. Historical references that are no longer applicable, and references to effective dates that have passed, have been removed.

III. Legal Authority

A. Rulemaking Authority

The Bureau is issuing this interim final rule pursuant to its authority under the S.A.F.E. Act and the Dodd-Frank Act.[4] Effective July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies. The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.'' [5] The S.A.F.E. Act is a ''Federal consumer financial law.'' [6] Additionally, section 1061 transferred to the Bureau all of the HUD Secretary's consumer protection functions relating to the S.A.F.E. Act, which includes rulemaking authority. The Dodd-Frank Act also granted the Bureau rulemaking authority pursuant to the S.A.F.E. Act with respect to employees of institutions regulated by the Farm Credit Administration.[7] Accordingly, effective July 21, 2011, the Bureau has rulemaking authority for the S.A.F.E. Act.[8]

The S.A.F.E. Act, as amended, authorizes the Bureau to ''develop and maintain a system for registering employees of a depository institution, employees of a subsidiary that is owned and controlled by a depository institution and regulated by a Federal banking agency, or employees of an institution regulated by the Farm Credit Administration, as registered loan originators with the Nationwide Mortgage Licensing System and Registry.'' [9] The S.A.F.E. Act also authorizes the Bureau to make such de minimis exceptions to the registration requirements as may be appropriate.[10] Further, under the S.A.F.E. Act, if the Bureau determines that a state's loan origination licensing system does not meet the minimum requirements of the S.A.F.E. Act, the Bureau is charged with establishing and implementing a system for all loan originators in that state. Additionally, if at any time the Bureau determines that the nationwide mortgage licensing system and registry is failing to meet the S.A.F.E. Act's requirements, the Bureau is charged with establishing and maintaining a licensing and registry database for loan originators.[11] Regulations G and H are issued in accordance with these authorities.

B. Authority To Issue an Interim Final Rule Without Prior Notice and Comment

The Administrative Procedure Act (APA) [12] generally requires public notice and an opportunity to comment before promulgation of regulations.[13] The APA provides exceptions to notice-and-comment procedures, however, where an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest or when a rulemaking relates to agency organization, procedure, and practice.[14] The Bureau finds that there is good cause to conclude that providing notice and opportunity for comment would be unnecessary and contrary to the public interest under these circumstances. In addition, substantially all the changes made by this interim final rule, which were necessitated by the Dodd-Frank Act's transfer of S.A.F.E. Act authority to the Bureau, relate to agency organization, procedure, and practice and are thus exempt from the APA's notice-and-comment requirements.

The Bureau's good cause findings are based on the following considerations. As an initial matter, the Federal registry agencies and HUD's existing regulations were a result of notice-and-comment rulemaking to the extent required. Moreover, the interim final rule published today does not impose any new, substantive obligations on regulated entities. Rather, the interim final rule makes only non-substantive, technical changes to the existing text of the regulations, such as renumbering, changing internal cross-references, replacing appropriate nomenclature to reflect the transfer of authority to the bureau, and updating to reflect the expiration of certain deadlines. Given the technical nature of these changes, and the fact that the interim final rule does not impose any additional substantive requirements on covered entities, an opportunity for prior public comment is unnecessary. In addition, recodifying the Federal registry agencies' and HUD's regulations to reflect the transfer of authority to the Bureau will help facilitate compliance with the S.A.F.E. Act and its implementing regulations, and the new regulations will help reduce uncertainty regarding the applicable regulatory framework. Using notice-and-comment procedures would delay this process and thus be contrary to the public interest.

The APA generally requires that rules be published not less than 30 days

[4] In addition, the Bureau also relies on section 1402 of the Dodd-Frank Act, which amends the Truth in Lending Act (TILA) to provide the Bureau with specific rulemaking authority over mortgage originator qualifications, among other things. The Bureau also has authority to make adjustments and exceptions with respect to consumer credit transactions pursuant to TILA rulemaking authority. *See* 15 U.S.C. 1604(a), 1639b.

[5] Public Law 111–203, section 1061(a)(1). Effective on the designated transfer date, July 21, 2011, the Bureau was also granted ''all powers and duties'' vested in certain other Federal agencies, relating to the consumer financial protection functions, on the day before the designated transfer date. Until this and other interim final rules take effect with respect to the functions transferred pursuant to section 1061, existing regulations for which rulemaking authority transferred to the Bureau continue to govern persons covered by this rule. *See* 76 FR 43569 (July 21, 2011).

[6] Public Law 111–203, section 1002(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws''); *id.* Section 1002(12) (defining ''enumerated consumer laws'' to include the S.A.F.E. Act).

[7] Public Law 111–203, section 1100.

[8] Section 1066 of the Dodd-Frank Act grants the Secretary of the Treasury interim authority to perform certain functions of the Bureau. Pursuant to that authority, Treasury is publishing this interim final rule on behalf of the Bureau.

[9] Public Law 111–203, section 1100(5)(A).

[10] 12 U.S.C. 5106(c).

[11] 12 U.S.C. 5107–5108.

[12] 5 U.S.C. 551 *et seq.*

[13] 5 U.S.C. 553(b), (c).

[14] 5 U.S.C. 553(b)(B).

before their effective dates. *See* 5 U.S.C. 553(d). As with the notice and comment requirement, however, the APA allows an exception when ''otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). The Bureau finds that there is good cause for providing less than 30 days notice here. A delayed effective date would harm consumers and regulated entities by needlessly perpetuating discrepancies between the amended statutory text and the implementing regulation, thereby hindering compliance and prolonging uncertainty regarding the applicable regulatory framework.[15]

In addition, delaying the effective date of the interim final rule for 30 days would provide no practical benefit to regulated entities in this context and in fact could operate to their detriment. As discussed above, the interim final rule published today does not impose any new, substantive obligations on regulated entities. Instead, the rule makes only non-substantive, technical changes to the existing text of the regulation. Thus, regulated entities that are already in compliance with the existing rules will not need to modify business practices as a result of this rule.

C. Section 1022(b)(2) of the Dodd-Frank Act

In developing the interim final rule, the Bureau has conducted an analysis of potential benefits, costs, and impacts.[16] The Bureau believes that the interim final rule will benefit consumers and covered persons by updating and recodifying in Regulations G and H the Federal registry agencies' and HUD's S.A.F.E. Act regulations to reflect the transfer of authority to the Bureau and certain other changes mandated by the Dodd-Frank Act. This will help facilitate compliance with the S.A.F.E. Act and its implementing regulations and help reduce any uncertainty regarding the applicable regulatory framework. The interim final rule will not impose any new substantive obligations on consumers or covered persons and is not expected to have any impact on consumers' access to consumer financial products and services.

Although not required by the interim final rule, covered entities may incur some costs in updating compliance manuals and related materials to reflect the new numbering and other technical changes reflected in the new Regulations G and H. The Bureau has worked to reduce any such burden by preserving the existing numbering to the extent possible and believes that such costs will likely be minimal. These changes could be handled in the short term by providing a short, standalone summary alerting users to the changes and in the long term could be combined with other updates at the covered entities' convenience. The Bureau intends to continue investigating the possible costs to affected entities of updating manuals and related materials to reflect these changes and solicits comments on this and other issues discussed in this section.

The interim final rule will have no unique impact on depository institutions or credit unions with $10 billion or less in assets described in section 1026(a) of the Dodd-Frank Act. Also, the interim final rule will have no unique impact on rural consumers.

In undertaking the process of updating and recodifying in Regulations G and H the Federal registry agencies' and HUD's S.A.F.E. Act regulations, as well as regulations implementing thirteen other existing consumer financial laws,[17] the Bureau consulted the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, the Board of Governors of the Federal Reserve System, the Federal Trade Commission, and the Department of Housing and Urban Development, including with respect to consistency with any prudential, market, or systemic objectives that may be administered by such agencies.[18] The Bureau also consulted the Farm Credit Administration regarding the recodification of Regulation G and consulted with the Office of Management and Budget for technical assistance. The Bureau expects to have further consultations with the appropriate Federal agencies during the comment period.

IV. Request for Comment

Although notice and comment rulemaking procedures are not required, the Bureau invites comments on this notice. Commenters are specifically encouraged to identify any technical issues raised by the rule. The Bureau is also seeking comment in response to a notice published at 76 FR 75825 (Dec. 5, 2011) concerning its efforts to identify priorities for streamlining regulations that it has inherited from other Federal agencies to address provisions that are outdated, unduly burdensome, or unnecessary.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[19] The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule 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.[20] The Bureau also is subject to certain additional procedures under the RFA

[15] This interim final rule is one of 14 companion rulemakings that together restate and recodify the implementing regulations under 14 existing consumer financial laws (part III.C, below, lists the 14 laws involved). In the interest of proper coordination of this overall regulatory framework, which includes numerous cross-references among some of the regulations, the Bureau is establishing the same effective date of December 30, 2011 for those rules published on or before that date and making those published thereafter (if any) effective immediately.

[16] Section 1022(b)(2)(A) of the Dodd-Frank Act addresses the consideration of the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas. Section 1022(b)(2)(B) requires that the Bureau ''consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies.'' The manner and extent to which these provisions apply to interim final rules and to costs, benefits, and impacts that are compelled by statutory changes rather than discretionary Bureau action is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

[17] The fourteen laws implemented by this and its companion rulemakings are: the Consumer Leasing Act, the Electronic Fund Transfer Act (except with respect to section 920 of that Act), the Equal Credit Opportunity Act, the Fair Credit Reporting Act (except with respect to sections 615(e) and 628 of that act), the Fair Debt Collection Practices Act, Subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act, sections 502 through 509 of the Gramm-Leach-Bliley Act (except for section 505 as it applies to section 501(b)), the Home Mortgage Disclosure Act, the Real Estate Settlement Procedures Act, the S.A.F.E. Mortgage Licensing Act, the Truth in Lending Act, the Truth in Savings Act, section 626 of the Omnibus Appropriations Act, 2009, and the Interstate Land Sales Full Disclosure Act.

[18] In light of the technical but voluminous nature of this recodification project, the Bureau focused the consultation process on a representative sample of the recodified regulations, while making information on the other regulations available. The Bureau expects to conduct differently its future consultations regarding substantive rulemakings.

[19] 5 U.S.C. 601 *et seq.*

[20] 5 U.S.C. 603, 604.

involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[21]

The IRFA and FRFA requirements described above apply only where a notice of proposed rulemaking is required,[22] and the panel requirement applies only when a rulemaking requires an IRFA.[23] As discussed above in part III, a notice of proposed rulemaking is not required for this rulemaking.

In addition, as discussed above, this interim final rule has only a minor impact on entities subject to Regulations G and H. The rule imposes no new, substantive obligations on covered entities. Accordingly, the undersigned certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities.

VI. Paperwork Reduction Act

The Bureau may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. Regulation G contains information collection requirements under the Paperwork Reduction Act (PRA), which have been previously approved by OMB, and the ongoing PRA burden for which is unchanged by this rule. There are no new information collection requirements in this interim final rule. The Bureau's OMB control number for this information collection is 3170–0005.

List of Subjects in 12 CFR Parts 1007 and 1008

Accounting, Administrative practice and procedure, Advertising, Agriculture, Bank deposit insurance, Banks, Banking, Confidential business information, Conflict of interests, Consumer protection, Credit unions, Crime, Currency, Exports, Foreign banking, Grant programs—housing and community development, Holding companies, Insurance, Investments, Loan programs—housing and community development, Licensing, Mortgages, National banks, Penalties, Registration, Reporting and recordkeeping requirements, Rural areas, Savings associations, Securities, Surety bonds.

[21] 5 U.S.C. 609.

[22] 5 U.S.C. 603(a), 604(a); 5 U.S.C. 553(b)(B).

[23] 5 U.S.C. 609(b).

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection adds Parts 1007 and 1008 to Chapter X in Title 12 of the Code of Federal Regulations to read as follows:

PART 1007—S.A.F.E. MORTGAGE LICENSING ACT—FEDERAL REGISTRATION OF RESIDENTIAL MORTGAGE LOAN ORIGINATORS (REGULATION G)

Sec.
1007.101 Authority, purpose, and scope of this part.
1007.102 Definitions applicable to this part.
1007.103 Registration of mortgage loan originators.
1007.104 Policies and procedures.
1007.105 Use of Unique Identifier.
Appendix A to Part 1007—Examples of Mortgage Loan Originator Activities

Authority: 12 U.S.C. 5101–5116; 15 U.S.C. 1604(a), 1639b; Pub. L. 111–203, 124 Stat. 1376.

§ 1007.101 Authority, purpose, and scope.

(a) *Authority.* This part, known as Regulation G, is issued by the Bureau of Consumer Financial Protection pursuant to the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, title V of the Housing and Economic Recovery Act of 2008 (S.A.F.E. Act) (Pub. L. 110–289, 122 Stat. 2654, 12 U.S.C. 5101 *et seq.*), 12 U.S.C. 5512, 5581, 15 U.S.C. 1604(a), 1639b.

(b) *Purpose.* This part implements the S.A.F.E. Act's Federal registration requirement for mortgage loan originators. The S.A.F.E. Act provides that the objectives of this registration include aggregating and improving the flow of information to and between regulators; providing increased accountability and tracking of mortgage loan originators; enhancing consumer protections; supporting anti-fraud measures; and providing consumers with easily accessible information at no charge regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against, mortgage loan originators.

(c) *Scope*—(1) *In general.* This part applies to:

(i) National banks, Federal branches and agencies of foreign banks, their operating subsidiaries (collectively referred to in this part as national banks), and their employees who act as mortgage loan originators;

(ii) Member banks of the Federal Reserve System; their respective subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act, as amended (12 U.S.C. 1844(c)(5)); branches and agencies of foreign banks; commercial lending companies owned or controlled by foreign banks (collectively referred to in this part as member banks); and their employees who act as mortgage loan originators;

(iii) Insured state nonmember banks (including state-licensed insured branches of foreign banks), their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers) (collectively referred to in this part as insured state nonmember banks), and employees of such banks or subsidiaries who act as mortgage loan originators;

(iv) Savings associations, their operating subsidiaries (collectively referred to in this part as savings associations), and their employees who act as mortgage loan originators;

(v) Farm Credit System lending institutions that actually originate residential mortgage loans pursuant to sections 1.9(3), 1.11 or 2.4(a) and (b) of the Farm Credit Act of 1971 (collectively referred to in this part as Farm Credit System institutions), and their employees who act as mortgage loan originators; and

(vi) Any federally insured credit union and its employees, including volunteers, who act as mortgage loan originators. This part also applies to non-federally insured credit unions and their employees, including volunteers, who act as mortgage loan originators, subject to the conditions in paragraph (c)(3) of this section.

(2) *De minimis exception.* (i) This part and the requirements of 12 U.S.C. 5103(a)(1)(A) and (2) of the S.A.F.E. Act do not apply to any employee of a national bank, member bank, insured state nonmember bank, savings association, Farm Credit System institution, or credit union who has never been registered or licensed through the Registry as a mortgage loan originator if during the past 12 months the employee acted as a mortgage loan originator for 5 or fewer residential mortgage loans.

(ii) Prior to engaging in mortgage loan origination activity that exceeds the exception limit in paragraph (c)(2)(i) of this section, an employee must register with the Registry pursuant to this part.

(iii) *Evasion.* National banks, member banks, insured state nonmember banks, savings associations, Farm Credit System institutions, and credit unions are prohibited from engaging in any act or practice to evade the limits of the *de minimis* exception set forth in paragraph (c)(2)(i) of this section.

(3) *For non-federally insured credit unions.* A non-federally insured credit union in a state identified on the

National Credit Union Administration's Web site (NCUA.gov) as one where the appropriate state supervisory authority has executed a Memorandum of Understanding (MOU) with the National Credit Union Administration may register under this rule provided that any Nationwide Mortgage Licensing System and Registry listing of the non-federally insured credit union and its employees contains a clear and conspicuous statement that the non-federally insured credit union is not insured by the National Credit Union Share Insurance Fund, and the state supervisory authority where the non-federally insured credit union is located maintains an agreement with the National Credit Union Administration for this registration process and oversight. If the state supervisory authority where the non-federally insured credit union is located fails to maintain such an agreement, the non-federally insured credit union and its employees in that state may not register or maintain registration under the Federal system. They instead must use the appropriate state licensing and registration system, or if the state does not have such a system, the licensing and registration system established by the Bureau for mortgage loan originators and their employees.

§ 1007.102 Definitions.

For purposes of this part, the following definitions apply:

Administrative or clerical tasks means the receipt, collection, and distribution of information common for the processing or underwriting of a loan in the residential mortgage industry and communication with a consumer to obtain information necessary for the processing or underwriting of a residential mortgage loan.

Annual renewal period means November 1 through December 31 of each year.

Bureau means the Bureau of Consumer Financial Protection.

Covered financial institution means any national bank, member bank, insured state nonmember bank, savings association, Farm Credit System institution, or federally insured credit union as any such term is defined in § 1007.101(c)(1). Covered financial institution also includes a non-federally insured credit union that registers subject to the conditions of § 1007.101(c)(3).

Mortgage loan originator means

(1) An individual who:

(i) Takes a residential mortgage loan application; and

(ii) Offers or negotiates terms of a residential mortgage loan for compensation or gain.

(2)(i) The term *mortgage loan originator* does not include:

(A) An individual who performs purely administrative or clerical tasks on behalf of an individual who is described as a mortgage loan originator in this section;

(B) An individual who only performs real estate brokerage activities (as defined in 12 U.S.C. 5102(4)(D)) and is licensed or registered as a real estate broker in accordance with applicable state law, unless the individual is compensated by a lender, a mortgage broker, or other mortgage loan originator or by any agent of such lender, mortgage broker, or other mortgage loan originator, and meets the definition of mortgage loan originator in this section; or

(C) An individual or entity solely involved in extensions of credit related to timeshare plans, as that term is defined in 11 U.S.C. 101(53D).

(ii) Examples of activities that would, and would not, result in an employee meeting the definition of mortgage loan originator are provided in Appendix A to this part.

Nationwide Mortgage Licensing System and Registry or *Registry* means the system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the state licensing and registration of state-licensed mortgage loan originators and the registration of mortgage loan originators pursuant to 12 U.S.C. 5107.

Registered mortgage loan originator or *registrant* means any individual who:

(1) Meets the definition of mortgage loan originator and is an employee of a covered financial institution; and

(2) Is registered pursuant to this part with, and maintains a unique identifier through, the Registry.

Residential mortgage loan means any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling (as defined in section 103(v) of the Truth in Lending Act, 15 U.S.C. 1602(v)) or residential real estate upon which is constructed or intended to be constructed a dwelling, and includes refinancings, reverse mortgages, home equity lines of credit and other first and additional lien loans that meet the qualifications listed in this definition. This definition does not amend or supersede 12 CFR 613.3030(c) with respect to Farm Credit System institutions.

Unique identifier means a number or other identifier that:

(1) Permanently identifies a registered mortgage loan originator;

(2) Is assigned by protocols established by the Nationwide Mortgage Licensing System and Registry and the Bureau to facilitate:

(i) Electronic tracking of mortgage loan originators; and

(ii) Uniform identification of, and public access to, the employment history of and the publicly adjudicated disciplinary and enforcement actions against mortgage loan originators; and

(3) Must not be used for purposes other than those set forth under the S.A.F.E. Act.

§ 1007.103 Registration of mortgage loan originators.

(a) *Registration requirement*—(1) *Employee registration.* Each employee of a covered financial institution who acts as a mortgage loan originator must register with the Registry, obtain a unique identifier, and maintain this registration in accordance with the requirements of this part. Any such employee who is not in compliance with the registration and unique identifier requirements set forth in this part is in violation of the S.A.F.E. Act and this part.

(2) *Covered financial institution requirement*—(i) *In general.* A covered financial institution that employs one or more individuals who act as a residential mortgage loan originator must require each such employee to register with the Registry, maintain this registration, and obtain a unique identifier in accordance with the requirements of this part.

(ii) *Prohibition.* A covered financial institution must not permit an employee who is subject to the registration requirements of this part to act as a mortgage loan originator for the covered financial institution unless such employee is registered with the Registry pursuant to this part.

(3) [Reserved]

(4) *Employees previously registered or licensed through the Registry*—(i) *In general.* If an employee of a covered financial institution was registered or licensed through, and obtained a unique identifier from, the Registry and has maintained this registration or license before the employee becomes subject to this part at the current covered financial institution, then the registration requirements of the S.A.F.E. Act and this part are deemed to be met, provided that:

(A) The employment information in paragraphs (d)(1)(i)(C) and (d)(1)(ii) of this section is updated and the

requirements of paragraph (d)(2) of this section are met;

(B) New fingerprints of the employee are submitted to the Registry for a background check, as required by paragraph (d)(1)(ix) of this section, unless the employee has fingerprints on file with the Registry that are less than 3 years old;

(C) The covered financial institution information required in paragraphs (e)(1)(i) (to the extent the covered financial institution has not previously met these requirements) and (e)(2)(i) of this section is submitted to the Registry; and

(D) The registration is maintained pursuant to paragraphs (b) and (e)(1)(ii) of this section, as of the date that the employee becomes subject to this part.

(ii) *Rule for certain acquisitions, mergers, or reorganizations.* When registered or licensed mortgage loan originators become covered financial institution employees as a result of an acquisition, consolidation, merger, or reorganization, only the requirements of paragraphs (a)(4)(i)(A), (C), and (D) of this section must be met, and these requirements must be met within 60 days from the effective date of the acquisition, merger, or reorganization.

(b) *Maintaining registration.* (1) A mortgage loan originator who is registered with the Registry pursuant to paragraph (a) of this section must:

(i) Except as provided in paragraph (b)(3) of this section, renew the registration during the annual renewal period, confirming the responses set forth in paragraphs (d)(1)(i) through (viii) of this section remain accurate and complete, and updating this information, as appropriate; and

(ii) Update the registration within 30 days of any of the following events:

(A) A change in the name of the registrant;

(B) The registrant ceases to be an employee of the covered financial institution; or

(C) The information required under paragraphs (d)(1)(iii) through (viii) of this section becomes inaccurate, incomplete, or out-of-date.

(2) A registered mortgage loan originator must maintain his or her registration, unless the individual is no longer engaged in the activity of a mortgage loan originator.

(3) The annual registration renewal requirement set forth in paragraph (b)(1) of this section does not apply to a registered mortgage loan originator who has completed his or her registration with the Registry pursuant to paragraph (a)(1) of this section less than 6 months prior to the end of the annual renewal period.

(c) *Effective dates*—(1) *Registration.* A registration pursuant to paragraph (a)(1) of this section is effective on the date the Registry transmits notification to the registrant that the registrant is registered.

(2) *Renewals or updates.* A renewal or update pursuant to paragraph (b) of this section is effective on the date the Registry transmits notification to the registrant that the registration has been renewed or updated.

(d) *Required employee information*—(1) *In general.* For purposes of the registration required by this section, a covered financial institution must require each employee who is a mortgage loan originator to submit to the Registry, or must submit on behalf of the employee, the following categories of information, to the extent this information is collected by the Registry:

(i) Identifying information, including the employee's:

(A) Name and any other names used;

(B) Home address and contact information;

(C) Principal business location address and business contact information;

(D) Social security number;

(E) Gender; and

(F) Date and place of birth;

(ii) Financial services-related employment history for the 10 years prior to the date of registration or renewal, including the date the employee became an employee of the covered financial institution;

(iii) Convictions of any criminal offense involving dishonesty, breach of trust, or money laundering against the employee or organizations controlled by the employee, or agreements to enter into a pretrial diversion or similar program in connection with the prosecution for such offense(s);

(iv) Civil judicial actions against the employee in connection with financial services-related activities, dismissals with settlements, or judicial findings that the employee violated financial services-related statutes or regulations, except for actions dismissed without a settlement agreement;

(v) Actions or orders by a state or Federal regulatory agency or foreign financial regulatory authority that:

(A) Found the employee to have made a false statement or omission or been dishonest, unfair or unethical; to have been involved in a violation of a financial services-related regulation or statute; or to have been a cause of a financial services-related business having its authorization to do business denied, suspended, revoked, or restricted;

(B) Are entered against the employee in connection with a financial services-related activity;

(C) Denied, suspended, or revoked the employee's registration or license to engage in a financial services-related activity; disciplined the employee or otherwise by order prevented the employee from associating with a financial services-related business or restricted the employee's activities; or

(D) Barred the employee from association with an entity or its officers regulated by the agency or authority or from engaging in a financial services-related business;

(vi) Final orders issued by a state or Federal regulatory agency or foreign financial regulatory authority based on violations of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct;

(vii) Revocation or suspension of the employee's authorization to act as an attorney, accountant, or state or Federal contractor;

(viii) Customer-initiated financial services-related arbitration or civil action against the employee that required action, including settlements, or which resulted in a judgment; and

(ix) Fingerprints of the employee, in digital form if practicable, and any appropriate identifying information for submission to the Federal Bureau of Investigation and any governmental agency or entity authorized to receive such information in connection with a state and national criminal history background check; however, fingerprints provided to the Registry that are less than 3 years old may be used to satisfy this requirement.

(2) *Employee authorizations and attestation.* An employee registering as a mortgage loan originator or renewing or updating his or her registration under this part, and not the employing covered financial institution or other employees of the covered financial institution, must:

(i) Authorize the Registry and the employing institution to obtain information related to sanctions or findings in any administrative, civil, or criminal action, to which the employee is a party, made by any governmental jurisdiction;

(ii) Attest to the correctness of all information required by paragraph (d) of this section, whether submitted by the employee or on behalf of the employee by the employing covered financial institution; and

(iii) Authorize the Registry to make available to the public information required by paragraphs (d)(1)(i)(A) and (C), and (d)(1)(ii) through (viii) of this section.

(3) *Submission of information.* A covered financial institution may identify one or more employees of the covered financial institution who may submit the information required by paragraph (d)(1) of this section to the Registry on behalf of the covered financial institution's employees provided that this individual, and any employee delegated such authority, does not act as a mortgage loan originator, consistent with paragraph (e)(1)(i)(F) of this section. In addition, a covered financial institution may submit to the Registry some or all of the information required by paragraphs (d)(1) and (e)(2) of this section for multiple employees in bulk through batch processing in a format to be specified by the Registry, to the extent such batch processing is made available by the Registry.

(e) *Required covered financial institution information.* A covered financial institution must submit the following categories of information to the Registry:

(1) *Covered financial institution record.* (i) In connection with the registration of one or more mortgage loan originators:

(A) Name, main office address, and business contact information;

(B) Internal Revenue Service Employer Tax Identification Number (EIN);

(C) Research Statistics Supervision and Discount (RSSD) number, as issued by the Board of Governors of the Federal Reserve System;

(D) Identification of its primary Federal regulator;

(E) Name(s) and contact information of the individual(s) with authority to act as the covered financial institution's primary point of contact for the Registry;

(F) Name(s) and contact information of the individual(s) with authority to enter the information required by paragraphs (d)(1) and (e) of this section to the Registry and who may delegate this authority to other individuals. For the purpose of providing information required by paragraph (e) of this section, this individual and their delegates must not act as mortgage loan originators unless the covered financial institution has 10 or fewer full time or equivalent employees and is not a subsidiary; and

(G) If a subsidiary of a national bank, member bank, savings association, or insured state nonmember bank, indication that it is a subsidiary and the RSSD number of the parent institution; if an operating subsidiary of an agricultural credit association, indication that it is a subsidiary, and the RSSD number of the parent agricultural credit association.

(ii) *Attestation.* The individual(s) identified in paragraphs (e)(1)(i)(E) and (F) of this section must comply with Registry protocols to verify their identity and must attest that they have the authority to enter data on behalf of the covered financial institution, that the information provided to the Registry pursuant to this paragraph (e) is correct, and that the covered financial institution will keep the information required by this paragraph (e) current and will file accurate supplementary information on a timely basis.

(iii) A covered financial institution must update the information required by this paragraph (e) of this section within 30 days of the date that this information becomes inaccurate.

(iv) A covered financial institution must renew the information required by paragraph (e) of this section on an annual basis.

(2) *Employee information.* In connection with the registration of each employee who acts as a mortgage loan originator:

(i) After the information required by paragraph (d) of this section has been submitted to the Registry, confirmation that it employs the registrant; and

(ii) Within 30 days of the date the registrant ceases to be an employee of the covered financial institution, notification that it no longer employs the registrant and the date the registrant ceased being an employee.

§ 1007.104 Policies and procedures.

A covered financial institution that employs one or more mortgage loan originators must adopt and follow written policies and procedures designed to assure compliance with this part. These policies and procedures must be appropriate to the nature, size, complexity, and scope of the mortgage lending activities of the covered financial institution, and apply only to those employees acting within the scope of their employment at the covered financial institution. At a minimum, these policies and procedures must:

(a) Establish a process for identifying which employees of the covered financial institution are required to be registered mortgage loan originators;

(b) Require that all employees of the covered financial institution who are mortgage loan originators be informed of the registration requirements of the S.A.F.E. Act and this part and be instructed on how to comply with such requirements and procedures;

(c) Establish procedures to comply with the unique identifier requirements in § 1007.105;

(d) Establish reasonable procedures for confirming the adequacy and accuracy of employee registrations, including updates and renewals, by comparisons with its own records;

(e) Establish reasonable procedures and tracking systems for monitoring compliance with registration and renewal requirements and procedures;

(f) Provide for independent testing for compliance with this part to be conducted at least annually by covered financial institution personnel or by an outside party;

(g) Provide for appropriate action in the case of any employee who fails to comply with the registration requirements of the S.A.F.E. Act, this part, or the covered financial institution's related policies and procedures, including prohibiting such employees from acting as mortgage loan originators or other appropriate disciplinary actions;

(h) Establish a process for reviewing employee criminal history background reports received pursuant to this part, taking appropriate action consistent with applicable Federal law, including section 19 of the Federal Deposit Insurance Act (12 U.S.C. 1829), section 206 of the Federal Credit Union Act (12 U.S.C. 1786(i)), and section 5.65(d) of the Farm Credit Act of 1971, as amended (12 U.S.C. 2277a–14(d)), and implementing regulations with respect to these reports, and maintaining records of these reports and actions taken with respect to applicable employees; and

(i) Establish procedures designed to ensure that any third party with which the covered financial institution has arrangements related to mortgage loan origination has policies and procedures to comply with the S.A.F.E. Act, including appropriate licensing and/or registration of individuals acting as mortgage loan originators.

§ 1007.105 Use of unique identifier.

(a) The covered financial institution shall make the unique identifier(s) of its registered mortgage loan originator(s) available to consumers in a manner and method practicable to the institution.

(b) A registered mortgage loan originator shall provide his or her unique identifier to a consumer:

(1) Upon request;

(2) Before acting as a mortgage loan originator; and

(3) Through the originator's initial written communication with a consumer, if any, whether on paper or electronically.

Appendix A to Part 1007—Examples of Mortgage Loan Originator Activities

This appendix provides examples to aid in the understanding of activities that would cause an employee of a covered financial institution to fall within or outside the definition of mortgage loan originator. The examples in this Appendix are not all-inclusive. They illustrate only the issue described and do not illustrate any other issues that may arise under this part. For purposes of the examples below, the term ''loan'' refers to a residential mortgage loan.

(a) *Taking a loan application.* The following examples illustrate when an employee takes, or does not take, a loan application.

(1) Taking an application includes: receiving information provided in connection with a request for a loan to be used to determine whether the consumer qualifies for a loan, even if the employee:

(i) Has received the consumer's information indirectly in order to make an offer or negotiate a loan;

(ii) Is not responsible for verifying information;

(iii) Is inputting information into an online application or other automated system on behalf of the consumer; or

(iv) Is not engaged in approval of the loan, including determining whether the consumer qualifies for the loan.

(2) Taking an application does not include any of the following activities performed solely or in combination:

(i) Contacting a consumer to verify the information in the loan application by obtaining documentation, such as tax returns or payroll receipts;

(ii) Receiving a loan application through the mail and forwarding it, without review, to loan approval personnel;

(iii) Assisting a consumer who is filling out an application by clarifying what type of information is necessary for the application or otherwise explaining the qualifications or criteria necessary to obtain a loan product;

(iv) Describing the steps that a consumer would need to take to provide information to be used to determine whether the consumer qualifies for a loan or otherwise explaining the loan application process;

(v) In response to an inquiry regarding a prequalified offer that a consumer has received from a covered financial institution, collecting only basic identifying information about the consumer and forwarding the consumer to a mortgage loan originator; or

(vi) Receiving information in connection with a modification to the terms of an existing loan to a borrower as part of the covered financial institution's loss mitigation efforts when the borrower is reasonably likely to default.

(b) *Offering or negotiating terms of a loan.* The following examples are designed to illustrate when an employee offers or negotiates terms of a loan, and conversely, what does not constitute offering or negotiating terms of a loan.

(1) Offering or negotiating the terms of a loan includes:

(i) Presenting a loan offer to a consumer for acceptance, either verbally or in writing, including, but not limited to, providing a disclosure of the loan terms after application under the Truth in Lending Act, even if:

(A) Further verification of information is necessary;

(B) The offer is conditional;

(C) Other individuals must complete the loan process; or

(D) Only the rate approved by the covered financial institution's loan approval mechanism function for a specific loan product is communicated without authority to negotiate the rate.

(ii) Responding to a consumer's request for a lower rate or lower points on a pending loan application by presenting to the consumer a revised loan offer, either verbally or in writing, that includes a lower interest rate or lower points than the original offer.

(2) Offering or negotiating terms of a loan does not include solely or in combination:

(i) Providing general explanations or descriptions in response to consumer queries regarding qualification for a specific loan product, such as explaining loan terminology (*e.g.,* debt-to-income ratio); lending policies (*e.g.,* the loan-to-value ratio policy of the covered financial institution); or product-related services;

(ii) In response to a consumer's request, informing a consumer of the loan rates that are publicly available, such as on the covered financial institution's Web site, for specific types of loan products without communicating to the consumer whether qualifications are met for that loan product;

(iii) Collecting information about a consumer in order to provide the consumer with information on loan products for which the consumer generally may qualify, without presenting a specific loan offer to the consumer for acceptance, either verbally or in writing;

(iv) Arranging the loan closing or other aspects of the loan process, including communicating with a consumer about those arrangements, provided that communication with the consumer only verifies loan terms already offered or negotiated;

(v) Providing a consumer with information unrelated to loan terms, such as the best days of the month for scheduling loan closings at the covered financial institution;

(vi) Making an underwriting decision about whether the consumer qualifies for a loan;

(vii) Explaining or describing the steps or process that a consumer would need to take in order to obtain a loan offer, including qualifications or criteria that would need to be met without providing guidance specific to that consumer's circumstances; or

(viii) Communicating on behalf of a mortgage loan originator that a written offer, including disclosures provided pursuant to the Truth in Lending Act, has been sent to a consumer without providing any details of that offer.

(c) *Offering or negotiating a loan for compensation or gain.* The following examples illustrate when an employee does or does not offer or negotiate terms of a loan ''for compensation or gain.''

(1) Offering or negotiating terms of a loan for compensation or gain includes engaging in any of the activities in paragraph (b)(1) of this appendix in the course of carrying out employment duties, even if the employee does not receive a referral fee or commission or other special compensation for the loan.

(2) Offering or negotiating terms of a loan for compensation or gain does not include engaging in a seller-financed transaction for the employee's personal property that does not involve the covered financial institution.

PART 1008—S.A.F.E. MORTGAGE LICENSING ACT—STATE COMPLIANCE AND BUREAU REGISTRATION SYSTEM (REGULATION H)

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Appendix D to Part 1008—Attorneys: Circumstances that Require a State Mortgage Loan Originator License

Authority: 12 U.S.C. 5101–5116; Pub. L. 111–203, 124 Stat. 1376.

§ 1008.1 Purpose.

(a) *Authority.* This part, known as Regulation H, is issued by the Bureau of Consumer Financial Protection to implement the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, title V of the Housing and Economic Recovery Act of 2008 (S.A.F.E. Act) (Pub. L. 110–289, 122 Stat. 2654, 12 U.S.C. 5101 *et seq.*).

(b) *Purpose.* The purpose of this part is to enhance consumer protection and reduce fraud by directing states to adopt minimum uniform standards for the licensing and registration of residential mortgage loan originators and to participate in a nationwide mortgage licensing system and registry database of residential mortgage loan originators. Under the S.A.F.E. Act, if the Bureau determines that a state's loan origination licensing system does not meet the minimum requirements of the S.A.F.E. Act, the Bureau is charged with establishing and implementing a system for all loan originators in that state. Additionally, if at any time the Bureau determines that the nationwide mortgage licensing system and registry is failing to meet the S.A.F.E. Act's requirements, the Bureau is charged with establishing and maintaining a licensing and registry database for loan originators.

(c) *Organization.* The regulation is divided into subparts and appendices as follows:

(1) Subpart A establishes the definitions applicable to this part.

(2) Subpart B provides the minimum standards that a state must meet in licensing loan originators, including standards for whom a state must require to be licensed, and sets forth the Bureau's procedure for determining a state's compliance with the minimum standards.

(3) Subpart C provides the requirements that the Bureau will apply in any state that the Bureau determines has not established a licensing and registration system in compliance with the minimum standards of the S.A.F.E. Act.

(4) Subpart D provides minimum requirements for the administration of the Nationwide Mortgage Licensing System and Registry.

(5) Subpart E clarifies the Bureau's enforcement authority in states in which it operates a state licensing system.

(6) Appendices A through D set forth examples to aid in the understanding and application of the regulations.

§ 1008.3 Confidentiality of information.

(a) Except as otherwise provided in this part, any requirement under Federal or state law regarding the privacy or confidentiality of any information or material provided to the Nationwide Mortgage Licensing System and Registry or a system established by the Director under this part, and any privilege arising under Federal or state law (including the rules of any Federal or state court) with respect to such information or material, shall continue to apply to such information or material after the information or material has been disclosed to the system. Such information and material may be shared with all state and Federal regulatory officials with mortgage industry oversight authority without the loss of privilege or the loss of confidentiality protections provided by Federal and state laws.

(b) Information or material that is subject to a privilege or confidentiality under paragraph (a) of this section shall not be subject to:

(1) Disclosure under any Federal or state law governing the disclosure to the public of information held by an officer or an agency of the Federal Government or the respective state; or

(2) Subpoena or discovery, or admission into evidence, in any private civil action or administrative process, unless with respect to any privilege held by the Nationwide Mortgage Licensing System and Registry or by the Director with respect to such information or material, the person to whom such information or material pertains, waives, in whole or in part, in the discretion of such person, that privilege.

(c) Any state law, including any state open record law, relating to the disclosure of confidential supervisory information or any information or material described in paragraph (a) of this section that is inconsistent with paragraph (a), shall be superseded by the requirements of such provision to the extent that state law provides less confidentiality or a weaker privilege.

(d) This section shall not apply with respect to the information or material relating to the employment history of, and any publicly adjudicated disciplinary and enforcement action against, any loan originator that is included in the Nationwide Mortgage Licensing System and Registry for access by the public.

Subpart A—General

§ 1008.20 Scope of this subpart.

This subpart provides the definitions applicable to this part, and other general requirements applicable to this part.

§ 1008.23 Definitions.

Terms that are defined in the S.A.F.E. Act and used in this part have the same meaning as in the S.A.F.E. Act, unless otherwise provided in this section.

Administrative or clerical tasks means the receipt, collection, and distribution of information common for the processing or underwriting of a loan in the mortgage industry and communication with a consumer to obtain information necessary for the processing or underwriting of a residential mortgage loan.

American Association of Residential Mortgage Regulators (AARMR) is the national association of executives and employees of the various states who are charged with the responsibility for administration and regulation of residential mortgage lending, servicing, and brokering, and dedicated to the goals described at *www.aarmr.org.*

Application means a request, in any form, for an offer (or a response to a solicitation of an offer) of residential mortgage loan terms, and the information about the borrower or prospective borrower that is customary or necessary in a decision on whether to make such an offer.

Bureau means the Bureau of Consumer Financial Protection.

Clerical or support duties:

(1) Include:

(i) The receipt, collection, distribution, and analysis of information common for the processing or underwriting of a residential mortgage loan; and

(ii) Communicating with a consumer to obtain the information necessary for the processing or underwriting of a loan, to the extent that such communication does not include offering or negotiating loan rates or terms, or counseling consumers about residential mortgage loan rates or terms; and

(2) Does not include:

(i) Taking a residential mortgage loan application; or

(ii) Offering or negotiating terms of a residential mortgage loan.

Conference of State Bank Supervisors (CSBS) is the national organization composed of state bank supervisors dedicated to maintaining the state banking system and state regulation of financial services in accordance with the CSBS statement of principles described at *www.csbs.org.*

Director means the Director of the Bureau of Consumer Financial Protection.

Employee means an individual:

(1) Whose manner and means of performance of work are subject to the right of control of, or are controlled by, a person, and

(2) Whose compensation for Federal income tax purposes is reported, or required to be reported, on a W–2 form issued by the controlling person.

Farm Credit Administration means the independent Federal agency, authorized by the Farm Credit Act of 1971, that examines and regulates the Farm Credit System.

For compensation or gain. See § 1008.103(c)(2)(ii).

Independent contractor means an individual who performs his or her duties other than at the direction of and subject to the supervision and instruction of an individual who is licensed and registered in accordance with § 1008.103(a), or is not required to be licensed, in accordance with § 1008.103(e)(5), (6), or (7).

Loan originator. See § 1008.103.

Loan processor or underwriter, for purposes of this part, means an individual who, with respect to the origination of a residential mortgage loan, performs clerical or support duties at the direction of and subject to the supervision and instruction of:

(1) A state-licensed loan originator; or

(2) A registered loan originator.

Nationwide Mortgage Licensing System and Registry or NMLSR means the mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the licensing and registration of loan originators and the registration of registered loan originators or any system established by the Director, as provided in subpart D of this part.

Nontraditional mortgage product means any mortgage product other than a 30-year fixed-rate mortgage.

Origination of a residential mortgage loan, for purposes of the definition of loan processor or underwriter, means all residential mortgage loan-related activities from the taking of a residential mortgage loan application through the completion of all required loan closing documents and funding of the residential mortgage loan.

Real estate brokerage activities mean any activity that involves offering or providing real estate brokerage services to the public including—

(1) Acting as a real estate agent or real estate broker for a buyer, seller, lessor, or lessee of real property;

(2) Bringing together parties interested in the sale, purchase, lease, rental, or exchange of real property;

(3) Negotiating, on behalf of any party, any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property (other than in connection with providing financing with respect to any such transaction);

(4) Engaging in any activity for which a person engaged in the activity is required to be registered as a real estate agent or real estate broker under any applicable law; and

(5) Offering to engage in any activity, or act in any capacity, described in paragraphs (1), (2), (3), or (4) of this definition.

Residential mortgage loan means any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling (as defined in section 103(w) of the Truth in Lending Act) or residential real estate upon which is constructed or intended to be constructed a dwelling (as so defined).

State means any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

Unique identifier means a number or other identifier that:

(1) Permanently identifies a loan originator;

(2) Is assigned by protocols established by the Nationwide Mortgage Licensing System and Registry and the Bureau to facilitate electronic tracking of loan originators and uniform identification of, and public access to, the employment history of and the publicly adjudicated disciplinary and enforcement actions against loan originators; and

(3) Shall not be used for purposes other than those set forth under the S.A.F.E. Act.

Subpart B—Determination of State Compliance With the S.A.F.E. Act

§ 1008.101 Scope of this subpart.

This subpart describes the minimum standards of the S.A.F.E. Act that apply to a state's licensing and registering of loan originators. This subpart also provides the procedures that the Bureau follows to determine that a state does not have in place a system for licensing and registering mortgage loan originators that complies with the minimum standards. Upon making such a determination, the Bureau will impose the requirements and exercise the enforcement authorities described in subparts C and E of this part.

§ 1008.103 Individuals required to be licensed by states.

(a) Except as provided in paragraph (e) of this section, in order to operate a S.A.F.E.-compliant program, a state must prohibit an individual from engaging in the business of a loan originator with respect to any dwelling or residential real estate in the state, unless the individual first:

(1) Registers as a loan originator through and obtains a unique identifier from the NMLSR, and

(2) Obtains and maintains a valid loan originator license from the state.

(b) An individual engages in the business of a loan originator if the individual, in a commercial context and habitually or repeatedly:

(1)(i) Takes a residential mortgage loan application; and

(ii) Offers or negotiates terms of a residential mortgage loan for compensation or gain; or

(2) Represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items), that such individual can or will perform the activities described in paragraph (b)(1) of this section.

(c)(1) An individual ''takes a residential mortgage loan application'' if the individual receives a residential mortgage loan application for the purpose of facilitating a decision whether to extend an offer of residential mortgage loan terms to a borrower or prospective borrower (or to accept the terms offered by a borrower or prospective borrower in response to a solicitation), whether the application is received directly or indirectly from the borrower or prospective borrower.

(2) An individual ''offers or negotiates terms of a residential mortgage loan for compensation or gain'' if the individual:

(i)(A) Presents for consideration by a borrower or prospective borrower particular residential mortgage loan terms;

(B) Communicates directly or indirectly with a borrower, or prospective borrower for the purpose of reaching a mutual understanding about prospective residential mortgage loan terms; or

(C) Recommends, refers, or steers a borrower or prospective borrower to a particular lender or set of residential mortgage loan terms, in accordance with a duty to or incentive from any person other than the borrower or prospective borrower; and

(ii) Receives or expects to receive payment of money or anything of value in connection with the activities described in paragraph (c)(2)(i) of this section or as a result of any residential mortgage loan terms entered into as a result of such activities.

(d)(1) Except as provided in paragraph (e) of this section, a state must prohibit an individual who is an independent contractor from engaging in residential mortgage loan origination activities as a loan processor or underwriter with respect to any dwelling or residential real estate in the state, unless the individual first:

(i) Registers as a loan originator through and obtains a unique identifier from the NMLSR, and

(ii) Obtains and maintains a valid loan originator license from the state.

(2) An individual ''engage[s] in residential mortgage loan origination activities as a loan processor or underwriter'' if, with respect to a residential mortgage loan application, the individual performs clerical or support duties.

(e) A state is not required to impose the prohibitions required under paragraphs (a) and (d) of this section on the following individuals:

(1) An individual who performs only real estate brokerage activities and is licensed or registered in accordance with applicable state law, unless the individual is compensated directly or indirectly by a lender, mortgage broker, or other loan originator or by an agent of such lender, mortgage broker, or other loan originator;

(2) An individual who is involved only in extensions of credit relating to timeshare plans, as that term is defined in 11 U.S.C. 101(53D);

(3) An individual who performs only clerical or support duties and:

(i) Who does so at the direction of and subject to the supervision and instruction of an individual who:

(A) Is licensed and registered in accordance with paragraph (a) of this section, or

(B) Is not required to be licensed in accordance with paragraph (e)(5); or

(ii) Who performs such duties solely with respect to transactions for which the individual who acts as a loan originator is not required to be licensed, in accordance with paragraph (e)(2), (6), or (7) of this section;

(4) An individual who performs only purely administrative or clerical tasks on behalf of a loan originator;

(5) An individual who is lawfully registered with, and maintains a unique identifier through, the Nationwide Mortgage Licensing System and Registry, and who is an employee of a covered financial institution, as that term is defined in 12 CFR Part 1007.

(6)(i) An individual who is an employee of a Federal, state, or local government agency or housing finance agency and who acts as a loan originator only pursuant to his or her official duties as an employee of the Federal, state, or local government agency or housing finance agency.

(ii) For purposes of this paragraph (e)(6), the term *employee* has the meaning provided in paragraph (1) of the definition of employee in § 1008.23 and excludes the meaning provided in paragraph (2) of the definition.

(iii) For purposes of this paragraph (e)(6), the term *housing finance agency* means any authority:

(A) That is chartered by a state to help meet the affordable housing needs of the residents of the state;

(B) That is supervised directly or indirectly by the state government;

(C) That is subject to audit and review by the state in which it operates; and

(D) Whose activities make it eligible to be a member of the National Council of State Housing Agencies.

(7)(i) An employee of a bona fide nonprofit organization who acts as a loan originator only with respect to his or her work duties to the bona fide nonprofit organization, and who acts as a loan originator only with respect to residential mortgage loans with terms that are favorable to the borrower.

(ii) For an organization to be considered a bona fide nonprofit organization under this paragraph, a state supervisory authority that opts not to require licensing of the employee must determine, under criteria and pursuant to processes established by the state, that the organization:

(A) Has the status of a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986;

(B) Promotes affordable housing or provides homeownership education, or similar services;

(C) Conducts its activities in a manner that serves public or charitable purposes, rather than commercial purposes;

(D) Receives funding and revenue and charges fees in a manner that does not incentivize it or its employees to act other than in the best interests of its clients;

(E) Compensates its employees in a manner that does not incentivize employees to act other than in the best interests of its clients;

(F) Provides or identifies for the borrower residential mortgage loans with terms favorable to the borrower and comparable to mortgage loans and housing assistance provided under government housing assistance programs; and

(G) Meets other standards that the state determines are appropriate.

(iii) A state must periodically examine the books and activities of an organization it determines is a bona fide nonprofit organization and revoke its status as a bona fide nonprofit organization if it does not continue to meet the criteria under paragraph (e)(7)(ii) of this section;

(iv) For residential mortgage loans to have terms that are favorable to the borrower, a state must determine that the terms are consistent with loan origination in a public or charitable context, rather than a commercial context.

(f) A state must require an individual licensed in accordance with paragraphs (a) or (d) of this section to renew the loan originator license no less often than annually.

§ 1008.105 Minimum loan originator license requirements.

For an individual to be eligible for a loan originator license required under § 1008.103(a) and (d), a state must require and find, at a minimum, that an individual:

(a) Has never had a loan originator license revoked in any governmental jurisdiction, except that a formally vacated revocation shall not be deemed a revocation;

(b)(1) Has never been convicted of, or pled guilty or *nolo contendere* to, a felony in a domestic, foreign, or military court:

(i) During the 7-year period preceding the date of the application for licensing; or

(ii) At any time preceding such date of application, if such felony involved an act of fraud, dishonesty, a breach of trust, or money laundering.

(2) For purposes of this paragraph (b):

(i) Expunged convictions and pardoned convictions do not, in themselves, affect the eligibility of the individual; and

(ii) Whether a particular crime is classified as a felony is determined by the law of the jurisdiction in which an individual is convicted.

(c) Has demonstrated financial responsibility, character, and general fitness, such as to command the confidence of the community and to warrant a determination that the loan originator will operate honestly, fairly, and efficiently, under reasonable standards established by the individual state.

(d) Completed at least 20 hours of pre-licensing education that has been reviewed and approved by the Nationwide Mortgage Licensing System and Registry. The pre-licensing education completed by the individual must include at least:

(1) 3 hours of Federal law and regulations;

(2) 3 hours of ethics, which must include instruction on fraud, consumer protection, and fair lending issues; and

(3) 2 hours of training on lending standards for the nontraditional mortgage product marketplace.

(e)(1) Achieved a test score of not less than 75 percent correct answers on a written test developed by the NMLSR in accordance with 12 U.S.C. 5105(d).

(2) To satisfy the requirement under paragraph (e)(1) of this section, an individual may take a test three consecutive times, with each retest occurring at least 30 days after the preceding test. If an individual fails three consecutive tests, the individual must wait at least 6 months before taking the test again.

(3) If a formerly state-licensed loan originator fails to maintain a valid license for 5 years or longer, not taking into account any time during which such individual is a registered loan originator, the individual must retake the test and achieve a test score of not less than 75 percent correct answers.

(f) Be covered by either a net worth or surety bond requirement, or pays into a state fund, as required by the state loan originator supervisory authority.

(g) Has submitted to the NMLSR fingerprints for submission to the Federal Bureau of Investigation and to any government agency for a state and national criminal history background check; and

(h) Has submitted to the NMLSR personal history and experience, which must include authorization for the NMLSR to obtain:

(1) Information related to any administrative, civil, or criminal findings by any governmental jurisdiction; and

(2) An independent credit report.

§ 1008.107 Minimum annual license renewal requirements.

(a) For an individual to be eligible to renew a loan originator license as required under § 1008.103(f), a state must require the individual:

(1) To continue to meet the minimum standards for license issuance provided in § 1008.105; and

(2) To satisfy annual continuing education requirements, which must include at least 8 hours of education approved by the NMLSR. The 8 hours of annual continuing education must include at least:

(i) 3 hours of Federal law and regulations;

(ii) 2 hours of ethics (including instruction on fraud, consumer protection, and fair lending issues); and

(iii) 2 hours of training related to lending standards for the nontraditional mortgage product marketplace.

(b) A state must provide that a state-licensed loan originator may only receive credit for a continuing education course in the year in which the course is taken, and that a state-licensed loan originator may not apply credits for education courses taken in one year to meet the continuing education requirements of subsequent years. A state must provide that an individual may not meet the annual requirements for continuing education by taking an approved course more than one time in the same year or in successive years.

(c) An individual who is an instructor of an approved continuing education course may receive credit for the individual's own annual continuing education requirement at the rate of 2 hours credit for every one hour taught.

§ 1008.109 Effective date of state requirements imposed on individuals.

(a) Except as provided in paragraphs (b) and (c) of this section, a state must provide that the effective date for requirements it imposes in accordance with §§ 1008.103, 1008.105, and 1008.107 is no later than August 29, 2011.

(b) For an individual who was permitted to perform residential mortgage loan originations under state legislation or regulations enacted or promulgated prior to the state's enactment or promulgation of a licensing system that complies with this subpart, a state may delay the effective date for requirements it imposes in accordance with §§ 1008.103, 1008.105, and 1008.107 to no later than August 29, 2011. For purposes of this paragraph (b), an individual was permitted to perform residential mortgage loan originations only if prior state law required the individual to be licensed, authorized, registered, or otherwise granted a form of affirmative and revocable government permission for individuals as a condition of performing residential mortgage loan originations.

(c) The Bureau may approve a later effective date only upon a state's demonstration that substantial numbers of loan originators (or of a class of loan originators) who require a state license face unusual hardship, through no fault of their own or of the state government, in complying with the standards required by the S.A.F.E. Act and in obtaining state licenses within one year.

§ 1008.111 Other minimum requirements for state licensing systems.

(a) *General.* A state must maintain a loan originator licensing, supervisory, and oversight authority (supervisory authority) that provides effective supervision and enforcement, in accordance with the minimum standards provided in this section and in § 1008.113.

(b) *Authorities.* A supervisory authority must have the legal authority and mechanisms:

(1) To examine any books, papers, records, or other data of any loan originator operating in the state;

(2) To summon any loan originator operating in the state, or any person having possession, custody, or care of the reports and records relating to such a loan originator, to appear before the supervisory authority at a time and place named in the summons and to produce such books, papers, records, or other data, and to give testimony, under oath, as may be relevant or material to an investigation of such loan originator for compliance with the requirements of the S.A.F.E. Act;

(3) To administer oaths and affirmations and examine and take and preserve testimony under oath as to any matter in respect to the affairs of any such loan originator;

(4) To enter an order requiring any individual or person that is, was, or would be a cause of a violation of the S.A.F.E. Act as implemented by the state, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same requirement;

(5) To suspend, terminate, and refuse renewal of a loan originator license for violation of state or Federal law; and

(6) To impose civil money penalties for individuals acting as loan originators, or representing themselves to the public as loan originators, in the state without a valid license or registration.

(c) A supervisory authority must have established processes in place to verify that individuals subject to the requirement described in § 1008.103(a)(1) and (d)(1) are registered with the NMLSR.

(d) The supervisory authority must be required under state law to regularly report violations of such law, as well as enforcement actions and other relevant information, to the NMLSR.

(e) The supervisory authority must have a process in place for challenging information contained in the NMLSR.

(f) The supervisory authority must require a loan originator to ensure that all residential mortgage loans that close as a result of the loan originator engaging in activities described in § 1008.103(b)(1) are included in reports of condition submitted to the NMLSR. Such reports of condition shall be in such form, shall contain such

information, and shall be submitted with such frequency and by such dates as the NMLSR may reasonably require.

§ 1008.113 Performance standards.

(a) For the Bureau to determine that a state is providing effective supervision and enforcement, a supervisory authority must meet the following performance standards:

(1) The supervisory authority must participate in the NMLSR;

(2) The supervisory authority must approve or deny loan originator license applications and must renew or refuse to renew existing loan originator licenses for violations of state or Federal law;

(3) The supervisory authority must discipline loan originator licensees with appropriate enforcement actions, such as license suspensions or revocations, cease-and-desist orders, civil money penalties, and consumer refunds for violations of state or Federal law;

(4) The supervisory authority must examine or investigate loan originator licensees in a systematic manner based on identified risk factors or on a periodic schedule.

(b) A supervisory authority that is accredited under the Conference of State Bank Supervisors-American Association of Residential Mortgage Regulators Mortgage Accreditation Program will be presumed by the Bureau to be compliant with the requirements of this section.

§ 1008.115 Determination of noncompliance.

(a) *Evidence of compliance.* Any time a state enacts legislation that affects its compliance with the S.A.F.E. Act, it must notify the Bureau. Upon request from the Bureau, a state must provide evidence that it is in compliance with the requirements of the S.A.F.E. Act and this part, including citations to applicable state law and regulations; descriptions of processes followed by the state's supervisory authority; and data concerning examination, investigation, and enforcement actions.

(b) *Initial determination of noncompliance.* If the Bureau makes an initial determination that a state is not in compliance with the S.A.F.E. Act, the Bureau will notify the state and will publish, in the **Federal Register**, a notice providing the Bureau's initial determination and presenting the opportunity for public comment for a period of no less than 30 days. This public comment period will allow the residents of the state and other interested members of the public to comment on the Bureau's initial determination.

(c) *Final determination of noncompliance.* In making a final determination of noncompliance, the Bureau will review additional information that may be offered by a state and the comments submitted during the public comment period described in paragraph (b) of this section. If the Bureau makes a final determination that a state does not have in place by law or regulation a system that complies with the minimum requirements of the S.A.F.E. Act, as described in this part, the Bureau will publish that final determination in the **Federal Register**.

(d) *Good-faith effort to comply.* If the Bureau makes the final determination described in paragraph (c) of this section, but the Bureau finds that the state is making a good-faith effort to meet the requirements of 12 U.S.C. 5104, 5105, 5107(d), and this subpart, the Bureau may grant the state a period of not more than 24 months to comply with these requirements. If an extension is granted to the state in accordance with this paragraph (d), then the Bureau will provide an additional initial and final determination process before it determines that the state is not in compliance and is subject to subparts C and E of this part.

(e) *Effective date of subparts C and E.* The provisions of subparts C and E of this part will become effective with respect to a state for which a final determination of noncompliance has been made upon:

(1) The effective date of the Bureau's final determination with respect to the state, pursuant to paragraph (c) of this section, unless an extension had been granted to the state in accordance with paragraph (d) of this section; or

(2) If an extension had been granted to the state in accordance with paragraph (d) of this section, the effective date of the Bureau's subsequent final determination with respect to the state following the expiration of the period of time granted pursuant to paragraph (d) of this section.

Subpart C—The Bureau's Loan Originator Licensing System and Nationwide Mortgage Licensing and Registry System

§ 1008.201 Scope of this subpart.

The S.A.F.E. Act provides the Bureau with ''backup authority'' to establish a loan originator licensing system for any state that is determined by the Bureau not to be in compliance with the minimum standards of the S.A.F.E. Act. The provisions of this subpart become applicable to individuals in a state as provided in § 1008.115(e). The S.A.F.E. Act also authorizes the Bureau to establish and maintain a nationwide mortgage licensing system and registry if the Bureau determines that the NMLSR is failing to meet the purposes and requirements of the S.A.F.E. Act for a comprehensive licensing, supervisory, and tracking system for loan originators.

§ 1008.203 The Bureau's establishment of loan originator licensing system.

If the Bureau determines, in accordance with § 1008.115(e), that a state has not established a licensing and registration system in compliance with the minimum standards of the S.A.F.E. Act, the Bureau shall apply to individuals in that state the minimum standards of the S.A.F.E. Act, as specified in subpart B, which provides the minimum requirements that a state must meet to be in compliance with the S.A.F.E. Act, and as may be further specified in this part.

§ 1008.205 The Bureau's establishment of nationwide mortgage licensing system and registry.

If the Bureau determines that the NMLSR established by CSBS and AARMR does not meet the minimum requirements of subpart D of this part, the Bureau will establish and maintain a nationwide mortgage licensing system and registry.

Subpart D—Minimum Requirements for Administration of the NMLSR

§ 1008.301 Scope of this subpart.

This subpart establishes minimum requirements that apply to administration of the NMLSR by the Conference of State Bank Supervisors or by the Bureau. The NMLSR must accomplish the following objectives:

(a) Provide uniform license applications and reporting requirements for state-licensed loan originators.

(b) Provide a comprehensive licensing and supervisory database.

(c) Aggregate and improve the flow of information to and between regulators.

(d) Provide increased accountability and tracking of loan originators.

(e) Streamline the licensing process and reduce the regulatory burden.

(f) Enhance consumer protections and support anti-fraud measures.

(g) Provide consumers with easily accessible information, offered at no charge, utilizing electronic media, including the Internet, regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against, loan originators.

(h) Establish a means by which residential mortgage loan originators would, to the greatest extent possible, be

required to act in the best interests of the consumer.

(i) Facilitate responsible behavior in the mortgage marketplace and provide comprehensive training and examination requirements related to mortgage lending.

(j) Facilitate the collection and disbursement of consumer complaints on behalf of state and Federal mortgage regulators.

§ 1008.303 Financial reporting.

To the extent that CSBS maintains the NMLSR, CSBS must annually provide to the Bureau, and the Bureau will annually collect and make available to the public, NMLSR financial statements, audited in accordance with Generally Accepted Accounting Principles (GAAP) promulgated by the Federal Accounting Standards Advisory Board, and other data. These financial statements and other data shall include, but not be limited to, the level and categories of funds received in relation to the NMLSR and how such funds are spent, including the aggregate total of funds paid for system development and improvements, the aggregate total of salaries and bonuses paid, the aggregate total of other administrative costs, and detail on other money spent, including money and interest paid to reimburse system investors or lenders, and a report of each state's activity with respect to the NMLSR, including the number of licensees, the state's financial commitment to the system, and the fees collected by the state through the NMLSR.

§ 1008.305 Data security.

(a) To the extent that CSBS, AARMR, or their successors maintain the NMLSR, CSBS, AARMR, and their successors, as applicable, must complete a background check on their employees, contractors, or other persons who have access to loan originators' Social Security Numbers, fingerprints, or any credit reports collected by the system.

(b) To the extent that CSBS, AARMR, or their successors maintain the NMLSR, CSBS, AARMR, and their successors as applicable, must keep and adhere to an appropriate information security and privacy policy. If the NMLSR forms a reasonable belief that a security breach has occurred, it shall notify affected parties, as soon as practicable, including the Bureau, any loan originator or registrant whose data may have been compromised, and the employer of the loan originator or registrant, if such employer is also licensed through the system.

§ 1008.307 Fees.

CSBS, AARMR, or the Bureau, as applicable, may charge reasonable fees to cover the costs of maintaining and providing access to information from the Nationwide Mortgage Licensing System and Registry. Fees shall not be charged to consumers for access to such system and registry. If the Bureau determines to charge fees, the fees to be charged shall be issued by notice with the opportunity for comment prior to any fees being charged.

§ 1008.309 Absence of liability for good-faith administration.

The Bureau or any organization serving as the administrator of the Nationwide Mortgage Licensing System and Registry or a system established by the Bureau under 12 U.S.C. 5108 and in accordance with subpart C, or any officer or employee of the Bureau or the Bureau's designee, shall not be subject to any civil action or proceeding for monetary damages by reason of the good-faith action or omission of any officer or employee of any such entity, while acting within the scope of office or employment, relating to the collection, furnishing, or dissemination of information concerning persons who are loan originators or are applying for licensing or registration as loan originators.

Subpart E—Enforcement of the Bureau's Licensing System

§ 1008.401 The Bureau's authority to examine loan originator records.

(a) *Summons authority.* The Bureau may:

(1) Examine any books, papers, records, or other data of any loan originator operating in any state which is subject to a licensing system established by the Bureau under subpart C of this part; and

(2) Summon any loan originator referred to in paragraph (a)(1) of this section or any person having possession, custody, or care of the reports and records relating to such loan originator, to appear before the Bureau at a time and place named in the summons and to produce such books, papers, records, or other data, and to give testimony, under oath, as may be relevant or material to an investigation of such loan originator for compliance with the requirements of the S.A.F.E. Act.

(b) *Examination authority*—(1) *In general.* If the Bureau establishes a licensing system under 12 U.S.C. 5107 and in accordance with subpart C of this part for any state, the Bureau shall appoint examiners for the purposes of ensuring the appropriate administration of the Bureau's licensing system.

(2) *Power to examine.* Any examiner appointed under paragraph (b)(1) of this section shall have power, on behalf of the Bureau, to make any examination of any loan originator operating in any state which is subject to a licensing system established by the Bureau under 12 U.S.C. 5107 and in accordance with subpart C of this part, whenever the Bureau determines that an examination of any loan originator is necessary to determine the compliance by the originator with minimum requirements of the S.A.F.E. Act.

(3) *Report of examination.* Each Bureau examiner appointed under paragraph (b)(1) of this section shall make a full and detailed report to the Bureau of examination of any loan originator examined under this section.

(4) *Administration of oaths and affirmations; evidence.* In connection with examinations of loan originators operating in any state which is subject to a licensing system established by the Bureau under 12 U.S.C. 5107, and in accordance with subpart C of this part, or with other types of investigations to determine compliance with applicable law and regulations, the Bureau and the examiners appointed by the Bureau may administer oaths and affirmations and examine and take and preserve testimony under oath as to any matter in respect to the affairs of any such loan originator.

(5) *Assessments.* The cost of conducting any examination of any loan originator operating in any state which is subject to a licensing system established by the Bureau under 12 U.S.C 5107 and in accordance with subpart C of this part shall be assessed by the Bureau against the loan originator to meet the Director's expenses in carrying out such examination.

§ 1008.403 [Reserved].

§ 1008.405 [Reserved].

Appendix A to Part 1008—Examples of Mortgage Loan Originator Activities

This Appendix provides examples to aid in the understanding of activities that would cause an individual to fall within or outside the definition of a mortgage loan originator under Part 1008. The examples in this Appendix are not all-inclusive. They illustrate only the issue described and do not illustrate any other issues that may arise. For purposes of the examples below, the term ''loan'' refers to a residential mortgage loan as defined in § 1008.23 of this part.

(a) *Taking a Loan Application.* Taking a residential mortgage loan application within the meaning of § 1008.103(c)(1) means receipt by an individual, for the purpose of facilitating a decision whether to extend an

offer of loan terms to a borrower or prospective borrower, of an application as defined in § 1008.23 (a request in any form for an offer, or a response to a solicitation of an offer, of residential mortgage loan terms, and the information about the borrower or prospective borrower that is customary or necessary in a decision whether to make such an offer).

(1) The following are examples to illustrate when an individual takes, or does not take, a loan application:

(i) An individual ''takes a residential mortgage loan application'' even if the individual:

(A) Has received the borrower or prospective borrower's request or information indirectly. Section 1008.103(c)(1) provides that an individual takes an application, whether he or she receives it ''directly or indirectly'' from the borrower or prospective borrower. This means that an individual who offers or negotiates residential mortgage loan terms for compensation or gain cannot avoid licensing requirements simply by having another person physically receive the application from the prospective borrower and then pass the application to the individual;

(B) Is not responsible for verifying information. The fact that an individual who takes application information from a borrower or prospective borrower is not responsible for verifying that information—for example, the individual is a mortgage broker who collects and sends that information to a lender—does not mean that the individual is not taking an application;

(C) Only inputs the information into an online application or other automated system; or

(D) Is not involved in approval of the loan, including determining whether the consumer qualifies for the loan. Similar to an individual who is not responsible for verification, an individual can still ''take a residential mortgage loan application'' even if he or she is not ultimately responsible for approving the loan. A mortgage broker, for example, can take a residential mortgage loan application even though it is passed on to a lender for a decision on whether the borrower qualifies for the loan and for the ultimate loan approval.

(ii) An individual does not take a loan application merely because the individual performs any of the following actions:

(A) Receives a loan application through the mail and forwards it, without review, to loan approval personnel. The Bureau interprets the term ''takes a residential mortgage loan application'' to exclude an individual whose only role with respect to the application is physically handling a completed application form or transmitting a completed form to a lender on behalf of a borrower or prospective borrower. This interpretation is consistent with the definition of ''loan originator'' in section 1503(3) of the S.A.F.E. Act.

(B) Assists a borrower or prospective borrower who is filling out an application by explaining the contents of the application and where particular borrower information is to be provided on the application;

(C) Generally describes for a borrower or prospective borrower the loan application process without a discussion of particular loan products; or

(D) In response to an inquiry regarding a prequalified offer that a borrower or prospective borrower has received from a lender, collects only basic identifying information about the borrower or prospective borrower on behalf of that lender.

(b) *Offering or Negotiating Terms of a Loan.* The following examples are designed to illustrate when an individual offers or negotiates terms of a loan within the meaning of § 1008.103(c)(2) and, conversely, what does not constitute offering or negotiating terms of a loan:

(1) Offering or negotiating the terms of a loan includes:

(i) Presenting for consideration by a borrower or prospective borrower particular loan terms, whether verbally, in writing, or otherwise, even if:

(A) Further verification of information is necessary;

(B) The offer is conditional;

(C) Other individuals must complete the loan process;

(D) The individual lacks authority to negotiate the interest rate or other loan terms; or

(E) The individual lacks authority to bind the person that is the source of the prospective financing.

(ii) Communicating directly or indirectly with a borrower or prospective borrower for the purpose of reaching a mutual understanding about prospective residential mortgage loan terms, including responding to a borrower or prospective borrower's request for a different rate or different fees on a pending loan application by presenting to the borrower or prospective borrower a revised loan offer, even if a mutual understanding is not subsequently achieved.

(2) Offering or negotiating terms of a loan does not include any of the following activities:

(i) Providing general explanations or descriptions in response to consumer queries, such as explaining loan terminology (*e.g.,* debt-to-income ratio) or lending policies (*e.g.,* the loan-to-value ratio policy of the lender), or describing product-related services;

(ii) Arranging the loan closing or other aspects of the loan process, including by communicating with a borrower or prospective borrower about those arrangements, provided that any communication that includes a discussion about loan terms only verifies terms already agreed to by the borrower or prospective borrower;

(iii) Providing a borrower or prospective borrower with information unrelated to loan terms, such as the best days of the month for scheduling loan closings at the bank;

(iv) Making an underwriting decision about whether the borrower or prospective borrower qualifies for a loan;

(v) Explaining or describing the steps that a borrower or prospective borrower would need to take in order to obtain a loan offer, including providing general guidance about qualifications or criteria that would need to be met that is not specific to that borrower or prospective borrower's circumstances;

(vi) Communicating on behalf of a mortgage loan originator that a written offer has been sent to a borrower or prospective borrower without providing any details of that offer; or

(vii) Offering or negotiating loan terms solely through a third-party licensed loan originator, so long as the nonlicensed individual does not represent to the public that he or she can or will perform covered activities and does not communicate with the borrower or potential borrower. For example:

(A) A seller who provides financing to a purchaser of a dwelling owned by that seller in which the offer and negotiation of loan terms with the borrower or prospective borrower is conducted exclusively by a third-party licensed loan originator;

(B) An individual who works solely for a lender, when the individual offers loan terms exclusively to third-party licensed loan originators and not to borrowers or potential borrowers.

(c) *For Compensation or Gain.* (1) An individual acts ''for compensation or gain'' within the meaning of § 1008.103(c)(2)(ii) if the individual receives or expects to receive in connection with the individual's activities anything of value, including, but not limited to, payment of a salary, bonus, or commission. The concept ''anything of value'' is interpreted broadly and is not limited only to payments that are contingent upon the closing of a loan.

(2) An individual does not act ''for compensation or gain'' if the individual acts as a volunteer without receiving or expecting to receive anything of value in connection with the individual's activities.

Appendix B to Part 1008—Engaging in the Business of a Loan Originator: Commercial Context and Habitualness

An individual who acts (or holds himself or herself out as acting) as a loan originator in a commercial context and with some degree of habitualness or repetition is considered to be ''engage[d] in the business of a loan originator[.]'' An individual who acts as a loan originator does so in a commercial context if the individual acts for the purpose of obtaining anything of value for himself or herself, or for an entity or individual for which the individual acts, rather than exclusively for public, charitable, or family purposes. The habitualness or repetition of the origination activities that is needed to ''engage in the business of a loan originator'' may be met either if the individual who acts as a loan originator does so with a degree of habitualness or repetition, or if the source of the prospective financing provides mortgage financing or performs other origination activities with a degree of habitualness or repetition. This Appendix provides examples to aid in the understanding of activities that would not constitute engaging in the business of a loan originator, such that an individual is not required to obtain and maintain a state mortgage loan originator license. The examples in this Appendix are not all-inclusive. They illustrate only the issue described and do not illustrate any other issues that may arise under part 1008. For purposes of the examples below, the term

''loan'' refers to a ''residential mortgage loan'' as defined in § 1008.23 of this part.

(a) *Not Engaged in the Business of a Mortgage Loan Originator.* The following examples illustrate when an individual generally does not ''engage in the business of a loan originator'':

(1) An individual who acts as a loan originator in providing financing for the sale of that individual's own residence, provided that the individual does not act as a loan originator or provide financing for such sales so frequently and under such circumstances that it constitutes a habitual and commercial activity.

(2) An individual who acts as a loan originator in providing financing for the sale of a property owned by that individual, provided that such individual does not engage in such activity with habitualness.

(3) A parent who acts as a loan originator in providing loan financing to his or her child.

(4) An employee of a government entity who acts as a loan originator only pursuant to his or her official duties as an employee of that government entity, if all applicable conditions in § 1008.103(e)(6) of this part are met.

(5) If all applicable conditions in § 1008.103(e)(7) of this part are met, an employee of a nonprofit organization that has been determined to be a bona fide nonprofit organization by the state supervisory authority, when the employee acts as a loan originator pursuant to his or her duties as an employee of that organization.

(6) An individual who does not act as a loan originator habitually or repeatedly, provided that the source of prospective financing does not provide mortgage financing or perform other loan origination activities habitually or repeatedly.

Appendix C to Part 1008—Independent Contractors and Loan Processor and Underwriter Activities That Require a State Mortgage Loan Originator License

The examples below are designed to aid in the understanding of loan processing or underwriting activities for which an individual is required to obtain a S.A.F.E. Act-compliant mortgage loan originator license. The examples in this Appendix are not all-inclusive. They illustrate only the issue described and do not illustrate any other issues that may arise under part 1008. For purposes of the examples below, the term ''loan'' refers to a residential mortgage loan as defined in § 1008.23 of this part.

(a) An individual who is a loan processor or underwriter who must obtain and maintain a state loan originator license includes:

(1) Any individual who engages in the business of a loan originator, as defined in § 1008.103 of this part;

(2) Any individual who performs clerical or support duties and who is an independent contractor, as those terms are defined in § 1008.23;

(3) Any individual who collects, receives, distributes, or analyzes information in connection with the making of a credit decision and who is an independent contractor, as that term is defined in § 1008.23; and

(4) Any individual who communicates with a consumer to obtain information necessary for making a credit decision and who is an independent contractor, as that term is defined in § 1008.23.

(b) A state is not required to impose S.A.F.E. Act licensing requirements on any individual loan processor or underwriter who, for example:

(1) Performs only clerical or support duties (i.e., the loan processor's or underwriter's activities do not include, e.g., offering or negotiating loan rates or terms, or counseling borrowers or prospective borrowers about loan rates or terms), and who performs those clerical or support duties at the direction of and subject to the supervision and instruction of an individual who either: Is licensed and registered in accordance with § 1008.103(a) (state licensing of loan originators); or is not required to be licensed because he or she is excluded from the licensing requirement pursuant to § 1008.103(e)(2) (time-share exclusion), (e)(5)(federally registered loan originator), (e)(6) (government employees exclusion), or (e)(7) (nonprofit exclusion).

(2) Performs only clerical or support duties as an employee of a mortgage lender or mortgage brokerage firm, and who performs those duties at the direction of and subject to the supervision and instruction of an individual who is employed by the same employer and who is licensed in accordance with § 1008.103(a) (state licensing of loan originators).

(3) Is an employee of a loan processing or underwriting company that provides loan processing or underwriting services to one or more mortgage lenders or mortgage brokerage firms under a contract between the loan processing or underwriting company and the mortgage lenders or mortgage brokerage firms, provided the employee performs only clerical or support duties and performs those duties only at the direction of and subject to the supervision and instruction of a licensed loan originator employee of the same loan processing and underwriting company.

(4) Is an individual who does not otherwise perform the activities of a loan originator and is *not* involved in the receipt, collection, distribution, or analysis of information common for the processing or underwriting of a residential mortgage loan, nor is in communication with the consumer to obtain such information.

(c) In order to conclude that an individual who performs clerical or support duties is doing so at the direction of and subject to the supervision and instruction of a loan originator who is licensed or registered in accordance with § 1008.103 (or, as applicable, an individual who is excluded from the licensing and registration requirements under § 1008.103(e)(2), (e)(6), or (e)(7)), there must be an actual nexus between the licensed or registered loan originator's (or excluded individual's) direction, supervision, and instruction and the loan processor or underwriter's activities. This actual nexus must be more than a nominal relationship on an organizational chart. For example, there is an actual nexus when:

(1) The supervisory licensed or registered loan originator assigns, authorizes, and monitors the loan processor or underwriter employee's performance of clerical and support duties.

(2) The supervisory licensed or registered loan originator exercises traditional supervisory responsibilities, including, but not limited to, the training, mentoring, and evaluation of the loan processor or underwriter employee.

Appendix D to Part 1008—Attorneys: Circumstances That Require a State Mortgage Loan Originator License

This Appendix D clarifies the circumstances in which the S.A.F.E. Act requires a licensed attorney who engages in loan origination activities to obtain a state loan originator license and registration. This special category recognizes limited, heavily regulated activities that meet strict criteria that are different from the criteria for specific exemptions from the S.A.F.E. Act requirements and the exclusions set forth in the regulations and illustrated in other appendices of part 1008.

(a) *S.A.F.E. Act-compliant licensing required.* An individual who is a licensed attorney is required to be licensed if the individual is engaged in the business of a loan originator as defined in § 1008.103 and such loan origination activities are not all of the following:

(1) Considered by the state's court of last resort (or other state governing body responsible for regulating the practice of law) to be part of the authorized practice of law within the state;

(2) Carried out within an attorney-client relationship; and

(3) Accomplished by the attorney in compliance with all applicable laws, rules, ethics, and standards.

(b) *S.A.F.E. Act-compliant licensing not required.* A licensed attorney performing activities that come within the definition of a loan originator is not required to be licensed, provided that such activities are:

(1) Considered by the state's court of last resort (or other state governing body responsible for regulating the practice of law) to be part of the authorized practice of law within the state;

(2) Carried out within an attorney-client relationship; and

(3) Accomplished by the attorney in compliance with all applicable laws, rules, ethics, and standards.

Dated: October 24, 2011.

Alastair M. Fitzpayne,

Deputy Chief of Staff and Executive Secretary, Department of the Treasury.

[FR Doc. 2011–31730 Filed 12–16–11; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1013

[Docket No. CFPB–2011–0026]

RIN 3170–AA06

Consumer Leasing (Regulation M)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interim final rule with request for public comment.

SUMMARY: Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) transferred rulemaking authority for a number of consumer financial protection laws from seven Federal agencies to the Bureau of Consumer Financial Protection (Bureau) as of July 21, 2011. The Bureau is in the process of republishing the regulations implementing those laws with technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. In light of the transfer of the Board of Governors of the Federal Reserve System's (Board's) rulemaking authority for the Consumer Leasing Act of 1976 (CLA) to the Bureau, the Bureau is publishing for public comment an interim final rule establishing a new Regulation M (Consumer Leasing). This interim final rule does not impose any new substantive obligations on persons subject to the existing Regulation M, previously published by the Board.

DATES: This interim final rule is effective December 30, 2011. Comments must be received on or before February 17, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2011–0026 or RIN 3170–AA06, by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1500 Pennsylvania Avenue NW., (*Attn:* 1801 L Street), Washington, DC 20220.
- *Hand Delivery/Courier in Lieu of Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20006, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Courtney Jean or Priscilla Walton-Fein, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Background

The Consumer Leasing Act (CLA), 15 U.S.C. 1667–1667e, was enacted in 1976 as an amendment to the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.* The purpose of the CLA is to ensure meaningful and accurate disclosure of the terms of personal property leases for personal, family, or household use. The CLA and Regulation M require lessors to provide consumers with uniform cost and other disclosures about consumer lease transactions. The statute and the regulation generally apply to consumer leases for the use of personal property in which the contractual obligation has a term of more than four months and the lessee's total contractual obligation under the lease exceeds a specified dollar threshold. Historically, the CLA has been implemented in Regulation M of the Board of Governors of the Federal Reserve System (Board), 12 CFR Part 213. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] amended a number of consumer financial protection laws, including the CLA. In addition to various substantive amendments, the Dodd-Frank Act transferred rulemaking authority for the CLA to the Bureau of Consumer Financial Protection (Bureau), effective July 21, 2011.[2] *See* sections 1061, 1100A, and 1100E of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and the CLA, as amended, the Bureau is publishing for public comment an interim final rule establishing a new Regulation M (Consumer Leasing), 12 CFR Part 1013, implementing the CLA (except with respect to persons excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act).

II. Summary of the Interim Final Rule

A. General

The interim final rule substantially duplicates the Board's Regulation M as the Bureau's new Regulation M, 12 CFR Part 1013, making only certain non-substantive, technical, formatting, and stylistic changes. To minimize any potential confusion, the Bureau is preserving the numbering of the Board's Regulation M, other than the new part number. While this interim final rule generally incorporates the Board's existing regulatory text, appendices (including model forms and clauses), and supplements, as amended,[3] the rule has been edited as necessary to reflect nomenclature and other technical amendments required by the Dodd-Frank Act. Notably, this interim final rule does not impose any new substantive obligations on regulated entities.

B. Specific Changes

The Bureau has made certain nomenclature and other non-substantive changes consistently throughout Regulation M. References to the Board and its administrative structure have been replaced with references to the Bureau. Conforming edits have been made to internal cross-references and to reflect the scope of the Bureau's authority pursuant to the CLA, as amended by the Dodd-Frank Act. Appendix B, entitled ''Federal Enforcement Agencies,'' has been eliminated, because it was designed to be informational only and is unnecessary for purposes of implementing the CLA, as amended. Historical references that are no longer applicable, and references to effective dates that have passed, have been removed as appropriate.

III. Legal Authority

A. Rulemaking Authority

The Bureau is issuing this interim final rule pursuant to its authority under the CLA and the Dodd-Frank Act. Effective July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies. The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] Section 1029 of the Dodd-Frank Act generally excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

[3] *See* 76 FR 35721 (June 20, 2011).

Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.''[4] The CLA is a Federal consumer financial law.[5] Accordingly, effective July 21, 2011, except with respect to persons excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act, the authority of the Board to issue regulations pursuant to the CLA transferred to the Bureau.[6]

The CLA, as amended, authorizes the Bureau to prescribe regulations to update and clarify the requirements and definitions applicable to lease disclosures and contracts, and any other issues specifically related to consumer leasing, to the extent the Bureau determines such action necessary to carry out the purposes, prevent the circumvention, or facilitate compliance with the requirements of the CLA.[7] These regulations may contain such classifications and differentiations, or provide for such adjustments and exceptions for any class of transactions, that the Bureau considers appropriate.[8] The CLA also directs the Bureau to establish and publish model forms to facilitate compliance with the disclosure requirements of the CLA and to aid consumers in understanding the transactions to which the disclosure forms relate.[9] Section 1100E of the Dodd-Frank Act directs the Bureau to adjust the dollar threshold for covered consumer lease transactions annually for inflation by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W), as published by the Bureau of Labor Statistics.[10] In its existing regulation, the Board used its CLA authority to establish rules to promote meaningful and accurate disclosure in consumer lease transactions.[11]

B. Authority To Issue an Interim Final Rule Without Prior Notice and Comment

The Administrative Procedure Act (APA)[12] generally requires public notice and an opportunity to comment before promulgation of regulations.[13] The APA provides exceptions to notice-and-comment procedures, however, where an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest or when a rulemaking relates to agency organization, procedure, and practice.[14] The Bureau finds that there is good cause to conclude that providing notice and opportunity for comment would be unnecessary and contrary to the public interest under these circumstances. In addition, substantially all the changes made by this interim final rule, which were necessitated by the Dodd-Frank Act's transfer of CLA authority from the Board to the Bureau, relate to agency organization, procedure, and practice and are thus exempt from the APA's notice-and-comment requirements.

The Bureau's good cause findings are based on the following considerations. As an initial matter, the Board's existing regulation was a result of notice-and-comment rulemaking to the extent required. Moreover, the interim final rule published today does not impose any new, substantive obligations on regulated entities. Rather, the interim final rule makes only non-substantive, technical changes to the existing text of the regulation, such as renumbering, changing internal cross-references, and replacing appropriate nomenclature to reflect the transfer of authority to the Bureau. Given the technical nature of these changes, and the fact that the interim final rule does not impose any additional substantive requirements on covered entities, an opportunity for prior public comment is unnecessary. In addition, recodifying the Board's regulation to reflect the transfer of authority to the Bureau will help facilitate compliance with the CLA and its implementing regulation, and will help reduce uncertainty regarding the applicable regulatory framework. Using notice-and-comment procedures would delay this process and thus be contrary to the public interest.

The APA generally requires that rules be published not less than 30 days before their effective dates. *See* 5 U.S.C. 553(d). As with the notice and comment requirement, however, the APA allows an exception when ''otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). The Bureau finds that there is good cause for providing less than 30 days notice here. A delayed effective date would harm consumers and regulated entities by needlessly perpetuating discrepancies between the amended statutory text and the implementing regulation, thereby hindering compliance and prolonging uncertainty regarding the applicable regulatory framework.[15]

In addition, delaying the effective date of the interim final rule for 30 days would provide no practical benefit to regulated entities in this context and in fact could operate to their detriment. As discussed above, the interim final rule published today does not impose any new, substantive obligations on regulated entities. Instead, the rule makes only non-substantive, technical changes to the existing text of the regulation. Thus, regulated entities that are already in compliance with the existing rules will not need to modify business practices as a result of this rule.

C. Section 1022(b)(2) of the Dodd-Frank Act

In developing the interim final rule, the Bureau has conducted an analysis of potential benefits, costs, and impacts.[16] The Bureau believes that the interim final rule will benefit consumers and

[4] Public Law 111–203, section 1061(a)(1). Effective on the designated transfer date, July 21, 2011, the Bureau was also granted ''all powers and duties'' vested in each of the Federal agencies, relating to the consumer financial protection functions, on the day before the designated transfer date. Until this and other interim final rules take effect, existing regulations for which rulemaking authority transferred to the Bureau continue to govern persons covered by this rule. *See* 76 FR 43569 (July 21, 2011).

[5] Public Law 111–203, section 1002(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws''); *id.* Section 1002(12) (defining ''enumerated consumer laws'' to include the Consumer Leasing Act of 1976).

[6] Section 1066 of the Dodd-Frank Act grants the Secretary of the Treasury interim authority to perform certain functions of the Bureau. Pursuant to that authority, Treasury is publishing this interim final rule on behalf of the Bureau.

[7] *Id.* Section 1100A(10); 15 U.S.C. 1667f(a).

[8] *Id.*

[9] *Id.*

[10] Public Law 111–203, section 1100E.

[11] *See* Regulation M, 12 CFR Part 213.

[12] 5 U.S.C. 551 *et seq.*

[13] 5 U.S.C. 553(b), (c).

[14] 5 U.S.C. 553(b)(3)(A), (B).

[15] This interim final rule is one of 14 companion rulemakings that together restate and recodify the implementing regulations under 14 existing consumer financial laws (part III.C, below, lists the 14 laws involved). In the interest of proper coordination of this overall regulatory framework, which includes numerous cross-references among some of the regulations, the Bureau is establishing the same effective date of December 30, 2011 for those rules published on or before that date and making those published thereafter (if any) effective immediately.

[16] Section 1022(b)(2)(A) of the Dodd-Frank Act addresses the consideration of the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas. Section 1022(b)(2)(B) requires that the Bureau ''consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies.'' The manner and extent to which these provisions apply to interim final rules and to benefits, costs, and impacts that are compelled by statutory changes rather than discretionary Bureau action is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

covered persons by updating and recodifying Regulation M to reflect the transfer of authority to the Bureau and certain other changes mandated by the Dodd-Frank Act. This will help facilitate compliance with the CLA and its implementing regulations and help reduce any uncertainty regarding the applicable regulatory framework. As discussed below, the interim final rule will not impose any new substantive obligations on consumers or covered persons and is not expected to have any impact on consumers' access to consumer financial products and services.

Although not required by the interim final rule, covered persons may incur some costs in updating compliance manuals and related materials to reflect the new numbering and other technical changes reflected in the new Regulation M. The Bureau has worked to reduce any such burden by preserving the existing numbering to the extent possible and believes that such costs will likely be minimal. These changes could be handled in the short term by providing a short, standalone summary alerting users to the changes and in the long term could be combined with other updates at the firm's convenience. The Bureau intends to continue investigating the possible costs to affected entities of updating manuals and related materials to reflect these changes and solicits comments on this and other issues discussed in this section.

The interim final rule will have no unique impact on depository institutions or credit unions with $10 billion or less in assets as described in section 1026(a) of the Dodd-Frank Act. Also, the interim final rule will have no unique impact on rural consumers.

In undertaking the process of recodifying Regulation M, as well as regulations implementing thirteen other existing consumer financial laws,[17] the Bureau consulted the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, the Board of Governors of the Federal Reserve System, the Federal Trade Commission, and the Department of Housing and Urban Development, including with respect to consistency with any prudential, market, or systemic objectives that may be administered by such agencies.[18] The Bureau also has consulted with the Office of Management and Budget for technical assistance. The Bureau expects to have further consultations with the appropriate Federal agencies during the comment period.

IV. Request for Comment

Although notice and comment rulemaking procedures are not required, the Bureau invites comments on this notice. Commenters are specifically encouraged to identify any technical issues raised by the rule. The Bureau is also seeking comment in response to a notice published at 76 FR 75825 (Dec. 5, 2011) concerning its efforts to identify priorities for streamlining regulations that it has inherited from other Federal agencies to address provisions that are outdated, unduly burdensome, or unnecessary.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[19] The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule 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.[20] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[21]

The IRFA and FRFA requirements described above apply only where a notice of proposed rulemaking is required,[22] and the panel requirement applies only when a rulemaking requires an IRFA.[23] As discussed above in part III, a notice of proposed rulemaking is not required for this rulemaking.

In addition, as discussed above, this interim final rule has only a minor impact on entities subject to Regulation M. The rule imposes no new, substantive obligations on covered entities. Accordingly, the undersigned certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities.

VI. Paperwork Reduction Act

The Bureau may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. This rule contains information collection requirements under the Paperwork Reduction Act (PRA), which have been previously approved by OMB, and the ongoing PRA burden for which is unchanged by this rule. There are no new information collection requirements in this interim final rule. The Bureau's OMB control number for this information collection is: 3170–0006.

List of Subjects in 12 CFR Part 1013

Advertising, Reporting and recordkeeping requirements, Truth in Lending.

Authority and Issuance

■ For the reasons set forth above, the Bureau of Consumer Financial Protection adds Part 1013 to Chapter X in Title 12 of the Code of Federal Regulations to read as follows:

PART 1013—CONSUMER LEASING (REGULATION M)

Sec.
1013.1 Authority, scope, purpose, and enforcement.
1013.2 Definitions.
1013.3 General disclosure requirements.
1013.4 Content of disclosures.
1013.5 Renegotiations, extensions, and assumptions.
1013.6 [Reserved]
1013.7 Advertising.
1013.8 Record retention.
1013.9 Relation to state laws.
Appendix A to Part 1013—Model Forms
Appendix B to Part 1013—[Reserved]
Appendix C to Part 1013—Issuance of Official Interpretations
Supplement I to Part 1013—Official Interpretations

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1604, 1667f.

[17] The fourteen laws implemented by this and its companion rulemakings are: the Consumer Leasing Act, the Electronic Fund Transfer Act (except with respect to section 920 of that Act), the Equal Credit Opportunity Act, the Fair Credit Reporting Act (except with respect to sections 615(e) and 628 of that act), the Fair Debt Collection Practices Act, Subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act, sections 502 through 509 of the Gramm-Leach-Bliley Act (except for section 505 as it applies to section 501(b)), the Home Mortgage Disclosure Act, the Real Estate Settlement Procedures Act, the S.A.F.E. Mortgage Licensing Act, the Truth in Lending Act, the Truth in Savings Act, section 626 of the Omnibus Appropriations Act, 2009, and the Interstate Land Sales Full Disclosure Act.

[18] In light of the technical but voluminous nature of this recodification project, the Bureau focused the consultation process on a representative sample of the recodified regulations, while making information on the other regulations available. The Bureau expects to conduct differently its future consultations regarding substantive rulemakings.

[19] 5 U.S.C. 601 *et seq.*

[20] 5 U.S.C. 603, 604.

[21] 5 U.S.C. 609.

[22] 5 U.S.C. 603(a), 604(a); 5 U.S.C. 553(b)(B).

[23] 5 U.S.C. 609(b).

§ 1013.1 Authority, scope, purpose, and enforcement.

(a) *Authority.* The regulation in this part, known as Regulation M, is issued by the Bureau of Consumer Financial Protection to implement the consumer leasing provisions of the Truth in Lending Act, which is Title I of the Consumer Credit Protection Act, as amended (15 U.S.C. 1601 *et seq.*). Information collection requirements contained in this part have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 3170–0006.

(b) *Scope and purpose.* This part applies to all persons that are lessors of personal property under consumer leases as those terms are defined in § 1013.2(e)(1) and (h), except persons excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, 124 Stat. 1376. The purpose of this part is:

(1) To ensure that lessees of personal property receive meaningful disclosures that enable them to compare lease terms with other leases and, where appropriate, with credit transactions;

(2) To limit the amount of balloon payments in consumer lease transactions; and

(3) To provide for the accurate disclosure of lease terms in advertising.

(c) *Enforcement and liability.* Section 108 of the Act contains the administrative enforcement provisions. Sections 112, 130, 131, and 185 of the Act contain the liability provisions for failing to comply with the requirements of the Act and this part.

§ 1013.2 Definitions.

For the purposes of this part the following definitions apply:

(a) *Act* means the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) and the Consumer Leasing Act is Chapter 5 of the Truth in Lending Act.

(b) *Advertisement* means a commercial message in any medium that directly or indirectly promotes a consumer lease transaction.

(c) *Bureau* refers to the Bureau of Consumer Financial Protection.

(d) *Closed-end lease* means a consumer lease other than an open-end lease as defined in this section.

(e)(1) *Consumer lease* means a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease. The threshold amount is adjusted annually to reflect increases in the Consumer Price Index for Urban Wage Earners and Clerical Workers, as applicable. See the official commentary to this paragraph (e) for the threshold amount applicable to a specific consumer lease. Unless the context indicates otherwise, in this part ''lease'' means ''consumer lease.''

(2) The term does not include a lease that meets the definition of a credit sale in Regulation Z (12 CFR 226.2(a)). It also does not include a lease for agricultural, business, or commercial purposes or a lease made to an organization.

(3) This part does not apply to a lease transaction of personal property which is incident to the lease of real property and which provides that:

(i) The lessee has no liability for the value of the personal property at the end of the lease term except for abnormal wear and tear; and

(ii) The lessee has no option to purchase the leased property.

(f) *Gross capitalized cost* means the amount agreed upon by the lessor and the lessee as the value of the leased property and any items that are capitalized or amortized during the lease term, including but not limited to taxes, insurance, service agreements, and any outstanding prior credit or lease balance. *Capitalized cost reduction* means the total amount of any rebate, cash payment, net trade-in allowance, and noncash credit that reduces the gross capitalized cost. The *adjusted capitalized cost* equals the gross capitalized cost less the capitalized cost reduction, and is the amount used by the lessor in calculating the base periodic payment.

(g) *Lessee* means a natural person who enters into or is offered a consumer lease.

(h) *Lessor* means a person who regularly leases, offers to lease, or arranges for the lease of personal property under a consumer lease. A person who has leased, offered, or arranged to lease personal property more than five times in the preceding calendar year or more than five times in the current calendar year is subject to the Act and this part.

(i) *Open-end lease* means a consumer lease in which the lessee's liability at the end of the lease term is based on the difference between the residual value of the leased property and its realized value.

(j) *Organization* means a corporation, trust, estate, partnership, cooperative, association, or government entity or instrumentality.

(k) *Person* means a natural person or an organization.

(l) *Personal property* means any property that is not real property under the law of the state where the property is located at the time it is offered or made available for lease.

(m) *Realized value* means:

(1) The price received by the lessor for the leased property at disposition;

(2) The highest offer for disposition of the leased property; or

(3) The fair market value of the leased property at the end of the lease term.

(n) *Residual value* means the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in calculating the base periodic payment.

(o) *Security interest* and *security* mean any interest in property that secures the payment or performance of an obligation.

(p) *State* means any state, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

§ 1013.3 General disclosure requirements.

(a) *General requirements.* A lessor shall make the disclosures required by § 1013.4, as applicable. The disclosures shall be made clearly and conspicuously in writing in a form the consumer may keep, in accordance with this section. The disclosures required by this part may be provided to the lessee in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). For an advertisement accessed by the consumer in electronic form, the disclosures required by § 1013.7 may be provided to the consumer in electronic form in the advertisement, without regard to the consumer consent or other provisions of the E-Sign Act.

(1) *Form of disclosures.* The disclosures required by § 1013.4 shall be given to the lessee together in a dated statement that identifies the lessor and the lessee; the disclosures may be made either in a separate statement that identifies the consumer lease transaction or in the contract or other document evidencing the lease. Alternatively, the disclosures required to be segregated from other information under paragraph (a)(2) of this section may be provided in a separate dated statement that identifies the lease, and the other required disclosures may be

provided in the lease contract or other document evidencing the lease. In a lease of multiple items, the property description required by § 1013.4(a) may be given in a separate statement that is included in the disclosure statement required by this paragraph.

(2) *Segregation of certain disclosures.* The following disclosures shall be segregated from other information and shall contain only directly related information: §§ 1013.4(b) through (f), (g)(2), (h)(3), (i)(1), (j), and (m)(1). The headings, content, and format for the disclosures referred to in this paragraph (a)(2) shall be provided in a manner substantially similar to the applicable model form in Appendix A of this part.

(3) *Timing of disclosures.* A lessor shall provide the disclosures to the lessee prior to the consummation of a consumer lease.

(4) *Language of disclosures.* The disclosures required by § 1013.4 may be made in a language other than English provided that they are made available in English upon the lessee's request.

(b) *Additional information; nonsegregated disclosures.* Additional information may be provided with any disclosure not listed in paragraph (a)(2) of this section, but it shall not be stated, used, or placed so as to mislead or confuse the lessee or contradict, obscure, or detract attention from any disclosure required by this part.

(c) *Multiple lessors or lessees.* When a transaction involves more than one lessor, the disclosures required by this part may be made by one lessor on behalf of all the lessors. When a lease involves more than one lessee, the lessor may provide the disclosures to any lessee who is primarily liable on the lease.

(d) *Use of estimates.* If an amount or other item needed to comply with a required disclosure is unknown or unavailable after reasonable efforts have been made to ascertain the information, the lessor may use a reasonable estimate that is based on the best information available to the lessor, is clearly identified as an estimate, and is not used to circumvent or evade any disclosures required by this part.

(e) *Effect of subsequent occurrence.* If a required disclosure becomes inaccurate because of an event occurring after consummation, the inaccuracy is not a violation of this part.

(f) *Minor variations.* A lessor may disregard the effects of the following in making disclosures:

(1) That payments must be collected in whole cents;

(2) That dates of scheduled payments may be different because a scheduled date is not a business day;

(3) That months have different numbers of days; and

(4) That February 29 occurs in a leap year.

§ 1013.4 Content of disclosures.

For any consumer lease subject to this part, the lessor shall disclose the following information, as applicable:

(a) *Description of property.* A brief description of the leased property sufficient to identify the property to the lessee and lessor.

(b) *Amount due at lease signing or delivery.* The total amount to be paid prior to or at consummation or by delivery, if delivery occurs after consummation, using the term ''amount due at lease signing or delivery.'' The lessor shall itemize each component by type and amount, including any refundable security deposit, advance monthly or other periodic payment, and capitalized cost reduction; and in motor vehicle leases, shall itemize how the amount due will be paid, by type and amount, including any net trade-in allowance, rebates, noncash credits, and cash payments in a format substantially similar to the model forms in Appendix A of this part.

(c) *Payment schedule and total amount of periodic payments.* The number, amount, and due dates or periods of payments scheduled under the lease, and the total amount of the periodic payments.

(d) *Other charges.* The total amount of other charges payable to the lessor, itemized by type and amount, that are not included in the periodic payments. Such charges include the amount of any liability the lease imposes upon the lessee at the end of the lease term; the potential difference between the residual and realized values referred to in paragraph (k) of this section is excluded.

(e) *Total of payments.* The total of payments, with a description such as ''the amount you will have paid by the end of the lease.'' This amount is the sum of the amount due at lease signing (less any refundable amounts), the total amount of periodic payments (less any portion of the periodic payment paid at lease signing), and other charges under paragraphs (b), (c), and (d) of this section. In an open-end lease, a description such as ''you will owe an additional amount if the actual value of the vehicle is less than the residual value'' shall accompany the disclosure.

(f) *Payment calculation.* In a motor vehicle lease, a mathematical progression of how the scheduled periodic payment is derived, in a format substantially similar to the applicable model form in Appendix A of this part, which shall contain the following:

(1) *Gross capitalized cost.* The gross capitalized cost, including a disclosure of the agreed upon value of the vehicle, a description such as ''the agreed upon value of the vehicle [state the amount] and any items you pay for over the lease term (such as service contracts, insurance, and any outstanding prior credit or lease balance),'' and a statement of the lessee's option to receive a separate written itemization of the gross capitalized cost. If requested by the lessee, the itemization shall be provided before consummation.

(2) *Capitalized cost reduction.* The capitalized cost reduction, with a description such as ''the amount of any net trade-in allowance, rebate, noncash credit, or cash you pay that reduces the gross capitalized cost.''

(3) *Adjusted capitalized cost.* The adjusted capitalized cost, with a description such as ''the amount used in calculating your base [periodic] payment.''

(4) *Residual value.* The residual value, with a description such as ''the value of the vehicle at the end of the lease used in calculating your base [periodic] payment.''

(5) *Depreciation and any amortized amounts.* The depreciation and any amortized amounts, which is the difference between the adjusted capitalized cost and the residual value, with a description such as ''the amount charged for the vehicle's decline in value through normal use and for any other items paid over the lease term.''

(6) *Rent charge.* The rent charge, with a description such as ''the amount charged in addition to the depreciation and any amortized amounts.'' This amount is the difference between the total of the base periodic payments over the lease term minus the depreciation and any amortized amounts.

(7) *Total of base periodic payments.* The total of base periodic payments with a description such as ''depreciation and any amortized amounts plus the rent charge.''

(8) *Lease payments.* The lease payments with a description such as ''the number of payments in your lease.''

(9) *Base periodic payment.* The total of the base periodic payments divided by the number of payment periods in the lease.

(10) *Itemization of other charges.* An itemization of any other charges that are part of the periodic payment.

(11) *Total periodic payment.* The sum of the base periodic payment and any other charges that are part of the periodic payment.

(g) *Early termination*—(1) *Conditions and disclosure of charges.* A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term; and the amount or a description of the method for determining the amount of any penalty or other charge for early termination, which must be reasonable.

(2) *Early termination notice.* In a motor vehicle lease, a notice substantially similar to the following: ''Early Termination. You may have to pay a substantial charge if you end this lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the lease is terminated. The earlier you end the lease, the greater this charge is likely to be.''

(h) *Maintenance responsibilities.* The following provisions are required:

(1) *Statement of responsibilities.* A statement specifying whether the lessor or the lessee is responsible for maintaining or servicing the leased property, together with a brief description of the responsibility;

(2) *Wear and use standard.* A statement of the lessor's standards for wear and use (if any), which must be reasonable; and

(3) *Notice of wear and use standard.* In a motor vehicle lease, a notice regarding wear and use substantially similar to the following: ''Excessive Wear and Use. You may be charged for excessive wear based on our standards for normal use.'' The notice shall also specify the amount or method for determining any charge for excess mileage.

(i) *Purchase option.* A statement of whether or not the lessee has the option to purchase the leased property, and:

(1) *End of lease term.* If at the end of the lease term, the purchase price; and

(2) *During lease term.* If prior to the end of the lease term, the purchase price or the method for determining the price and when the lessee may exercise this option.

(j) *Statement referencing nonsegregated disclosures.* A statement that the lessee should refer to the lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interests, if applicable.

(k) *Liability between residual and realized values.* A statement of the lessee's liability, if any, at early termination or at the end of the lease term for the difference between the residual value of the leased property and its realized value.

(l) *Right of appraisal.* If the lessee's liability at early termination or at the end of the lease term is based on the realized value of the leased property, a statement that the lessee may obtain, at the lessee's expense, a professional appraisal by an independent third party (agreed to by the lessee and the lessor) of the value that could be realized at sale of the leased property. The appraisal shall be final and binding on the parties.

(m) *Liability at end of lease term based on residual value.* If the lessee is liable at the end of the lease term for the difference between the residual value of the leased property and its realized value:

(1) *Rent and other charges.* The rent and other charges, paid by the lessee and required by the lessor as an incident to the lease transaction, with a description such as ''the total amount of rent and other charges imposed in connection with your lease [state the amount].''

(2) *Excess liability.* A statement about a rebuttable presumption that, at the end of the lease term, the residual value of the leased property is unreasonable and not in good faith to the extent that the residual value exceeds the realized value by more than three times the base monthly payment (or more than three times the average payment allocable to a monthly period, if the lease calls for periodic payments other than monthly); and that the lessor cannot collect the excess amount unless the lessor brings a successful court action and pays the lessee's reasonable attorney's fees, or unless the excess of the residual value over the realized value is due to unreasonable or excessive wear or use of the leased property (in which case the rebuttable presumption does not apply).

(3) *Mutually agreeable final adjustment.* A statement that the lessee and lessor are permitted, after termination of the lease, to make any mutually agreeable final adjustment regarding excess liability.

(n) *Fees and taxes.* The total dollar amount for all official and license fees, registration, title, or taxes required to be paid in connection with the lease.

(o) *Insurance.* A brief identification of insurance in connection with the lease including:

(1) *Through the lessor.* If the insurance is provided by or paid through the lessor, the types and amounts of coverage and the cost to the lessee; or

(2) *Through a third party.* If the lessee must obtain the insurance, the types and amounts of coverage required of the lessee.

(p) *Warranties or guarantees.* A statement identifying all express warranties and guarantees from the manufacturer or lessor with respect to the leased property that apply to the lessee.

(q) *Penalties and other charges for delinquency.* The amount or the method of determining the amount of any penalty or other charge for delinquency, default, or late payments, which must be reasonable.

(r) *Security interest.* A description of any security interest, other than a security deposit disclosed under paragraph (b) of this section, held or to be retained by the lessor; and a clear identification of the property to which the security interest relates.

(s) *Limitations on rate information.* If a lessor provides a percentage rate in an advertisement or in documents evidencing the lease transaction, a notice stating that ''this percentage may not measure the overall cost of financing this lease'' shall accompany the rate disclosure. The lessor shall not use the term ''annual percentage rate,'' ''annual lease rate,'' or any equivalent term.

(t) *Non-motor vehicle open-end leases.* Non-motor vehicle open-end leases remain subject to section 182(10) of the Act regarding end of term liability.

§ 1013.5 Renegotiations, extensions, and assumptions.

(a) *Renegotiation.* A renegotiation occurs when a consumer lease subject to this part is satisfied and replaced by a new lease undertaken by the same consumer. A renegotiation requires new disclosures, except as provided in paragraph (d) of this section.

(b) *Extension.* An extension is a continuation, agreed to by the lessor and the lessee, of an existing consumer lease beyond the originally scheduled end of the lease term, except when the continuation is the result of a renegotiation. An extension that exceeds six months requires new disclosures, except as provided in paragraph (d) of this section.

(c) *Assumption.* New disclosures are not required when a consumer lease is assumed by another person, whether or not the lessor charges an assumption fee.

(d) *Exceptions.* New disclosures are not required for the following, even if they meet the definition of a renegotiation or an extension:

(1) A reduction in the rent charge;

(2) The deferment of one or more payments, whether or not a fee is charged;

(3) The extension of a lease for not more than six months on a month-to-month basis or otherwise;

(4) A substitution of leased property with property that has a substantially equivalent or greater economic value, provided no other lease terms are changed;

(5) The addition, deletion, or substitution of leased property in a multiple-item lease, provided the average periodic payment does not change by more than 25 percent; or

(6) An agreement resulting from a court proceeding.

§ 1013.6 [Reserved]

§ 1013.7 Advertising.

(a) *General rule.* An advertisement for a consumer lease may state that a specific lease of property at specific amounts or terms is available only if the lessor usually and customarily leases or will lease the property at those amounts or terms.

(b) *Clear and conspicuous standard.* Disclosures required by this section shall be made clearly and conspicuously.

(1) *Amount due at lease signing or delivery.* Except for the statement of a periodic payment, any affirmative or negative reference to a charge that is a part of the disclosure required under paragraph (d)(2)(ii) of this section shall not be more prominent than that disclosure.

(2) *Advertisement of a lease rate.* If a lessor provides a percentage rate in an advertisement, the rate shall not be more prominent than any of the disclosures in § 1013.4, with the exception of the notice in § 1013.4(s) required to accompany the rate; and the lessor shall not use the term ''annual percentage rate,'' ''annual lease rate,'' or equivalent term.

(c) *Catalogs or other multipage advertisements; electronic advertisements.* A catalog or other multipage advertisement, or an electronic advertisement (such as an advertisement appearing on an Internet Web site), that provides a table or schedule of the required disclosures shall be considered a single advertisement if, for lease terms that appear without all the required disclosures, the advertisement refers to the page or pages on which the table or schedule appears.

(d) *Advertisement of terms that require additional disclosure.* (1) *Triggering terms.* An advertisement that states any of the following items shall contain the disclosures required by paragraph (d)(2) of this section, except as provided in paragraphs (e) and (f) of this section:

(i) The amount of any payment; or

(ii) A statement of any capitalized cost reduction or other payment (or that no payment is required) prior to or at consummation or by delivery, if delivery occurs after consummation.

(2) *Additional terms.* An advertisement stating any item listed in paragraph (d)(1) of this section shall also state the following items:

(i) That the transaction advertised is a lease;

(ii) The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;

(iii) The number, amounts, and due dates or periods of scheduled payments under the lease;

(iv) A statement of whether or not a security deposit is required; and

(v) A statement that an extra charge may be imposed at the end of the lease term where the lessee's liability (if any) is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

(e) *Alternative disclosures—merchandise tags.* A merchandise tag stating any item listed in paragraph (d)(1) of this section may comply with paragraph (d)(2) of this section by referring to a sign or display prominently posted in the lessor's place of business that contains a table or schedule of the required disclosures.

(f) *Alternative disclosures—television or radio advertisements*—(1) *Toll-free number or print advertisement.* An advertisement made through television or radio stating any item listed in paragraph (d)(1) of this section complies with paragraph (d)(2) of this section if the advertisement states the items listed in paragraphs (d)(2)(i) through (iii) of this section, and:

(i) Lists a toll-free telephone number along with a reference that such number may be used by consumers to obtain the information required by paragraph (d)(2) of this section; or

(ii) Directs the consumer to a written advertisement in a publication of general circulation in the community served by the media station, including the name and the date of the publication, with a statement that information required by paragraph (d)(2) of this section is included in the advertisement. The written advertisement shall be published beginning at least three days before and ending at least ten days after the broadcast.

(2) *Establishment of toll-free number.* (i) The toll-free telephone number shall be available for no fewer than ten days, beginning on the date of the broadcast.

(ii) The lessor shall provide the information required by paragraph (d)(2) of this section orally, or in writing upon request.

§ 1013.8 Record retention.

A lessor shall retain evidence of compliance with the requirements imposed by this part, other than the advertising requirements under § 1013.7, for a period of not less than two years after the date the disclosures are required to be made or an action is required to be taken.

§ 1013.9 Relation to state laws.

(a) *Inconsistent state law.* A state law that is inconsistent with the requirements of the Act and this part is preempted to the extent of the inconsistency. If a lessor cannot comply with a state law without violating a provision of this part, the state law is inconsistent within the meaning of section 186(a) of the Act and is preempted, unless the state law gives greater protection and benefit to the consumer. A state, through an official having primary enforcement or interpretative responsibilities for the state consumer leasing law, may apply to the Bureau for a preemption determination.

(b) *Exemptions*—(1) *Application.* A state may apply to the Bureau for an exemption from the requirements of the Act and this part for any class of lease transactions within the state. The Bureau will grant such an exemption if the Bureau determines that:

(i) The class of leasing transactions is subject to state law requirements substantially similar to the Act and this part or that lessees are afforded greater protection under state law; and

(ii) There is adequate provision for state enforcement.

(2) *Enforcement and liability.* After an exemption has been granted, the requirements of the applicable state law (except for additional requirements not imposed by Federal law) will constitute the requirements of the Act and this part. No exemption will extend to the civil liability provisions of sections 130, 131, and 185 of the Act.

Appendix A to Part 1013—Model Forms

A–1—Model Open-End or Finance Vehicle Lease Disclosures

A–2—Model Closed-End or Net Vehicle Lease Disclosures

A–3—Model Furniture Lease Disclosures

BILLING CODE 4810–AM–P

Appendix A-1 Model Open-End or Finance Vehicle Lease Disclosures

Federal Consumer Leasing Act Disclosures

Date _____

Lessor(s) _____ **Lessee(s)** _____

Amount Due at Lease Signing or Delivery (Itemized below)* $ _____	**Monthly Payments** Your first monthly payment of $ _____ is due on _____, followed by _____ payments of $ _____ due on the _____ of each month. The total of your monthly payments is $ _____.	**Other Charges** (not part of your monthly payment) Disposition fee (if you do not purchase the vehicle) $ _____ _____ _____ Total $ _____	**Total of Payments** (The amount you will have paid by the end of the lease) $ _____ You will owe an additional amount if the actual value of the vehicle is less than the residual value.

*** Itemization of Amount Due at Lease Signing or Delivery**

Amount Due At Lease Signing or Delivery:		**How the Amount Due at Lease Signing or Delivery will be paid:**	
Capitalized cost reduction	$ _____	Net trade-in allowance	$ _____
First monthly payment	_____	Rebates and noncash credits	_____
Refundable security deposit	_____	Amount to be paid in cash	_____
Title fees	_____	_____	_____
Registration fees	_____		
_____	_____		
Total	$ _____	Total	$ _____

Your monthly payment is determined as shown below:

Gross capitalized cost. The agreed upon value of the vehicle ($ _____) and any items you pay over the lease term (such as service contracts, insurance, and any outstanding prior credit or lease balance) ..... $ _____

If you want an itemization of this amount, please check this box. ☐

Capitalized cost reduction. The amount of any net trade-in allowance, rebate, noncash credit, or cash you pay that reduces the gross capitalized cost ..... − _____

Adjusted capitalized cost. The amount used in calculating your base monthly payment ..... = _____

Residual value. The value of the vehicle at the end of the lease used in calculating your base monthly payment ..... − _____

Depreciation and any amortized amounts. The amount charged for the vehicle's decline in value through normal use and for other items paid over the lease term ..... = _____

Rent charge. The amount charged in addition to the depreciation and any amortized amounts ..... + _____

Total of base monthly payments. The depreciation and any amortized amounts plus the rent charge ..... = _____

Lease payments. The number of payments in your lease ..... ÷ _____

Base monthly payment ..... = _____

Monthly sales/use tax ..... + _____

_____ ..... + _____

Total monthly payment ..... =$ _____

Rent and other charges. The total amount of rent and other charges imposed in connection with your lease $ _____ .

Early Termination. You may have to pay a substantial charge if you end this lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the lease is terminated. The earlier you end the lease, the greater this charge is likely to be.

Excessive Wear and Use. You may be charged for excessive wear based on our standards for normal use [and for mileage in excess of _____ miles per year at the rate of _____ per mile].

Purchase Option at End of Lease Term. [You have an option to purchase the vehicle at the end of the lease term for $ _____ [and a purchase option fee of $ _____].] [You do not have an option to purchase the vehicle at the end of the lease term.]

Other Important Terms. See your lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interest, if applicable.

[The following provisions are the nonsegregated disclosures required under Regulation M.]

Description of Leased Property				
Year	Make	Model	Body Style	Vehicle ID #

Official Fees and Taxes. The total amount you will pay for official and license fees, registration, title, and taxes over the term of your lease, whether included with your monthly payments or assessed otherwise: $ _____ .

Insurance. The following types and amounts of insurance will be acquired in connection with this lease:

_____ .

_____ We (lessor) will provide the insurance coverage quoted above for a total premium cost of $ _____.

_____ You (lessee) agree to provide insurance coverage in the amount and types indicated above.

End of Term Liability. (a) The residual value ($ _____) of the vehicle is based on a reasonable, good faith estimate of the value of the vehicle at the end of the lease term. If the actual value of the vehicle at that time is greater than the residual value, you will have no further liability under this lease, except for other charges already incurred [and are entitled to a credit or refund of any surplus.] If the actual value of the vehicle is less than the residual value, you will be liable for any difference up to $ _____ (3 times the monthly payment). For any difference in excess of that amount, you will be liable only if:
1. Excessive use or damage [as described in paragraph ____] [representing more than normal wear and use] resulted in an unusually low value at the end of the term.
2. The matter is not otherwise resolved and we win a lawsuit against you seeking a higher payment.
3. You voluntarily agree with us after the end of the lease term to make a higher payment.
Should we bring a lawsuit against you, we must prove that our original estimate of the value of the leased property at the end of the lease term was reasonable and was made in good faith. For example, we might prove that the actual value was less than the original estimated value, although the original estimate was reasonable, because of an unanticipated decline in value for that type of vehicle. We must also pay your attorney's fees.
(b) If you disagree with the value we assign to the vehicle, you may obtain, at your own expense, from an independent third party agreeable to both of us, a professional appraisal of the _____ value of the leased vehicle which could be realized at sale. The appraised value shall then be used as the actual value.

Standards for Wear and Use. The following standards are applicable for determining unreasonable or excess wear and use of the leased vehicle:

_____ .

Maintenance.
[You are responsible for the following maintenance and servicing of the leased vehicle:

_____].

[We are responsible for the following maintenance and servicing of the leased vehicle:

_____].

Warranties. The leased vehicle is subject to the following express warranties:

_____ .

Early Termination and Default. (a) You may terminate this lease before the end of the lease term under the following conditions:

_____ .

The charge for such early termination is:

_____ .

(b) We may terminate this lease before the end of the lease term under the following conditions:

_____ .

Upon such termination we shall be entitled to the following charge(s) for:

_____ .

(c) To the extent these charges take into account the value of the vehicle at termination, if you disagree with the value we assign to the vehicle, you may obtain, at your own expense, from an independent third party agreeable to both of us, a professional appraisal of the _____ value of the leased vehicle which could be realized at sale. The appraised value shall then be used as the actual value.

Security Interest. We reserve a security interest of the following type in the property listed below to secure performance of your obligations under this lease:

_____ .

Late Payments. The charge for late payments is: _____ .

Option to Purchase Leased Property Prior to the End of the Lease. [You have an option to purchase the leased vehicle prior to the end of the term. The price will be [$ _____ /[the method of determining the price].] [You do not have an option to purchase the leased vehicle.]

Appendix A-2 Model Closed-End or Net Vehicle Lease Disclosures

Federal Consumer Leasing Act Disclosures

Date _____

Lessor(s) _____ **Lessee(s)** _____

Amount Due at Lease Signing or Delivery (Itemized below)* $ _____	**Monthly Payments** Your first monthly payment of $ _____ is due on _____, followed by _____ payments of $ _____ due on the _____ of each month. The total of your monthly payments is $ _____.	**Other Charges** (not part of your monthly payment) Disposition fee (if you do not purchase the vehicle) $ _____ _____ _____ Total $ _____	**Total of Payments** (The amount you will have paid by the end of the lease) $ _____

*** Itemization of Amount Due at Lease Signing or Delivery**

Amount Due At Lease Signing or Delivery:		**How the Amount Due at Lease Signing or Delivery will be paid:**	
Capitalized cost reduction	$ _____	Net trade-in allowance	$ _____
First monthly payment	_____	Rebates and noncash credits	_____
Refundable security deposit	_____	Amount to be paid in cash	_____
Title fees	_____	_____	_____
Registration fees	_____		
_____	_____		
Total	$ _____	Total	$ _____

Your monthly payment is determined as shown below:

Gross capitalized cost. The agreed upon value of the vehicle ($ _____) and any items you pay over the lease term (such as service contracts, insurance, and any outstanding prior credit or lease balance) ..... $ _____

If you want an itemization of this amount, please check this box. ☐

Capitalized cost reduction. The amount of any net trade-in allowance, rebate, noncash credit, or cash you pay that reduces the gross capitalized cost ..... - _____

Adjusted capitalized cost. The amount used in calculating your base monthly payment ..... = _____

Residual value. The value of the vehicle at the end of the lease used in calculating your base monthly payment ..... - _____

Depreciation and any amortized amounts. The amount charged for the vehicle's decline in value through normal use and for other items paid over the lease term ..... = _____

Rent charge. The amount charged in addition to the depreciation and any amortized amounts ..... + _____

Total of base monthly payments. The depreciation and any amortized amounts plus the rent charge ..... = _____

Lease payments. The number of payments in your lease ..... ÷ _____

Base monthly payment ..... = _____

Monthly sales/use tax ..... + _____

_____ ..... + _____

Total monthly payment ..... =$ _____

Early Termination. You may have to pay a substantial charge if you end this lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the lease is terminated. The earlier you end the lease, the greater this charge is likely to be.

Excessive Wear and Use. You may be charged for excessive wear based on our standards for normal use [and for mileage in excess of _____ miles per year at the rate of _____ per mile].

Purchase Option at End of Lease Term. [You have an option to purchase the vehicle at the end of the lease term for $ _____ [and a purchase option fee of $ _____].] [You do not have an option to purchase the vehicle at the end of the lease term.]

Other Important Terms. See your lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interest, if applicable.

[The following provisions are the nonsegregated disclosures required under Regulation M.]

Description of Leased Property				
Year	Make	Model	Body Style	Vehicle ID #

Official Fees and Taxes. The total amount you will pay for official and license fees, registration, title, and taxes over the term of your lease, whether included with your monthly payments or assessed otherwise: $ _____ .

Insurance. The following types and amounts of insurance will be acquired in connection with this lease:

_____ .

_____ We (lessor) will provide the insurance coverage quoted above for a total premium cost of $ _____.

_____ You (lessee) agree to provide insurance coverage in the amount and types indicated above.

Standards for Wear and Use. The following standards are applicable for determining unreasonable or excess wear and use of the leased vehicle:

_____

Maintenance.
[You are responsible for the following maintenance and servicing of the leased vehicle:

_____].

[We are responsible for the following maintenance and servicing of the leased vehicle:

_____].

Warranties. The leased vehicle is subject to the following express warranties:

_____ .

Early Termination and Default. (a) You may terminate this lease before the end of the lease term under the following conditions:

_____ .

The charge for such early termination is:

_____ .

(b) We may terminate this lease before the end of the lease term under the following conditions:

_____ .

Upon such termination we shall be entitled to the following charge(s) for:

_____ .

(c) To the extent these charges take into account the value of the vehicle at termination, if you disagree with the value we assign to the vehicle, you may obtain, at your own expense, from an independent third party agreeable to both of us, a professional appraisal of the _____ value of the leased vehicle which could be realized at sale. The appraised value shall then be used as the actual value.

Security Interest. We reserve a security interest of the following type in the property listed below to secure performance of your obligations under this lease:

_____

Late Payments. The charge for late payments is: _____

Option to Purchase Leased Property Prior to the End of the Lease. [You have an option to purchase the leased vehicle prior to the end of the term. The price will be [$ _____ /[the method of determining the price].] [You do not have an option to purchase the leased vehicle.]

Appendix A-3 Model Furniture Lease Disclosures

Federal Consumer Leasing Act Disclosures

Date _____

Lessor(s) _____ **Lessee(s)** _____

Description of Leased Property				
Item	Color	Stock #	Mfg.	Quantity

Amount Due at Lease Signing or Delivery	**Monthly Payments**	**Other Charges** (not part of your monthly payment)	**Total of Payments** (The amount you will have paid by the end of the lease)
First monthly payment $ _____ Refundable security deposit $ _____ Delivery/Installation fee $ _____ _____ $ _____ Total $ _____	Your first monthly payment of $ _____ is due on _____, followed by _____ payments of $ _____ due on the _____ of each month. The total of your monthly payments is $ _____.	Pick-up fee $ _____ _____ $ _____ Total $ _____	$ _____

Purchase Option at End of Lease Term. [You have an option to purchase the leased property at the end of the lease term for $ _____ [and a purchase option fee of $ _____].] [You do not have an option to purchase the leased property at the end of the lease term.]

Other Important Terms. See your lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interest, if applicable.

[The following provisions are the nonsegregated disclosures required under Regulation M.]

Official Fees and Taxes. The total amount you will pay for official fees, and taxes over the term of your lease, whether included with your monthly payments or assessed otherwise: $ _____ .

Insurance. The following types and amounts of insurance will be acquired in connection with this lease: _____
_____ .

_____ We (lessor) will provide the insurance coverage quoted above for a total premium cost of $ _____ .

_____ You (lessee) agree to provide insurance coverage in the amount and types indicated above.

Standards for Wear and Use. The following standards are applicable for determining unreasonable or excess wear and use of the leased property:
_____

Maintenance.

[You are responsible for the following maintenance and servicing of the leased property:
_____.]

[We are responsible for the following maintenance and servicing of the leased property:
_____.]

Warranties. The leased property is subject to the following express warranties:
_____ .

Early Termination and Default. (a) You may terminate this lease before the end of the lease term under the following conditions:
_____ .

The charge for such early termination is: _____ .

(b) We may terminate this lease before the end of the lease term under the following conditions: _____ .

Upon such termination we shall be entitled to the following charge(s) for: _____ .

Early Termination and Default. (continued)

(c) To the extent these charges take into account the value of the leased property at termination, if you disagree with the value we assign to the property, you may obtain, at your own expense, from an independent third party agreeable to both of us, a professional appraisal of the _____ value of the property which could be realized at sale. The appraised value shall then be used as the actual value.

Security Interest. We reserve a security interest of the following type in the property listed below to secure performance of your obligations under this lease: _____ .

Late Payments. The charge for late payments is: _____ .

Purchase Option Prior to the End of the Lease Term.

[You have an option to purchase the leased property prior to the end of the term. The price will be [$ _____]/the method of determining the price].]

[You do not have an option to purchase the leased property.]

Appendix B to Part 1013—[Reserved]

Appendix C to Part 1013—Issuance of Official Interpretations

Interpretations of this part issued by officials of the Bureau provide the formal protection afforded under section 130(f) of the Act. Except in unusual circumstances, interpretations will not be issued separately but will be incorporated in an official commentary to Regulation M (Supplement I of this part), which will be amended periodically. No official interpretations will be issued approving a lessor's forms, statements, or calculation tools or methods.

Supplement I to Part 1013—Official Interpretations

Introduction

1. *Official status.* The commentary in Supplement I is the vehicle by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation M (12 CFR part 1013). Good faith compliance with this commentary affords protection from liability under section 130(f) of the Truth in Lending Act (15 U.S.C. 1640(f)). Section 130(f) protects lessors from civil liability for any act done or omitted in good faith in conformity with any interpretation issued by the Bureau.

2. *Procedures for requesting interpretations.* Under Appendix C of Regulation M, anyone may request an official interpretation. Interpretations that are adopted will be incorporated in this commentary following publication in the **Federal Register**. No official interpretations are expected to be issued other than by means of this commentary.

3. *Comment designations.* Each comment in the commentary is identified by a number and the regulatory section or paragraph that it interprets. The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, some of the comments to § 1013.4(f) are further divided by subparagraph, such as comment 4(f)(1)–1 and comment 4(f)(2)–1. In other cases, comments have more general application and are designated, for example, as comment 4(a)–1. This introduction may be cited as comments I–1 through I–4. An appendix may be cited as comment app. A–1.

4. *Illustrations.* Lists that appear in the commentary may be exhaustive or illustrative; the appropriate construction should be clear from the context. Illustrative lists are introduced by phrases such as ''including,'' ''such as,'' ''to illustrate,'' and ''for example.''

Section 1013.1—Authority, Scope, Purpose, and Enforcement

1. *Foreign applicability.* Regulation M applies to all persons (including branches of foreign banks or leasing companies located in the United States) that offer consumer leases to residents of any state (including foreign nationals) as defined in § 1013.2(p), except persons excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376. The regulation does not apply to a foreign branch of a U.S. bank or to a leasing company leasing to a U.S. citizen residing or visiting abroad or to a foreign national abroad.

Section 1013.2—Definitions

2(b) Advertisement

1. *Coverage.* The term advertisement includes messages inviting, offering, or otherwise generally announcing to prospective customers the availability of consumer leases, whether in visual, oral, print or electronic media. Examples include:

i. Messages in newspapers, magazines, leaflets, catalogs, and fliers.

ii. Messages on radio, television, and public address systems.

iii. Direct mail literature.

iv. Printed material on any interior or exterior sign or display, in any window display, in any point-of-transaction literature or price tag that is delivered or made available to a lessee or prospective lessee in any manner whatsoever.

v. Telephone solicitations.

vi. Online messages, such as those on the Internet.

2. *Exclusions.* The term does not apply to the following:

i. Direct personal contacts, including follow-up letters, cost estimates for individual lessees, or oral or written communications relating to the negotiation of a specific transaction.

ii. Informational material distributed only to businesses.

iii. Notices required by Federal or state law, if the law mandates that specific information be displayed and only the mandated information is included in the notice.

iv. News articles controlled by the news medium.

v. Market research or educational materials that do not solicit business.

3. *Persons covered.* See the commentary to § 1013.7(a).

2(d) Closed-End Lease

1. *General.* In closed-end leases, sometimes referred to as ''walk-away'' leases, the lessee is not responsible for the residual value of the leased property at the end of the lease term.

2(e) Consumer Lease

1. *Primary purposes.* A lessor must determine in each case if the leased property will be used primarily for personal, family, or household purposes. If a question exists as to the primary purpose for a lease, the fact that a lessor gives disclosures is not controlling on the question of whether the transaction is covered. The primary purpose of a lease is determined before or at consummation and a lessor need not provide Regulation M disclosures where there is a subsequent change in the primary use.

2. *Period of time.* To be a consumer lease, the initial term of the lease must be more than four months. Thus, a lease of personal property for four months, three months or on a month-to-month or week-to-week basis (even though the lease actually extends beyond four months) is not a consumer lease and is not subject to the disclosure requirements of the regulation. However, a lease that imposes a penalty for not continuing the lease beyond four months is considered to have a term of more than four months. To illustrate:

i. A three-month lease extended on a month-to-month basis and terminated after one year is not subject to the regulation.

ii. A month-to-month lease with a penalty, such as the forfeiture of a security deposit for terminating before one year, is subject to the regulation.

3. *Total contractual obligation.* The total contractual obligation is not necessarily the same as the total of payments disclosed under § 1013.4(e). The total contractual obligation includes nonrefundable amounts a lessee is contractually obligated to pay to the lessor, but excludes items such as:

i. Residual value amounts or purchase-option prices;

ii. Amounts collected by the lessor but paid to a third party, such as taxes, licenses, and registration fees.

4. *Credit sale.* The regulation does not cover a lease that meets the definition of a credit sale in Regulation Z, 12 CFR 226.2(a)(16), which is defined, in part, as a bailment or lease (unless terminable without penalty at any time by the consumer) under which the consumer:

i. Agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and services involved; and

ii. Will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.

5. *Agricultural purpose.* Agricultural purpose means a purpose related to the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures those agricultural products, including but not limited to the acquisition of personal property and services used primarily in farming. Agricultural products include horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

6. *Organization or other entity.* A consumer lease does not include a lease made to an organization such as a corporation or a government agency or instrumentality. Such a lease is not covered by the regulation even if the leased property is used (by an employee, for example) primarily for personal, family or household purposes, or is guaranteed by or subsequently assigned to a natural person.

7. *Leases of personal property incidental to a service.* The following leases of personal property are deemed incidental to a service and thus are not subject to the regulation:

i. Home entertainment systems requiring the consumer to lease equipment that enables

a television to receive the transmitted programming.

ii. Security alarm systems requiring the installation of leased equipment intended to monitor unlawful entries into a home and in some cases to provide fire protection.

iii. Propane gas service where the consumer must lease a propane tank to receive the service.

8. *Safe deposit boxes.* The lease of a safe deposit box is not a consumer lease under § 1013.2(e).

9. *Threshold amount.* A consumer lease is exempt from the requirements of this part if the total contractual obligation exceeds the threshold amount in effect at the time of consummation. The threshold amount in effect during a particular time period is the amount stated below for that period. The threshold amount is adjusted effective January 1 of each year by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. This comment will be amended to provide the threshold amount for the upcoming year after the annual percentage change in the CPI–W that was in effect on June 1 becomes available. Any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900. If a consumer lease is exempt from the requirements of this part because the total contractual obligation exceeds the threshold amount in effect at the time of consummation, the lease remains exempt regardless of a subsequent increase in the threshold amount.

i. Prior to July 21, 2011, the threshold amount is $25,000.

ii. From July 21, 2011 through December 31, 2011, the threshold amount is $50,000.

2(g) Lessee

1. *Guarantors.* Guarantors are not lessees for purposes of the regulation.

2(h) Lessor

1. *Arranger of a lease.* To ''arrange'' for the lease of personal property means to provide or offer to provide a lease that is or will be extended by another person under a business or other relationship pursuant to which the person arranging the lease (a) receives or will receive a fee, compensation, or other consideration for the service or (b) has knowledge of the lease terms and participates in the preparation of the contract documents required in connection with the lease. To illustrate:

i. An entity that, pursuant to a business relationship, completes the necessary lease agreement before forwarding it for execution to the leasing company (to whom the obligation is payable on its face) is ''arranging'' for the lease.

ii. An entity that, without receiving a fee for the service, refers a customer to a leasing company that will prepare all relevant contract documents is not ''arranging'' for the lease.

2. *Consideration.* The term ''other consideration'' as used in comment 2(h)–1 refers to an actual payment corresponding to a fee or similar compensation and not to intangible benefits, such as the advantage of increased business, which may flow from the relationship between the parties.

3. *Assignees.* An assignee may be a lessor for purposes of the regulation in circumstances where the assignee has substantial involvement in the lease transaction. See cf. *Ford Motor Credit Co.* v. *Cenance,* 452 U.S. 155 (1981) (held that an assignee was a creditor for purposes of the pre-1980 Truth in Lending Act and Regulation Z because of its substantial involvement in the credit transaction).

4. *Multiple lessors.* See the commentary to § 1013.3(c).

2(j) Organization

1. *Coverage.* The term ''organization'' includes joint ventures and persons operating under a business name.

2(l) Personal Property

1. *Coverage.* Whether property is personal property depends on state or other applicable law. For example, a mobile home or houseboat may be considered personal property in one state but real property in another.

2(m) Realized Value

1. *General.* Realized value refers to either the retail or wholesale value of the leased property at early termination or at the end of the lease term. It is not a required disclosure. Realized value is relevant only to leases in which the lessee's liability at early termination or at the end of the lease term typically is based on the difference between the residual value (or the adjusted lease balance) of the leased property and its realized value.

2. *Options.* Subject to the contract and to state or other applicable law, the lessor may calculate the realized value in determining the lessee's liability at the end of the lease term or at early termination in one of the three ways stated in § 1013.2(m). If the lessor sells the property prior to making the determination about liability, the price received for the property (or the fair market value) is the realized value. If the lessor does not sell the property prior to making that determination, the highest offer or the fair market value is the realized value.

3. *Determination of realized value.* Disposition charges are not subtracted in determining the realized value but amounts attributable to taxes may be subtracted.

4. *Offers.* In determining the highest offer for disposition, the lessor may disregard offers that an offeror has withdrawn or is unable or unwilling to perform.

5. *Lessor's appraisal.* See commentary to § 1013.4(l).

2(o) Security Interest and Security

1. *Disclosable interests.* For purposes of disclosure, a security interest is an interest taken by the lessor to secure performance of the lessee's obligation. For example, if a bank that is not a lessor makes a loan to a leasing company and takes assignments of consumer leases generated by that company to secure the loan, the bank's security interest in the lessor's receivables is not a security interest for purposes of this part.

2. *General coverage.* An interest the lessor may have in leased property must be disclosed only if it is considered a security interest under state or other applicable law. The term includes, but is not limited to, security interests under the Uniform Commercial Code; real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded; mechanic's, materialman's, artisan's, and other similar liens; vendor's liens in both real and personal property; liens on property arising by operation of law; and any interest in a lease when used to secure payment or performance of an obligation.

3. *Insurance exception.* The lessor's right to insurance proceeds or unearned insurance premiums is not a security interest for purposes of this part.

Section 1013.3—General Disclosure Requirements

3(a) General Requirements

1. *Basis of disclosures.* Disclosures must reflect the terms of the legal obligation between the parties. For example:

i. In a three-year lease with no penalty for termination after a one-year minimum term, disclosures are based on the full three-year term of the lease. The one-year minimum term is only relevant to the early termination provisions of §§ 1013.4 (g)(1), (k) and (l).

2. *Clear and conspicuous standard.* The clear and conspicuous standard requires that disclosures be reasonably understandable. For example, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other; Appendix A of this part contains model forms that meet this standard. In addition, although no minimum typesize is required, the disclosures must be legible, whether typewritten, handwritten, or printed by computer.

3. *Multipurpose disclosure forms.* A lessor may use a multipurpose disclosure form provided the lessor is able to designate the specific disclosures applicable to a given transaction, consistent with the requirement that disclosures be clearly and conspicuously provided.

4. *Number of transactions.* Lessors have flexibility in handling lease transactions that may be viewed as multiple transactions. For example:

i. When a lessor leases two items to the same lessee on the same day, the lessor may disclose the leases as either one or two lease transactions.

ii. When a lessor sells insurance or other incidental services in connection with a lease, the lessor may disclose in one of two ways: As a single lease transaction (in which case Regulation M, not Regulation Z, disclosures are required) or as a lease transaction and a credit transaction.

iii. When a lessor includes an outstanding lease or credit balance in a lease transaction, the lessor may disclose the outstanding balance as part of a single lease transaction

(in which case Regulation M, not Regulation Z, disclosures are required) or as a lease transaction and a credit transaction.

3(a)(1) Form of Disclosures

1. *Cross-references.* Lessors may include in the nonsegregated disclosures a cross-reference to items in the segregated disclosures rather than repeat those items. A lessor may include in the segregated disclosures numeric or alphabetic designations as cross-references to related information so long as such references do not obscure or detract from the segregated disclosures.

2. *Identification of parties.* While disclosures must be made clearly and conspicuously, lessors are not required to use the word ''lessor'' and ''lessee'' to identify the parties to the lease transaction.

3. *Lessor's address.* The lessor must be identified by name; an address (and telephone number) may be provided.

4. *Multiple lessors and lessees.* In transactions involving multiple lessors and multiple lessees, a single lessor may make all the disclosures to a single lessee as long as the disclosure statement identifies all the lessors and lessees.

5. *Lessee's signature.* The regulation does not require that the lessee sign the disclosure statement, whether disclosures are separately provided or are part of the lease contract. Nevertheless, to provide evidence that disclosures are given before a lessee becomes obligated on the lease transaction, the lessor may, for example, ask the lessee to sign the disclosure statement or an acknowledgement of receipt, may place disclosures that are included in the lease documents above the lessee's signature, or include instructions alerting a lessee to read the disclosures prior to signing the lease.

3(a)(2) Segregation of Certain Disclosures

1. *Location.* The segregated disclosures referred to in § 1013.3(a)(2) may be provided on a separate document and the other required disclosures may be provided in the lease contract, so long as all disclosures are given at the same time. Alternatively, all disclosures may be provided in a separate document or in the lease contract.

2. *Additional information among segregated disclosures.* The disclosures required to be segregated may contain only the information required or permitted to be included among the segregated disclosures.

3. *Substantially similar.* See commentary to Appendix A of this part.

3(a)(3) Timing of Disclosures

1. *Consummation.* When a contractual relationship is created between the lessor and the lessee is a matter to be determined under state or other applicable law.

3(b) Additional Information; Nonsegregated Disclosures

1. *State law disclosures.* A lessor may include in the nonsegregated disclosures any state law disclosures that are not inconsistent with the Act and regulation under § 1013.9 as long as, in accordance with the standard set forth in § 1013.3(b) for additional information, the state law disclosures are not used or placed to mislead or confuse or detract from any disclosure required by the regulation.

3(c) Multiple Lessors or Lessees

1. *Multiple lessors.* If a single lessor provides disclosures to a lessee on behalf of several lessors, all disclosures for the transaction must be given, even if the lessor making the disclosures would not otherwise have been obligated to make a particular disclosure.

3(d) Use of Estimates

1. *Time of estimated disclosure.* The lessor may, after making a reasonable effort to obtain information, use estimates to make disclosures if necessary information is unknown or unavailable at the time the disclosures are made.

2. *Basis of estimates.* Estimates must be made on the basis of the best information reasonably available at the time disclosures are made. The ''reasonably available'' standard requires that the lessor, acting in good faith, exercise due diligence in obtaining information. The lessor may rely on the representations of other parties. For example, the lessor might look to the consumer to determine the purpose for which leased property will be used, to insurance companies for the cost of insurance, or to an automobile manufacturer or dealer for the date of delivery. See commentary to § 1013.4(n) for estimating official fees and taxes.

3. *Residual value of leased property at termination.* In an open-end lease where the lessee's liability at the end of the lease term is based on the residual value of the leased property as determined at consummation, the estimate of the residual value must be reasonable and based on the best information reasonably available to the lessor (see § 1013.4(m)). A lessor should generally use an accepted trade publication listing estimated current or future market prices for the leased property unless other information or a reasonable belief based on its experience provides the better information. For example:

i. An automobile lessor offering a three-year open-end lease assigns a wholesale value to the vehicle at the end of the lease term. The lessor may disclose as an estimate a wholesale value derived from a generally accepted trade publication listing current wholesale values.

ii. Same facts as above, except that the lessor discloses an estimated value derived by adjusting the residual value quoted in the trade publication because, in its experience, the trade publication values either understate or overstate the prices actually received in local used vehicle markets. The lessor may adjust estimated values quoted in trade publications if the lessor reasonably believes based on its experience that the values are understated or overstated.

4. *Retail or wholesale value.* The lessor may choose either a retail or a wholesale value in estimating the value of leased property at termination of an open-end lease provided the choice is consistent with the lessor's general practice when determining the value of the property at the end of the lease term. The lessor should indicate whether the value disclosed is a retail or wholesale value.

5. *Labeling estimates.* Generally, only the disclosure for which the exact information is unknown is labeled as an estimate. Nevertheless, when several disclosures are affected because of the unknown information, the lessor has the option of labeling as an estimate every affected disclosure or only the disclosure primarily affected.

3(e) Effect of Subsequent Occurrence

1. *Subsequent occurrences.* Examples of subsequent occurrences include:

i. An agreement between the lessee and lessor to change from a monthly to a weekly payment schedule.

ii. An increase in official fees or taxes.

iii. An increase in insurance premiums or coverage caused by a change in the law.

iv. Late delivery of an automobile caused by a strike.

2. *Redisclosure.* When a disclosure becomes inaccurate because of a subsequent occurrence, the lessor need not make new disclosures unless new disclosures are required under § 1013.5.

3. *Lessee's failure to perform.* The lessor does not violate the regulation if a previously given disclosure becomes inaccurate when a lessee fails to perform obligations under the contract and a lessor takes actions that are necessary and proper in such circumstances to protect its interest. For example, the addition of insurance or a security interest by the lessor because the lessee has not performed obligations contracted for in the lease is not a violation of the regulation.

Section 1013.4—Content of Disclosures

4(a) Description of Property

1. *Placement of description.* Although the description of leased property may not be included among the segregated disclosures, a lessor may choose to place the description directly above the segregated disclosures.

4(b) Amount Due at Lease Signing or Delivery

1. *Consummation.* See commentary to § 1013.3(a)(3).

2. *Capitalized cost reduction.* A capitalized cost reduction is a payment in the nature of a downpayment on the leased property that reduces the amount to be capitalized over the term of the lease. This amount does not include any amounts included in a periodic payment paid at lease signing or delivery.

3. *''Negative'' equity trade-in allowance.* If an amount owed on a prior lease or credit balance exceeds the agreed upon value of a trade-in, the difference is not reflected as a negative trade-in allowance under § 1013.4(b). The lessor may disclose the trade-in allowance as zero or not applicable, or may leave a blank line.

4. *Rebates.* Only rebates applied toward an amount due at lease signing or delivery are required to be disclosed under § 1013.4(b).

5. *Balance sheet approach.* In motor vehicle leases, the total for the column labeled ''total amount due at lease signing or delivery'' must equal the total for the column labeled ''how the amount due at lease signing or delivery will be paid.''

6. *Amounts to be paid in cash.* The term cash is intended to include payments by check or other payment methods in addition

to currency; however, a lessor may add a line item under the column ''how the amount due at lease signing or delivery will be paid'' for non-currency payments such as credit cards.

4(c) Payment Schedule and Total Amount of Periodic Payments

1. *Periodic payments.* The phrase ''number, amount, and due dates or periods of payments'' requires the disclosure of all payments that are made at regular or irregular intervals and generally derived from rent, capitalized or amortized amounts such as depreciation, and other amounts that are collected by the lessor at the same interval(s), including, for example, taxes, maintenance, and insurance charges. Other periodic payments may, but need not, be disclosed under § 1013.4(c).

4(d) Other Charges

1. *Coverage.* Section 1013.4(d) requires the disclosure of charges that are anticipated by the parties incident to the normal operation of the lease agreement. If a lessor is unsure whether a particular fee is an ''other charge,'' the lessor may disclose the fee as such without violating § 1013.4(d) or the segregation rule under § 1013.3(a)(2).

2. *Excluded charges.* This section does not require disclosure of charges that are imposed when the lessee terminates early, fails to abide by, or modifies the terms of the existing lease agreement, such as charges for:

i. Late payment.

ii. Default.

iii. Early termination.

iv. Deferral of payments.

v. Extension of the lease.

3. *Third-party fees and charges.* Third-party fees or charges collected by the lessor on behalf of third parties, such as taxes, are not disclosed under § 1013.4(d).

4. *Relationship to other provisions.* The other charges mentioned in this paragraph are charges that are not required to be disclosed under some other provision of § 1013.4. To illustrate:

i. The price of a mechanical breakdown protection (MBP) contract is sometimes disclosed as an ''other charge.'' Nevertheless, the price of MBP is sometimes reflected in the periodic payment disclosure under § 1013.4(c) or in states where MBP is regarded as insurance, the cost is be disclosed in accordance with § 1013.4(o).

5. *Lessee's liabilities at the end of the lease term.* Liabilities that the lessor imposes upon the lessee at the end of the scheduled lease term and that must be disclosed under § 1013.4(d) include disposition and ''pick-up'' charges.

6. *Optional ''disposition'' charges.* Disposition and similar charges that are anticipated by the parties as an incident to the normal operation of the lease agreement must be disclosed under § 1013.4(d). If, under a lease agreement, a lessee may return leased property to various locations, and the lessor charges a disposition fee depending upon the location chosen, under § 1013.4(d), the lessor must disclose the highest amount charged. In such circumstances, the lessor may also include a brief explanation of the fee structure in the segregated disclosure. For example, if no fee or a lower fee is imposed for returning a leased vehicle to the originating dealer as opposed to another location, that fact may be disclosed. By contrast, if the terms of the lease treat the return of the leased property to a location outside the lessor's service area as a default, the fee imposed is not disclosed as an ''other charge,'' although it may be required to be disclosed under § 1013.4(q).

4(e) Total of Payments

1. *Open-end lease.* The additional statement is required under § 1013.4(e) for open-end leases because, with some limitations, a lessee is liable at the end of the lease term for the difference between the residual and realized values of the leased property.

4(f) Payment Calculation

1. *Motor vehicle lease.* Whether leased property is a motor vehicle is determined by state or other applicable law.

2. *Multiple items.* If a lease transaction involves multiple items of leased property, one of which is not a motor vehicle under state law, at their option, lessors may include all items in the disclosures required under § 1013.4(f). See comment 3(a)–4 regarding disclosure of multiple transactions.

4(f)(1) Gross Capitalized Cost

1. *Agreed upon value of the vehicle.* The agreed upon value of a motor vehicle includes the amount of capitalized items such as charges for vehicle accessories and options, and delivery or destination charges. The lessor may also include taxes and fees for title, licenses, and registration that are capitalized. Charges for service or maintenance contracts, insurance products, guaranteed automobile protection, or an outstanding balance on a prior lease or credit transaction are not included in the agreed upon value.

2. *Itemization of the gross capitalized cost.* The lessor may choose to provide the itemization of the gross capitalized cost only on request or may provide the itemization as a matter of course. In the latter case, the lessor need not provide a statement of the lessee's option to receive an itemization. The gross capitalized cost must be itemized by type and amount. The lessor may include in the itemization an identification of the items and amounts of some or all of the items contained in the agreed upon value of the vehicle. The itemization must be provided at the same time as the other disclosures required by § 1013.4, but it may not be included among the segregated disclosures.

4(f)(7) Total of Base Periodic Payments

1. *Accuracy of disclosure.* If the periodic payment calculation under § 1013.4(f) has been calculated correctly, the amount disclosed under § 1013.4(f)(7)—the total of base periodic payments—is correct for disclosure purposes even if that amount differs from the base periodic payment disclosed under § 1013.4(f)(9) multiplied by the number of lease payments disclosed under § 1013.4(f)(8), when the difference is due to rounding.

4(f)(8) Lease Payments

1. *Lease Term.* The lease term may be disclosed among the segregated disclosures.

4(g) Early Termination

4(g)(1) Conditions and Disclosure of Charges

1. *Reasonableness of charges.* See the commentary to § 1013.4(q).

2. *Description of the method.* Section 1013.4(g)(1) requires a full description of the method of determining an early termination charge. The lessor should attempt to provide consumers with clear and understandable descriptions of its early termination charges. Descriptions that are full, accurate, and not intended to be misleading will comply with § 1013.4(g)(1), even if the descriptions are complex. In providing a full description of an early termination method, a lessor may use the name of a generally accepted method of computing the unamortized cost portion (also known as the ''adjusted lease balance'') of its early termination charges. For example, a lessor may state that the ''constant yield'' method will be utilized in obtaining the adjusted lease balance, but must specify how that figure, and any other term or figure, is used in computing the total early termination charge imposed upon the consumer. Additionally, if a lessor refers to a named method in this manner, the lessor must provide a written explanation of that method if requested by the consumer. The lessor has the option of providing the explanation as a matter of course in the lease documents or on a separate document.

3. *Timing of written explanation of a named method.* While a lessor may provide an address or telephone number for the consumer to request a written explanation of the named method used to calculate the adjusted leased balance, if at consummation a consumer requests such an explanation, the lessor must provide a written explanation at that time. If a consumer requests an explanation after consummation, the lessor must provide a written explanation within a reasonable time after the request is made.

4. *Default.* When default is a condition for early termination of a lease, default charges must be disclosed under § 1013.4(g)(1). See the commentary to § 1013.4(q).

5. *Lessee's liability at early termination.* When the lessee is liable for the difference between the unamortized cost and the realized value at early termination, the method of determining the amount of the difference must be disclosed under § 1013.4(g)(1).

4(h) Maintenance Responsibilities

1. *Standards for wear and use.* No disclosure is required if a lessor does not set standards or impose charges for wear and use (such as excess mileage).

4(i) Purchase Option

1. *Mandatory disclosure of no purchase option.* Generally the lessor need only make the specific required disclosures that apply to a transaction. In the case of a purchase option disclosure, however, a lessor must disclose affirmatively that the lessee has no option to purchase the leased property if the purchase option is inapplicable.

2. *Existence of purchase option.* Whether a purchase option exists under the lease is determined by state or other applicable law. The lessee's right to submit a bid to purchase property at termination of the lease is not an option to purchase under § 1013.4(i) if the lessor is not required to accept the lessee's bid and the lessee does not receive preferential treatment.

3. *Purchase-option fee.* A purchase-option fee is disclosed under § 1013.4(i), not § 1013.4(d). The fee may be separately itemized or disclosed as part of the purchase-option price.

4. *Official fees and taxes.* Official fees such as those for taxes, licenses, and registration charged in connection with the exercise of a purchase option may be disclosed under § 1013.4(i) as part of the purchase-option price (with or without a reference to their inclusion in that price) or may be separately disclosed and itemized by category. Alternatively, a lessor may provide a statement indicating that the purchase-option price does not include fees for tags, taxes, and registration.

5. *Purchase-option price.* Lessors must disclose the purchase-option price as a sum certain or as a sum certain to be determined at a future date by reference to a readily available independent source. The reference should provide sufficient information so that the lessee will be able to determine the actual price when the option becomes available. Statements of a purchase price as the ''negotiated price'' or the ''fair market value'' do not comply with the requirements of § 1013.4(i).

4(j) Statement Referencing Nonsegregated Disclosures

1. *Content.* A lessor may delete inapplicable items from the disclosure. For example, if a lease contract does not include a security interest, the reference to a security interest may be omitted.

4(l) Right of Appraisal

1. *Disclosure inapplicable.* The lessee does not have the right to an independent appraisal merely because the lessee is liable at the end of the lease term or at early termination for unreasonable wear or use. Thus, the disclosure under § 1013.4(l) does not apply. For example:

i. The automobile lessor might expect a lessee to return an undented car with four good tires at the end of the lease term. Even though it may hold the lessee liable for the difference between a dented car with bald tires and the value of a car in reasonably good repair, the disclosure under § 1013.4(l) is not required.

2. *Lessor's appraisal.* If the lessor obtains an appraisal of the leased property to determine its realized value, that appraisal does not suffice for purposes of section 183(c) of the Act; the lessor must disclose the lessee's right to an independent appraisal under § 1013.4(l).

3. *Retail or wholesale.* In providing the disclosures in § 1013.4(l), a lessor must indicate whether the wholesale or retail appraisal value will be used.

4. *Time restriction on appraisal.* The regulation does not specify a time period in which the lessee must exercise the appraisal right. The lessor may require a lessee to obtain the appraisal within a reasonable time after termination of the lease.

4(m) Liability at End of Lease Term Based on Residual Value

1. *Open-end leases.* Section 1013.4(m) applies only to open-end leases.

2. *Lessor's payment of attorney's fees.* Section 183(a) of the Act requires that the lessor pay the lessee's attorney's fees in all actions under § 1013.4(m), whether successful or not.

4(m)(1) Rent and Other Charges

1. *General.* This disclosure is intended to represent the cost of financing an open-end lease based on charges and fees that the lessor requires the lessee to pay. Examples of disclosable charges, in addition to the rent charge, include acquisition, disposition, or assignment fees. Charges imposed by a third party whose services are not required by the lessor (such as official fees and voluntary insurance) are not included in the § 1013.4(m)(1) disclosure.

4(m)(2) Excess Liability

1. *Coverage.* The disclosure limiting the lessee's liability for the value of the leased property does not apply in the case of early termination.

2. *Leases with a minimum term.* If a lease has an alternative minimum term, the disclosures governing the liability limitation are not applicable for the minimum term.

3. *Charges not subject to rebuttable presumption.* The limitation on liability applies only to liability at the end of the lease term that is based on the difference between the residual value of the leased property and its realized value. The regulation does not preclude a lessor from recovering other charges from the lessee at the end of the lease term. Examples of such charges include:

i. Disposition charges.

ii. Excess mileage charges.

iii. Late payment and default charges.

iv. In simple-interest accounting leases, amount by which the unamortized cost exceeds the residual value because the lessee has not made timely payments.

4(n) Fees and Taxes

1. *Treatment of certain taxes.* Taxes paid in connection with the lease are generally disclosed under § 1013.4(n), but there are exceptions. To illustrate:

i. Taxes paid by lease signing or delivery are disclosed under § 1013.4(b) and § 1013.4(n).

ii. Taxes that are part of the scheduled payments are reflected in the disclosure under § 1013.4(c), (f), and (n).

iii. A tax payable by the lessor that is passed on to the consumer and is reflected in the lease documentation must be disclosed under § 1013.4(n). A tax payable by the lessor and absorbed as a cost of doing business need not be disclosed.

iv. Taxes charged in connection with the exercise of a purchase option are disclosed under § 1013.4(i), not § 1013.4(n).

2. *Estimates.* In disclosing the total amount of fees and taxes under § 1013.4(n), lessors may need to base the disclosure on estimated tax rates or amounts and are afforded great flexibility in doing so. Where a rate is applied to the future value of leased property, lessors have flexibility in estimating that value, including, but not limited to, using the mathematical average of the agreed upon value and the residual value or published valuation guides; or a lessor could prepare estimates using the agreed upon value and disclose a reasonable estimate of the total fees and taxes. Lessors may include a statement that the actual total of fees and taxes may be higher or lower depending on the tax rates in effect or the value of the leased property at the time a fee or tax is assessed.

4(o) Insurance

1. *Coverage.* If insurance is obtained through the lessor, information on the type and amount of insurance coverage (whether voluntary or required) as well as the cost, must be disclosed.

2. *Lessor's insurance.* Insurance purchased by the lessor primarily for its own benefit, and absorbed as a business expense and not separately charged to the lessee, need not be disclosed under § 1013.4(o) even if it provides an incidental benefit to the lessee.

3. *Mechanical breakdown protection and other products.* Whether products purchased in conjunction with a lease, such as mechanical breakdown protection (MBP) or guaranteed automobile protection (GAP), should be treated as insurance is determined by state or other applicable law. In states that do not treat MBP or GAP as insurance, § 1013.4(o) disclosures are not required. In such cases the lessor may, however, disclose this information in accordance with the additional information provision in § 1013.3(b). For MBP insurance contracts not capped by a dollar amount, lessors may describe coverage by referring to a limitation by mileage or time period, for example, by indicating that the mechanical breakdown contract insures parts of the automobile for up to 100,000 miles.

4(p) Warranties or Guarantees

1. *Brief identification.* The statement identifying warranties may be brief and need not describe or list all warranties applicable to specific parts such as for air conditioning, radio, or tires in an automobile. For example, manufacturer's warranties may be identified simply by a reference to the standard manufacturer's warranty. If a lessor provides a comprehensive list of warranties that may not all apply, to comply with § 1013.4(p) the lessor must indicate which warranties apply or, alternatively, which warranties do not apply.

2. *Warranty disclaimers.* Although a disclaimer of warranties is not required by the regulation, the lessor may give a disclaimer as additional information in accordance with § 1013.3(b).

3. *State law.* Whether an express warranty or guaranty exists is determined by state or other law.

4(q) Penalties and Other Charges for Delinquency

1. *Collection costs.* The automatic imposition of collection costs or attorney fees upon default must be disclosed under

§ 1013.4(q). Collection costs or attorney fees that are not imposed automatically, but are contingent upon expenditures in conjunction with a collection proceeding or upon the employment of an attorney to effect collection, need not be disclosed.

2. *Charges for early termination.* When default is a condition for early termination of a lease, default charges must also be disclosed under § 1013.4(g)(1). The § 1013.4(q) and (g)(1) disclosures may, but need not, be combined. Examples of combined disclosures are provided in the model lease disclosure forms in Appendix A.

3. *Simple-interest leases.* In a simple-interest accounting lease, the additional rent charge that accrues on the lease balance when a periodic payment is made after the due date does not constitute a penalty or other charge for late payment. Similarly, continued accrual of the rent charge after termination of the lease because the lessee fails to return the leased property does not constitute a default charge. But in either case, if the additional charge accrues at a rate higher than the normal rent charge, the lessor must disclose the amount of or the method of determining the additional charge under § 1013.4(q).

4. *Extension charges.* Extension charges that exceed the rent charge in a simple-interest accounting lease or that are added separately are disclosed under § 1013.4(q).

5. *Reasonableness of charges.* Pursuant to section 183(b) of the Act, penalties or other charges for delinquency, default, or early termination may be specified in the lease but only in an amount that is reasonable in light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

4(r) Security Interest

1. *Disclosable security interests.* See § 1013.2(o) and accompanying commentary to determine what security interests must be disclosed.

4(s) Limitations on Rate Information

1. *Segregated disclosures.* A lease rate may not be included among the segregated disclosures referenced in § 1013.3(a)(2).

Section 1013.5—Renegotiations, Extensions, and Assumptions

1. *Coverage.* Section 1013.5 applies only to existing leases that are covered by the regulation. It does not apply to the renegotiation or extension of leases with an initial term of four months or less, because such leases are not covered by the definition of consumer lease in § 1013.2(e). Whether and when a lease is satisfied and replaced by a new lease is determined by state or other applicable law.

5(a) Renegotiation

1. *Basis of disclosures.* Lessors have flexibility in making disclosures so long as they reflect the legal obligation under the renegotiated lease. For example, assume that a 24-month lease is replaced by a 36-month lease. The initial lease began on January 1, 1998, and was renegotiated and replaced on July 1, 1998, so that the new lease term ends on January 1, 2001.

i. If the renegotiated lease covers the 36-month period beginning January 1, 1998, the new disclosures would reflect all payments made by the lessee on the initial lease and all payments on the renegotiated lease. In this example, since the renegotiated lease covers a 36-month period beginning January 1, 1998, the disclosures must reflect payments made since that date. On the model form, the ''total of base periodic payments'' disclosed under § 1013.4(f)(7) should reflect periodic payments to be made over the entire 36-month term. Payments received since January 1, 1998, are added as a new line item disclosed as ''total of payments received'' and are subtracted from the ''total of base periodic payments'' in calculating a new item disclosed as the ''total of base periodic payments remaining.'' For example, if 6 monthly payments of $300 were received since January 1, 1998, the disclosure form should include a ''total of base periodic payments'' line from which $1,800 is subtracted to arrive at the ''total of base periodic payments remaining.'' The remainder of the disclosures would not change.

ii. If the renegotiated lease covers only the remaining 30 months, from July 1, 1998, to January 1, 2001, the disclosures would reflect only the charges incurred in connection with the renegotiation and the payments for the remaining period.

5(b) Extension

1. *Time of extension disclosures.* If a consumer lease is extended for a specified term greater than six months, new disclosures are required at the time the extension is agreed upon. If the lease is extended on a month-to-month basis and the cumulative extensions exceed six months, new disclosures are required at the commencement of the seventh month and at the commencement of each seventh month thereafter for as long as the extensions continue. If a consumer lease is extended for terms of varying durations, one of which will exceed six months beyond the originally scheduled termination date of the lease, new disclosures are required at the commencement of the term that will exceed six months beyond the originally scheduled termination date.

2. *Content of disclosures for month-to-month extensions.* The disclosures for a lease extended on a month-to-month basis for more than six months should reflect the month-to-month nature of the transaction.

3. *Basis of disclosures.* The disclosures should be based on the extension period, including any upfront costs paid in connection with the extension. For example, assume that initially a lease ends on March 1, 1999. In January 1999, agreement is reached to extend the lease until October 1, 1999. The disclosure would include any extension fee paid in January and the periodic payments for the seven-month extension period beginning in March.

Section 1013.6—[Reserved]

Section 1013.7—Advertising

7(a) General Rule

1. *Persons covered.* All ''persons'' must comply with the advertising provisions in this section, not just those that meet the definition of a lessor in § 1013.2(h). Thus, automobile dealers (to the extent they are not excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act), merchants, and others who are not themselves lessors must comply with the advertising provisions of the regulation if they advertise consumer lease transactions. Pursuant to section 184(b) of the Act, however, owners and personnel of the media in which an advertisement appears or through which it is disseminated are not subject to civil liability for violations under section 185(b) of the Act.

2. *''Usually and customarily.''* Section 1013.7(a) does not prohibit the advertising of a single item or the promotion of a new leasing program, but prohibits the advertising of terms that are not and will not be available. Thus, an advertisement may state terms that will be offered for only a limited period or terms that will become available at a future date.

3. *Total contractual obligation of advertised lease.* Section 1013.7 applies to advertisements for consumer leases, as defined in § 1013.2(e). Under § 1013.2(e), a consumer lease is exempt from the requirements of this part if the total contractual obligation exceeds the threshold amount in effect at the time of consummation. See comment 2(e)–9. Accordingly, § 1013.7 does not apply to an advertisement for a specific consumer lease if the total contractual obligation for that lease exceeds the threshold amount in effect when the advertisement is made. If a lessor promotes multiple consumer leases in a single advertisement, the entire advertisement must comply with § 1013.7 unless all of the advertised leases are exempt under § 1013.2(e). For example:

i. Assume that, in an advertisement, a lessor states that certain terms apply to a consumer lease for a specific automobile. The total contractual obligation of the advertised lease exceeds the threshold amount in effect when the advertisement is made. Although the advertisement does not refer to any other lease, some or all of the advertised terms for the exempt lease also apply to other leases offered by the lessor with total contractual obligations that do not exceed the applicable threshold amount. The advertisement is not required to comply with § 1013.7 because it refers only to an exempt lease.

ii. Assume that, in an advertisement, a lessor states certain terms (such as the amount due at lease signing) that will apply to consumer leases for automobiles of a particular brand. However, the advertisement does not refer to a specific lease. The total contractual obligations of the leases for some of the automobiles will exceed the threshold amount in effect when the advertisement is made, but the total contractual obligations of the leases for other automobiles will not exceed the threshold. The entire advertisement must comply with § 1013.7

because it refers to terms for consumer leases that are not exempt.

iii. Assume that, in a single advertisement, a lessor states that certain terms apply to consumer leases for two different automobiles. The total contractual obligation of the lease for the first automobile exceeds the threshold amount in effect when the advertisement is made, but the total contractual obligation of the lease for the second automobile does not exceed the threshold. The entire advertisement must comply with § 1013.7 because it refers to a consumer lease that is not exempt.

7(b) Clear and Conspicuous Standard

1. *Standard.* The disclosures in an advertisement in any media must be reasonably understandable. For example, very fine print in a television advertisement or detailed and very rapidly stated information in a radio advertisement does not meet the clear and conspicuous standard if consumers cannot see and read or hear, and cannot comprehend, the information required to be disclosed.

7(b)(1) Amount Due at Lease Signing or Delivery

1. *Itemization not required.* Only a total of amounts due at lease signing or delivery is required to be disclosed, not an itemization of its component parts. Such an itemization is provided in any transaction-specific disclosures provided under § 1013.4.

2. *Prominence rule.* Except for a periodic payment, oral or written references to components of the total due at lease signing or delivery (for example, a reference to a capitalized cost reduction, where permitted) may not be more prominent than the disclosure of the total amount due at lease signing or delivery.

7(b)(2) Advertisement of a Lease Rate

1. *Location of statement.* The notice required to accompany a percentage rate stated in an advertisement must be placed in close proximity to the rate without any other intervening language or symbols. For example, a lessor may not place an asterisk next to the rate and place the notice elsewhere in the advertisement. In addition, with the exception of the notice required by § 1013.4(s), the rate cannot be more prominent than any other § 1013.4 disclosure stated in the advertisement.

7(c) Catalogs or Other Multi-Page Advertisements; Electronic Advertisements

1. *General rule.* The multiple-page advertisements referred to in § 1013.7(c) are advertisements consisting of a series of numbered pages—for example, a supplement to a newspaper. A mailing comprising several separate flyers or pieces of promotional material in a single envelope is not a single multiple-page advertisement.

2. *Cross references.* A catalog or other multiple-page advertisement or an electronic advertisement (such as an advertisement appearing on an internet Web site) is a single advertisement (requiring only one set of lease disclosures) if it contains a table, chart, or schedule with the disclosures required under § 1013.7(d)(2)(i) through (v). If one of the triggering terms listed in § 1013.7(d)(1) appears in a catalog, or in a multiple-page or electronic advertisement, it must clearly direct the consumer to the page or location where the table, chart, or schedule begins. For example, in an electronic advertisement, a term triggering additional disclosures may be accompanied by a link that directly connects the consumer to the additional information.

7(d)(1) Triggering Terms

1. *Typical example.* When any triggering term appears in a lease advertisement, the additional terms enumerated in § 1013.7(d)(2)(i) through (v) must also appear. In a multi-lease advertisement, an example of one or more typical leases with a statement of all the terms applicable to each may be used. The examples must be labeled as such and must reflect representative lease terms that are made available by the lessor to consumers.

7(d)(2) Additional Terms

1. *Third-party fees that vary by state or locality.* The disclosure of a periodic payment or total amount due at lease signing or delivery may:

i. Exclude third-party fees, such as taxes, licenses, and registration fees and disclose that fact; or

ii. Provide a periodic payment or total that includes third-party fees based on a particular state or locality as long as that fact and the fact that fees may vary by state or locality are disclosed.

7(e) Alternative Disclosures—Merchandise Tags

1. *Multiple-item leases.* Multiple-item leases that utilize merchandise tags requiring additional disclosures may use the alternate disclosure rule.

7(f) Alternative Disclosures—Television or Radio Advertisements

7(f)(1) Toll-Free Number or Print Advertisement

1. *Publication in general circulation.* A reference to a written advertisement appearing in a newspaper circulated nationally, for example, USA Today or the Wall Street Journal, may satisfy the general circulation requirement in § 1013.7(f)(1)(ii).

2. *Toll-free number, local or collect calls.* In complying with the disclosure requirements of § 1013.7(f)(1)(i), a lessor must provide a toll-free number for nonlocal calls made from an area code other than the one used in the lessor's dialing area. Alternatively, a lessor may provide any telephone number that allows a consumer to reverse the phone charges when calling for information.

3. *Multi-purpose number.* When an advertised toll-free number responds with a recording, lease disclosures must be provided early in the sequence to ensure that the consumer receives the required disclosures. For example, in providing several dialing options—such as providing directions to the lessor's place of business—the option allowing the consumer to request lease disclosures should be provided early in the telephone message to ensure that the option to request disclosures is not obscured by other information.

4. *Statement accompanying toll free number.* Language must accompany a telephone and television number indicating that disclosures are available by calling the toll-free number, such as ''call 1–(800) 000–0000 for details about costs and terms.''

Section 1013.8—Record Retention

1. *Manner of retaining evidence.* A lessor must retain evidence of having performed required actions and of having made required disclosures. Such records may be retained in paper form, on microfilm, microfiche, or computer, or by any other method designed to reproduce records accurately. The lessor need retain only enough information to reconstruct the required disclosures or other records.

Section 1013.9—Relation to State Laws

1. *Exemptions granted.* The Bureau recognizes exemptions granted by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1982, the Board of Governors of the Federal Reserve System granted the following exemptions from portions of the Consumer Leasing Act:

i. *Maine.* Lease transactions subject to the Maine Consumer Credit Code and its implementing regulations are exempt from Chapters 2, 4, and 5 of the Federal act. (The exemption does not apply to transactions in which a federally chartered institution is a lessor.)

ii. *Oklahoma.* Lease transactions subject to the Oklahoma Consumer Credit Code are exempt from Chapters 2 and 5 of the Federal act. (The exemption does not apply to sections 132 through 135 of the Federal act, nor does it apply to transactions in which a federally chartered institution is a lessor.)

Appendix A—Model Forms

1. *Permissible changes.* Although use of the model forms is not required, lessors using them properly will be deemed to be in compliance with the regulation. Generally, lessors may make certain changes in the format or content of the forms and may delete any disclosures that are inapplicable to a transaction without losing the Act's protection from liability. For example, the model form based on monthly periodic payments may be modified for single-payment lease transactions or for quarterly or other regular or irregular periodic payments. The model form may also be modified to reflect that a transaction is an extension. The content, format, and headings for the segregated disclosures must be substantially similar to those contained in the model forms; therefore, any changes should be minimal. The changes to the model forms should not be so extensive as to affect the substance and the clarity of the disclosures.

2. *Examples of acceptable changes.*

i. Using the first person, instead of the second person, in referring to the lessee.

ii. Using ''lessee,'' ''lessor,'' or names instead of pronouns.

iii. Rearranging the sequence of the nonsegregated disclosures.

iv. Incorporating certain state ''plain English'' requirements.

v. Deleting or blocking out inapplicable disclosures, filling in ''N/A'' (not applicable) or ''0,'' crossing out, leaving blanks, checking a box for applicable items, or circling applicable items (this should facilitate use of multipurpose standard forms).

vi. Adding language or symbols to indicate estimates.

vii. Adding numeric or alphabetic designations.

viii. Rearranging the disclosures into vertical columns, except for § 1013.4(b) through (e) disclosures.

ix. Using icons and other graphics.

3. *Model closed-end or net vehicle lease disclosure.* Model A–2 is designed for a closed-end or net vehicle lease. Under the ''Early Termination and Default'' provision a reference to the lessee's right to an independent appraisal of the leased vehicle under § 1013.4(l) is included for those closed-end leases in which the lessee's liability at early termination is based on the vehicle's realized value.

4. *Model furniture lease disclosures.* Model A–3 is a closed-end lease disclosure statement designed for a typical furniture lease. It does not include a disclosure of the appraisal right at early termination required under § 1013.4(l) because few closed-end furniture leases base the lessee's liability at early termination on the realized value of the leased property. The disclosure should be added if it is applicable.

Dated: October 24, 2011.

Alastair M. Fitzpayne,

Deputy Chief of Staff and Executive Secretary, Department of the Treasury.

[FR Doc. 2011–31723 Filed 12–16–11; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0651; Directorate Identifier 2011–NM–041–AD; Amendment 39–16879; AD 2011–25–03]

RIN 2120–AA64

Airworthiness Directives; Learjet Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Learjet Inc. Model 45 airplanes. This AD was prompted by a report of the potential for fatigue cracking of the end cap of the main landing gear (MLG) prior to the published life limitation. This AD requires revising the maintenance program to incorporate life limits for the MLG actuator end cap. We are issuing this AD to prevent fatigue cracking of the end cap of the MLG, which could result in the failure of the MLG actuator upon landing, and failure of the MLG to extend or retract during flight.

DATES: This AD is effective January 23, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of January 23, 2012.

ADDRESSES: For service information identified in this AD, contact Learjet, Inc., One Learjet Way, Wichita, Kansas 67209–2942; telephone (316) 946–2000; fax (316) 946–2220; email *ac.ict@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 Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: (800) 647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Paul Chapman, Aerospace Engineer, Airframe and Services Branch, ACE–118W, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, KS 67209; phone: (316) 946–4152; fax: (316) 946–4129; email: *paul.chapman@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM published in the **Federal Register** on July 8, 2011 (76 FR 40291). That NPRM proposed to require revising the maintenance program to incorporate life limits for the MLG actuator end cap.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (76 FR 40291, July 8, 2011) or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD affects 351 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise maintenance plan	1 work-hour × $85 per hour = $85 per revision.	$0	$ 85 per revision	$29,835

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

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

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

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

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

(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.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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):

2011–25–03 Learjet Inc.: Amendment 39–16879; Docket No. FAA–2011–0651; Directorate Identifier 2011–NM–041–AD.

(a) Effective Date

This AD is effective January 23, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Learjet Inc. Model 45 airplanes, certificated in any category; all serial numbers.

Note 1: This AD requires revisions to certain operator maintenance documents to include new actions (e.g. inspections). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these actions, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (i) of this AD. The request should include a description of changes to the required actions that will ensure the continued operational safety of the airplane.

(d) Subject

Air Transport Association (ATA) of America Code 32: Landing Gear.

(e) Unsafe Condition

This AD was prompted by a report of the potential for fatigue cracking of the end cap of the main landing gear (MLG) prior to the published life limitation. We are issuing this AD to prevent fatigue cracking of the end cap of the MLG, which could result in the failure of the MLG actuator upon landing, and failure of the MLG to extend or retract during flight.

(f) Compliance

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

(g) Maintenance Program Revision

Within 30 days after the effective date of this AD, revise the maintenance program by incorporating inspection reference number (IRN) T3220105 (Main Landing Gear Actuator End Cap (part number (P/N) 200–0303)), as specified in Learjet 40 Temporary Revision 4–23, dated January 24, 2011, to Learjet 40 Maintenance Manual; or Learjet 45 Temporary Revision 4–34, dated January 24, 2011, to Learjet 45 Maintenance Manual; as applicable. The initial compliance time for the replacement specified in IRN T3220105 is prior to the accumulation of 2,387 total flight cycles on the end cap (P/N 200–0303), or within 25 flight cycles after the effective date of this AD, whichever occurs later.

(h) No Alternative Actions or Intervals

After accomplishing the revision required by paragraph (g) of this AD, no alternative actions (e.g., replacements) or intervals, may be used, unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (i) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 FR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(j) Related Information

For more information about this AD, contact Paul Chapman, Aerospace Engineer, Airframe and Services Branch, ACE–118W, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, KS 67209; phone: (316) 946–4152; fax: (316) 946–4129; email: *paul.chapman@faa.gov.*

(k) Material Incorporated by Reference

(1) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) under 5 U.S.C. 552(a) and 1 CFR part 51 of the following service information on the date specified:

(i) Learjet 40 Temporary Revision 4–23, dated January 24, 2011, to Learjet 40 Maintenance Manual, approved for IBR January 23, 2012.

(ii) Learjet 45 Temporary Revision 4–34, dated January 24, 2011, to Learjet 45 Maintenance Manual, approved for IBR January 23, 2012.

(2) For Learjet service information identified in this AD, contact Learjet, Inc., One Learjet Way, Wichita, Kansas 67209–2942; telephone (316) 946–2000; fax (316) 946–2220; email *ac.ict@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(3) 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on November 23, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–30999 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0916; Directorate Identifier 2011–NM–127–AD; Amendment 39–16895; AD 2011–26–05]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

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

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) that applies to certain Bombardier, Inc. Model DHC–8–300 series airplanes. This 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 cases of aileron terminal quadrant support brackets that were manufactured using sheet metal have been found cracked on DHC–8 Series 300 aircraft. Investigation revealed that the failure of the support bracket was due to fatigue. Failure of the aileron terminal quadrant support bracket could result in an adverse reduction of aircraft roll control.
>
> * * * * *

These conditions could result in loss of control of the airplane. We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective January 23, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 1, 2011 (75 FR 81420, December 28, 2010).

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Aziz Ahmed, 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) 228–7329; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on September 7, 2011 (76 FR 55296), and proposed to supersede AD 2010–26–13, Amendment 39–16553 (75 FR 81420, December 28, 2010). That NPRM proposed to revise the existing compliance time to include a 33,000 total flight hours compliance time. That NPRM proposed to correct an unsafe condition for the specified products. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (76 FR 55296, September 7, 2011) or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a Note within the AD.

Costs of Compliance

We estimate that this AD will affect about 13 products of U.S. registry.

The actions that are required by AD 2010–26–13, Amendment 39–16553 (75 FR 81420, December 28, 2010), and retained in this AD take about 72 work-hours per product, at an average labor rate of $85 per work-hour. Required parts cost about $1,080 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, the estimated cost of the currently required actions is $93,600, or $7,200 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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. 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 AD and placed it in the AD docket.

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 the NPRM (76 FR 55296, September 7, 2011), 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.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–16553 (75 FR 81420, December 28, 2010) and adding the following new AD:

2011–26–05 Bombardier, Inc.: Amendment 39–16895. Docket No. FAA–2011–0916; Directorate Identifier 2011–NM–127–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 23, 2012.

Affected ADs

(b) This AD supersedes AD 2010–26–13, Amendment 39–16553 (75 FR 81420, December 28, 2010).

Applicability

(c) This AD applies to Bombardier, Inc. Model DHC–8–301, –311, and –315 airplanes, certificated in any category; having serial numbers 100 through 530 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Reason

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

Several cases of aileron terminal quadrant support brackets that were manufactured using sheet metal have been found cracked on DHC–8 Series 300 aircraft. Investigation revealed that the failure of the support bracket was due to fatigue. Failure of the aileron terminal quadrant support bracket could result in an adverse reduction of aircraft roll control.

* * * * *

These conditions could result in loss of control 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.

Restatement of Requirements of AD 2010–26–13, Amendment 39–16553, (75 FR 81420, December 28, 2010) With Reduced Compliance Time and no New Service Information

Actions

(g) For airplanes with an aileron terminal quadrant support bracket having part number (P/N) 85711569: At the applicable times specified in paragraph (g)(1) or (g)(2) of this AD, install a new aileron input quadrant support bracket by incorporating MODSUM 8Q101250, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 8–57–43, Revision B, dated October 7, 2009.

(1) For airplanes that have accumulated 30,000 total flight hours or more as of February 1, 2011 (the effective date of AD 2010–26–13, Amendment 39–16553 (75 FR 81420, December 28, 2010)): Within 3,000 flight hours after February 1, 2011.

(2) For airplanes that have accumulated less than 30,000 total flight hours as of February 1, 2011: At the earlier of the times of paragraphs (g)(2)(i) and (g)(2)(ii).

(i) Before the accumulation of 33,000 total flight cycles or within 6,000 flight hours after February 1, 2011, whichever occurs first.

(ii) Before the accumulation of 33,000 total flight hours or within 6,000 flight hours after the effective date of this AD, whichever occurs first.

Credit for Actions Accomplished in Accordance With Previous Service Information

(h) Doing the installation by incorporating MODSUM 8Q101250 is also acceptable for compliance with the requirements of paragraph (g) of this AD if done before February 1, 2011, in accordance with Bombardier Service Bulletin 8–57–43, dated August 9, 2002; or Bombardier Service Bulletin 8–57–43, Revision A, dated January 17, 2003.

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 Aircraft Certification Office (ACO), ANE–170, 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 New York ACO, send it 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–2009–45, dated December 11, 2009; and Bombardier Service Bulletin 8–57–43, Revision B, dated October 7, 2009; for related information.

Material Incorporated by Reference

(k) You must use Bombardier Service Bulletin 8–57–43, Revision B, dated October 7, 2009, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register previously approved the incorporation by reference of Bombardier Service Bulletin 8–57–43, Revision B, dated October 7, 2009, on February 1, 2011 (75 FR 81420, December 28, 2010), under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this 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.*

(3) You may review copies of the 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on December 6, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–32019 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0918; Directorate Identifier 2011–NM–090–AD; Amendment 39–16896; AD 2011–26–06]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Airbus Model A330–200 and –300 series airplanes, Model A340–200 and –300 series airplanes, and Model A340–500 and –600 series airplanes. This 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:

During a pre-flight test before delivery of an aeroplane from the Airbus production line, a fault message was triggered on FDU1 [fire detection unit].

Investigations by the supplier on the faulty FDU have identified a soldering quality issue on one of the internal cards. This quality issue resulted from a specific repair process that was applied to some FDU * * * during manufacturing.

The FDU monitors the engine, Auxiliary Power Unit (APU) and Main Landing Gear (MLG) bay fire detection systems.

This condition, if not corrected, may adversely affect the fire detection system performance in case of a fire in the area that is monitored by the faulty FDU, potentially resulting in an unsafe condition.

* * * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective January 23, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 23, 2012.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

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

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on September 14, 2011 (76 FR 56680). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

During a pre-flight test before delivery of an aeroplane from the Airbus production line, a fault message was triggered on FDU1.

Investigations by the supplier on the faulty FDU have identified a soldering quality issue on one of the internal cards. This quality issue resulted from a specific repair process that was applied to some FDU Part Number (P/N) 3711–00 during manufacturing.

The FDU monitors the engine, Auxiliary Power Unit (APU) and Main Landing Gear (MLG) bay fire detection systems.

This condition, if not corrected, may adversely affect the fire detection system performance in case of a fire in the area that is monitored by the faulty FDU, potentially resulting in an unsafe condition.

For the reasons described above, this [EASA] AD requires the identification and replacement of the affected FDU.

You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (76 FR 56680, September 14, 2011) or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed.

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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a Note within the AD.

Costs of Compliance

We estimate that this AD will affect 58 products of U.S. registry. We also estimate that it will take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $0 per product. Replacement parts may be provided free of charge by the manufacturer. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $4,930, or $85 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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

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

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

3. 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 AD and placed it in the AD docket.

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 the NPRM (76 FR 56680, September 14, 2011), 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.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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:

2011–26–06 Airbus: Amendment 39–16896. Docket No. FAA–2011–0918; Directorate Identifier 2011–NM–090–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 23, 2012.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A330–201, –202, –203, –223, –223F, –243, and –243F airplanes; Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; Model A340–211, –212, and –213 airplanes; Model A340–311, –312, and –313 airplanes; Model A340–541 airplanes; and Model A340–642 airplanes; certificated in any category; all serial numbers.

Subject

(d) Air Transport Association (ATA) of America Code 26: Fire Protection.

Reason

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

During a pre-flight test before delivery of an aeroplane from the Airbus production line, a fault message was triggered on FDU1 [fire detection unit].

Investigations by the supplier on the faulty FDU have identified a soldering quality issue on one of the internal cards. This quality issue resulted from a specific repair process that was applied to some FDU * * * during manufacturing.

The FDU monitors the engine, Auxiliary Power Unit (APU) and Main Landing Gear (MLG) bay fire detection systems.

This condition, if not corrected, may adversely affect the fire detection system performance in case of a fire in the area that is monitored by the faulty FDU, potentially resulting in an unsafe condition.

* * * * *

Compliance

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

Actions

(g) Within 1,000 flight hours after the effective date of this AD: Do an inspection to identify the fire detection unit (FDU) part number (P/N) and serial number (S/N) of each engine, auxiliary power unit (APU), and MLG bay (for Model A340–500 and –600 series airplanes only), as applicable, in accordance with the instructions of Airbus All Operators Telex (AOT) A330–26A3052, dated April 19, 2011 (for Model A330–200 and –300 series airplanes); Airbus AOT A340–200/300–26A4044, dated April 19, 2011 (for Model A340–200 and –300 series airplanes); or Airbus AOT A340–500/600–26A5024, dated April 19, 2011 (for Model A340–500 and –600 series airplanes). A review of maintenance records is acceptable in lieu of this inspection if the part number and serial number of the installed FDU can be conclusively determined from that review.

(h) If during the inspection required by paragraph (g) of this AD, an FDU with P/N 3711–00 is found installed and the serial number of the FDU is listed in table 1 of this AD: Before further flight, replace the FDU with a serviceable FDU, in accordance with the instructions of Airbus AOT A330–26A3052, dated April 19, 2011 (for Model A330–200 and –300 series airplanes); Airbus AOT A340–200/300–26A4044, dated April 19, 2011 (for Model A340–200 and –300 series airplanes); or Airbus AOT A340–500/600–26A5024, dated April 19, 2011 (for Model A340–500 and –600 series airplanes).

TABLE 1—AFFECTED P/N 3711–00 FDUS

Serial numbers
ZL0683
ZL0718
ZL0721 through ZL0725 inclusive
ZL0727
ZL0729 through ZL0731 inclusive
ZL0736
ZL0738
ZL0740
ZL0742
ZL0743
ZL0745
ZL0747
ZL0770
ZL0772
ZL0775
ZL0788
ZL0804

Note 1: Some of the affected P/N 3711–00 FDUs have been installed in production on certain airplanes, as indicated in table 2 of this AD.

TABLE 2—FDUS INSTALLED IN PRODUCTION

Model A330–200 and –300 airplanes manufacturer serial numbers	Position	S/N
1177	ENG2 FDU (1WD2)	ZL0683
1191	ENG2 FDU (1WD2)	ZL0723
1192	ENG1 FDU (1WD1)	ZL0721
	ENG2 FDU (1WD2)	ZL0722
1193	APU FDU (13WG)	ZL0718
1195	ENG1 FDU (1WD1)	ZL0740
1196	ENG1 FDU (1WD1)	ZL0742
	ENG2 FDU (1WD2)	ZL0736
	APU FDU (13WG)	ZL0743
1198	ENG2 FDU (1WD2)	ZL0738
1199	APU FDU (13WG)	ZL0731
1200	ENG1 FDU (1WD1)	ZL0747

TABLE 2—FDUS INSTALLED IN PRODUCTION—Continued

Model A330–200 and –300 airplanes manufacturer serial numbers	Position	S/N
1206	ENG2 FDU (1WD2)	ZL0770

Parts Installation

(i) As of the effective date of this AD, no person may install on any airplane, any P/N 3711–00 FDU with a serial number listed in table 1 of this AD, unless the FDU has been reworked and re-identified by L'Hotellier as specified in the instructions in Airbus AOT A330–26A3052, dated April 19, 2011 (for Model A330–200 and –300 series airplanes); Airbus AOT A340–200/300–26A4044, dated April 19, 2011 (for Model A340–200 and –300 series airplanes); or Airbus AOT A340–500/600–26A5024, dated April 19, 2011 (for Model A340–500 and –600 series airplanes).

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(j) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, 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 International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

Related Information

(k) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2011–0073, dated April 20, 2011; Airbus AOT A330–26A3052, dated April 19, 2011; Airbus AOT A340–200/300–26A4044, dated April 19, 2011; and Airbus AOT A340–500/600–26A5024, dated April 19, 2011; for related information.

Material Incorporated by Reference

(l) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) of the following service information under 5 U.S.C. 552(a) and 1 CFR part 51:

(1) Airbus All Operators Telex (AOT) A330–26A3052, dated April 19, 2011. Only the first page of this document contains the document number and date.

(2) Airbus AOT A340–200/300–26A4044, dated April 19, 2011. Only the first page of this document contains the document number and date.

(3) Airbus AOT A340–500/600–26A5024, dated April 19, 2011. Only the first page of this document contains the document number and date.

(4) For service information identified in this AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330-A340@airbus.com;* Internet *http://www.airbus.com.*

(5) You may review copies of the 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.

(6) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on December 6, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–32021 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0199; Directorate Identifier 2011–CE–005–AD; Amendment 39–16890; AD 2011–06–06 R1]

RIN 2120–AA64

Airworthiness Directives; Eclipse Aerospace, Inc. Airplanes Equipped With Pratt & Whitney Canada, Corp. PW610F–A Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are revising an existing airworthiness directive (AD) that applies to all Eclipse Aerospace, Inc. Model EA500 airplanes equipped with Pratt & Whitney Canada, Corp. (P&WC) Model PW610F–A engines. The existing AD currently requires incorporating an operating limitation of a maximum operating altitude of 30,000 feet into Section 2, Limitations, of the airplane flight manual (AFM). Since we issued that AD, P&WC has developed a design change for the combustion chamber liner assembly. This new AD retains the requirements of the current AD, clarifies the engine applicability, and allows the option of incorporating the design change to terminate the current operating limitation and restore the original certificated maximum operating altitude of 41,000 feet. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD is effective January 23, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of January 23, 2012.

ADDRESSES: For service information identified in this AD, contact Pratt & Whitney Canada, 1000 Marie-Victorin Blvd., Longueuil, Quebec, J4G 1A1 Canada; telephone: (800) 268–8000; Internet: *www.P&WC.ca.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Eric Kinney, Aerospace Engineer, FAA, Fort Worth Aircraft Certification Office, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone: (817) 222–5459; fax: (817) 222–5960; email: *eric.kinney@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to revise AD 2011–06–06, Amendment 39–16631 (76 FR 13078, March 10, 2011). That AD applies to the specified products. The NPRM published in the **Federal Register** on October 13, 2011 (76 FR 63571). That NPRM proposed to retain all requirements of AD 2011–06–06, clarify the engine applicability, and allow the option of incorporating Pratt & Whitney Canada Service Bulletin P&WC S.B. No. 60077, dated June 1, 2011, to terminate the operating limitations set in AD 2011–06–06 and restore the original certificated altitude of 41,000 feet.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (76 FR 63571, October 13, 2011) or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (76 FR 63571, October 13, 2011) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD affects 259 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

[Retained from AD 2011–06–06, Amendment 39–16631 (76 FR 13078, March 10, 2011)]

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Incorporate operating limitations of maximum operating altitude of 30,000 feet into Section 2, Limitations, of the AFM.	1 work-hour × $85 per hour = $85 ..	Not Applicable	$85	$22,015

The cost presented above is a cost estimate only. A person holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may insert the AFM change.

ESTIMATED COSTS

[Optional action]

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Incorporation of Pratt & Whitney Canada Service Bulletin P&WC S.B. No. 60077, dated June 1, 2011, on both engines.	20 work-hours × $85 per hour = $1,700 for both engines.	$236,610 for both engines	$238,310 for both engines	$61,722,290 for both engines

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

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

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

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

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

(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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2011–06–06, Amendment 39–16631 (76 FR 13078, March 10, 2011), and adding the following new AD:

2011–06–06 R1 Eclipse Aerospace, Inc.: Amendment 39–16890; Docket No. FAA–2011–0199; Directorate Identifier 2011–CE–005–AD.

(a) Effective Date

This AD is effective January 23, 2012.

(b) Affected ADs

This AD revises AD 2011–06–06, Amendment 39–16631 (76 FR 13078, March 10, 2011).

(c) Applicability

This AD applies to Eclipse Aerospace, Inc. Model EA500 airplanes, all serial numbers, that are:

(1) Equipped with Pratt & Whitney Canada, Corp. Model PW610F–A engines, all serial numbers up to and including serial number PCE–LA0583; and

(2) Certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 72, Engine.

(e) Unsafe Condition

This AD was prompted by several incidents of engine surge. We are issuing this AD to prevent hard carbon buildup on the static vane, which could result in engine surges. Engine surges may result in a necessary reduction in thrust and decreased power for the affected engine. In some cases, this could result in flight and landing under single-engine conditions. It is also possible this could affect both engines at the same time, requiring dual-engine shutdown.

(f) Compliance

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

(g) Action Retained from AD 2011–06–06, Amendment 39–16631 (76 FR 13078, March 10, 2011)

(1) Before further flight after March 21, 2011 (the effective date retained from AD 2011–06–06), incorporate the following language into Section 2, Limitations, of your airplane flight manual (AFM): ''Per AD 2011–06–06, LIMIT THE MAXIMUM OPERATING ALTITUDE TO 30,000 FEET (9144M) PRESSURE ALTITUDE.''

(2) A person holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may insert the operating limitations into Section 2, Limitations, of the AFM. Make an entry into the aircraft logbook showing compliance with this portion of the AD in accordance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).

(3) You may incorporate paragraph (g) of this AD into Section 2, Limitations, of your AFM to comply with this AD.

(h) Optional Action To Restore Original Certificated Maximum Operating Altitude

(1) You may, at any time after compliance with paragraph (g) of this AD, on both engines replace the turbofan engine combustion chamber liner assembly with one that has inner and outer liner assemblies that include heat shields. Do the replacements in accordance with Pratt & Whitney Canada Service Bulletin P&WC S.B. No. 60077, dated June 1, 2011. This includes the change to the weight and balance in paragraph 1.H. in the service bulletin.

(2) Before further flight after doing the replacement specified in paragraph (h)(1) of this AD, remove the limitation required in paragraph (g)(1) of this AD.

(3) Within 30 days after doing the replacement specified in paragraph (h)(1) of this AD or within 30 days after January 23, 2012 (the effective date of this AD), whichever occurs later, send a memo or email to Eric Kinney at the address specified in paragraph (k) of this AD notifying him of the completion of the replacement. In this notification, include the airplane serial number, engine serial numbers, and time-in-service (TIS) hours at the time of replacement.

(i) Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Fort Worth Airplane Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

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

(3) AMOCs approved for AD 2011–06–06, Amendment 39–16631 (76 FR 13078, March 10, 2011) are approved as AMOCs for this AD.

(k) Related Information

For more information about this AD, contact Eric Kinney, Aerospace Engineer, Fort Worth ACO, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone: (817) 222–5459; fax: (817) 222–5960; email: *eric.kinney@faa.gov.*

(l) Material Incorporated by Reference

(1) You must use Pratt & Whitney Canada Service Bulletin P&WC S.B. No. 60077, dated June 1, 2011, to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) under 5 U.S.C. 552(a) and 1 CFR part 51 on January 23, 2012.

(2) For service information identified in this AD, contact Pratt & Whitney Canada, 1000 Marie-Victorin Blvd., Longueuil, Quebec, J4G 1A1 Canada; telephone: (800) 268–8000; Internet: *http://www.P&WC.ca.*

(3) You may review copies of the service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call (202) 741–6030, or go to *http://www.archives.gov/ federal_register/code_of_federal_regulations/ ibr_locations.html.*

Issued in Kansas City, Missouri, on December 6, 2011.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–31795 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0578; Airspace Docket No. 11–ASO–24]

Establishment of Class D and E Airspace and Amendment of Class E; Brooksville, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class D and E airspace and amends existing Class E airspace at Brooksville, FL, to accommodate a new air traffic control tower at Hernando County Airport This action enhances the safety and management of Instrument Flight Rules (IFR) operations for standard instrument approach procedures at the airport. This action also makes a minor adjustment to the geographic coordinates of the airport.

DATES: Effective 0901 UTC, February 9, 2012. The Director of the **Federal Register** approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

History

On September 7, 2011, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to establish Class D and E airspace and amend existing Class E airspace at Brooksville, FL, to accommodate a new air traffic control tower at Hernando County Airport (76 FR 55298). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class D and E airspace designations are published in Paragraphs 5000, 6002, and 6005, respectively, of FAA Order 7400.9V dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The Class D and E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes Class D airspace extending upward from the surface to and including 1,500 feet MSL within a 5.1-mile radius of Hernando County Airport, Brooksville, FL, and Class E surface area airspace within a 5.1-mile radius of the airport. This action also amends Class E airspace extending upward from 700 feet above the surface within a 7.6-mile radius of the airport. Additional controlled airspace is necessary to support the new air traffic control tower and new standard instrument approach procedures developed for continued safety and management of IFR operations at Hernando County Airport. Also, the geographic coordinates of the airport are adjusted to be in concert with the FAAs aeronautical database.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes and amends controlled airspace at Hernando County Airport, Brooksville, FL.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011, is amended as follows:

Paragraph 5000 Class D Airspace

* * * * *

ASO FL D Brooksville, FL [NEW]

Hernando County Airport, FL
(Lat. 28°28′42″ N., long. 82°27′33″ W.)

That airspace extending upward from the surface up to and including 1,500 feet MSL within a 5.1-mile radius of the Hernando County Airport. This Class D airspace area is effective during specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Paragraph 6002 Class E Airspace Designated as Surface Areas

* * * * *

ASO FL E2 Brooksville, FL [NEW]

Hernando County Airport, FL
(Lat. 28°28′42″ N., long. 82°27′33″ W.)

That airspace extending from the surface within a 5.1-mile radius of Hernando County Airport. This Class E airspace area is effective during specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 feet or More Above the Surface of the Earth.

* * * * *

ASO FL E5 Brooksville, FL [AMENDED]

Hernando County Airport, FL
(Lat. 28°28′42″ N., long. 82°27′33″ W.)

That airspace extending upward from 700 feet above the surface within a 7.6-mile radius of Hernando County Airport.

Issued in College Park, Georgia, on December 5, 2011.

Mark D. Ward,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–32037 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 314

[Docket No. FDA–2011–N–0898]

Applications for Food and Drug Administration Approval To Market a New Drug; Revision of Postmarketing Reporting Requirements—Discontinuance

AGENCY: Food and Drug Administration, HHS.

ACTION: Interim final rule; request for comments.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is issuing an interim final rule amending its postmarketing reporting regulations implementing certain provisions of the Federal Food, Drug and Cosmetic Act. The provisions of the Federal Food, Drug and Cosmetic Act require manufacturers who are the sole manufacturers of certain drug products to notify FDA at least 6 months before discontinuance of manufacture of the products. This interim final rule modifies the term ''discontinuance'' and clarifies the term ''sole manufacturer'' with respect to notification of discontinuance requirements. The broader reporting resulting from these changes will enable FDA to improve its collection and distribution of drug shortage information to physician and patient organizations and to work with manufacturers and other stakeholders to respond to potential drug shortages.

DATES: This interim final rule is effective January 18, 2012. Submit either electronic or written comments on the provisions of this interim final rule by February 17, 2012. Submit comments on the information collection requirements under the Paperwork Reduction Act of 1995 by January 3, 2012 (see the ''Paperwork Reduction Act of 1995'' section of this document).

ADDRESSES: You may submit comments, identified by Docket No. FDA–2011–N–0898 by any of the following methods, except that comments on information collection issues under the Paperwork Reduction Act of 1995 must be submitted to the Office of Regulatory Affairs, Office of Management and Budget (OMB) (see the ''Paperwork Reduction Act of 1995'' section of this document).

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

• *Fax:* (301) 827–6870.

• *Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2011–N–0898 for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Kalah Auchincloss, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, (301) 796–0659, or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, (301) 827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of October 18, 2007 (72 FR 58993), we (FDA) issued a final rule to revise our postmarketing reporting requirements to implement section 506C of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 356c). Section 506C of the Federal Food, Drug, and Cosmetic Act (section 506C) requires manufacturers who are the sole manufacturers of certain drug products to notify us at least 6 months before discontinuance of manufacture of the products. Section 506C applies to sole manufacturers of products that meet the following three criteria:

1. The products are life supporting, life sustaining, or intended for use in the prevention of a debilitating disease or condition;

2. The products are approved under section 505(b) or (j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(b) or (j)); and

3. The products are not originally derived from human tissue and replaced by a recombinant product.

These three criteria are statutory requirements. FDA assesses whether a drug is ''life supporting, life sustaining, or intended for use in the prevention of a debilitating disease or condition'' on a case-by-case basis, but intends to provide further guidance on this issue in the near future.

Section 506C also requires us to distribute certain information about covered discontinuances to appropriate physician and patient organizations. Under section 506C, FDA may reduce the 6-month notification period if we find good cause exists for the reduction.

Recent experience with drug shortages in the United States has shown the serious and immediate impacts they can have on patients and healthcare providers, particularly those shortages involving drugs that are manufactured by a small number of firms and for which there are no good therapeutic substitutes available. The number of drug shortages annually has tripled from 61 in 2005 to 178 in 2010. Some shortages delay or deny needed care for patients, because they involve critical drugs used to treat cancer, to provide required parenteral nutrition, or to address other serious medical conditions. Other shortages can result in providers prescribing second-line alternatives, which may be less effective and higher risk than first-line therapies. A survey of 1,800 health practitioners conducted by the Institute for Safe Medication Practices (ISMP) concluded that drug shortages could lead to medication errors and poor patient outcomes because shortages can result in the use of secondary alternative therapies (Ref. 1).

In light of increasing concerns about the impact of drug shortages on health care in the United States, on October 31, 2011, the President issued Executive Order 13588 directing the FDA to ''take steps that will help to prevent and reduce current and future disruptions in the supply of lifesaving medicines'' and noting that ''one important step is ensuring that the FDA and the public

receive adequate advance notice of shortages whenever possible'' (Ref. 2). In response to the Executive Order's directive to address the growing drug shortage problem, this rule modifies the regulation at § 314.81(b)(3)(iii) (21 CFR 314.81(b)(3)(iii)), which, in addition to § 314.91 (21 CFR 314.91), implements section 506C of the Federal Food, Drug, and Cosmetic Act.

II. Overview of the Interim Final Rule

This interim final rule adds two definitions to § 314.81(b)(3)(iii)—a definition of ''discontinuance'' and a definition of ''sole manufacturer.'' Although these terms were discussed in the preamble to the final rule issuing § 314.81(b)(3)(iii) published on October 18, 2007 (72 FR 58993) (2007 Preamble), and have been used in various documents informally expressing the Agency's interpretation of section 506C and its implementing regulations (see, for example, the Center for Drug Evaluation and Research (CDER) Manual of Policies and Procedures 6003.1, Drug Shortage Management (Ref. 3)), these terms were not defined in the regulation. Given the serious and growing threat to public health due to drug shortages, the Agency believes it is appropriate at this time to codify definitions of these terms. This modification and clarification of our existing regulations will further the public health objective of the Federal Food, Drug, and Cosmetic Act as a whole, and section 506C specifically by increasing the scope of information that FDA receives regarding discontinuances. This will enable the Agency to: (1) Expand collection and distribution of information on the discontinuance of certain drugs to appropriate physician and patient organizations as required by section 506C(c); and (2) work with manufacturers and other stakeholders to implement appropriate strategies to reduce, to the greatest extent possible, the public health impact of discontinuances of products that can lead to drug shortages. We believe that clarification of terminology will also improve statutory compliance.

A. Discontinuance

The Agency is revising an earlier policy position and defining the term ''discontinuance'' in the regulation to include both permanent and temporary interruptions in the manufacturing of a drug product, if the interruption could lead to a disruption in supply of the product. This interpretation of the statutory language best achieves the public health purpose of section 506C and the Federal Food, Drug, and Cosmetic Act as a whole.

Under section 506C, sole manufacturers are required to notify FDA of a ''discontinuance'' of a drug product subject to section 506C. In the 2007 Preamble, in response to a comment on the meaning of the term discontinuance, we indicated that a discontinuance did not include planned or unplanned temporary manufacturing cessations (72 FR 58993 at 58995, response to comment 4). At that time, we stated that only manufacturers who intended to permanently discontinue manufacture and marketing of the drug product were subject to mandatory reporting requirements under section 506C. In our response to the comment in the 2007 Preamble, however, we did request that manufacturers who experience an unplanned temporary manufacturing cessation keep the Agency informed of the status of the shutdown because ''the duration of an unplanned shutdown may be unpredictable and could affect the availability of needed therapy for patients.''

FDA no longer believes that this narrow policy position regarding the term ''discontinuance'' serves the public health need that the Federal Food, Drug, and Cosmetic Act was intended to address. In 2007, the Agency believed that the supply of drug product available to patients during a temporary manufacturing cessation, particularly one that was planned, would not be greatly affected during the interruption in manufacturing. However, subsequent experience has shown that even temporary discontinuances of manufacturing can have a significant impact on patient access to drug products. For example, if an equipment failure necessitates an unexpected temporary interruption in manufacturing of a drug product subject to section 506C, this discontinuance could have serious implications for patient access to the product. Notification to FDA of such discontinuances will expand FDA's ability to distribute information on the discontinuance of certain drugs to physician and patient organizations and enable FDA to work with manufacturers and other stakeholders to respond to potential drug shortages.

The interim final rule therefore adds § 314.81(b)(3)(iii)(*d*) to provide that ''discontinuance'' means ''any interruption of manufacturing of a drug product described in paragraph (b)(3)(iii)(*a*) for sale in the United States that could lead to a potential disruption in supply of the drug product, whether the interruption is intended to be temporary or permanent.'' Thus the term ''discontinuance'' now includes both temporary and permanent interruptions in manufacturing, if the interruption could lead to a disruption in supply of the product. This interpretation of ''discontinuance'' is consistent with Webster's Third New International Dictionary, which defines the term to mean ''cessation, shutdown, closure; interruption'' (Ref. 4). The dictionary definition indicates that a discontinuance can be interpreted to include both situations that are permanent (cessation, shutdown, closure) and those that are temporary (interruption).

Any permanent discontinuance of manufacturing by a sole manufacturer will lead, per se, to a disruption in supply of the product; thus, all permanent discontinuances must continue to be reported. Temporary discontinuances must be reported to the Agency under this interim final rule only if the discontinuance could lead to a disruption in supply of the product.

We understand that a manufacturer may be unable to report some temporary discontinuances 6 months before the discontinuance, as required by statute. When notification at least 6 months prior to the discontinuance is impossible because it was unforeseen, the manufacturer must notify the Agency as soon as possible after it knows that a discontinuance will occur. For example, if a contamination problem requires immediate shut down of a manufacturing plant for a drug product subject to section 506C, the manufacturer will not be able to provide the FDA with 6 months prior notification, but would be required to notify FDA as soon as the manufacturer becomes aware that the contamination necessitates a temporary discontinuance of manufacture of the product.

Other circumstances that would trigger notification to the FDA of a discontinuance of a drug product subject to section 506C include:

- A business decision to permanently discontinue manufacture of a drug product;
- A delay in acquiring active pharmaceutical ingredients or inactive ingredients that leads to, or could lead to, a temporary interruption in manufacturing of a drug product while alternative suppliers are located;
- Equipment failure or contamination affecting the quality of a drug product that necessitates an interruption in manufacturing while the equipment is repaired or the contamination issue is addressed;
- Manufacturing shut-downs for maintenance or other routine matters, if

the shut-down extends for longer than anticipated or otherwise could disrupt supply of a drug product;

Conversely, a manufacturer is not required to notify FDA if a discontinuance is part of the normal manufacturing schedule and is not expected to lead to a disruption in supply of a drug product subject to 506C. For example, FDA need not be notified in the following circumstances:

- The manufacturer uses the same manufacturing plant to manufacture two drug products, one of which (Product A) is subject to section 506C. From January to June of each year the manufacturer uses the plant to produce Product A. From July to December of each year the manufacturer uses the plant to produce Product B. Although this could be considered a temporary discontinuance of Product A from July to December, because this is the usual manufacturing schedule and should not therefore result in a disruption in the supply of Product A, the manufacturer need not notify the Agency of the annual, temporary discontinuance of Product A.
- A manufacturer of a drug product implements a scheduled shutdown of its manufacturing facility each year for routine maintenance. The annual shutdown is anticipated and planned for in advance; therefore, it is not expected to disrupt supply of a drug product subject to 506C. The shutdown does not need to be reported to the Agency under section 506C.
- A manufacturer of a drug product subject to 506C experiences an unexpected power outage that results in an unscheduled interruption in manufacturing. The manufacturer expects to resume normal operations within a relatively short timeframe and does not expect a disruption in the supply of the drug product. The shutdown does not need to be reported to the Agency under section 506C.

If any of the circumstances described above do lead to a disruption in supply of the drug product, even if unanticipated, then it becomes a reportable discontinuance under this rule and the manufacturer would be required to notify FDA of a discontinuance of the product.

In addition to revising the definition of ''discontinuance,'' this interim final rule makes a minor conforming change by striking the phrase ''discontinuing manufacture'' in the first sentence of § 314.81(b)(3)(iii)(*a*) and replacing it with the phrase ''discontinuance of manufacture.'' This change ensures that the regulations contain an appropriate cross-reference to the revised definition of discontinuance.

The interim final rule also makes a minor change to the procedures in § 314.81(b)(3)(iii)(*b*) for reporting notices of discontinuances to the Agency. The interim final rule requires manufacturers to report a notice of a discontinuance to FDA either electronically or by telephone according to instructions on the FDA's Drug Shortages Web site at *http://www.fda.gov/Drugs/DrugSafety/DrugShortages.* Products regulated by CDER must be reported to the CDER Drug Shortages Coordinator. Products regulated by the Center for Biologics Evaluation and Research (CBER) must be reported to the CBER Products Shortage Coordinator. This change ensures that the appropriate offices are timely notified of all relevant discontinuances. It also reflects existing practice for submitting notices of discontinuance, and reduces the burden on industry to submit multiple copies of the notification.

B. Sole Manufacturer

To best achieve the public health purposes of the Federal Food, Drug, and Cosmetic Act, and section 506C, the Agency is clarifying the term sole manufacturer to ensure that we receive timely reports of all discontinuances of drug products subject to section 506C, including where other strengths, dosage forms, or routes of administration of the same drug product are marketed. The clarification is intended to improve statutory compliance and to minimize instances where manufacturers fail to make reports to the Agency as required by section 506C. This clarification of the statutory language best achieves the purpose of section 506C and the Federal Food, Drug, and Cosmetic Act as a whole.

Section 314.81(b)(3)(iii) currently does not include a definition of the term ''sole manufacturer.'' In the 2007 Preamble, we rejected a suggestion to rely on the ''Orange Book'' (FDA's publication on ''Approved Drug Products with Therapeutic Equivalence Evaluations'') as the source for determining whether an entity is a sole manufacturer (72 FR 58993 at 58995, comment 3). The comment to the proposed rule had expressed concern that, although the Orange Book lists all drug products with approved new drug applications (NDA) and abbreviated new drug applications (ANDA), it is not possible to determine whether the listed approved products are, in fact, being manufactured. The comment requested that we define sole manufacturer as ''an applicant listed in the Orange Book who is the holder of the only listed approved application under section 505(b) or (j) of the [FD&C] Act.'' We declined to accept this definition of sole manufacturer, and reliance on the Orange Book, to determine whether an applicant was a sole manufacturer for several reasons in 2007, including the following: (1) There may be delays in updating the Orange Book, rendering it temporarily inaccurate; (2) the suggested definition could create potential confusion because some drugs are approved but not marketed and are therefore placed in the ''discontinued'' section of the Orange Book; and (3) there are other generally reliable sources for obtaining commercial manufacturing information to assist in determining whether an applicant is a sole manufacturer.

We continue to believe that reference to the Orange Book is not the appropriate way to identify a ''sole manufacturer'' for purposes of implementing section 506C. In addition, we believe there has been some confusion as to the scope of the term. Accordingly, the interim final rule adds § 314.81(b)(3)(iii)(*d*) to define ''sole manufacturer'' in the regulation to mean ''an applicant that is the only entity currently manufacturing a drug product of a specific strength, dosage form, or route of administration for sale in the United States, whether the product is manufactured by the applicant or for the applicant under contract with one or more different entities.''

The definition in this interim final rule is intended to clarify that a sole manufacturer means the only applicant currently supplying the U.S. market with the drug product. It does not mean sole NDA or ANDA holder. A manufacturer is considered a sole manufacturer even if other manufacturers hold an approved NDA or ANDA for the same product, if the other applicants are no longer manufacturing (or have never manufactured) the product for sale in the United States. For example, Company A holds an NDA for a drug product subject to section 506C and manufactures and sells that product in the United States. Company B holds an ANDA for the drug product, but does not manufacture or sell the product in the United States. Company A would be considered a sole manufacturer of the drug product for purposes of reporting a discontinuance of the drug product under section 506C. If Company B began manufacturing and selling the drug product in the United States, then Company A would no longer be considered a sole manufacturer. A manufacturer is responsible for determining if it is a sole manufacturer under this regulation. There is commercial information available to

help with this determination. If an applicant is unsure if it is a sole manufacturer of a drug product subject to section 506C, FDA's drugs shortages staff may be able to work with it to help it determine whether it is or is not the sole manufacturer of the drug.

The interim final rule also clarifies that the specific strength, dosage form, and route of administration of the product are critical in determining if a manufacturer is a sole manufacturer. For example, if a company manufacturers for sale in the United States an injectable dosage form of a drug product subject to section 506C, that company is considered a sole manufacturer of that drug product, even if a second company manufactures and sells in the United States an oral dosage form of the same drug product for the same indication. In this example, if the second company was the only applicant manufacturing and selling the oral dosage form in the United States, both companies would be considered sole manufacturers for purposes of section 506C.

It is important that an entity currently manufacturing a drug product of a specific strength, dosage form, or route of administration for sale in the United States report a discontinuance to FDA because that specific strength, dosage form, or route of administration may be critical for the targeted needs of particular patients. To enable the Agency to fully distribute information under section 506C(c), and to work most effectively with manufacturers and other stakeholders to implement appropriate strategies to reduce, to the greatest extent possible, the public health impact of drug shortages, discontinuances of a specific strength, dosage form, or route of administration of drug products subject to section 506C must be reported to us. Moreover, recent experience has shown that discontinuances of a specific strength, dosage form, or route of administration of a drug product may lead to a shortage of another strength, dosage form, or route of administration of the product, compounding patient difficulties in obtaining the drug product.

Finally, the new definition in the interim final rule clarifies who bears the responsibility for reporting to FDA a discontinuance of a drug product subject to section 506C. The inclusion of ''whether the product is manufactured by the applicant or for the applicant under contract with one or more different entities'' in the definition makes clear that the application holder must report a discontinuance to FDA. For purposes of section 506C, an application holder will be considered a ''manufacturer'' even if the application holder contracts that function out to another entity. The application holder is responsible for establishing a process with any relevant contract manufacturer that ensures the application holder's compliance with this rule. This could include contractual terms between the application holder and the contract manufacturer, as well as monitoring. For example, Company X holds an NDA for a drug product subject to section 506C. Company X contracts with Company Y to manufacture the drug product for the purposes of marketing and selling the drug product in the United States. Company X would be considered the ''sole manufacturer'' in the above situation, and is required to establish a process with Company Y that ensures Company X's ability to report a discontinuance of the drug product to FDA.

III. Legal Authority

FDA is amending its postmarketing reporting regulations implementing section 506C of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 356c). Section 506C requires manufacturers who are the sole manufacturers of certain drug products to notify us at least 6 months before discontinuance of manufacture of the drug products. This interim final rule modifies the term ''discontinuance'' and clarifies the term ''sole manufacturer'' with respect to section 506C notification requirements. FDA's authority for this rule also derives from section 701(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 371(a)).

The Administrative Procedure Act permits an agency to promulgate a rule without notice and comment procedures when an agency for ''good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest'' (5 U.S.C. 553(b); 21 CFR 10.40(e)). FDA has determined that good cause exists for this interim final rule and that notice and comment procedures are contrary to the public interest given the serious and growing threat to public health due to drug shortages.

Recent experience with drug shortages in the United States has shown serious and immediate impacts on patients and healthcare providers, particularly those shortages involving drugs that are manufactured by a small number of firms and for which there are no good therapeutic substitutes available. Some shortages delay or deny needed care for patients, because they involve critical drugs used to treat cancer, to provide required parenteral nutrition, or to address other serious medical conditions. Other shortages can result in providers prescribing second-line alternatives, which may be less effective and higher risk than first-line therapies. The number of drug shortages annually has tripled from 61 in 2005 to 178 in 2010. New shortages are occurring at the present time.

The scope of information FDA receives under the current regulations has not adequately enabled the Agency to distribute information on the discontinuance of certain drugs to physician and patient organizations as required by section 506C(c) and to work with manufacturers and other stakeholders to respond to potential drug shortages. There are significant non-quantifiable benefits of reporting information about discontinuances to FDA, including better enabling the Agency, manufacturers, healthcare providers, and patients to monitor and evaluate these discontinuances to mitigate or prevent potential drug shortages that can arise as a result of these discontinuances and that could otherwise lead to serious and widespread adverse health consequences. Any delay in the implementation of this rule would limit the ability of healthcare providers to respond to potential and actual shortages, and would reduce the ability of FDA to work with manufacturers and other stakeholders to prevent and mitigate drug shortages. In this instance, FDA has determined that an interim final rule is legally permissible and in the public's interest.

IV. Analysis of Impacts

A. Introduction and Summary

1. Introduction

FDA has examined the impacts of the interim final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). This interim final rule is a significant regulatory action as defined by Executive Order 12866 and accordingly has been reviewed by the Office of Management and Budget.

The Regulatory Flexibility Act requires agencies to analyze regulatory

options that would minimize any significant impact of a rule on small entities. The Agency projects that the interim final rule will not likely have a significant economic impact on a substantial number of small entities, but seeks comments on its analysis below.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $136 million, using the most current (2010) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this interim final rule to result in any 1-year expenditure that would meet or exceed this amount.

2. Summary

The interim final rule modifies the term ''discontinuance'' and clarifies the term ''sole manufacturer'' with respect to notifications of discontinuance of products that are life supporting, life sustaining, or intended for use in the prevention of a debilitating disease or condition. The interim final rule will impose annual reporting costs of up to $15,064 in total. Non-quantifiable benefits include the value of the reported information about discontinuances in helping FDA, manufacturers, healthcare providers, and patients to monitor and evaluate these discontinuances to mitigate or prevent potential drug shortages that can arise as a result of these discontinuances and that could otherwise lead to serious and widespread adverse health consequences.

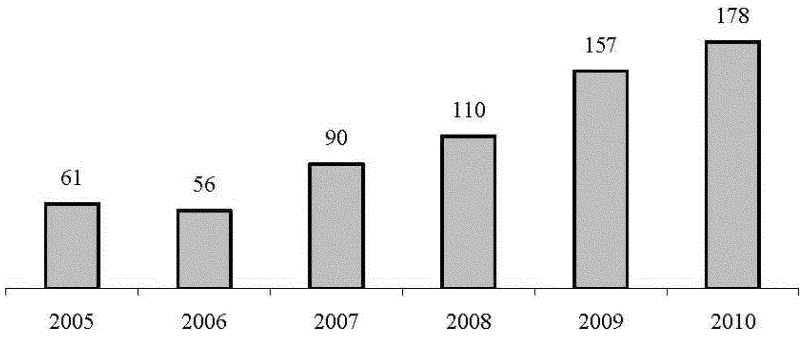
B. Objective of and Need for the Interim Final Rule

Current regulations require that a sole manufacturer of a drug product that is: (1) Life supporting, life sustaining, or intended for use in the prevention of a debilitating disease or condition; (2) approved under section 505(b) or 505(j) of the Federal Food, Drug, and Cosmetic Act; and (3) not a product that was originally derived from human tissue and was replaced by a recombinant product report permanent discontinuances to FDA at least 6 months prior to the discontinuance. FDA can reduce the 6-month notification period if the applicant submits a certification of good cause, and the Agency finds good cause.

The purpose of the interim final rule is to define the terms ''discontinuance'' and ''sole manufacturer.'' In the interim final rule, ''discontinuance'' is defined as ''any interruption in manufacturing of a drug product described in paragraph (b)(3)(iii)(*a*) for sale in the United States that could lead to a potential disruption in supply of the drug product, whether the interruption is intended to be temporary or permanent.'' ''Sole manufacturer'' is defined as ''an applicant that is the only entity currently manufacturing a drug product of a specific strength, dosage form, or route of administration for sale in the United States, whether the product is manufactured by the applicant or for the applicant under contract with one or more different entities.'' These definitions will require additional manufacturers to report to FDA a wider range of discontinuances that could potentially lead to a drug shortage than under the current, existing regulations.

While existing regulations require that only permanent discontinuances be reported to FDA, in practice, some manufacturers voluntarily notify FDA about temporary discontinuances. In the past 2 years, such notifications have enabled FDA to prevent 233 drug shortages by expediting review of new manufacturing sites, new suppliers, and specification changes. Nonetheless, recent data from FDA's Drug Shortages Program (DSP) indicate that the number of drug shortages has tripled from 2005 to 2010 (see figure 1 below, Ref. 5).

Figure 1.
Number of Drug Shortages



A survey conducted by the American Hospital Association (AHA) concluded that drug shortages are experienced by hospitals. For example, almost 100 percent of the 820 hospitals surveyed had experienced at least one drug shortage in the 6 months preceding the survey (Ref. 6). Another survey of 1,800 health practitioners conducted by the ISMP suggested that because drug shortages often result in the need for physicians to prescribe alternative therapies which may be less effective and higher risk than first-line treatments, drug shortages can lead to the potential for medication errors and poor patient outcomes as well as higher costs (Refs. 1 and 7).

The interim final rule is intended to increase the scope of information that FDA receives, enabling the Agency to: (1) Expand distribution of information on the discontinuance of certain drugs to appropriate physician and patient organizations as required by section 506C(c); and (2) work with manufacturers and other stakeholders to implement appropriate strategies to reduce, to the greatest extent possible, the public health impact of discontinuances of products that can lead to drug shortages. The public health purpose of section 506C and the Federal Food, Drug, and Cosmetic Act as a whole are best achieved with this modification to our existing regulations.

Currently it appears that some manufacturers may lack sufficient incentives to either take steps to prevent certain shortages or to notify FDA early enough for the Agency to act (Ref. 7). By providing clear definitions, the interim final rule will address this concern and require all applicants to report appropriate information to the Agency in a timely manner.

C. Benefits

The interim final rule modifies the term ''discontinuance'' and clarifies the term ''sole manufacturer'' with respect to postmarketing reporting requirements of products subject to section 506C. The clarification in terminology captures additional manufacturers as ''sole manufacturers'' by explicitly linking the definition of sole manufacturer to a specific strength, dosage form, or route of administration of a drug product. Requiring notification of temporary discontinuances and clarifying the term sole manufacturer will result in FDA receiving better and more timely information on a wider range of discontinuances. This increased reporting will enable FDA to distribute information on discontinuances to appropriate physician and patient organizations and to work with manufactures and other stakeholders to try to prevent a discontinuance from leading to a drug shortage, or to mitigate the impacts of an unavoidable drug shortage on patients and healthcare providers.

There is evidence that the negative impact of drug shortages could be significant. For instance, the American Society of Health System Pharmacists (ASHP) reported that annual labor costs to manage drug shortages are approximately $216 million in the United States (Ref. 7). Moreover, drugs in several major therapeutic classes are in shortage, including oncology products, antibiotics, and electrolyte/nutrition products. For example, statistics indicate that cancer alone affects more than 11 million people in the United States (Ref. 8). Therefore, the potential benefits of the interim final rule as a result of prevention or mitigation of these drug shortages could be substantial from both an economic and public health viewpoint. Because the shortage of even one critical drug can impact a large number of patients and healthcare providers, the potential benefits could be substantial even if the interim final rule only results in a small number of additional notifications of discontinuances to the Agency.

D. Costs

Currently, FDA receives one mandatory notification that meets the statutory and regulatory criteria of a section 506C discontinuance per year and zero certifications of good cause. In addition, there are several dozen voluntary submissions of information to FDA that are related to section 506C discontinuances but do not meet the applicable statutory criteria, as implemented by the current regulation. We note that as a result of FDA's letter to industry (Ref. 10), FDA has experienced a significant increase in the number of notifications. We estimate that the total number of manufacturers who would be required to notify us of a discontinuance under the interim final rule would be 80 per year.[1] However, the impact of the interim final rule represents the incremental impact, which is the difference between the total number of reports required by the interim final rule and the baseline, *i.e.,* the estimated number of reports that we would receive without the interim final rule. We estimate that as a result of the interim final rule, we will receive an additional 9 to 24 notifications of section 506C discontinuances (both temporary and permanent discontinuances) and 2 to 5 associated certifications of good cause. In the 2007 Preamble, we estimated that it would take two hours to prepare a notification of discontinuance and 16 hours to prepare a certification of good cause (72 FR 58993 at 58999). Since neither the format nor the content of these submissions will change as a result of the interim final rule, we continue to estimate that it will take two hours to prepare a notification of discontinuance and 16 hours to prepare a certification of good cause. We estimate that it will take longer to prepare a certification of good cause than a notification of discontinuance because preparing a certification of good cause requires a detailed narrative justifying a reduction in the notification period, which is more labor intensive than the simpler notification of discontinuance.

Notifications are generally prepared and submitted by a regulatory affairs manager. Thus, labor hours are valued using the median hourly wage for Management Occupations (occupation code 11–0000) in Pharmaceutical and Medicine Manufacturing (North American Industry Notification, NAICS, code 325400) as reported by the Bureau of Labor Statistics 2010 Employment Occupational Statistics (Ref. 9). The median hourly wage is $117, which is adjusted for benefits and overhead.

The estimated cost is $234 ($117 × 2 hours) per notification of discontinuance, and $1,872 ($117 × 16 hours) per certification of good cause. In table 1 below we present the estimated costs. The estimated annual cost of the interim final rule is between $5,850 and $15,064.

TABLE 1—ESTIMATED ADDITIONAL ANNUAL REPORTING COSTS OF THE INTERIM FINAL RULE

Type of response	Number of additional responses	Hours per response	Cost per response	Total estimated cost
Notification of Discontinuance (§ 314.81(b)(3)(iii))	9–24	2	$234	$2,106–$5,704
Certification of Good Cause (§ 314.91)	2–5	16	$1,872	$3,744–9,360
Total				$5,850–$15,064

E. Analysis of Regulatory Alternatives

The interim final rule will result in the submission of additional notifications to FDA of a discontinuance of a drug product subject to section 506C. As noted in FDA's recent report on medical product shortages (Ref. 5), any system that increases reporting must ensure that, in the pursuit of more ''signal,'' FDA is not overwhelmed with ''noise.'' We welcome comments on how the notifications can be designed in line with this principle. Such an approach is consistent with Section 4 of Executive Order 13563, which calls

[1] The total is estimated based on 220 shortages tracked by FDA's CDER Drug Shortages Coordinator from January through October of 2011, of which we estimate 30 percent would relate to discontinuances subject to mandatory reporting under section 506C and this interim final rule. The estimated number of discontinuances subject to mandatory reporting (220 × 30 percent) is then adjusted to include two additional months of reporting.

upon agencies ''to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.'' FDA identified the following alternatives to the interim final rule: (1) No change in regulation; and (2) publish guidance that encourages sole manufacturers (including manufacturers of specific strengths, dosage forms, and routes of administration) to notify FDA about temporary discontinuances of drug products subject to the rule, and (3) provide incentives for voluntary reporting.

1. Alternative 1: No Change in Regulation

A simple alternative would be to leave the current regulation unchanged. While this alternative may not impose additional costs on sole manufacturers of drug products subject to section 506C, the benefits of this option would be uncertain and would not provide any additional tools to reduce the number of product shortages.

2. Alternative 2: Publish Guidance

FDA could draft additional guidance to encourage voluntary notification of upcoming discontinuances. A recent example is a FDA's letter to industry (Ref. 10). However, such communications and guidance cannot impose new regulatory requirements. Without this regulation defining which manufacturers are required to notify FDA about both temporary and permanent discontinuances of drug products subject to section 506C, FDA may not have adequate information to distribute to physician and patient organizations and to work effectively with manufacturers and other stakeholders to better prevent and mitigate drug shortages.

3. Alternative 3: Provide Incentives for Voluntary Reporting

It may be possible to develop a system of incentives to encourage increased reporting on a voluntary basis. FDA welcomes comments from the public on how such a system could be implemented, including the types of incentives that would advance the FDA's mission to protect the public health while encouraging additional reporting.

F. Regulatory Flexibility Analysis

FDA has examined the economic implications of the interim final rule as required by the Regulatory Flexibility Act. The Agency projects that the interim final rule will not likely have a significant economic impact on a substantial number of small entities, but seeks comment on its analysis below.

1. Economic Effect on Small Entities

The Small Business Administration (SBA) uses different definitions of what a small entity is for different industries. Using SBA standard size definitions, a firm categorized in NAICS code 315412 (Pharmaceutical Preparations) or NAICS code 325414 (Biological Products) is considered small if it employs fewer than 750 or 500 people, respectively (Ref. 11). The most currently available data from the 2007 Economic Census (Ref. 12) show that at least 92 percent of these establishments would be considered small by SBA standards.[2] We note that using data at the establishment level implicitly assumes that the typical manufacturing establishment is roughly equivalent to the typical small manufacturing firm.

We estimate that the cost per response as a percent of average sales for manufacturers in NAICS code 325412 could represent up to 0.002 percent of sales. The greatest impact is on establishments hiring fewer than 10 employees, where the cost per response as a percent of average sales ranges from 0.029 percent to 0.235 percent. The analysis of the effect on small versus large entities for NAICS 312314 is limited by data restrictions imposed to safeguard the confidentially of some establishments. Consequently, for NAICS code 312314 the average value of shipments is only presented for all establishments. We estimate that the cost per response as a percent of average sales in this industry is between 0.001 percent and 0.004 percent (see table 2). Therefore, the Agency concludes that this rule will not likely have a significant impact on a substantial number of small entities, but we request comments on our analysis.

TABLE 2—ESTIMATED ECONOMIC IMPACT OF INTERIM FINAL RULE ON SMALL ENTITIES

Number of employees	Number of establishments	Total value of shipments ($000)	Average value of shipments ($1,000)	Cost per response as a percent of average sales	
				($234 per response—notification of discontinuance) (%)	($1,872 per response—certification of good cause) (%)
NAICS Code 325412:					
0–9	408	324,604	796	0.029	0.235
10–19	77	317,551	4,124	0.006	0.045
20–99	249	8,377,347	33,644	0.001	0.006
100–499	182	32,516,961	178,665	0.000	0.001
500 and over	75	68,162,155	908,829	0.000	0.000
All	991	109,698,618	110,695	0.000	0.002
NAICS Code 325414:					
All	350	16,112,435	46,036	0.001	0.004

2. Additional Flexibility Identified

In this section, we identify alternatives that would present reductions in costs to small entities.

Alternative 1: Exempt Small-sized Entities: Exempting small-sized businesses from the interim final rule would reduce the economic impact to small businesses by up to 0.235 percent of average sales. However, not imposing these notification requirements on drug products subject to section 506C could

[2] For NAICS code 325412, total value of shipments data are not available for establishments employing fewer than 750 employees. The estimated percent of small establishments (92 percent) is based on the total number of establishments with fewer than 500 employees. For NAICS code 324514 the percent of establishments with fewer than 750 employees is 96 percent.

exacerbate the increasing trend in drug shortages that affect a substantial number of patients and healthcare providers. Moreover, these reporting requirements enable FDA to distribute information to physician and patient organizations, to assess potential drug shortages, and to evaluate mitigation strategies. Thus, exempting small business entities may in the long-term lead to high social costs associated with outcomes such as worsening of conditions for patients for whom these products are necessary.

Alternative 2: Extend the Compliance Period for Small Businesses: An alternative to reduce costs would be to extend the compliance period for small-sized entities. While a longer compliance period may enable small businesses to reduce labor costs, it would delay FDA's receipt of notices of discontinuance and limit the Agency's ability to distribute information to physician and patient organizations as required by section 506C(c), to assess potential drug shortages, and to work with manufacturers and other stakeholders to prevent or mitigate shortages.

V. Paperwork Reduction Act of 1995

This interim final rule contains information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (the PRA). The title, description, and respondent description of these provisions are shown below with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

FDA invites comments on: (1) Whether the proposed collections of information are necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collections of information on respondents, including through the use of automated collection techniques, when appropriate, or other forms of information technology.

Title: Applications for Food and Drug Administration Approval to Market a New Drug; Revision of Postmarketing Reporting Requirements—Discontinuance.

Description: Sections 314.81(b)(3)(iii) and 314.91 of FDA's regulations (''§ 314.81(b)(3)(iii)'' and ''§ 314.91'', respectively) implement section 506C. Section 314.81(b)(3)(iii) requires entities who are the sole manufacturers of certain drug products to notify us at least 6 months before discontinuance of manufacture of the product. For the regulations to apply, a product must meet the following three criteria:

1. The product must be life supporting, life sustaining, or intended for use in the prevention of a debilitating disease or condition;
2. The product must have been approved by FDA under section 505(b) or 505(j) of the Federal Food, Drug, and Cosmetic Act; and
3. The product must not have been originally derived from human tissue and replaced by a recombinant product.

Under § 314.81(b)(3)(iii)(*c*), we will publicly disclose information about drug products subject to section 506C that are to be discontinued. Section 314.91 allows us to reduce the 6-month notification period if we find that good cause exists for the reduction. A manufacturer may request that we reduce the notification period by certifying that good cause for the reduction exists.

In the October 18, 2007 final rule (72 FR 58993), we added §§ 314.81(b)(3)(iii) and 314.91 to our regulations. Sections 314.81(b)(3)(iii) and 314.91 require two new reporting requirements to FDA that are subject to OMB approval under the PRA: Notification of Discontinuance and Certification of Good Cause. The interim final rule adds two new definitions to § 314.81(b)(3)(iii): ''discontinuance'' and ''sole manufacturer.'' The interim final rule clarifies the scope of manufacturers required to report and expands the range of circumstances required to be reported to the Agency under § 314.81(b)(3)(iii), but does not change the substantive content of the reports required to be submitted to the Agency. This PRA analysis covers the information collection resulting from the October 18, 2007 final rule and also includes our estimates of how the number of Notifications of Discontinuance and Certifications of Good Cause may increase as a result of this interim final rule. Accordingly, the estimates included in the Analysis of Impacts will not directly match the estimates in the PRA analysis because the PRA analysis represents an estimate of the total reporting burden under §§ 314.81(b)(3)(iii) and 314.91, while the Analysis of Impacts examines only the increased costs and benefits as a result of the interim final rule.

A. Notification of Discontinuance

Under § 314.81(b)(3)(iii), at least 6 months before a sole manufacturer intends to discontinue manufacture of a drug product subject to section 506C, the manufacturer must send us notification of the discontinuance. The notification of discontinuance generally contains the name of the manufacturer, the name of the product to be discontinued, the reason for the discontinuance, and the date of discontinuance. We will work with relevant manufacturers during the 6-month notification period to help minimize the effect of the discontinuance on patients and health care providers, and to distribute appropriate information about the discontinuance to physician and patient organizations. The interim final rule adds definitions of ''discontinuance'' and ''sole manufacturer'' to § 314.81(b)(3)(iii). The inclusion of these definitions expands notification requirements under § 314.81(b)(3)(iii) to additional discontinuance circumstances and clarifies the scope of manufacturers who must report discontinuances. The interim final rule also requires that notifications of discontinuance be submitted either electronically or by telephone according to instructions on FDA's Drug Shortage Web site at *http://www.fda.gov/Drugs/DrugSafety/DrugShortages.* This change ensures that the appropriate offices are timely notified of all relevant discontinuances. It also reflects existing practice for submitting notices of discontinuance, and reduces the burden on industry to submit multiple copies of the notification.

B. Certification of Good Cause

We may reduce the 6-month notification period if we find good cause for the reduction. As described in § 314.91, a manufacturer can request a reduction in the notification period by submitting written certification that good cause exists to the following designated offices: (1) The CDER Drug Shortage Coordinator at the address of the Director of CDER; (2) the CDER Drug Registration and Listing Team, Division of Compliance Risk Management and Surveillance in CDER; and (3) the director of either the CDER division or the CBER office that is responsible for reviewing the application. The following circumstances may establish good cause:

- A public health problem may result from continuation of manufacturing for the 6-month period (§ 314.91(d)(1));

• A biomaterials shortage prevents the continuation of manufacturing for the 6-month period (§ 314.91(d)(2));

• A liability problem may exist for the manufacturer if the manufacturing is continued for the 6-month period (§ 314.91(d)(3));

• Continuation of the manufacturing for the 6-month period may cause substantial economic hardship for the manufacturer (§ 314.91(d)(4));

• The manufacturer has filed for bankruptcy under chapter 7 or 11 of title 11, United States Code (§ 314.91(d)(5));

• The manufacturer can stop making the product but still distribute it to satisfy existing market need for 6 months (§ 314.91(d)(6)); or

• Other good cause exists for a reduction in the notification period (§ 314.91(d)(7)).

With each certification described previously, the manufacturer must describe in detail the basis for its conclusion that such circumstances exist. We require that the written certification that good cause exists be submitted to the offices identified previously to ensure that our efforts to address the discontinuance take place in a timely manner. The interim final rule makes no changes to the requirements or process for certification of good cause.

Description of Respondents: An applicant that is the sole manufacturer and who is discontinuing manufacture of a drug product that meets the following criteria: (1) Is life supporting, life sustaining, or intended for use in the prevention of a debilitating disease or condition; (2) was approved by FDA under section 505(b) or (j) of the Federal Food, Drug, and Cosmetic Act; and (3) was not originally derived from human tissue and replaced by a recombinant product.

Burden Estimate: Table 3 of this document provides an estimate of the annual reporting burden for notification of a product discontinuance and certification of good cause under §§ 314.81(b)(3)(iii) and 314.91, as amended by this interim final rule.

Notification of Discontinuance: Based on data collected from the CDER Drug Shortage Coordinator since December 17, 2007, when §§ 314.81(b)(3)(iii) and 314.91 went into effect, one manufacturer during each year reported to FDA a discontinuance of one drug product meeting the criteria of section 506C and its implementing regulations (*i.e.,* the drug product was approved under section 505(b) or (j) of the Federal Food, Drug, and Cosmetic Act, the drug product was ''life-supporting, life-sustaining or intended for use in the prevention of a debilitating disease or condition,'' the drug product was produced by a sole manufacturer, and the drug product was permanently discontinued). CDER's Drug Shortages Coordinator tracked 220 drug shortages between January and October of 2011. The Agency estimates that 30 percent (66) of these shortages would relate to discontinuances subject to mandatory reporting under section 506C as a result of the interim final rule. Adjusting to include an additional two months of reporting (November and December), we estimate that FDA will receive a total of 80 notifications of a discontinuance per year under section 506C, as amended by the interim final rule. Based on experience, a manufacturer submits only one notification of a discontinuance per year, thus the total number of manufacturers who would be required to notify us of a discontinuance would be 80. Therefore, the number of respondents is estimated to be 80. The hours per response is the estimated number of hours that a respondent would spend preparing the information to be submitted with a notification of product discontinuance, including the time it takes to gather and copy the statement. Based on experience in working with manufacturers to submit notifications under § 314.81(b)(3)(iii), we estimate that approximately 2 hours on average are needed per response. We do not expect the changes in the interim final rule to affect the number of hours per response. Therefore, we estimate that respondents will spend 160 hours per year notifying us of a product discontinuance under these regulations.

Certification of Good Cause: Based on data collected from the CDER drug shortage coordinator since 2007, one manufacturer each year reported a discontinuance of one drug product under section 506C and its implementing regulations. Each manufacturer has the opportunity under § 314.91 to request a reduction in the 6-month notification period by certifying to us that good cause exists for the reduction. The Agency has received no certifications of good cause since 2007. Although we expect we will receive an increase in the number of reports of discontinuances as a result of the changes in the interim final rule, because of the limited circumstances under which good cause can be requested or would be appropriately granted, we do not expect a correspondingly large increase in the number of manufacturers requesting a certification of good cause. We estimate that only 5 manufacturers will request a certification of good cause each year. Therefore, the number of respondents is estimated to be 5. The total annual responses are the total number of certifications of good cause that are expected to be submitted to us in a year. We estimate that the total annual responses will remain small, averaging one response per respondent. The hours per response is the estimated number of hours that a respondent spends preparing the detailed information certifying that good cause exists for a reduction in the notification period, including the time it takes to gather and copy the documents. We estimate that approximately 16 hours on average are needed per response. Therefore, we estimate that 80 hours will be spent per year by respondents certifying that good cause exists for a reduction in the 6-month notification period under § 314.91.

TABLE 3—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section	Number of respondents	Number of responses per respondent	Total annual responses	Hours per response	Total hours
Notification of Discontinuance (314.81(b)(3)(iii))	80	1	80	2	160
Certification of Good Cause (314.91)	5	1	5	16	80
Total	240				

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The information collection provisions for this interim final rule have been submitted to OMB for emergency review under the Paperwork Reduction Act of 1995. 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.

Interested persons are requested to fax comments regarding the information collection to the Office of Information and Regulatory Affairs, OMB. 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) 395–5806, or emailed to *OIRA_submission@omb.eop.gov.* All comments should be identified with the title, ''Applications for Food and Drug Administration Approval to Market a New Drug; Revision of Postmarketing Reporting Requirements—Discontinuance.''

VI. Federalism

FDA has analyzed this interim final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the Agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VII. Environmental Impact

The Agency has determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. 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.

IX. References

The following references are on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified all Web site addresses, but FDA is not responsible for any subsequent changes to the Web site after this document publishes in the **Federal Register**).

1. Institute for Safe Medication Practices. Drug Shortages: National Survey Reveals High Level of Frustration, Low Level of Safety. ISMP Medication Safety Alert. Sept 23, 2010, *available at http://www.ismp.org/newsletters/acutecare/articles/20100923.asp,* accessed December 2011.
2. Executive Order 13588, Reducing Prescription Drug Shortages, October 31, 2011, *available at http://www.gpo.gov/fdsys/pkg/FR-2011-11-03/pdf/2011-28728.pdf* accessed December 2011.
3. Center for Drug Evaluation and Research, Manual of Policies and Procedures 6003.1, Drug Shortage Management, September 26, 2006, *available at http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/ManualofPoliciesProcedures/ucm079936.pdf,* accessed December 2011.
4. Webster's Third New International Dictionary of the English Language Unabridged, 2002, defining ''discontinuance.''
5. Food and Drug Administration. A Review of FDA's Approach to Medical Product Shortage, October 31, 2011, *available at http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/ucm275051.htm,* accessed December 2011.
6. American Hospital Association. AHA Survey on Drug Shortages, *available at http://www.aha.org/aha/content/2011/pdf/drugshortagesurvey.pdf,* accessed December 2011.
7. Department of Health and Human Services. Assistant Secretary for Planning and Evaluation. Economic Analysis of the Causes of Drug Shortages, October 2011, *available at http://aspe.hhs.gov/sp/reports/2011/DrugShortages/ib.shtml,* accessed December 2011.
8. American Cancer Society. Cancer Facts & Figures 2011. Atlanta: American Cancer Society; 2011, *available at http://www.cancer.org/acs/groups/content/@epidemiologysurveilance/documents/document/acspc-029771.pdf,* accessed December 2011.
9. Bureau of Labor Statistics. National Occupational Employment and Wage Estimates. Occupational Employment Statistics, May 2010, *available at http://www.bls.gov/oes/current/oes_nat.htm,* accessed December 2011.
10. Food and Drug Administration. Letter to Industry, October 31, 2011, *available at http://www.fda.gov/Drugs/DrugSafety/DrugShortages/ucm277675.htm,* accessed December 2011.
11. Small Business Administration. Table of Small Business Size Standards Matched to North American Industry Classification System Codes. November 2010, *available at http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf,* accessed December 2011.
12. United States Census Bureau. 2007 Economic Census. Sector 31: Manufacturing: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2007, *available at http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-ds_name=EC0731SG3&-_lang=en,* accessed December 2011.

List of Subjects in 21 CFR Part 314

Administrative practice and procedure, Confidential business information, Drugs, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 314 is amended as follows:

PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG

■ 1. The authority citation for 21 CFR part 314 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 356, 356a, 356b, 356c, 371, 374, 379e.

■ 2. In § 314.81, paragraph (b)(3)(iii)(*a*) is amended by removing the phrase ''discontinuing manufacture'' and adding in its place the phrase ''discontinuance of manufacture''; by revising paragraph (b)(3)(iii)(*b*); and by adding new paragraph (b)(3)(iii)(*d*) to read as follows:

§ 314.81 Other postmarketing reports.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(*b*) Notifications required by paragraph (b)(3)(iii)(*a*) of this section must be submitted to FDA either electronically or by phone according to instructions on FDA's Drug Shortages Web site at: *http://www.fda.gov/Drugs/DrugSafety/DrugShortages.*

* * * * *

(*d*) For purposes of this section and § 314.91, the terms ''discontinuance'' and ''sole manufacturer'' are defined as follows:

Discontinuance means any interruption in manufacturing of a drug product described in paragraph (b)(3)(iii)(a) of this section for sale in the United States that could lead to a potential disruption in supply of the drug product, whether the interruption

is intended to be temporary or permanent.

Sole manufacturer means an applicant that is the only entity currently manufacturing a drug product of a specific strength, dosage form, or route of administration for sale in the United States, whether the product is manufactured by the applicant or for the applicant under contract with one or more different entities.

* * * * *

Dated: December 13, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–32354 Filed 12–15–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9565]

RIN 1545–BG15

Corporate Reorganizations; Guidance on the Measurement of Continuity of Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that provide guidance regarding the continuity of interest requirement for corporate reorganizations. The guidance is necessary to establish the date upon which continuity of interest is measured. These regulations affect corporations and their shareholders.

DATES: *Effective Date:* These regulations are effective on December 19, 2011.

Applicability Date: For dates of applicability, see § 1.368–1(e)(9)(ii).

FOR FURTHER INFORMATION CONTACT: Richard Starke at (202) 622–7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The Internal Revenue Code of 1986 (Code) provides for general non-recognition treatment for reorganizations described in section 368 of the Code. In addition to satisfying the statutory requirements of a reorganization, a transaction also must satisfy certain non-statutory requirements, such as continuity of interest (COI). COI requires that, in substance, a substantial part of the value of the proprietary interests in the target corporation be preserved in the reorganization. A proprietary interest in the target corporation is preserved if, in a potential reorganization, it is exchanged for a proprietary interest in the issuing corporation, it is exchanged by the acquiring corporation for a direct interest in the target corporation enterprise, or it otherwise continues as a proprietary interest in the target corporation. See § 1.368–1(e)(1)(i).

On August 10, 2004, the IRS and the Treasury Department published a notice of proposed rulemaking (REG–129706–04, 2004–2 CB 479) in the **Federal Register** (69 FR 48429) (2004 proposed regulations) identifying certain circumstances in which the determination of whether a proprietary interest in the target corporation is preserved would be made by reference to the value of the issuing corporation's stock on the day before there is an agreement to effect the potential reorganization. Specifically, the 2004 proposed regulations provided that, in determining whether a proprietary interest in the target corporation is preserved, the consideration to be exchanged for the proprietary interests in the target corporation pursuant to a contract to effect the potential reorganization is valued on the last business day before the first date such contract is a binding contract (the Pre-Signing Date), if such consideration was fixed at the signing date (the signing date rule). On September 16, 2005, the IRS and the Treasury Department published final regulations (TD 9225, 2005–2 CB 716) in the **Federal Register** (70 FR 54631) (2005 final regulations) that retained the general framework of the 2004 proposed regulations but made several modifications in response to comments received regarding the proposed regulations. After consideration of comments relating to the 2005 final regulations, the IRS and the Treasury Department published temporary (TD 9316, 2007–1 CB 962) and proposed (REG–146247–06, 2007–1 CB 977) regulations in the **Federal Register** (72 FR 12974 and 72 FR 13058 respectively) (the 2007 temporary regulations). The 2007 temporary regulations generally narrowed the definition of fixed consideration, and accordingly, limited the application of the signing date rule. The preamble explained that the signing date rule is based on the principle that, where a binding contract provides for fixed consideration, the target corporation shareholders can generally be viewed as being subject to the economic fortunes of the issuing corporation as of the signing date. However, if the contract does not provide for fixed consideration, the signing date value of the issuing corporation stock is not relevant for purposes of determining the extent to which a proprietary interest in the target corporation is preserved.

On March 17, 2010, the IRS released Notice 2010–25 (the Notice), 2010–1 CB 527. Notice 2010–25 acknowledged that the 2007 temporary regulations would, as required by sunset provisions of section 7805(e)(2), expire on March 19, 2010. It also noted that proposed regulations (REG–146247–06, 2007–1 CB 977) previously published in the **Federal Register** (72 FR 13058) had the same text as the expiring temporary regulations and would remain outstanding after that expiration. The Notice provided that, until the issuance of new regulations, taxpayers could choose, as long as a specified condition of consistency among parties was satisfied, to apply the rules in the proposed regulations. The ability of taxpayers to elect to apply the rules of the proposed regulations, as provided in the Notice, is incorporated into § 1.368–1(e)(9)(ii), the effective/applicability date of these final regulations. See § 601.601(d)(2)(ii)(*b*).

Explanation of Revisions

These final regulations adopt the 2007 temporary regulations with only minor changes. First, questions were raised concerning whether a contract can provide for fixed consideration under the general definition of fixed consideration if the contract provides for a shareholder election. These final regulations clarify that a shareholder election does not prevent a contract from satisfying the general definition of fixed consideration if that requirement is otherwise met. Second, *Example 9* is modified to address a more typical fact pattern.

In response to comments regarding the application of the signing date rule and after further consideration of the purpose and operation of that rule, the IRS and the Treasury Department have proposed a regulation, published elsewhere in this issue of the **Federal Register**, under which application of the signing date principles would be expanded. That notice of proposed rulemaking (REG–124627–11) also requests comments regarding the propriety of applying signing date principles more generally to transactions in which the target corporation shareholders, pursuant to a binding contract to effect a potential reorganization, become subject to the economic fortunes of issuing corporation consideration between the signing date and the closing date. In

these cases, a more liberal application of signing date principles may result in valuing issuing corporation consideration at one or more dates between the signing date and the closing date.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13565. 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 this regulation and, because the regulation does not impose a collection of information on small entities, 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, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

Drafting Information

The principal author of these final regulations is Richard Starke of the Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and record keeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.368–1 is amended by revising paragraph (e)(2), revising the paragraph heading of (e)(9)(i), and revising paragraph (e)(9)(ii) to read as follows:

§ 1.368–1 Purpose and scope of exception of reorganization exchanges.

* * * * *

(e) * * *

(2) *Measuring continuity of interest*—(i) *In general.* In determining whether a proprietary interest in the target corporation is preserved, the consideration to be exchanged for the proprietary interests in the target corporation pursuant to a contract to effect the potential reorganization shall be valued on the last business day before the first date such contract is a binding contract (the pre-signing date), if such contract provides for fixed consideration. If a portion of the consideration provided for in such a contract consists of other property identified by value, then this specified value of such other property is used for purposes of determining the extent to which a proprietary interest in the target corporation is preserved. If the contract does not provide for fixed consideration, this paragraph (e)(2)(i) is not applicable.

(ii) *Binding contract*—(A) *In general.* A binding contract is an instrument enforceable under applicable law against the parties to the instrument. The presence of a condition outside the control of the parties (including, for example, regulatory agency approval) shall not prevent an instrument from being a binding contract. Further, the fact that insubstantial terms remain to be negotiated by the parties to the contract, or that customary conditions remain to be satisfied, shall not prevent an instrument from being a binding contract.

(B) *Modifications*—(*1*) *In general.* If a term of a binding contract that relates to the amount or type of the consideration the target shareholders will receive in a potential reorganization is modified before the closing date of the potential reorganization, and the contract as modified is a binding contract, the date of the modification shall be treated as the first date there is a binding contract.

(*2*) *Modification of a transaction that preserves continuity of interest.* Notwithstanding paragraph (e)(2)(ii)(B)(*1*) of this section, a modification of a term that relates to the amount or type of consideration the target shareholders will receive in a transaction that would have resulted in the preservation of a substantial part of the value of the target corporation shareholders' proprietary interests in the target corporation if there had been no modification will not be treated as a modification if—

(*i*) The modification has the sole effect of providing for the issuance of additional shares of issuing corporation stock to the target corporation shareholders;

(*ii*) The modification has the sole effect of decreasing the amount of money or other property to be delivered to the target corporation shareholders; or

(*iii*) The modification has the effect of decreasing the amount of money or other property to be delivered to the target corporation shareholders and providing for the issuance of additional shares of issuing corporation stock to the target corporation shareholders.

(*3*) *Modification of a transaction that does not preserve continuity of interest.* Notwithstanding paragraph (e)(2)(ii)(B)(*1*) of this section, a modification of a term that relates to the amount or type of consideration the target shareholders will receive in a transaction that would not have resulted in the preservation of a substantial part of the value of the target corporation shareholders' proprietary interests in the target corporation if there had been no modification will not be treated as a modification if—

(*i*) The modification has the sole effect of providing for the issuance of fewer shares of issuing corporation stock to the target corporation shareholders;

(*ii*) The modification has the sole effect of increasing the amount of money or other property to be delivered to the target corporation shareholders; or

(*iii*) The modification has the effect of increasing the amount of money or other property to be delivered to the target corporation shareholders and providing for the issuance of fewer shares of issuing corporation stock to the target corporation shareholders.

(C) *Tender offers.* For purposes of this paragraph (e)(2), a tender offer that is subject to section 14(d) of the Securities and Exchange Act of 1934 [15 U.S.C. 78n(d)(1)] and Regulation 14D (17 CFR 240.14d–1 through 240.14d–101) and is not pursuant to a binding contract, is treated as a binding contract made on the date of its announcement, notwithstanding that it may be modified by the offeror or that it is not enforceable against the offerees. If a modification (not pursuant to a binding contract) of such a tender offer is subject to the provisions of Regulation 14d–6(c) (17 CFR 240.14d–6(c)) and relates to the amount or type of the consideration received in the tender offer, then the date of the modification shall be treated as the first date there is a binding contract.

(iii) *Fixed consideration*—(A) *In general.* A contract provides for fixed consideration if it provides the number of shares of each class of stock of the issuing corporation, the amount of money, and the other property (identified either by value or by specific description), if any, to be exchanged for all the proprietary interests in the target corporation, or to be exchanged for each proprietary interest in the target

corporation. A shareholder's election to receive a number of shares of stock of the issuing corporation, money, or other property (or some combination of stock of the issuing corporation, money, or other property) in exchange for all of the shareholder's proprietary interests in the target corporation, or each of the shareholder's proprietary interests in the target corporation, will not prevent a contract from satisfying the definition of fixed consideration provided for in this paragraph (e)(2)(iii)(A).

(B) *Shareholder elections.* A contract that provides a target corporation shareholder with an election to receive a number of shares of stock of the issuing corporation, money, or other property (or some combination of stock of the issuing corporation, money, or other property) in exchange for all of the shareholder's proprietary interests in the target corporation, or each of the shareholder's proprietary interests in the target corporation, provides for fixed consideration if the determination of the number of shares of issuing corporation stock to be provided to the target corporation shareholder is determined using the value of the issuing corporation stock on the last business day before the first date there is a binding contract. This is the case even though the shareholder election may preclude a determination, prior to the closing date, of the number of shares of each class of the issuing corporation, the amount of money, and the other property (or the combination of shares, money and other property) to be exchanged for each proprietary interest in the target corporation.

(C) *Contingent adjustments to the consideration*—(*1*) *In general.* Except as provided in paragraph (e)(2)(iii)(C)(*2*) of this section, a contract that provides for contingent adjustments to the consideration will be treated as providing for fixed consideration if it would satisfy the requirements of paragraph (e)(2)(iii)(A) of this section without the contingent adjustment provision.

(*2*) *Exceptions.* A contract will not be treated as providing for fixed consideration if the contract provides for contingent adjustments to the consideration that prevent (to any extent) the target corporation shareholders from being subject to the economic benefits and burdens of ownership of the issuing corporation stock after the last business day before the first date the contract is a binding contract. For example, a contract will not be treated as providing for fixed consideration if the contract provides for contingent adjustments to the consideration in the event that the value of the stock of the issuing corporation, the value of the assets of the issuing corporation, or the value of any surrogate for either the value of the stock of the issuing corporation or the assets of the issuing corporation increases or decreases after the last business day before the first date there is a binding contract. Similarly, a contract will not be treated as providing for fixed consideration if the contract provides for contingent adjustments to the number of shares of the issuing corporation stock to be provided to the target corporation shareholders computed using any value of the issuing corporation shares after the last business day before the first date there is a binding contract.

(D) *Escrows.* Placing part of the consideration to be exchanged for proprietary interests in the target corporation in escrow to secure target's performance of customary pre-closing covenants or customary target representations and warranties will not prevent a contract from being treated as providing for fixed consideration.

(E) *Anti-dilution clauses.* The presence of a customary anti-dilution clause will not prevent a contract from being treated as providing for fixed consideration. However, the absence of such a clause will prevent a contract from being treated as providing for fixed consideration if the issuing corporation alters its capital structure between the first date there is an otherwise binding contract to effect the transaction and the effective date of the transaction in a manner that materially alters the economic arrangement of the parties to the binding contract. If the number of shares of the issuing corporation to be issued to the target corporation shareholders is altered pursuant to a customary anti-dilution clause, the value of the shares determined under paragraph (e)(2)(i) of this section must be adjusted accordingly.

(F) *Dissenters' rights.* The possibility that some shareholders may exercise dissenters' rights and receive consideration other than that provided for in the binding contract will not prevent the contract from being treated as providing for fixed consideration.

(G) *Fractional shares.* The fact that money may be paid in lieu of issuing fractional shares will not prevent a contract from being treated as providing for fixed consideration.

(iv) *New issuances.* For purposes of applying paragraph (e)(2)(i) of this section, any class of stock, securities, or indebtedness that the issuing corporation issues to the target corporation shareholders pursuant to the potential reorganization and that does not exist before the first date there is a binding contract to effect the potential reorganization is deemed to have been issued on the last business day before the first date there is a binding contract to effect the potential reorganization.

(v) *Examples.* For purposes of the examples in this paragraph (e)(2)(v), P is the issuing corporation, T is the target corporation, S is a wholly owned subsidiary of P, all corporations have only one class of stock outstanding, A is an individual, no transactions other than those described occur, and the transactions are not otherwise subject to recharacterization. The following examples illustrate the application of this paragraph (e)(2):

Example 1. Application of signing date rule. On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged with and into P on June 1 of year 1. Pursuant to the contract, the T shareholders will receive 40 P shares and $60 of cash in exchange for all of the outstanding stock of T. Twenty of the P shares, however, will be placed in escrow to secure customary target representations and warranties. The P stock is listed on an established market. On January 2 of year 1, the value of the P stock is $1 per share. On June 1 of year 1, T merges with and into P pursuant to the terms of the contract. On that date, the value of the P stock is $.25 per share. None of the stock placed in escrow is returned to P. Because the contract provides for the number of shares of P and the amount of money to be exchanged for all of the proprietary interests in T, under this paragraph (e)(2), there is a binding contract providing for fixed consideration as of January 3 of year 1. Therefore, whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock on the pre-signing date. Because, for continuity of interest purposes, the T stock is exchanged for $40 of P stock and $60 of cash, the transaction preserves a substantial part of the value of the proprietary interest in T. Therefore, the transaction satisfies the continuity of interest requirement.

Example 2. Treatment of forfeited escrowed stock. (i) Escrowed stock. The facts are the same as in *Example 1* except that T's breach of a representation results in the escrowed consideration being returned to P. Because the contract provides for the number of shares of P and the amount of money to be exchanged for all of the proprietary interests in T, under this paragraph (e)(2), there is a binding contract providing for fixed consideration as of January 3 of year 1. Therefore, whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock on the pre-signing date. Pursuant to paragraph (e)(1)(i) of this section, for continuity of interest purposes, the T stock is exchanged for $20 of P stock and $60 of cash, and the transaction does not preserve a substantial part of the value of the proprietary interest in T. Therefore, the

transaction does not satisfy the continuity of interest requirement.

(ii) *Escrowed stock and cash.* The facts are the same as in paragraph (i) of this *Example 2* except that the consideration placed in escrow consists solely of eight of the P shares and $12 of the cash. Because the contract provides for the number of shares of P and the amount of money to be exchanged for all of the proprietary interests in T, under this paragraph (e)(2), there is a binding contract providing for fixed consideration as of January 3 of year 1. Therefore, whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock on the pre-signing date. Pursuant to paragraph (e)(1)(i) of this section, for continuity of interest purposes, the T stock is exchanged for $32 of P stock and $48 of cash, and the transaction preserves a substantial part of the value of the proprietary interest in T. Therefore, the transaction satisfies the continuity of interest requirement.

Example 3. Redemption of stock received pursuant to binding contract. The facts are the same as in *Example 1* except that A owns 50 percent of the outstanding stock of T immediately prior to the merger and receives 10 P shares and $30 in the merger and an additional 10 P shares upon the release of the stock placed in escrow. In connection with the merger, A and S agree that, immediately after the merger, S will purchase any P shares that A acquires in the merger for $1 per share. Shortly after the merger, S purchases A's P shares for $20. Because the contract provides for the number of shares of P and the amount of money to be exchanged for all of the proprietary interests in T, under this paragraph (e)(2), there is a binding contract providing for fixed consideration as of January 3 of year 1. Therefore, whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock on the pre-signing date. In addition, S is a person related to P under paragraph (e)(4)(i)(A) of this section. Accordingly, A is treated as exchanging his T shares for $50 of cash. Because, for continuity of interest purposes, the T stock is exchanged for $20 of P stock and $80 of cash, the transaction does not preserve a substantial part of the value of the proprietary interest in T. Therefore, the transaction does not satisfy the continuity of interest requirement.

Example 4. Modification of binding contract—continuity not preserved. The facts are the same as in *Example 1* except that on April 1 of year 1, the parties modify their contract. Pursuant to the modified contract, which is a binding contract, the T shareholders will receive 50 P shares (an additional 10 shares) and $75 of cash (an additional $15 of cash) in exchange for all of the outstanding T stock. On March 31 of year 1, the value of the P stock is $.50 per share. Under this paragraph (e)(2), although there was a binding contract providing for fixed consideration as of January 3 of year 1, terms of that contract relating to the consideration to be provided to the target shareholders were modified on April 1 of year 1. The execution of the transaction without modification would have resulted in the preservation of a substantial part of the value of the target corporation shareholders' proprietary interests in the target corporation if there had been no modification. However, because the modified contract provides for additional P stock and cash to be exchanged for all the proprietary interests in T, the exception in paragraph (e)(2)(ii)(B)(*2*) of this section does not apply to preserve the original signing date. Therefore, whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock on March 31 of year 1. Because, for continuity of interest purposes, the T stock is exchanged for $25 of P stock and $75 of cash, the transaction does not preserve a substantial part of the value of the proprietary interest in T. Therefore, the transaction does not satisfy the continuity of interest requirement.

Example 5. Modification of binding contract disregarded—continuity preserved. The facts are the same as in *Example 4* except that, pursuant to the modified contract, which is a binding contract, the T shareholders will receive 60 P shares (an additional 20 shares as compared to the original contract) and $60 of cash in exchange for all of the outstanding T stock. In addition, on March 31 of year 1, the value of the P stock is $.40 per share. Under this paragraph (e)(2), although there was a binding contract providing for fixed consideration as of January 3 of year 1, terms of that contract relating to the consideration to be provided to the target shareholders were modified on April 1 of year 1. Nonetheless, the modification has the sole effect of providing for the issuance of additional P shares to the T shareholders. In addition, the execution of the terms of the contract without regard to the modification would have resulted in the preservation of a substantial part of the value of the T shareholders' proprietary interest in T because, for continuity of interest purposes, the T stock would have been exchanged for $40 of P stock and $60 of cash. Pursuant to paragraph (e)(2)(ii)(B)(*2*) of this section, the modification is not treated as a modification for purposes of paragraph (e)(2)(ii)(B)(*1*) of this section. Accordingly, whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock on the pre-signing date. Because, for continuity of interest purposes, the T stock is exchanged for $60 of P stock and $60 of cash, the transaction preserves a substantial part of the value of the proprietary interest in T. Therefore the transaction satisfies the continuity of interest requirement.

Example 6. New issuance. The facts are the same as in *Example 1,* except that, instead of cash, the T shareholders will receive a new class of P securities that will be publicly traded. In the aggregate, the securities will have a stated principal amount of $60 and bear interest at the average LIBOR (London Interbank Offered Rates) during the 10 days prior to the potential reorganization. If the T shareholders had been issued the P securities on January 2 of year 1, the P securities would have had a value of $60 (determined by reference to the value of comparable publicly traded securities). Whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock and the P securities to be issued to the T shareholders on January 2 of year 1. Under paragraph (e)(2)(iv) of this section, for purposes of valuing the new P securities, they will be treated as having been issued on the pre-signing date. Because, for continuity of interest purposes, the T stock is exchanged for $40 of P stock and $60 of other property, the transaction preserves a substantial part of the value of the proprietary interest in T. Therefore, the transaction satisfies the continuity of interest requirement.

Example 7. Fixed consideration—continuity not preserved. On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged with and into P on June 1 of year 1. Pursuant to the contract, 60 shares of the T stock will be exchanged for $80 of cash and 40 shares of the T stock will be exchanged for 20 shares of P stock. On January 2 of year 1, the value of the P stock is $1 per share. On June 1 of year 1, T merges with and into P pursuant to the terms of the contract. This contract provides for fixed consideration and therefore whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock on the pre-signing date. However, applying the signing date rule, the P stock represents only 20 percent of the value of the total consideration to be received by the T shareholders. Accordingly, based on the economic realities of the exchange, the transaction does not preserve a substantial part of the value of the proprietary interest in T. Therefore, the transaction does not satisfy the continuity of interest requirement.

Example 8. Anti-dilution clause. (i) *Absence of anti-dilution clause.* On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged with and into P on June 1 of year 1. Pursuant to the contract, the T shareholders will receive 40 P shares and $60 of cash in exchange for all of the outstanding stock of T. The contract does not contain a customary anti-dilution provision. The P stock is listed on an established market. On January 2 of year 1, the value of the P stock is $1 per share. On April 10 of year 1, P issues its stock to effect a stock split; each shareholder of P receives an additional share of P for each P share that it holds. On April 11 of year 1, the value of the P stock is $.50 per share. Because P altered its capital structure between January 3 and June 1 of year 1 in a manner that materially alters the economic arrangement of the parties, under paragraph (e)(2)(iii)(E) of this section, the contract is not treated as a binding contract that provides for fixed consideration. Accordingly, whether the transaction satisfies the continuity of interest requirement cannot be determined by reference to the value of the P stock on January 2 of year 1.

(ii) *Adjustment for anti-dilution clause.* The facts are the same as in paragraph (i) of this *Example 8* except that the contract contains a customary anti-dilution provision, and the T shareholders receive 80 P shares and $60 of cash in exchange for all of the outstanding stock of T. Under paragraph

(e)(2)(iii)(E) of this section, the contract is treated as a binding contract that provides for fixed consideration as of January 3 of year 1. Therefore, whether the transaction satisfies the continuity of interest requirement is generally determined by reference to the value of the P stock on January 2 of year 1. However, under paragraph (e)(2)(iii)(E) of this section, the value of the P stock on the pre-signing date must be adjusted to take the stock split into account. For continuity of interest purposes, the T stock is exchanged for $40 of P stock (($1/2) × 80) and $60 of cash. Therefore, the transaction satisfies the continuity of interest requirement.

Example 9. Shareholder election. On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged with and into P on June 1 of year 1. On January 2 of year 1, the value of the P stock and the T stock is $1 per share. Pursuant to the contract, at the shareholders' election, each share of T's 100 shares will be exchanged for cash of $1, or alternatively, P stock. The contract provides that the determination of the number of shares of P stock to be exchanged for a share of T stock is made using the value of the P stock on the last business day before the first date there is a binding contract (that is, $1 per share). The contract further provides that, in the aggregate, 40 shares of P stock and $60 will be delivered, and contains a proration mechanism in the event that either item of consideration is oversubscribed. On the closing date, the value of the P stock is $.20 per share, and all target shareholders elect to receive cash. Pursuant to the proration provision, each target share is exchanged for $.60 of cash and $.08 of P stock. Pursuant to paragraph (e)(2)(iii)(A) of this section, the contract provides for fixed consideration because it provides for the number of shares of P stock and the amount of money to be exchanged for all the proprietary interests in the target corporation. Furthermore, pursuant to paragraph (e)(2)(iii)(B) of this section, the contract provides for fixed consideration because the number of shares of issuing corporation stock to be provided to the target corporation shareholders is determined using the pre-signing date value of P stock. Accordingly, whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock on January 2 of year 1. Because, for continuity purposes, the T stock is exchanged for $40 of P stock and $60 of cash, the transaction preserves a substantial part of the value of the proprietary interest in T. Therefore, the transaction satisfies the continuity of interest requirement.

Example 10. Contingent adjustment based on the value of the issuing corporation stock—continuity not preserved. On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged with and into P on June 1 of year 1. On January 2 of year 1, the value of the P stock is $1 per share. Pursuant to the contract, if the value of the P stock does not decrease after January 2 of year 1, the T shareholders will receive 40 P shares and $60 of cash in exchange for all of the outstanding stock of T. Furthermore, the contract provides that the T shareholders will receive $.16 of additional P shares and $.24 for every $.01 decrease in the value of one share of P stock after January 2 of year 1. On June 1 of year 1, T merges with and into P pursuant to the terms of the contract. On that date, the value of the P stock is $.40 per share. Pursuant to the terms of the contract, the consideration is adjusted so that the T shareholders receive 24 more P shares ((60 × $.16)/$.40) and $14.40 more cash (60 × $.24) than they would absent an adjustment. Accordingly, at closing the T shareholders receive 64 P shares and $74.40 of cash. Because the contract provides that additional P shares and cash will be delivered to the T shareholders if the value of the stock of P decreases after January 2 of year 1, under paragraph (e)(2)(iii)(C)(*2*) of this section, the contract is not treated as providing for fixed consideration, and therefore whether the transaction satisfies the continuity of interest requirement cannot be determined by reference to the value of the P stock on January 2 of year 1. For continuity of interest purposes, the T stock is exchanged for $25.60 of P stock (64 × $.40) and $74.40 of cash and the transaction does not preserve a substantial part of the value of the proprietary interest in T. Therefore, the transaction does not satisfy the continuity of interest requirement.

Example 11. Contingent adjustment to boot based on the value of the target corporation stock—continuity not preserved. On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged with and into P on June 1 of year 1. On January 2 of year 1, T has 100 shares outstanding, and each T share is worth $1. On January 2 of year 1, each P share is worth $1. Pursuant to the contract, if the value of the T stock does not increase after January 3 of year 1, the T shareholders will receive 40 P shares and $60 of cash in exchange for all of the outstanding stock of T. Furthermore, the contract provides that the T shareholders will receive $1 of additional cash for every $.01 increase in the value of one share of T stock after January 3 of year 1. On June 1 of year 1, the value of the T stock is $1.40 per share and the value of the P stock is $.75 per share. Pursuant to the terms of the contract, the consideration is adjusted so that the T shareholders receive $40 more cash (40 × $1) than they would absent an adjustment. Accordingly, at closing the T shareholders receive 40 P shares and $100 of cash. Because the contract provides the number of shares of P stock and the amount of money to be exchanged for all the proprietary interests in T, and the contingent adjustment to the cash consideration is not based on changes in the value of the P stock, P assets, or any surrogate thereof, after January 2 of year 1, there is a binding contract providing for fixed consideration as of January 3 of year 1. Therefore, whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock on January 2 of year 1. For continuity of interest purposes, the T stock is exchanged for $40 of P stock (40 × $1) and $100 of cash. Therefore, the transaction does not satisfy the continuity of interest requirement.

Example 12. Contingent adjustment to stock based on the value of the target corporation stock—continuity preserved. On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged with and into P on June 1 of year 1. On that date T has 100 shares outstanding, and each T share is worth $1. On January 2 of year 1, each P share is worth $1. Pursuant to the contract, if the value of the T stock does not decrease after January 3 of year 1, the T shareholders will receive 40 P shares and $60 of cash in exchange for all of the outstanding stock of T. Furthermore, the contract provides that the T shareholders will receive $.40 less P stock and $.60 less cash for every $.01 decrease in the value of one share of T stock after January 3 of year 1. The contract also provides that the number of P shares by which the consideration will be reduced as a result of this adjustment will be determined based on the value of the P stock on January 2 of year 1. On June 1 of year 1, T merges with and into P pursuant to the terms of the contract. On that date, the value of the T stock is $.70 per share and the value of the P stock is $.75 per share. Pursuant to the terms of the contract, the consideration is adjusted so that the T shareholders receive 12 fewer P shares ((30 × $.40)/$1) and $18 less cash (30 × $.60) than they would absent an adjustment. Accordingly, at closing the T shareholders receive 28 P shares and $42 of cash. Because the contract provides for the number of shares of P stock and the amount of money to be exchanged for all of the proprietary interests in T, the contract does not provide for contingent adjustments to the consideration based on a change in value of the P stock, P assets, or any surrogate thereof, after January 2 of year 1, and the adjustment to the number of P shares the T shareholders receive is determined based on the value of the P shares on January 2 of year 1, there is a binding contract providing for fixed consideration as of January 3 of year 1. Therefore, whether the transaction satisfies the continuity of interest requirement is determined by reference to the value of the P stock on January 2 of year 1. For continuity of interest purposes, the T stock is exchanged for $28 of P stock (28 × $1) and $42 of cash. Accordingly, the transaction satisfies the continuity of interest requirement.

* * * * *

(9) *Effective/applicability dates*—(i) * * *

(ii) *COI measurement date.* Paragraph (e)(2) of this section applies to transactions occurring pursuant to binding contracts entered into after December 19, 2011. For transactions entered into after March 19, 2010, and occurring pursuant to binding contracts entered into on or before December 19, 2011, the parties to the transaction may elect to apply the provisions of § 1.368–1T as contained in 26 CFR, Part 1, §§ 1.301–1.400, revised as of April 1, 2009. However, the target corporation, the issuing corporation, the controlling corporation of the acquiring corporation if stock thereof is provided as consideration in the transaction, and any direct or indirect transferee of transferred basis property from any of the foregoing, may not elect to apply the

provisions of § 1.368–1T as contained in 26 CFR, Part 1, §§ 1.301–1.400, revised as of April 1, 2009, unless all such taxpayers elect to apply such provisions. This election requirement will be satisfied if none of the specified parties adopts inconsistent treatment. For transactions entered into on or before March 19, 2010, see § 1.368–1T as contained in 26 CFR, Part 1, §§ 1.301–1.400, revised as of April 1, 2009.

§ 1.368–1T [Removed]

■ **Par. 3.** Section 1.368–1T is removed.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: December 6, 2011.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2011–32078 Filed 12–16–11; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9563]

RIN 1545–BI45

Guidance Regarding Foreign Base Company Sales Income

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that provide guidance relating to foreign base company sales income when personal property sold by a controlled foreign corporation (CFC) is purchased, sold, manufactured, produced, constructed, grown or extracted by one or more branches of the CFC. The regulations finalize proposed regulations and withdraw temporary regulations published on December 29, 2008. These regulations, in general, affect controlled foreign corporations and their United States shareholders.

DATES: *Effective Date:* These regulations are effective on December 19, 2011.

Applicability Date: These regulations apply to taxable years of CFCs beginning after June 30, 2009, and for taxable years of United States shareholders in which or with which such taxable years of the CFCs end.

FOR FURTHER INFORMATION CONTACT: Barbara E. Rasch, (202) 622–3840 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On February 28, 2008, the IRS and the Treasury Department published a notice of proposed rulemaking in the **Federal Register** (REG–124590–07, 2008–16 IRB 801, 73 FR 10716, as corrected at 73 FR 20201), which proposed amendments to § 1.954–3, including rules that addressed the application of the section 954(d)(2) branch rules under the foreign base company sales income (FBCSI) rules. Written comments were received in response to the notice of proposed rulemaking, and a public hearing on the proposed regulations was held on July 29, 2008. On December 29, 2008, the IRS and the Treasury Department published final and temporary regulations under section 954(d) (TD 9438, 73 FR 79334–01, as corrected at 74 FR 11843–01) in the **Federal Register**. On the same date, the IRS and the Treasury Department published a notice of proposed rulemaking (REG–150066–08, 2009–5 IRB 423, 73 FR 79421–01) in the **Federal Register** cross-referencing the temporary regulations. The temporary and proposed regulations address the treatment under the FBCSI rules of the sale by a CFC of personal property that is purchased, sold, manufactured, produced, constructed, grown or extracted by one or more branches of the CFC. Written comments were received, and are available at *www.regulations.gov* or upon request. A public hearing was not requested and none was held. This Treasury decision adopts the proposed regulation with the changes described below as a final regulation and removes the corresponding temporary regulations.

Explanation of Provisions

These regulations amend the provisions of § 1.954–3(b) that address the application of the FBCSI rules to CFCs with branches or similar establishments (branches), and, in particular manufacturing branches.

A. Branch Rule

Section 954(d)(1) defines FBCSI to mean income derived by a CFC in connection with: (i) The purchase of personal property from a related person and its sale to any person; (ii) the sale of personal property to any person on behalf of a related person; (iii) the purchase of personal property from any person and its sale to a related person; or (iv) the purchase of personal property from any person on behalf of a related person, provided (in all of these cases) that the property is manufactured, produced, grown or extracted outside of the CFC's country of organization and is sold for use, consumption or disposition outside of such country. There are certain exceptions to the FBCSI rules, including an exception that applies if a CFC sells personal property that it manufactured, produced, constructed, grew or extracted. See section 954(d)(1)(A), § 1.954–3(a)(4).

Section 954(d)(2) applies the FBCSI rules to a CFC that has a branch outside the CFC's country of incorporation (branch rule). The branch rule applies if the CFC carries on purchasing, selling, manufacturing, producing, constructing, growing or extracting activities by or through the branch, and the carrying on of such activities has substantially the same tax effect as if the branch were a wholly-owned subsidiary of the CFC, as provided in regulations. If so, the branch and the remainder of the CFC will be treated as separate corporations for purposes of determining FBCSI of such CFC.

The ''substantially same tax effect'' determination is made pursuant to a tax rate disparity test set forth in § 1.954–3(b)(1)(i)(*b*) and § 1.954–3(b)(1)(ii)(*b*). With respect to a sales or purchase branch, the tax rate disparity test is applied by comparing the rate of tax imposed on the income derived from the purchasing or selling activities of the branch with the rate of tax that would apply if the income were earned by the remainder of the CFC. With respect to a manufacturing branch, the tax rate disparity test is applied by comparing the rate of tax imposed on the income derived from the purchasing and selling activities of the CFC with the rate of tax that would apply to such income under the laws of the country in which the manufacturing branch is located.

These final regulations provide guidance on the application of the branch rule, in particular with respect to a CFC that has multiple branches. For example, the regulations set forth rules on how to determine whether a CFC earns FBCSI if purchase and sales activities are conducted by multiple branches and if multiple branches are involved in the manufacture of either a single or multiple items of personal property that is sold by the CFC.

B. Summary of Comments

1. Demonstrably Greater Contribution

Section 1.954–3T(b)(1)(ii)(*c*)(*3*)(*iii*) provides that if none of the branches or the remainder of a CFC independently satisfies the substantial contribution test, but the CFC as a whole made a substantial contribution, then for purposes of applying the tax rate

disparity test, the location of manufacture, production or construction is the ''tested manufacturing location'' unless the ''tested sales location'' provided a ''demonstrably greater'' contribution. Comments were received seeking clarification on the meaning of the word ''demonstrably'' and expressing concern that it could be interpreted to provide an evidentiary rule regarding the standard of proof required with respect to the determination of the location of manufacture of an item pursuant to § 1.954–3T(b)(1)(ii)(*c*)(*3*)(*iii*). The IRS and the Treasury Department did not intend the word ''demonstrably'' to refer to an elevated standard of proof. In order to eliminate uncertainty, the word ''demonstrably'' has been deleted from § 1.954–3(b)(1)(ii)(*c*)(*3*)(*iii*).

2. Grouping of Branches

Comments sought clarification of the rule in § 1.954–3T(b)(2)(ii)(*a*) that generally provides for the grouping of branches that do not have tax rate disparity with a purchasing or selling branch, or with the remainder of the CFC treated as purchasing or selling on behalf of a manufacturing branch. This grouping rule applies for purposes of § 1.954–3T(b)(2)(ii), which sets forth the rules that apply after it has been determined that a branch and the remainder of a CFC will be treated as separate corporations. Comments suggested that this grouping rule could be interpreted to group not only the activities of the branches but also the income of those branches and recommended that the rule be clarified by specifically stating that the rule groups the ''activities'' of the relevant branches.

The rules in § 1.954–3T(b)(2)(ii) apply to determine whether the income of a branch or remainder of a CFC is FBCSI rather than to determine the amount of the income of the branch or remainder of the CFC. The purpose of this grouping rule is to allow a CFC to aggregate the activities of branches that do not have tax rate disparity with a sales or purchasing branch (or remainder) when applying the separate corporation analysis to determine whether the sales income of the sales or purchase branch (or remainder) is FBCSI. § 1.954–3(b)(1)(ii)(*c*)(*3*)(*v*), *Example 1.* The IRS and the Treasury Department believe that the grouping rule in § 1.954–3T(b)(2)(ii)(*a*) properly aggregates the activities of the relevant branches (or remainder). However, for clarity, the phrase ''the activities of'' was added to § 1.954–3(b)(2)(ii)(*a*).

C. Deletion of § 1.954–3(b)(2)(ii)(d)

The final regulations delete paragraph (*d*) of § 1.954–3(b)(2)(ii), which provided that income that is FBCSI as a result of the application of § 1.954–3(b)(1)(i) (purchasing or selling branch rules) is not again classified as FBCSI as a result of the application of § 1.954–3(b)(1)(ii) (manufacturing branch rules). This paragraph is no longer needed as a result of the addition of the rule in § 1.954–3(b)(1)(ii)(c)(1), which provides that if one or more sales or purchasing branches are used in addition to a manufacturing branch, then only the manufacturing branch rules apply.

D. Future Guidance

The IRS and the Treasury Department continue to study additional FBCSI issues, and are considering whether to issue additional guidance, including guidance regarding when a branch should be treated as a separate corporation under section 954(d)(2), and the scope of, and relationship between, FBCSI and foreign base company services income. The IRS and the Treasury Department welcome comments on these issues.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866; 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. In addition, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply because the regulations do not impose a collection of information on small entities. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final and temporary regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Barbara E. Rasch of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for 26 CFR part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *.

■ **Par. 2.** Section 1.954–3 is amended by:
■ 1. Revising paragraphs (b)(1)(i)(*c*), (b)(1)(ii)(*a*), and (b)(1)(ii)(*c*).
■ 2. Revising paragraphs (b)(2)(i)(*b*), (b)(2)(ii)(*a*), and (b)(2)(ii)(*b*).
■ 3. Removing and reserving paragraph (b)(2)(ii)(*d*).
■ 4. Revising paragraph (b)(2)(ii)(*e*).
■ 5. Revising paragraph (b)(4) introductory text.
■ 6. Revising *Example 3* in paragraph (b)(4).
■ 7. Adding *Examples 8* and *9* in paragraph (b)(4).
■ 8. Revising paragraphs (c) and (d).

The revisions and additions read as follows:

§ 1.954–3 Foreign base company sales income.

* * * * *

(b) * * *
(1) * * *
(i) * * *

(*c*) *Use of more than one branch.* If a controlled foreign corporation carries on purchasing or selling activities by or through more than one branch or similar establishment located outside the country under the laws of which such corporation is created or organized, then paragraph (b)(1)(i)(*b*) of this section shall be applied separately to the income derived by each such branch or similar establishment (by treating such purchasing or selling branch or similar establishment as if it were the only branch or similar establishment of the controlled foreign corporation and as if any such other branches or similar establishments were separate corporations) in determining whether the use of such branch or similar establishment has substantially the same tax effect as if such branch or similar establishment were a wholly owned subsidiary corporation of the controlled foreign corporation. See paragraph (b)(1)(ii)(*c*)(*1*) of this section for rules applicable to a controlled foreign corporation that carries on purchase or sales activities by or through one or more branches or similar establishments in addition to carrying on manufacturing activities by or through one or more branches or similar establishments.

(ii) *Manufacturing branch*—(*a*) *In general.* If a controlled foreign corporation carries on manufacturing, producing, constructing, growing, or extracting activities by or through a branch or similar establishment located outside the country under the laws of which such corporation is created or organized and the use of the branch or similar establishment for such activities with respect to personal property purchased or sold by or through the remainder of the controlled foreign corporation has substantially the same tax effect as if the branch or similar establishment were a wholly owned subsidiary corporation of such controlled foreign corporation, the branch or similar establishment and the remainder of the controlled foreign corporation will be treated as separate corporations for purposes of determining the foreign base company sales income of such corporation. See section 954(d)(2). The provisions of this paragraph (b)(1)(ii) will apply only if the controlled foreign corporation (including any branches or similar establishments of such controlled foreign corporation) manufactures, produces, or constructs such personal property within the meaning of paragraph (a)(4)(i) of this section, or carries on growing or extracting activities with respect to such personal property.

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(*c*) *Use of more than one branch*—(*1*) *Use of one or more sales or purchase branches in addition to a manufacturing branch.* If, with respect to personal property manufactured, produced, constructed, grown, or extracted by or through a branch or similar establishment located outside the country under the laws of which the controlled foreign corporation is created or organized, purchasing or selling activities are carried on by or through more than one branch or similar establishment, or by or through one or more branches or similar establishments located outside such country, of such corporation, then paragraph (b)(1)(ii)(*b*) of this section shall be applied separately to the income derived by each such purchasing or selling branch or similar establishment (by treating such purchasing or selling branch or similar establishment as though it alone were the remainder of the controlled foreign corporation) for purposes of determining whether the use of such manufacturing, producing, constructing, growing, or extracting branch or similar establishment has substantially the same tax effect as if such branch or similar establishment were a wholly owned subsidiary corporation of the controlled foreign corporation. If this rule applies, the sales or purchase branch rules contained in paragraph (b)(1)(i) of this section do not apply. The application of this paragraph (b)(1)(ii)(*c*)(*1*) is illustrated by the following example:

Example. All activities of controlled foreign corporation conducted through sales branches and manufacturing branch. (i) *Facts.* FS, a controlled foreign corporation organized under the laws of country M, operates three branches. Branch A, located in country A, manufactures Product X under the principles of paragraph (a)(4)(i) of this section. Branch B, located in Country B, sells Product X manufactured by Branch A to customers for use outside of Country B. Branch C, located in Country C sells Product X manufactured by Branch A to customers for use outside of Country C. FS does not conduct any manufacturing or selling activities apart from the activities of Branches A, B and C. Country M imposes an effective rate of tax on sales income of 0%. Country A imposes an effective rate of tax on sales income of 20%. Country B imposes an effective rate of tax on sales income of 20%. Country C imposes an effective rate of tax on sales income of 18%.

(ii) *Result.* Pursuant to this paragraph (b)(1)(ii)(*c*)(*1*), paragraph (b)(1)(ii)(*b*) of this section is applied to the sales income derived by Branch B by treating Branch B as though it alone were the remainder of the controlled foreign corporation. The use of Branch B does not have the same tax effect as if Branch B were a wholly owned subsidiary of FS because the tax rate applicable to the income allocated to Branch B under paragraph (b)(1)(ii)(*b*) of this section (20%) is not less than 90% of, and at least 5 percentage points less than, the effective rate of tax which would apply to such income under the laws of Country A (20%), the country in which Branch A is located. In addition, paragraph (b)(1)(ii)(*b*) of this section is applied separately to the sales income derived by Branch C by treating Branch C as though it alone were the remainder of the controlled foreign corporation. The use of Branch C does not have the same tax effect as if Branch C were a wholly owned subsidiary of FS because the tax rate applicable to the income allocated to Branch C under paragraph (b)(1)(ii)(*b*) of this section (18%) is not less than 90% of, and at least 5 percentage points less than, the effective rate of tax which would apply to such income under the laws of Country A (20%), the country in which Branch A is located. Pursuant to this paragraph (b)(1)(ii)(*c*)(*1*), the rules under paragraph (b)(1)(i) of this section for determining whether a sales or purchase branch is treated as a separate corporation from the remainder of the controlled foreign corporation do not apply.

(*2*) *Use of more than one branch to manufacture, produce, construct, grow, or extract separate items of personal property.* If a controlled foreign corporation carries on manufacturing, producing, constructing, growing, or extracting activities with respect to separate items of personal property by or through more than one branch or similar establishment located outside the country under the laws of which such corporation is created or organized, then paragraphs (b)(1)(ii)(*b*) and (*c*) of this section will be applied separately to each such branch or similar establishment (by treating such manufacturing branch or similar establishment as if it were the only such branch or similar establishment of the controlled foreign corporation and as if any other such branches or similar establishments were separate corporations) for purposes of determining whether the use of such branch or similar establishment has substantially the same tax effect as if such branch or similar establishment were a wholly owned subsidiary corporation of the controlled foreign corporation. The application of this paragraph (b)(1)(ii)(*c*)(*2*) is illustrated by the following example:

Example. Multiple branches that satisfy paragraph (a)(4)(i). (i) *Facts.* FS is a controlled foreign corporation organized in Country M. FS operates two branches, Branch A and Branch B located in Country A and Country B, respectively. Branch A and Branch B each manufacture separate items of personal property (Product X and Product Y, respectively) within the meaning of paragraph (a)(4)(ii) or (iii) of this section. Raw materials used in the manufacture of Product X and Product Y are purchased by FS from an unrelated person. FS engages in activities in Country M to sell Product X and Product Y to a related person for use, disposition or consumption outside of Country M. Employees of FS located in Country M perform only sales functions. The effective rate of tax imposed in Country M on the income from the sales of Product X and Product Y is 10%. Country A imposes an effective rate of tax on sales income of 20%. Country B imposes an effective rate of tax on sales income of 12%.

(ii) *Result.* Pursuant to this paragraph (b)(1)(ii)(*c*)(*2*), paragraph (b)(1)(ii)(*b*) of this section is applied separately to Branch A and Branch B with respect to the sales income of FS attributable to Product X (manufactured by Branch A) and Product Y (manufactured by Branch B). Because the effective rate of tax on FS's sales income from the sale of Product X in Country M (10%) is less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in the country in which Branch A is located (20%), the use of Branch A to manufacture Product X has substantially the same tax effect as if Branch A were a wholly owned subsidiary corporation of FS. Because the effective rate of tax on FS's sales income from the sale of Product Y in Country M (10%) is not less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in the country in which Branch B is located (12%), the use of Branch B to manufacture

Product Y does not have substantially the same tax effect as if Branch B were a wholly owned subsidiary corporation of FS. Consequently, only Branch A is treated as a separate corporation apart from the remainder of FS for purposes of determining foreign base company sales income from the sales of Product X.

(*3*) *Use of more than one manufacturing branch, or one or more manufacturing branches and the remainder of the controlled foreign corporation, to manufacture, produce, or construct the same item of personal property*—(*i*) *In general.* This paragraph (b)(1)(ii)(*c*)(*3*) applies to determine the location of manufacture, production, or construction of personal property for purposes of applying paragraph (b)(1)(i)(*b*) or (b)(1)(ii)(*b*) of this section where more than one branch or similar establishment of a controlled foreign corporation, or one or more branches or similar establishments of a controlled foreign corporation and the remainder of the controlled foreign corporation, each engage in manufacturing, producing, or constructing activities with respect to the same item of personal property which is then sold by the controlled foreign corporation. This paragraph (b)(1)(ii)(*c*)(*3*) is applied separately with respect to the income derived by each purchasing or selling branch or similar establishment or purchasing or selling remainder of the controlled foreign corporation as provided under paragraphs (b)(1)(i) and (b)(1)(ii) of this section. The location of manufacture, production, or construction is determined under paragraph (b)(1)(ii)(*c*)(*3*)(*ii*) of this section if one or more branches or similar establishments or the remainder of the controlled foreign corporation independently satisfies paragraph (a)(4)(i) of this section with respect to an item of personal property. The location of manufacture, production, or construction is determined under paragraph (b)(1)(ii)(*c*)(*3*)(*iii*) of this section if none of the branches or similar establishments or the remainder of the controlled foreign corporation independently satisfies paragraph (a)(4)(i) of this section with respect to an item of personal property, but the controlled foreign corporation as a whole makes a substantial contribution to the manufacture, production or construction of that property within the meaning of paragraph (a)(4)(iv) of this section. For purposes of this paragraph (b)(1)(ii)(*c*)(*3*), the location of any activity with respect to the manufacture, production, or construction of an item of personal property is determined under paragraph (b)(1)(ii)(*c*)(*3*)(*iv*) of this section. For purposes of this paragraph (b)(1)(ii)(*c*)(*3*), if multiple branches or similar establishments are located in a single jurisdiction, then the activities of those branches will be aggregated for purposes of determining whether a branch or remainder of the controlled foreign corporation satisfies paragraph (a)(4)(i) of this section.

(*ii*) *Manufacture, production, or construction in one or more locations.* If only one branch or similar establishment or only the remainder of a controlled foreign corporation independently satisfies paragraph (a)(4)(i) of this section with respect to an item of personal property, then that branch or similar establishment or the remainder of the controlled foreign corporation will be the location of manufacture, production, or construction of that property for purposes of applying paragraph (b)(1)(i)(*b*) or (b)(1)(ii)(*b*) of this section to the income from the sale of that property. See paragraph (b)(1)(ii)(*c*)(*3*)(*v*) *Example 1* of this section. If more than one branch or similar establishment or one or more branches or similar establishments and the remainder of the controlled foreign corporation, each independently satisfy paragraph (a)(4)(i) of this section with respect to an item of personal property, then the location of manufacture, production, or construction of that property for purposes of applying paragraph (b)(1)(i)(*b*) or (b)(1)(ii)(*b*) of this section will be the location of that branch or similar establishment or the jurisdiction under the laws of which the remainder of the controlled foreign corporation is organized that satisfies paragraph (a)(4)(i) of this section and that would, after applying paragraph (b)(1)(ii)(*b*) of this section to such branch or similar establishment or paragraph (b)(1)(i)(*b*) of this section to the remainder of the controlled foreign corporation, impose the lowest effective rate of tax on the income allocated to such branch or the remainder of the controlled foreign corporation under such section (that is, either paragraph (b)(1)(i)(*b*) or (b)(1)(ii)(*b*) of this section). See paragraph (b)(1)(ii)(*c*)(*3*)(*v*) *Example 2* of this section.

(*iii*) *No location independently satisfies manufacturing test.* If no branch or similar establishment or the remainder of the controlled foreign corporation independently satisfies paragraph (a)(4)(i) of this section with respect to an item of personal property but the controlled foreign corporation as a whole makes a substantial contribution to the manufacture, production, or construction of that property within the meaning of paragraph (a)(4)(iv) of this section, then for purposes of applying paragraph (b)(1)(i)(*b*) or (b)(1)(ii)(*b*) of this section, the location of manufacture, production, or construction with respect to the income derived by a purchasing or selling branch or similar establishment or the purchasing or selling remainder of the controlled foreign corporation in connection with the purchase or sale of that property will be the ''tested manufacturing location'' unless the ''tested sales location'' provides a greater contribution to the manufacture, production, or construction of the property. The tested manufacturing location is the location of any branch or similar establishment or remainder of the controlled foreign corporation that contributes to the manufacture, production, or construction of the personal property, if any, that would, after applying paragraph (b)(1)(ii)(*b*) of this section to such branch or similar establishment or paragraph (b)(1)(i)(*b*) of this section to the remainder of the controlled foreign corporation, be treated as a separate corporation and would impose the lowest effective rate of tax on the income allocated to such branch or similar establishment or to the remainder of the controlled foreign corporation under such section (that is, either paragraph (b)(1)(i)(*b*) or (b)(1)(ii)(*b*) of this section). The tested sales location is the location of the purchasing or selling branch or similar establishment or the remainder of the controlled foreign corporation by or through which the purchasing or selling activities are carried on with respect to the personal property. For purposes of this paragraph (b)(1)(ii)(*c*)(*3*)(*iii*), the contribution to the manufacture, production, or construction of the personal property by the tested sales location will be deemed to include the activities of any branch or similar establishment or remainder of the controlled foreign corporation that would not be treated as a corporation separate from the tested sales location after the application of paragraph (b)(1)(i)(*b*) or (b)(1)(ii)(*b*) of this section. For purposes of this paragraph (b)(1)(ii)(*c*)(*3*)(*iii*), the contribution of the tested manufacturing location to the manufacture, production, or construction of the personal property will be deemed to include any activities of any branch or similar establishment or remainder of the controlled foreign corporation that would be treated as a corporation separate from the tested sales location after the application of paragraph (b)(1)(i)(*b*) or (b)(1)(ii)(*b*) of this section. Whether the tested sales location provides a greater contribution to the manufacture, production, or

construction of the personal property is determined by weighing the relative contributions to the manufacture, production, or construction of that property by the tested sales location and the tested manufacturing location under the facts and circumstances test provided in paragraph (a)(4)(iv) of this section. See paragraph (b)(1)(ii)(*c*)(*3*)(*v*) *Examples 3, 4, 5,* and *6* of this section. If the tested sales location provides a greater contribution to the manufacture, production, or construction of the personal property than the tested manufacturing location or if there is no tested manufacturing location, then the tested sales location is the location of manufacture, production, or construction of that property and the rules of paragraphs (b)(1)(i)(*a*) and (b)(1)(ii)(*a*) of this section will not apply with respect to the income derived by the tested sales location in connection with the purchase or sale of that property and the use of that purchasing or selling branch or similar establishment or the purchasing or selling remainder will not result in a branch being treated as a separate corporation for purposes of paragraph (b)(2)(ii) of this section.

(*iv*) *Location of activity.* For purposes of paragraph (b)(1)(ii)(*c*)(*3*) of this section, the location of any activity with respect to the manufacture, production, or construction of an item of personal property is the location where the employees of the controlled foreign corporation perform such activity. For example, the location of any activity concerning intellectual property is determined based on where employees of the controlled foreign corporation develop or direct the use or development of the intellectual property, not on the formal assignment of that intellectual property.

(*v*) *Examples.* The following examples illustrate the application of this paragraph (b)(1)(ii)(*c*)(*3*):

Example 1. Multiple branches contribute to the manufacture of a single product only one branch satisfies paragraph (a)(4)(i). (i) *Facts.* FS is a controlled foreign corporation organized in Country M. FS operates three branches, Branch A, Branch B, and Branch C, located respectively in Country A, Country B, and Country C. Branch A, Branch B, and Branch C each performs different manufacturing activities with respect to the manufacture of Product X. Branch A, through the activities of employees of FS located in Country A, designs Product X. Branch B, through the activities of employees of FS located in Country B, provides quality control and oversight and direction. Branch C, through the activities of employees of FS located in Country C, manufactures Product X (within the meaning of paragraph (a)(4)(ii) or (a)(4)(iii) of this section) using the designs developed by Branch A and under the oversight of the quality control personnel of Branch B. The activities of Branch A and Branch B do not independently satisfy paragraph (a)(4)(i) of this section. Employees of FS located in Country M purchase the raw materials used in the manufacture of Product X from a related person and control the work-in-process and finished goods throughout the manufacturing process. Employees of FS located in Country M also manage the manufacturing costs and capacities related to Product X. Further, employees of FS located in Country M oversee the coordination between the branches. The activities of the remainder of FS in Country M do not independently satisfy paragraph (a)(4)(i) of this section. Employees of FS located in Country M sell Product X to unrelated persons for use outside of Country M. The sales income from the sale of Product X is taxed in Country M at an effective rate of tax of 10%. Country C imposes an effective rate of tax of 20% on sales income.

(ii) *Result.* Country C is the location of manufacture for purposes of applying paragraph (b)(1)(ii)(*b*) of this section because only the activities of Branch C independently satisfy paragraph (a)(4)(i) of this section. The use of Branch C has substantially the same tax effect as if Branch C were a wholly owned subsidiary corporation of FS because the effective rate of tax on the sales income (10%) is less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in the country in which Branch C is located (20%). Therefore, sales of Product X by the remainder of FS are treated as sales on behalf of Branch C. In determining whether the remainder of FS will qualify for the manufacturing exception under paragraph (a)(4)(iv) of this section, the activities of FS will include the activities of Branch A or Branch B, respectively, if each of those branches would not be treated as a separate corporation under paragraph (b)(1)(ii)(*b*) of this section, if that paragraph were applied independently to each of Branch A and Branch B. See paragraph (b)(2)(ii)(*a*) of this section.

Example 2. Multiple branches satisfy paragraph (a)(4)(i) with respect to the same product sold by the controlled foreign corporation. (i) *Facts.* Assume the same facts as in *Example 1,* except for the following. In addition to the design of Product X, Branch A also performs in Country A other manufacturing activities, including those ascribed to FS in *Example 1,* that are sufficient to qualify as manufacturing under paragraph (a)(4)(iv) of this section with respect to Product X. Country A imposes an effective rate of tax of 12% on sales income.

(ii) *Result.* Branch A and Branch C through their activities each independently satisfy the requirements of paragraph (a)(4)(i) of this section. Therefore, paragraph (b)(1)(ii)(*b*) of this section is applied by comparing the effective rate of tax imposed on the income from the sales of Product X against the lowest effective rate of tax that would apply to the sales income in either Country A or Country C if paragraph (b)(1)(ii)(*b*) of this section were applied separately to Branch A and Branch C. Country A imposes the lower effective rate of tax, and therefore, Branch A is treated as the location of manufacture for purposes of applying paragraph (b)(1)(ii)(*b*) of this section. The effective rate of tax in Country B is not considered because Branch B does not satisfy paragraph (a)(4)(i) of this section. Neither Branch A nor Branch C is treated as a separate corporation because the effective rate of tax on the sales income of FS from the sale of Product X (10%) is not less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in the country in which Branch A is located (12%). Sales of Product X by the remainder of the controlled foreign corporation are not treated as made on behalf of any branch.

Example 3. Determining the location of manufacture when manufacturing activities performed by multiple branches and no branch independently satisfies paragraph (a)(4)(i). (i) *Facts.* FS, a controlled foreign corporation organized in Country M, purchases raw materials from a related person. The raw materials are manufactured (under the principles of paragraph (a)(4)(ii) or (a)(4)(iii) of this section) into Product X by CM, an unrelated corporation, pursuant to a contract manufacturing arrangement. CM physically performs the substantial transformation, assembly, or conversion of the raw materials in Country C. FS has two branches, Branch A and Branch B, located in Country A and Country B respectively. Branch A, through the activities of employees of FS located in Country A, designs Product X. Branch B, through the activities of employees of FS located in Country B, controls manufacturing related logistics, provides oversight and direction during the manufacturing process, and controls the raw materials and work-in-process. FS manages the manufacturing costs and capacities related to the manufacture of Product X through employees located in Country M. Further, employees of FS located in Country M oversee the coordination between the branches. Employees of FS located in Country M also sell Product X to unrelated persons for use outside of Country M. Country M imposes an effective rate of tax on sales income of 10%. Country A imposes an effective rate of tax on sales income of 20%, and Country B imposes an effective rate of tax on sales income of 24%. Neither the remainder of FS, nor any branch of FS independently satisfies paragraph (a)(4)(i) of this section. However, under the facts and circumstances of the business, FS as a whole provides a substantial contribution to the manufacture of Product X within the meaning of paragraph (a)(4)(iv) of this section.

(ii) *Result.* Based on the facts, neither the remainder of FS (through the activities of its employees in Country M) nor any branch of FS independently satisfies paragraph (a)(4)(i) of this section with respect to Product X, but FS, as a whole, provides a substantial contribution through the activities of its employees to the manufacture of Product X. The remainder of FS, Branch A, and Branch B each provides a contribution through the activities of employees to the manufacture of Product X. Therefore, FS must determine the location of manufacture under paragraph

(b)(1)(ii)(*c*)(*3*)(*iii*) of this section. The tested sales location is Country M because the selling activities with respect to Product X are carried on by the remainder of FS. The location of Branch A is the tested manufacturing location because the effective rate of tax imposed on FS's sales income by Country M (10%) is less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in Country A (20%), and Country A has the lowest effective rate of tax among the manufacturing branches that would, after applying paragraph (b)(1)(ii)(*b*) of this section, be treated as a separate corporation. The activities of Branch B will be included in the contribution of Branch A for purposes of determining the location of manufacture of Product X because the effective rate of tax imposed on the sales income by Country M (10%) is less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in Country B (24%). Under the facts and circumstances of the business, the activities of the remainder of FS would not provide a greater contribution to the manufacture of Product X than the activities of Branch A and Branch B, considered together. Therefore, the location of manufacture is Country A, the location of Branch A.

Example 4. Manufacturing activities performed by multiple branches, no branch independently satisfies paragraph (a)(4)(i), selling activities carried on by remainder of the controlled foreign corporation, remainder contribution includes branch manufacturing activities. (i) *Facts.* The facts are the same as *Example 3,* except that the effective rate of tax on sales income in Country B is 12%. In addition, under the facts of the particular business, the activities of employees of FS located in Country B and Country M, if considered together, would provide a greater contribution to the manufacture of Product X than the activities of employees of FS located in Country A.

(ii) *Result.* Based on the facts, neither the remainder of FS (through activities of its employees in Country M) nor any branch of FS independently satisfies paragraph (a)(4)(i) of this section with respect to Product X, but FS, as a whole, provides a substantial contribution through the activities of its employees to the manufacture of Product X. The remainder of FS, Branch A, and Branch B each provide a contribution through the activities of their employees to the manufacture of Product X. Therefore, FS must determine the location of manufacture under paragraph (b)(1)(ii)(*c*)(*3*)(*iii*) of this section. The tested sales location is Country M because the selling activities with respect to Product X are carried on by the remainder of FS. The location of Branch A is the tested manufacturing location because the effective rate of tax imposed on FS's sales income by Country M (10%) is less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in Country A (20%), and Branch A is the only branch that would, after applying paragraph (b)(1)(ii)(*b*) of this section, be treated as a separate corporation. The activities of Branch B will be included in the contribution of the remainder of FS for purposes of determining the location of manufacture of Product X because the effective rate of tax imposed on the sales income by Country M (10%) is not less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in Country B (12%). Under a facts and circumstances analysis, considered together, the activities of Branch B and the remainder of FS would provide a greater contribution to the manufacture of Product X than the activities of Branch A. Therefore, the rules of paragraph (b)(1)(ii)(a) of this section will not apply with respect to the income derived by the remainder of FS in connection with the sale of Product X, and neither Branch A nor Branch B will be treated as a separate corporation for purposes of paragraph (b)(2)(ii) of this section.

Example 5. Manufacturing activities performed by multiple branches, no branch independently satisfies paragraph (a)(4)(i), sales carried on by remainder of the controlled foreign corporation and a sales branch. (i) *Facts.* The facts are the same as *Example 3,* except that sales of Product X are also carried on through Branch D in Country D, and Country D imposes a 16% effective rate of tax on sales income. In addition, under the facts and circumstances of the business, the activities of employees of FS located in Country A and Country M, considered together, would provide a greater contribution to the manufacture of Product X than the activities of employees of FS located in Country B.

(ii) *Result.* Based on the facts, neither the remainder of FS nor any branch of FS independently satisfies paragraph (a)(4)(i) of this section with respect to Product X, but FS, as a whole, provides a substantial contribution through the activities of its employees to the manufacture of Product X. The remainder of FS, Branch A, and Branch B each provide a contribution through the activities of their employees to the manufacture of Product X. Therefore, FS must determine the location of manufacture under paragraph (b)(1)(ii)(*c*)(*3*)(*iii*) of this section. Further, pursuant to paragraph (b)(1)(ii)(*c*)(*1*) of this section, paragraph (b)(1)(ii)(*c*)(*3*)(*iii*) of this section must be applied separately to the sales income derived by the remainder of FS and Branch D respectively. The results with respect to the income derived by the remainder of FS in connection with the sale of Product X in this *Example 5* are the same as in *Example 3.* However, paragraph (b)(1)(ii)(*c*)(*3*)(*iii*) of this section must also be applied with respect to Branch D because the sale of Product X is also carried on through Branch D. Thus, for purposes of that sales income, the location of Branch D is the tested sales location. The location of Branch B is the tested manufacturing location because the effective rate of tax imposed on Branch D's sales income by Country D (16%) is less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in Country B (24%), and Branch B is the only branch that would, after applying paragraph (b)(1)(ii)(*b*) of this section, be treated as a separate corporation. The manufacturing activities performed in Country M by the remainder of FS and the manufacturing activities performed in Country A by Branch A will be included in Branch D's contribution to the manufacture of Product X for purposes of determining the location of manufacture of Product X with respect to Branch D's sales income because the effective rate of tax imposed on the sales income by Country D (16%) is not less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in Country M (10%) and Country A (20%). Under the facts and circumstances of the business, the activities of Branch D, Branch A, and the remainder of FS, considered together, would provide a greater contribution to the manufacture of Product X than the activities of Branch B. Therefore, the rules of paragraph (b)(1)(ii)(*a*) of this section will not apply with respect to the income derived by Branch D in connection with the sale of Product X and the use of Branch D to sell Product X will not result in a branch being treated as a separate corporation for purposes of paragraph (b)(2)(ii) of this section.

Example 6. Determining the location of manufacture when employees of remainder of controlled foreign corporation travel to location of unrelated contract manufacturer to perform manufacturing activities. (i) *Facts.* FS, a controlled foreign corporation organized in Country M, purchases raw materials from a related person. The raw materials are manufactured (under the principles of paragraph (a)(4)(ii) or (a)(4)(iii) of this section) into Product X by CM, an unrelated corporation, pursuant to a contract manufacturing arrangement. CM physically performs the substantial transformation, assembly, or conversion of the raw materials in Country C. Employees of FS located in Country M sell Product X to unrelated persons for use outside of Country M. Employees of FS located in Country M engage in product design, manage the manufacturing costs and capacities with respect to Product X, and direct the use of intellectual property for the purpose of manufacturing Product X. Quality control and oversight and direction of the manufacturing process are conducted in Country C by employees of FS who are employed in Country M but who regularly travel to Country C. Branch A, located in Country A, is the only branch of FS. Product design with respect to Product X conducted by employees of FS located in Country A is supplemental to the bulk of the design work, which is done by employees of FS located in Country M. At all times, employees of Branch A control the raw materials, work-in-process and finished goods. Employees of FS located in Country A also control manufacturing related logistics with respect to Product X. Country M imposes an effective rate of tax on sales income of 10%. Country A imposes an effective rate of tax on sales income of 20%. Neither the remainder of FS nor Branch A independently satisfies paragraph (a)(4)(i) of this section. However, under the facts and circumstance of the business, FS as a whole (including Branch A) provides a substantial contribution to the manufacture of Product X within the meaning of paragraph (a)(4)(iv) of this section.

(ii) *Result.* Based on the facts, neither the remainder of FS nor Branch A independently

satisfies paragraph (a)(4)(i) of this section with respect to Product X, but FS, as a whole, provides a substantial contribution through the activities of its employees to the manufacture of Product X. The remainder of FS and Branch A each provide a contribution through the activities of employees to the manufacture of Product X. Therefore, FS must determine the location of manufacture under paragraph (b)(1)(ii)(*c*)(*3*)(*iii*) of this section. The tested sales location is Country M because the selling activities with respect to Product X are carried on by the remainder of FS. The tested manufacturing location is the location of Branch A because the effective rate of tax imposed on the remainder of FS's sales income by Country M (10%) is less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in Country A (20%), and Branch A is the only branch that would, after applying paragraph (b)(1)(ii)(*b*) of this section, be treated as a separate corporation. Although the activities of traveling employees are considered in determining whether FS, as a whole, makes a substantial contribution to the manufacture of Product X under paragraph (a)(4)(iv) of this section, the activities of the employees of FS that are performed in Country C are not taken into consideration in determining whether Country M, the jurisdiction under the laws of which FS is organized, is the location of manufacture under paragraph (b)(1)(ii)(*c*)(*3*)(*iii*) of this section. Activities of employees performed outside the jurisdiction in which the controlled foreign corporation is organized and outside a location in which the controlled foreign corporation maintains a branch or similar establishment, are not considered in determining the location of manufacture. Under the facts and circumstances of the business, the activities of employees of FS performed in Country M do not provide a greater contribution to the manufacture of Product X than the activities of employees of FS performed in Country A. Therefore, the location of manufacture is Country A, the location of Branch A.

(*4*) *Use of more than one branch to manufacture, produce, construct, grow, or extract separate items of personal property.* For purposes of paragraphs (b)(1)(ii)(*c*)(*2*) and (b)(1)(ii)(*c*)(*3*) of this section, an item of personal property refers to an individual unit of personal property rather than a type or class of personal property.

(2) * * *

(i) * * *

(*b*) *Activities treated as performed on behalf of the remainder of corporation.* (*1*) With respect to purchasing or selling activities performed by or through the branch or similar establishment, such purchasing or selling activities will, with respect to personal property manufactured, produced, constructed, grown, or extracted by the remainder of the controlled foreign corporation, be treated as performed on behalf of the remainder of the controlled foreign corporation.

(*2*) With respect to purchasing or selling activities performed by or through the branch or similar establishment, such purchasing or selling activities will, with respect to personal property (other than property described in paragraph (b)(2)(i)(*b*)(*1*) of this section) purchased or sold, or purchased and sold, by the remainder of the controlled foreign corporation (or any branch treated as the remainder of the controlled foreign corporation), be treated as performed on behalf of the remainder of the controlled foreign corporation.

* * * * *

(ii) * * *

(*a*) *Treatment as separate corporations.* The branch or similar establishment will be treated as a wholly owned subsidiary corporation of the controlled foreign corporation, and such branch or similar establishment will be deemed to be incorporated in the country in which it is located. For purposes of applying the rules of this paragraph (b)(2)(ii), a branch or similar establishment of a controlled foreign corporation treated as a separate corporation purchasing or selling on behalf of the remainder of the controlled foreign corporation under paragraph (b)(2)(ii)(*b*) of this section, or the remainder of the controlled foreign corporation treated as a separate corporation purchasing or selling on behalf of a branch or similar establishment of the controlled foreign corporation under paragraph (b)(2)(ii)(*c*) of this section, will include the activities of any other branch or similar establishment or remainder of the controlled foreign corporation that would not be treated as a separate corporation (apart from the branch or similar establishment of a controlled foreign corporation that is treated as performing purchasing or selling activities on behalf of the remainder of the controlled foreign corporation under paragraph (b)(2)(ii)(*b*) of this section or the remainder of the controlled foreign corporation that is treated as performing purchasing or selling activities on behalf of the branch or similar establishment under paragraph (b)(2)(ii)(*c*) of this section) if the effective rate of tax imposed on the income of the purchasing or selling branch or similar establishment, or purchasing or selling remainder of the controlled foreign corporation, were tested under the principles of paragraph (b)(1)(i)(*b*) or (b)(1)(ii)(*b*) of this section against the effective rate of tax that would apply to such income if it were considered derived by such other branch or similar establishment or the remainder of the controlled foreign corporation.

(*b*) *Activities treated as performed on behalf of the remainder of corporation.* (*1*) With respect to purchasing or selling activities performed by or through the branch or similar establishment, such purchasing or selling activities will, with respect to personal property manufactured, produced, constructed, grown, or extracted by the remainder of the controlled foreign corporation, be treated as performed on behalf of the remainder of the controlled foreign corporation.

(*2*) With respect to purchasing or selling activities performed by or through the branch or similar establishment, such purchasing or selling activities will, with respect to personal property (other than property described in paragraph (b)(2)(ii)(*b*)(*1*) of this section) purchased or sold, or purchased and sold, by the remainder of the controlled foreign corporation (or any branch treated as the remainder of the controlled foreign corporation), be treated as performed on behalf of the remainder of the controlled foreign corporation.

* * * * *

(*d*) [Reserved].

(*e*) *Comparison with ordinary treatment.* Income derived by a branch or similar establishment, or by the remainder of the controlled foreign corporation, will not be foreign base company sales income under paragraph (b) of this section if the income would not be foreign base company sales income if it were derived by a separate controlled foreign corporation under like circumstances.

* * * * *

(4) *Illustrations.* The application of this paragraph (b) may be illustrated by the following examples:

* * * * *

Example 3. (i) *Facts.* Corporation E, a controlled foreign corporation incorporated under the laws of foreign Country X, is a wholly owned subsidiary of Corporation D, also a controlled foreign corporation incorporated under the laws of Country X. Corporation E maintains Branch B in foreign Country Y. Both corporations use the calendar year as the taxable year. In 1964, Corporation E's sole activity, carried on through Branch B, consists of the purchase of articles manufactured in Country X by Corporation D, a related person, and the sale of the articles through Branch B to unrelated persons. One hundred percent of the articles sold through Branch B are sold for use outside Country X and 90% are also sold for use outside of Country Y. The income of Corporation E derived by Branch B from such transactions is taxed to Corporation E by Country X only at the time Corporation E distributes such income to Corporation D and

is taxed on the basis of what the tax (a 40% effective rate) would have been if the income had been derived in 1964 by Corporation E from sources within Country X from doing business through a permanent establishment therein. Country Y levies an income tax at an effective rate of 50% on income derived from sources within such country, but the income of Branch B for 1964 is effectively taxed by Country Y at a 5% rate since under the laws of such country, only 10% of Branch B's income is derived from sources within such country. Corporation E makes no distributions to Corporation D in 1964.

(ii) *Result.* In determining foreign base company sales income of Corporation E for 1964, Branch B is treated as a separate wholly owned subsidiary corporation of Corporation E, the 5% rate of tax being less than 90% of, and at least 5 percentage points less than the 40% rate. Income derived by Branch B, treated as a separate corporation, from the purchase from a related person (Corporation D), of personal property manufactured outside of Country Y and sold for use, disposition, or consumption outside of Country Y constitutes foreign base company sales income. If, instead, Corporation D were unrelated to Corporation E, none of the income would be foreign base company sales income because Corporation E would be purchasing from and selling to unrelated persons and if Branch B were treated as a separate corporation it would likewise be purchasing from and selling to unrelated persons. Alternatively, if Corporation D were related to Corporation E, but Branch B manufactured the articles prior to sale under the principles of paragraph (a)(4)(iv) of this section, the income would not be foreign base company sales income because Branch B, treated as a separate corporation, would qualify for the manufacturing exception under paragraph (a)(4) of this section.

* * * * *

Example 8. Uniformly applicable incentive tax rate in one country. (i) *Facts.* FS is a controlled foreign corporation organized in Country M. FS operates one branch, Branch A, located in Country A. Branch A manufactures Product X within the meaning of paragraph (a)(4)(ii) or (a)(4)(iii) of this section. Raw materials used in the manufacture of Product X are purchased by FS from an unrelated person. FS engages in activities in Country M to sell Product X to a related person for use outside of Country M. Employees of FS located in Country M carry on only sales functions. The effective rate imposed in Country M on the income from the sale of Product X is 10%. Country A generally imposes an effective rate of tax on income of 20%, but imposes a uniformly applicable incentive rate of tax of 10% on manufacturing income and related sales income.

(ii) *Result.* The use of Branch A to manufacture Product X does not have substantially the same tax effect as if Branch A were a wholly owned subsidiary corporation of FS because the effective rate of tax on FS's sales income from the sale of Product X in Country M (10%) is not less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in the country in which Branch A is located (10%). Consequently, pursuant to paragraph (b)(1)(ii)(*b*) of this section, Branch A is not treated as a separate corporation apart from the remainder of FS for purposes of determining foreign base company sales income.

Example 9. Manufacturing activities performed by multiple branches, no branch independently satisfies paragraph (a)(4)(i), selling activities carried on by remainder of the controlled foreign corporation, some branch manufacturing activities included in remainder contribution. (i) *Facts.* FS, a controlled foreign corporation organized in Country M, has three branches, Branch A, Branch B, and Branch C, located in Country A, Country B, and Country C respectively. FS purchases raw materials from a related person. The raw materials are manufactured (under the principles of paragraph (a)(4)(ii) or (a)(4)(iii) of this section) into Product X by CM, an unrelated corporation, pursuant to a contract manufacturing arrangement. CM physically performs the substantial transformation, assembly, or conversion required to manufacture Product X outside of FS's country of organization. FS manages the manufacturing costs and capacities with respect to the manufacture of Product X through employees located in Country M. Further, employees of FS located in Country M oversee the coordination between the branches. Branch A, through the activities of employees of FS located in Country A, designs Product X, controls manufacturing related logistics, and controls the raw materials and work-in-process during the manufacturing process. Branch B, through the activities of employees of FS located in Country B, provides quality control. Branch C, through the activities of employees of FS located in Country C, provides oversight and direction during the manufacturing process. Employees of FS located in Country M sell Product X to unrelated persons for use outside of Country M. Country M imposes an effective rate of tax on sales income of 10%. Country A imposes an effective rate of tax on sales income of 12%, Country B imposes an effective rate of tax on sales income of 24%, and Country C imposes an effective rate of tax on sales income of 25%. None of the remainder of FS, Branch A, Branch B, or Branch C independently satisfies paragraph (a)(4)(i) of this section. However, under the facts and circumstances of the business, FS, as a whole, provides a substantial contribution to the manufacture of Product X within the meaning of paragraph (a)(4)(iv) of this section. Under the facts and circumstances of the business, the activities of the remainder of FS and Branch A, if considered together, would not provide a greater contribution to the manufacture of Product X than the activities of Branch B and Branch C, if considered together. Under the facts and circumstances of the business, however, the activities of the employees of the remainder of FS and Branch A, if considered together, would constitute a substantial contribution to the manufacture of Product X.

(ii) *Result.* Based on the facts, neither the remainder of FS (through activities of its employees in Country M) nor any branch of FS independently satisfies paragraph (a)(4)(i) of this section with respect to Product X, but FS, as a whole, provides a substantial contribution through the activities of its employees to the manufacture of Product X. The remainder of FS, Branch A, Branch B, and Branch C each provide a contribution through the activities of employees to the manufacture of Product X. Therefore, FS must determine the location of manufacture under paragraph (b)(1)(ii)(*c*)(*3*)(*iii*) of this section. The tested sales location is Country M because the selling activities with respect to Product X are carried on by the remainder of FS. The location of Branch B is the tested manufacturing location because the effective rate of tax imposed on FS's sales income by Country M (10%) is less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in Country B (24%), and Country B has the lowest effective rate of tax among the manufacturing branches that would, after applying paragraph (b)(1)(ii)(*b*) of this section, be treated as a separate corporation. The manufacturing activities performed in Country A by Branch A will be included in the contribution of the remainder of FS for purposes of determining the location of manufacture of Product X because the effective rate of tax imposed on the sales income by Country M (10%) is not less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in Country A (12%). The manufacturing activities performed in Country C by Branch C will be included in the contribution of Branch B for purposes of determining the location of manufacture of Product X because the effective rate of tax imposed on the sales income by Country M (10%) is less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income in Country C (25%). Under the facts and circumstances of the business, the manufacturing activities of the remainder of FS and Branch A, considered together, would not provide a greater contribution to the manufacture of Product X than the activities of Branch B and Branch C, considered together. Therefore, the location of manufacture is Country B, the location of Branch B. In determining that Country B is the location of manufacture, it was determined that after applying paragraph (b)(1)(ii)(*b*) of this section Branch B would be treated as a separate corporation under paragraph (b)(1)(ii)(*a*) of this section for purposes of determining foreign base company sales income. To determine whether income from the sale of Product X is foreign base company sales income, the remainder of FS takes into account the activities of Branch A because, under paragraph (b)(2)(ii)(*a*) of this section, Branch A would not be treated as a separate corporation apart from FS. The remainder of FS is considered to have manufactured Product X under paragraph (a)(4)(i) of this section because the manufacturing activities of the remainder of FS and Branch A, considered together, would make a substantial contribution to the manufacture of Product X within the meaning of

paragraph (a)(4)(iv) of this section. Therefore, income derived from the sale of Product X by the remainder of FS does not constitute foreign base company sales income.

(c) *Effective/applicability date.* Paragraphs (a)(1)(i), (a)(1)(iii) *Example 1,* (a)(1)(iii) *Example 2,* (a)(2), (a)(4)(i), (a)(4)(ii), (a)(4)(iii), (a)(4)(iv), (a)(6)(i), (b)(1)(i)(*c*), (b)(1)(ii)(*a*), (b)(1)(ii)(*c*), (b)(2)(i)(*b*), (b)(2)(ii)(*a*), (b)(2)(ii)(*b*), (b)(2)(ii)(*e*), and (b)(4) *Example 3,* (b)(4) *Example 8,* and (b)(4) *Example 9* of this section shall apply to taxable years of controlled foreign corporations beginning after June 30, 2009, and for taxable years of United States shareholders in which or with which such taxable years of the controlled foreign corporations end.

(d) *Application of regulations to earlier taxable years.* A taxpayer may choose to apply these regulations retroactively with respect to its open taxable years that began prior to July 1, 2009. The taxpayer may so choose if and only if the taxpayer and all members of the taxpayer's affiliated group (within the meaning of section 1504(a)) apply these regulations, in their entirety, to the earliest taxable year of each controlled foreign corporation that ends with or within an open taxable year of the taxpayer and to all subsequent taxable years.

§ 1.954–3T [Removed]

■ Par. 3. Section 1.954–3T is removed.

Approved: December 6, 2011.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2011–32394 Filed 12–15–11; 11:15 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9567]

RIN 1545–BK17

Reporting of Specified Foreign Financial Assets

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the provisions of the Hiring Incentives to Restore Employment (HIRE) Act that require foreign financial assets to be reported to the Internal Revenue Service for taxable years beginning after March 18, 2010. In particular, the temporary regulations provide guidance relating to the requirement that individuals attach a statement to their income tax return to provide required information regarding foreign financial assets in which they have an interest. The temporary regulations affect individuals required to file Form 1040, ''U.S. Individual Income Tax Return,'' and certain individuals required to file Form 1040–NR, ''Nonresident Alien Income Tax Return.'' The text of these temporary regulations also serves as the text of proposed regulations contained in a cross-reference notice of proposed rulemaking (REG–130302–10) published in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on December 19, 2011.

Applicability Dates: For dates of applicability, see §§ 1.6038D–1T(b), 1.6038D–2T(e), 1.6038D–3T(e), 1.6038D–4T(b), 1.6038D–5T(g), 1.6038D–7T(d), and 1.6038D–8T(g).

FOR FURTHER INFORMATION CONTACT: Joseph S. Henderson, (202) 622–3880 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These temporary regulations are being issued without prior notice and public comment pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and pending receipt and evaluation of public comments, approved by the Office of Management and Budget under Control Number 1545–2195. Responses to this collection of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. The collection of information contained in these regulations is satisfied by filing Form 8938, ''Statement of Specified Foreign Financial Assets,'' OMB No. 1545–2195, with the respondent's income tax return.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**.

Books and 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.

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) for reporting specified foreign financial assets under section 6038D of the Internal Revenue Code (Code).

Section 6038D was enacted by section 511 of the HIRE Act. Section 6038D(a) requires an individual who holds any interest in a specified foreign financial asset during the taxable year to attach a statement to that individual's return of tax imposed by subtitle A of the Code to report the information identified in section 6038D(c), if the aggregate value of the specified foreign financial assets in which the individual holds an interest exceeds $50,000 for the taxable year, or such higher dollar amount as the Secretary may prescribe.

Section 6038D(b) defines specified foreign financial assets. For purposes of section 6038D, a specified foreign financial asset is any financial account maintained by a foreign financial institution and, to the extent not held in an account at a financial institution: (i) Any stock or security issued by any person other than a United States person; (ii) any financial instrument or contract held for investment that has an issuer or counterparty that is not a United States person; and (iii) any interest in a foreign entity.

Section 6038D(c) sets forth the information an individual must include on the statement reporting specified foreign financial assets. For a financial account, the name and address of the financial institution in which the account is maintained must be reported, as well as the account number. For any stock or security, the name and address of the non-U.S. issuer, as well as information necessary to identify the class or issue of which the stock or security is a part, must be reported. In the case of any other instrument, contract, or interest, the names and addresses of all issuers and counterparties must be reported, together with the information necessary to identify the instrument, contract, or interest. The maximum value of each specified foreign financial asset during the taxable year also must be reported.

An individual who fails to disclose the information required to be reported

by section 6038D(c) is subject to a $10,000 penalty under section 6038D(d)(1). Section 6038D(d)(2) provides that if the failure to comply continues for more than 90 days after the day on which the Secretary mails notice of the failure to the individual, the individual must pay an additional penalty of $10,000 for each 30-day period (or fraction thereof) during which the failure to disclose continues after the expiration of the 90-day period. This continuation penalty is not to exceed $50,000 with respect to any such failure.

Under section 6038D(e), the aggregate value of any specified foreign financial assets in which an individual has an interest is presumed to exceed the reporting thresholds set forth in section 6038D(a) if the Secretary determines that the individual has an interest in one or more specified foreign financial assets and has not provided sufficient information to demonstrate the aggregate value of the assets. This presumption applies for purposes of assessing the penalties imposed under section 6038D.

Section 6038D(f) authorizes the Secretary to issue regulations or other guidance applying the provisions of section 6038D to any domestic entity as if the domestic entity were an individual, if the domestic entity is formed or availed of for the purposes of holding, directly or indirectly, specified foreign financial assets.

Section 6038D(g) provides that no penalty will be imposed by section 6038D for any failure to report that is shown to be due to reasonable cause and not due to willful neglect. A foreign law restriction, whether civil or criminal, on disclosing the information required to be reported is not reasonable cause.

Section 6038D(h) authorizes the Secretary to issue regulations or other guidance as may be necessary or appropriate to carry out the purposes of section 6038D. This guidance may include appropriate exceptions from reporting for nonresident aliens, bona fide residents of U.S. possessions, and classes of assets identified by the Secretary, such as assets subject to duplicative reporting requirements. The term ''U.S. possession'' means American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the U.S. Virgin Islands, each of which is generally referred to as a U.S. territory in this explanation.

Section 6038D is effective for taxable years beginning after March 18, 2010 (the date of enactment of the HIRE Act). Notice 2011–55, 2011–29 IRB 53 (July 18, 2011), provides that an individual that has a taxable year that begins after March 18, 2010, and is required to attach a statement of specified foreign financial assets to an annual return to be filed prior to the issuance of Form 8938, ''Statement of Specified Foreign Financial Assets,'' is to satisfy his or her obligation under section 6038D for such taxable year by attaching Form 8938 for such taxable year to his or her next annual return required to be filed after the issuance of Form 8938. *See § 601.601(d)(2)(ii)(b) of this chapter.*

Explanation of Provisions

1. Requirement To Report Specified Foreign Financial Assets

Section 1.6038D–1T sets forth the definitions of certain terms for purposes of section 6038D and the regulations. Section 1.6038D–2T provides rules for determining if a specified individual (as defined in § 1.6038D–1T(a)(2)) or a specified domestic entity (collectively referred to as a specified person) must file a Form 8938 with the specified person's annual return (as defined in § 1.6038D–1T(a)(11)).

For purposes of section 6038D, a specified person's annual return includes an annual federal income tax return of a specified individual or an annual federal income tax return or information return of a specified domestic entity filed with the Internal Revenue Service under section 876, 6011, 6012, 6013, 6031, or 6037, and the regulations . For example, a partnership that is a specified domestic entity is required to attach Form 8938 to its Form 1065, ''U.S. Return of Partnership Income,'' for the taxable year.

A specified person must file Form 8938 if the person has an interest in one or more specified foreign financial assets and those assets have an aggregate fair market value exceeding either $50,000 on the last day of the taxable year or $75,000 at any time during the taxable year. Married specified individuals filing a joint annual return are not required to file Form 8938 unless the aggregate value of all of the specified foreign financial assets in which either spouse has an interest exceeds $100,000 on the last day of the taxable year or $150,000 at any time during the taxable year.

An individual residing outside the United States can reasonably be expected to have a greater amount of specified foreign financial assets for reasons unrelated to the policies underlying section 6038D. Accordingly, the regulations increase the reporting threshold of section 6038D(a) in the case of a specified individual who is a qualified individual under section 911(d)(1). The regulations provide that such a specified individual is not required to file Form 8938 unless the aggregate value of the specified foreign financial assets in which the specified individual has an interest exceeds $200,000 on the last day of the taxable year or $300,000 at any time during the taxable year. If married specified individuals file a joint annual return and either spouse is a qualified individual under section 911(d)(1), the regulations provide that they are not required to file Form 8938 unless the aggregate value of all of the specified foreign financial assets in which either spouse has an interest exceeds $400,000 on the last day of the taxable year or $600,000 at any time during the taxable year.

As discussed in section 6 of this explanation, certain specified foreign financial assets are excepted from the reporting obligations imposed under section 6038D. Assets reported by a specified person on certain other forms timely filed with the Internal Revenue Service are not required to be separately identified on Form 8938, but if a specified person is required to file Form 8938, the number of such other forms filed with the Internal Revenue Service must be reported on Form 8938. In addition, the value of specified foreign financial assets that qualify for this exception is included for purposes of determining whether the aggregate value of specified foreign financial assets in which a specified individual has an interest exceeds the applicable reporting threshold.

Another category of assets excepted from reporting are assets considered owned by a specified person that is treated as the owner of certain trusts. Additionally, certain assets held by a specified individual who is a bona fide resident of a U.S. territory are also excepted from reporting. Specified foreign financial assets that qualify for either of these two exceptions are not included for purposes of determining whether the aggregate value of specified foreign financial assets in which a specified person has an interest exceeds the applicable reporting threshold.

The Form 8938 reporting period is the taxable year for a specified individual who is a U.S. citizen, a resident alien, or a bona fide resident of a U.S. territory for the entire taxable year. The Form 8938 reporting period for a specified domestic entity is the entity's taxable year. The Form 8938 reporting period for a specified individual who is a U.S. citizen or resident alien for less than the entire taxable year is the portion of the taxable year for which the specified individual is a U.S. citizen or resident

alien. The Form 8938 reporting period for a specified individual who is bona fide resident of Puerto Rico for less than the entire taxable year under § 1.937–1(f)(2)(ii) is the portion of the taxable year for which the specified individual is a U.S. citizen.

A specified person is not required to file Form 8938 for any taxable year for which the specified person is not required to file an annual return (for example, a Form 1040, ''U.S. Individual Income Tax Return,'' Form 1041, ''U.S. Income Tax Return for Estates and Trusts,'' Form 1120, ''U.S. Corporation Income Tax Return,'' Form 1120–S, ''U.S. Income Tax Return for an S Corporation,'' or Form 1065, ''U.S. Return of Partnership Income'') with the Internal Revenue Service.

If a specified domestic entity is a member of an affiliated group of corporations that files a consolidated return, the Form 8938 of the specified domestic entity must be filed with the consolidated federal income tax return of the affiliated group.

A. Individuals Required To File Form 8938, ''Statement of Specified Foreign Financial Assets''

For section 6038D purposes, a specified individual is a U.S. citizen, a resident alien of the United States (as determined under section 7701(b) and §§ 301.7701(b)–1 through 301.7701(b)–9 of this chapter), or a nonresident alien who has elected under section 6013(g) or (h) to be taxed as a U.S. resident. A resident alien who elects to be taxed as a resident of a foreign country pursuant to a U.S. income tax treaty's residency tie-breaker rules is a specified individual for purposes of section 6038D and the regulations.

In addition, certain nonresident aliens who are treated as residents under other sections of the Code are specified individuals for the purposes of section 6038D and the regulations . Under section 876 and § 1.876–1, nonresident alien individuals of the United States under section 7701(b) who are bona fide residents of Puerto Rico or a section 931 possession (as defined in § 1.931–1(c)(1)) are subject to tax under sections 1 and 55 in generally the same manner as a U.S. resident. Therefore, the rules under section 6038D apply to a nonresident alien who is a bona fide resident of Puerto Rico or American Samoa in the same manner as they apply to a U.S. citizen or resident.

As noted in this preamble, a specified person is not required to file Form 8938 if the specified person is not required to file an annual return with the Internal Revenue Service. With respect to bona fide residents of U.S. territories, this rule means that a bona fide resident of a U.S. territory has a filing requirement under section 6038D and the regulations only if he or she is required to file a federal income tax return for the taxable year. In general, bona fide residents of the U.S. Virgin Islands and U.S. territories to which section 935 applies (currently, Guam and the Northern Mariana Islands) are not required to file a federal income tax return provided they correctly report and pay tax on their worldwide income to their U.S. territory taxing authority. Bona fide residents of Puerto Rico or a section 931 possession (currently, American Samoa) generally are required to file a federal income tax return with the Internal Revenue Service only if they have income from sources without the relevant U.S. territory, because sections 931(a) and 933 generally exclude from gross income any income derived from sources within the relevant U.S. territory. Section 6038D and these regulations generally require only bona fide residents of Puerto Rico or a section 931 possession that are required to file a federal income tax return with the Internal Revenue Service to file a Form 8938 with the Internal Revenue Service.

B. Interest in a Specified Foreign Financial Asset

For section 6038D purposes, a specified person is generally considered to have an interest in a specified foreign financial asset if any income, gains, losses, deductions, credits, gross proceeds, or distributions attributable to the holding or disposition of the asset are or would be required to be reported, included, or otherwise reflected on the specified person's annual return filed with the Internal Revenue Service (even if no income, gains, losses, deductions, credits, gross proceeds, or distributions are attributable to the asset for a particular taxable year).

For purposes of section 6038D and the regulations, a parent that makes an election under section 1(g)(7) to include certain unearned income of a child in the parent's gross income required to be reported for the taxable year has an interest in any specified foreign financial asset held by the child.

A specified person that is the owner of an entity disregarded as an entity separate from its owner (as provided in § 301.7701–2(c)(2)(i) of this chapter) (disregarded entity) is treated as having an interest in any specified foreign financial assets held by the disregarded entity. A specified person that is treated as the owner of a trust or any portion of a trust under sections 671 through 679 is treated as having an interest in any specified foreign financial assets held by the trust or by the portion of the trust that the specified person owns, except as described in section 6(B) of this explanation. A specified person is not treated as having an interest in any specified foreign financial assets held by a partnership, corporation, trust (except as described in this explanation), or estate solely as a result of the specified person's status as a partner, shareholder, or beneficiary.

C. Jointly Owned Assets

A joint interest in a specified foreign financial asset is subject to reporting under section 6038D and § 1.6038D–2T(a) by each specified person that is a joint owner of the asset. In general, each joint owner includes the full value of the jointly owned asset for purposes of determining whether the aggregate value of all specified foreign financial assets in which the joint owner has an interest exceeds the reporting thresholds set forth in § 1.6038D–2T(a).

1. *Married individuals filing jointly.*

Married specified individuals who file a joint annual return for the taxable year must fulfill their reporting requirements under section 6038D and § 1.6038D–2T(a) by filing a single Form 8938 that reports all of the specified foreign financial assets in which either married specified individual has an interest. A specified foreign financial asset that is jointly owned by married specified individuals or a specified foreign financial asset held by a child for which the married specified individuals have made an election under section 1(g)(7) is reported once on the single Form 8938. Married specified individuals who file a joint annual return include the value of a specified foreign financial asset that they jointly own together or a specified foreign financial asset held by a child for which they have made an election under section 1(g)(7) only once in determining whether the aggregate value of all of the specified foreign financial assets in which either married specified individual has an interest exceeds the appropriate reporting threshold set forth in § 1.6038D–2T(a).

2. *Married individuals filing separately.*

A married specified individual who files a separate annual return for the taxable year must fulfill the reporting requirements under section 6038D and § 1.6038D–2T(a) by filing a separate Form 8938 that reports all of the specified foreign financial assets in which the married specified individual has an interest, including assets jointly owned with the married specified individual's spouse. A married specified individual that files a separate annual

return and whose spouse is a specified person includes only one-half of the value of a specified foreign financial asset that the married specified individual jointly owns with his or her spouse in determining whether the married specified individual has an interest in specified foreign financial assets the aggregate value of which exceeds the appropriate reporting threshold set forth in § 1.6038D–2T(a).

2. Specified Foreign Financial Assets

For purposes of section 6038D, specified foreign financial assets include financial accounts maintained by foreign financial institutions, as well as certain other foreign financial assets or instruments. An asset or instrument may be a specified foreign financial asset subject to reporting under section 6038D and the regulations even if the asset or instrument does not have a positive value.

A. Financial Account Maintained by a Foreign Financial Institution

For purposes of section 6038D, a financial account is defined by reference to section 1471(d)(2) and the regulations.

A foreign financial institution is defined by reference to section 1471(d)(4). For this purpose, a foreign financial institution is a financial institution (as determined under section 1471(d)(5)) that is a foreign entity (as determined under section 1473(5)). Under section 1471(d)(5), a financial institution is any entity that—

(1) Accepts deposits in the ordinary course of a banking or similar business;

(2) Holds financial assets for the account of others as a substantial portion of its business; or

(3) Is engaged, or holds itself out as being engaged, primarily in the business of investing, reinvesting, or trading in securities (as defined in section 475(c)(2) without regard to the last sentence thereof), partnership interests, commodities (as defined in section 475(e)(2)), or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.

Notwithstanding that a financial institution organized under the laws of a U.S. territory is not generally a foreign financial institution for purposes of section 1471(d)(4), for purposes of section 6038D and the regulations, a specified foreign financial asset includes a financial account maintained by a financial institution organized under the laws of a U.S. territory. Accordingly, such an account must be reported, except when owned by a bona fide resident of the relevant U.S. territory.

A financial account maintained by a U.S. payor as defined in § 1.6049–5(c)(5)(i) (including assets held in such an account) is not a specified foreign financial asset for purposes of section 6038D and the regulations thereunder. For example, a specified person is not required to report a financial account maintained by a U.S. branch of a foreign financial institution described in § 1.1441–1(b)(2)(iv).

An asset held in a financial account maintained by a foreign financial institution is not required to be reported on Form 8938 separately from the reported financial account in which the asset is held. The value of an asset held in a financial account maintained by a foreign financial institution is included in determining the maximum value of that account.

B. Other Specified Foreign Financial Assets

Under § 1.6038D–3T(b), specified foreign financial assets also include certain assets that are held outside of a financial account maintained by a financial institution. Specifically, a specified foreign financial asset includes any asset that is held for investment and is described in one or more of the following three categories: Stock or securities issued by a person other than a U.S. person; a financial instrument or contract issued by a person other than a U.S. person or that has a counterparty that is a person other than a U.S. person; and any interest in a foreign entity. For these purposes, a U.S. person is defined under section 7701(a)(30). Whether an entity is a foreign entity is determined under section 1473(5). These three categories are broad and overlap in certain cases such that an asset not held in a financial account may be within more than one of the statutory categories of section 6038D(b)(2). For example, stock issued by a foreign corporation is stock that is issued by a person other than a U.S. person, and is also an interest in a foreign entity.

An asset not held in an account maintained by a financial institution is held for investment for purposes of section 6038D and the regulations if the asset is not used or held for use in the specified person's trade or business. For purposes of determining whether an asset is used or held for use in the specified person's trade or business, the regulations apply principles based on the asset-use test of § 1.864–4(c)(2), with certain modifications. The regulations provide that stock is never considered to be used or held for use in a trade or business in applying the trade or business exception. The Department of the Treasury and the Internal Revenue Service believe this rule is appropriate given the broad exception for section 475 mark-to-market accounting discussed in section 2(D) of this explanation, and the exception from reporting for stock held in a financial account maintained by a foreign financial institution (provided the financial account is reported on Form 8938). The Department of the Treasury and the Internal Revenue Service request comments that concern the treatment of stock under these regulations and, more generally, what refinements, if any, to the regulation's trade or business standard would facilitate the implementation of the trade or business reporting exception.

C. Special Rule for Foreign Estates and Foreign Trusts

A beneficial interest in a foreign trust or a foreign estate is not a specified foreign financial asset of a specified person unless the specified person knows or has reason to know based on readily accessible information of the interest. Receipt of a distribution from the foreign trust or foreign estate is deemed for this purpose to be actual knowledge of the interest.

D. Assets Not Subject to Reporting Under Section 6038D

The following assets are not specified foreign financial assets—

(1) An asset for which a specified person uses mark-to-market accounting under section 475;

(2) A financial account maintained by a foreign financial institution for which the specified person uses mark-to-market accounting under section 475 for all of the holdings in the account; and

(3) An interest in a social security, social insurance, or other similar program of a foreign government.

3. Required Information

A specified person required to report on Form 8938 must provide the following information with regard to each specified foreign financial asset:

(A) In the case of a financial account maintained by a foreign financial institution, the name and address of the foreign financial institution and the account number of the account;

(B) In the case of stock or a security, the name and address of the issuer, and information that identifies the class or issue of which the stock or security is a part;

(C) In the case of a financial instrument or contract held for investment, information that identifies

the financial instrument or contract, including the names and addresses of all issuers and counterparties;

(D) In the case of an interest in a foreign entity, information that identifies the interest, including the name and address of the entity;

(E) The maximum value of the specified foreign financial asset during the portion of the taxable year in which the specified person has an interest in the asset;

(F) In the case of a financial account that is a depository or custodial account under section 1471(d)(2), whether such financial account was opened or closed during the taxable year;

(G) The date, if any, on which the specified foreign financial asset, other than a financial account that is a depository or custodial account under section 1471(d)(2), was either acquired or disposed of (or both) during the taxable year;

(H) The amount of any income, gain, loss, deduction, or credit recognized for the taxable year with respect to the reported specified foreign financial asset, and the schedule, form, or return filed with the Internal Revenue Service on which the income, gain, loss, deduction, or credit, if any, is reported or included by the specified person;

(I) The foreign currency exchange rate and, if the source of such rate is other than as described in § 1.6038D–5T(d)(1), the source of the rate used to determine the specified foreign financial asset's U.S. dollar value, including maximum value; and

(J) For a specified foreign financial asset excepted from reporting on Form 8938 under § 1.6038D–7T(a), the specified person must report the number of each type of form on which the asset is reported directly (for example, Form 3520, ''Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts,'' Form 3520–A, ''Annual Information Return of Foreign Trust With a U.S. Owner,'' Form 5471, ''Information Return of U.S. Persons With Respect To Certain Foreign Corporations,'' Form 8621, ''Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund,'' Form 8865, ''Return of U.S. Persons With Respect To Certain Foreign Partnerships,'' or Form 8891, ''U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans.'')

4. Valuation Guidelines

The value of a specified foreign financial asset must be determined both for purposes of determining if the aggregate value of the specified foreign financial assets in which a specified person holds an interest exceeds the reporting thresholds set forth in § 1.6038D–2T(a) and for purposes of reporting the maximum value of a specified foreign financial asset on Form 8938 as required by § 1.6038D–4T(a)(5). Under § 1.6038D–5T, the value of a specified foreign financial asset for both of these purposes generally is the asset's fair market value. The maximum value of a specified foreign financial asset is the asset's highest fair market value during the taxable year, except as otherwise provided in § 1.6038D–5T, and must be reported on Form 8938 in U.S. dollars. If the maximum value of a specified foreign financial asset is less than zero, the value of the specified foreign financial asset is treated as zero for the purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest and determining the maximum value of a specified foreign financial asset required to be reported on Form 8938.

A. Foreign Currency Conversion

If a specified foreign financial asset is denominated in a foreign currency, the value of the asset for purposes of determining both the aggregate value of specified foreign financial assets in which a specified person holds an interest and the maximum value of the specified foreign financial asset is first determined in the foreign currency prior to conversion into U.S. dollars (that is, independently of exchange rate fluctuations during the year). The asset's foreign currency value is then converted into U.S. dollars at the taxable year-end spot rate for converting the foreign currency into U.S. dollars (that is, the rate to purchase U.S. dollars). The U.S. Treasury Department's Financial Management Service foreign currency exchange rate is to be used to convert the value of a specified foreign financial asset into U.S. dollars. If no U.S. Treasury Department Financial Management Service foreign currency exchange rate is available, another publicly available foreign currency exchange rate may be used to determine an asset's maximum value, but the use of such rate must be disclosed on Form 8938.

B. Valuing Financial Accounts

The maximum value of a financial account means a reasonable estimate of the maximum value of the holdings of the financial account at any time during the taxable year. Periodic account statements provided at least annually may be relied upon for reporting a financial account's maximum value absent actual knowledge or reason to know based on readily accessible information that the statements do not reflect a reasonable estimate of the maximum account value during the taxable year.

C. Valuing Other Specified Foreign Financial Assets

Except as described in sections 5(D) and 5(E) of this explanation, for purposes of determining the maximum value of a specified foreign financial asset other than a financial account maintained with a foreign financial institution, a specified person may treat the asset's fair market value on the last day during the taxable year on which the specified person has an interest in the asset as the maximum value of the asset. The specified person may not use this valuation approach if the specified person has actual knowledge or reason to know based on readily accessible information that the fair market value determined as of such date does not reflect a reasonable estimate of the maximum value of the asset during the year (for example, because there is a reason to know that the asset's value declined significantly during the year).

A specified person may determine the fair market value of a specified foreign financial asset based on information publicly available from reliable financial information sources or from other verifiable sources. Even if there is no information from reliable financial information sources regarding the fair market value of a reported asset, the regulations do not require a specified person to obtain an appraisal by a third party in order to reasonably estimate the asset's fair market value.

D. Special Valuation Rules for Interests in Foreign Trusts

If a specified person is a beneficiary of a foreign trust, the maximum value of the specified person's interest in the trust is the sum of the fair market value, determined as of the last day of the taxable year, of all of the currency or other property distributed from the foreign trust during the taxable year to the specified person, plus the value as of the last day of the taxable year of the specified person's right as a beneficiary to receive mandatory distributions from the foreign trust as determined under section 7520.

For purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest, if the specified person does not know or have reason to know based on readily accessible information the fair market value of the person's interest in a foreign trust

during the taxable year, the value to be included in determining the aggregate value of the specified foreign financial assets is the maximum value of the specified person's interest in the foreign trust.

E. Special Valuation Rule for Interests in Foreign Estates, Pension Plans, and Deferred Compensation Plans

The maximum value of a specified person's interest in a foreign estate, foreign pension plan, or a foreign deferred compensation plan is the fair market value, determined as of the last day of the taxable year, of the specified person's beneficial interest in the assets of the foreign estate, foreign pension plan, or foreign deferred compensation plan. If the specified person does not know or have reason to know based on readily accessible information such fair market value, the maximum value to be reported is the fair market value, determined as of the last day of the taxable year, of the currency and other property distributed during the taxable year to the specified person as a beneficiary or participant.

For purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest, if the specified person does not know or have reason to know based on readily accessible information the fair market value of the person's interest in a foreign estate, foreign pension plan, or foreign deferred compensation plan during the taxable year, the value to be included in determining the aggregate value of the specified foreign financial assets is the fair market value, determined as of the last day of the taxable year, of the currency and other property distributed during the taxable year to the specified person as a beneficiary or participant.

F. Jointly Owned Assets

Except for certain married specified individuals who jointly own a specified foreign financial asset with a spouse, a specified person that jointly owns a specified foreign financial asset must use the value of the entire asset, and not the value of the specified person's separate interest, for purposes of determining whether the reporting thresholds set forth in § 1.6038D–2T(a) are exceeded. A specified person, including a married specified individual, that jointly owns a specified foreign financial asset must report the maximum value of the entire asset during the portion of the taxable year that the specified person has an interest in the asset. Married specified individuals that jointly own a specified foreign financial asset and that file a joint annual income return tax are only required to report the asset once on the single Form 8938 filed with their return.

5. Application to Entities Formed or Availed of for Purposes of Holding, Directly or Indirectly, Specified Foreign Financial Assets

The notice of proposed rulemaking accompanying these regulations (REG–130302–10) includes Prop. Reg. § 1.6038D–6, which applies section 6038D to certain domestic entities that are formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets. The Department of the Treasury and the Internal Revenue Service anticipate that Prop. Reg. § 1.6038D–6 will be issued as a final regulation during 2012 and will apply to taxable years beginning after December 31, 2011. Until Prop. Reg. § 1.6038D–6 is issued as a final regulation, no domestic entity is required to file Form 8938 to report specified foreign financial assets with its annual return.

6. Exceptions From the Application of Section 6038D

A. Duplicative Reporting of Assets

A specified person required to file Form 8938 with the Internal Revenue Service is not required to report a specified foreign financial asset on Form 8938 if the asset is reported or reflected on a Form 3520 (in the case of a specified person who is the beneficiary of a foreign trust), Form 5471, Form 8621, Form 8865, or Form 8891 timely filed with the Internal Revenue Service by the specified person for the taxable year, and the Form 8938 indicates the filing of the form on which the asset is reported.

A specified person required to file Form 8938 that is treated as an owner of a foreign trust or any portion of such a trust under sections 671 through 679 is not required to report any specified foreign financial asset held by the trust on Form 8938 provided the specified person reports the trust on a Form 3520 timely filed with the Internal Revenue Service for the taxable year, the trust timely files Form 3520–A with the Internal Revenue Service for the taxable year, and the Form 8938 filed by the specified person for the taxable year indicates the filing of the Form 3520 and the Form 3520–A.

B. Owner of Certain Trusts

A specified person that is treated as an owner of a domestic liquidating trust described in § 301.7701–4(d) of this chapter created pursuant to a court order issued in a bankruptcy under Chapter 7 (11 U.S.C. 701 *et seq.*) or a confirmed plan under Chapter 11 (11 U.S.C. 1101 *et seq.*) of the Bankruptcy Code, a domestic widely held fixed investment trust under § 1.671–5, or any portion of such a trust under sections 671 through 679 is not required to file Form 8938 to report any specified foreign financial asset held by the trust.

C. Certain Specified Foreign Financial Assets Held by a Bona Fide Resident of a U.S. Territory

As described in section 1(A) of this explanation, bona fide residents of the U.S. Virgin Islands and U.S. territories to which section 935 applies (currently, Guam and the Northern Mariana Islands) generally are not required to file a federal income tax return and, therefore, generally would not be required to file a Form 8938 with the Internal Revenue Service. By contrast, certain bona fide residents of Puerto Rico or a section 931 possession as defined in § 1.931–1(c)(1) (currently, American Samoa) who have income from sources outside their U.S. territory of residence may be required to file a federal income tax return; thus, the reporting requirements of section 6038D and the regulations may apply to such persons.

No reporting is required by a bona fide resident of a U.S. territory with respect to certain specified foreign financial assets that have certain connections to the U.S. territory of which the individual is a bona fide resident. Reporting is not required with respect to a financial account maintained by a financial institution organized under the laws of the U.S. territory of which the specified person is a bona fide resident. Reporting also is not required with respect to a financial account maintained by a branch of a financial institution not organized under the laws of the U.S. territory of which the specified person is a bona fide resident, if the branch is subject to the same income tax and information reporting requirements applicable to a financial institution organized under the laws of the U.S. territory.

Reporting is also not required with respect to stock or securities or any other interest in an entity organized under the laws of the U.S. territory of which the specified person is a bona fide resident. Similarly, reporting is not required with respect to a financial instrument or contract held for investment if the issuer or counterparty is: (i) An entity organized under the laws of the U.S. territory of which the specified person is a bona fide resident; or (ii) a bona fide resident of the U.S.

territory of which the specified person is a bona fide resident.

These reporting exceptions for certain U.S. territory-connected assets do not apply to assets held by a U.S. citizen or resident who is not a bona fide resident of any U.S. territory or an individual who is a bona fide resident of a U.S. territory other than the one to which the assets are connected.

D. Form TD F 90–22.1, ''Report of Foreign Bank and Financial Accounts'' (FBAR)

Reporting on Form TD F 90–22.1 is required under Title 31 (31 U.S.C. 5314) for other law enforcement purposes in addition to tax administration. As a consequence, different policy considerations apply to Form 8938 and FBAR reporting. These are reflected in the different categories of persons required to file Form 8938 and the FBAR, the different filing thresholds for Form 8938 and FBAR reporting, and the different assets (and accompanying information) required to be reported on each form. Although certain information may be reported on both Form 8938 and the FBAR, the information required by the forms is not identical in all cases, and reflects the different rules, key definitions (for example, ''financial account''), and reporting requirements applicable to Form 8938 and FBAR reporting.

These differing policy considerations were recognized during the passage of the HIRE Act and the enactment of section 6038D, and the intention to retain FBAR reporting notwithstanding the enactment of section 6038D was specifically noted in the Technical Explanation Of The Revenue Provisions Contained In Senate Amendment 3310, The ''Hiring Incentives To Restore Employment Act,'' Under Consideration by the Senate (Staff of the Joint Comm. on Taxation, JCX–4–10 (February 23, 2010)) (Technical Explanation) accompanying the HIRE Act. The Technical Explanation states that ''[n]othing in this provision [section 511 of the HIRE Act enacting section 6038D] is intended as a substitute for compliance with the FBAR reporting requirements, which are unchanged by this provision.'' (Technical Explanation at p. 60). Against this background, reporting on Form 8938 and the FBAR is not duplicative and both forms must be filed, if required.

7. Penalties for Failure To Disclose

A. In General

If a specified person fails to file a Form 8938 that includes the information required by section 6038D(c) and § 1.6038D–4T with respect to any taxable year at the time and in the manner described in section 6038D(a) and § 1.6038D–2T, a penalty of $10,000 will apply to that specified person under section 6038D(d) and § 1.6038D–8T. If any such failure continues for more than 90 days after the day on which the Commissioner or his delegate mails a notice of the failure to the specified person required to file the Form 8938, the specified person is subject to an additional penalty of $10,000 for each 30-day period (or fraction thereof) during which the failure continues after the 90-day period has expired. The additional (or continuation) penalty is limited to a maximum of $50,000 for each such failure.

Married specified individuals who file a joint annual return and fail to file a required Form 8938, ''Statement of Specified Foreign Financial Assets,'' that includes the information required by section 6038D(c) and § 1.6038D–4T with respect to any taxable year at the time and in the manner described in section 6038D(a) and § 1.6038D–2T are subject to penalties under section 6038D(d) and § 1.6038D–8T as if the married specified individuals are a single specified person. The liability of married specified individuals who file a joint annual return with respect to penalties under this section is joint and several.

B. Presumption of Aggregate Value

For the purpose of assessing the penalties for failure to disclose, if the Commissioner or his delegate determines that a specified person has an interest in one or more specified foreign financial assets, and the specified person has not provided sufficient information to demonstrate the aggregate value of the assets upon request by the Secretary, then the aggregate value of the assets is treated as being in excess of the applicable reporting threshold set forth in § 1.6038D–2T(a).

C. Reasonable Cause Exception

If a specified person shows that the failure to report the information required under section 6038D and § 1.6038D–4T is due to reasonable cause and not due to willful neglect, no penalty will be imposed under section 6038D(d) or § 1.6038D–8T. To show that the failure to report is due to reasonable cause and not due to willful neglect, the specified person must make an affirmative showing of all the facts alleged as reasonable cause for the failure to report.

The determination of whether a failure to disclose a specified foreign financial asset on Form 8938 was due to reasonable cause and not due to willful neglect is made on a case-by-case basis, taking into account all pertinent facts and circumstances. For this purpose, the fact that a foreign jurisdiction would impose a civil or criminal penalty on the specified person (or any other person) for disclosing the required information is not reasonable cause.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. 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. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Joseph S. Henderson, Office of Associate Chief Counsel (International). However, other personnel from the Internal Revenue Service and the Treasury Department participated in the development of the regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.6038D–0T also issued under 26 U.S.C. 6038D.

Section 1.6038D–1T also issued under 26 U.S.C. 6038D.

Section 1.6038D–2T also issued under 26 U.S.C. 6038D.

Section 1.6038D–3T also issued under 26 U.S.C. 6038D.

Section 1.6038D–4T also issued under 26 U.S.C. 6038D.
Section 1.6038D–5T also issued under 26 U.S.C. 6038D.
Section 1.6038D–7T also issued under 26 U.S.C. 6038D.
Section 1.6038D–8T also issued under 26 U.S.C. 6038D.* * *

■ **Par. 2.** Section 1.6038D–0T is added to read as follows:

§ 1.6038D–0T Outline of regulation provisions (temporary).

This section lists the table of contents for §§ 1.6038D–1T through 1.6038D–8T.

§ 1.6038D–1T Reporting with respect to specified foreign financial assets, definition of terms (temporary).

(a) In general.
(1) Specified person.
(2) Specified individual.
(3) Resident alien.
(4) Bona fide resident of a U.S. possession.
(5) U.S. possession.
(6) Specified foreign financial asset.
(7) Financial account.
(8) Financial institution.
(9) Foreign financial institution.
(10) Foreign entity.
(11) Annual return.
(12) Specified domestic entity. [Reserved]
(b) Effective/applicability dates.
(c) Expiration date.

§ 1.6038D–2T Requirement to report specified foreign financial assets (temporary).

(a) Reporting requirement.
(1) In general.
(2) Special rule for married specified individuals filing a joint annual return.
(3) Special rule for certain specified individuals living abroad.
(4) Special rule for qualified individuals filing a joint annual return.
(5) Assets with no positive value.
(6) Excepted assets.
(7) Form 8938 filed with annual return.
(i) General rule.
(ii) Consolidated returns.
(8) Reporting required regardless of tax result.
(9) Reporting period.
(10) Successor forms.
(b) Interest in a specified foreign financial asset.
(1) In general.
(2) Special rule for parent making an election under section 1(g)(7).
(3) Entities.
(c) Special rules for joint interests.
(1) Aggregate value of assets.
(i) Specified persons.
(ii) Married specified individuals.
(2) Annual return filed by married specified individual.
(i) Joint annual return.
(ii) Separate annual return.
(d) Example.
(1) Facts.
(2) Filing requirement.
(i) Married specified individuals filing separate annual returns.
(ii) Married specified individuals filing a joint annual return.
(e) Effective/applicability dates.
(f) Expiration date.

§ 1.6038D–3T Specified foreign financial assets (temporary).

(a) Financial accounts.
(1) In general.
(2) Financial account in a U.S. possession.
(3) Excepted financial accounts.
(i) Accounts maintained by U.S. payors.
(ii) Mark-to-market election under section 475.
(b) Other specified foreign financial assets.
(1) In general.
(2) Mark-to-market election under section 475.
(3) Held for investment.
(4)Trade-or-business test.
(5) Direct relationship between holding an asset and a trade or business.
(i) In general.
(ii) Presumption of direct relationship.
(c) Special rule for interests in foreign trusts and foreign estates.
(d) Examples.
(e) Effective/applicability dates.
(f) Expiration date.

§ 1.6038D–4T Information required to be reported (temporary).

(a) Required information.
(b) Effective/applicability dates.
(c) Expiration date.

§ 1.6038D–5T Valuation guidelines (temporary).

(a) Fair market value.
(b) Valuation of assets.
(1) Maximum value.
(2) U.S. dollars.
(3) Asset with no positive value.
(c) Foreign currency conversion.
(1) In general.
(2) Other publicly available exchange rate.
(3) Currency exchange rate.
(4) Determination date.
(d) Financial accounts.
(e) Asset held in a financial account.
(f) Other specified foreign financial assets.
(1) General rule.
(2) Interests in trusts that are specified foreign financial assets.
(i) Maximum value.
(ii) Reporting threshold.
(3) Interests in estates, pension plans, and deferred compensation plans.
(i) Maximum value.
(ii) Reporting threshold.
(g) Effective/applicability dates.
(h) Expiration date.

§ 1.6038D–6T Specified domestic entities (temporary). [Reserved]

§ 1.6038D–7T Exceptions from the reporting of certain assets under Section 6038D (temporary).

(a) Elimination of duplicative reporting of assets.
(1) In general.
(2) Foreign grantor trusts.
(b) Owner of certain trusts.
(c) Bona fide resident of a U.S. possession.
(d) Effective/applicability dates.
(e) Expiration date.

§ 1.6038D–8T Penalties for failure to disclose (temporary).

(a) In general.
(b) Married specified individuals filing a joint annual return.
(c) Increase in penalty.
(d) Presumption of aggregate value.
(e) Reasonable cause exception.
(1) In general.
(2) Affirmative showing required.
(3) Facts and circumstances taken into account.
(f) Penalties for underpayments attributable to undisclosed foreign financial assets.
(1) Accuracy related penalty.
(2) Criminal penalties.
(g) Effective/applicability dates.
(h) Expiration date.

■ **Par. 3.** Section 1.6038D–1T is added to read as follows:

§ 1.6038D–1T Reporting with respect to specified foreign financial assets, definition of terms (temporary).

(a) *In general.* The following definitions apply for purposes of section 6038D and the regulations—

(1) *Specified person.* The term *specified person* means a specified individual or a specified domestic entity.

(2) *Specified individual.* The term *specified individual* means an individual who is a—

(i) U.S. citizen;

(ii) Resident alien of the United States for any portion of the taxable year;

(iii) Nonresident alien for whom an election under section 6013(g) or (h) is in effect; or

(iv) Nonresident alien who is a bona fide resident of Puerto Rico or a section 931 possession (as defined in § 1.931–1(c)(1)).

(3) *Resident alien.* The term *resident alien* has the meaning set forth in section 7701(b) and §§ 301.7701(b)–1 through 301.7701(b)–9 of this chapter.

(4) *Bona fide resident of a U.S. possession.* The term *bona fide resident of a U.S. possession* means an individual who is a ''bona fide resident'' under section 937(a) and § 1.937–1.

(5) *U.S. possession.* The term *U.S. possession* means American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the U.S. Virgin Islands.

(6) *Specified foreign financial asset.* The term *specified foreign financial asset* has the meaning set forth in § 1.6038D–3T.

(7) *Financial account.* The term *financial account* has the meaning set forth in section 1471(d)(2) and the regulations.

(8) *Financial institution.* The term *financial institution* has the meaning set forth in section 1471(d)(5) and the regulations.

(9) *Foreign financial institution.* The term *foreign financial institution* has the meaning set forth in section 1471(d)(4) and the regulations.

(10) *Foreign entity.* The term *foreign entity* has the meaning set forth in section 1473(5) and the regulations.

(11) *Annual return.* The term *annual return* means an annual federal income tax return of a specified individual or an annual federal income tax return or information return of a specified domestic entity filed with the Internal Revenue Service under section 876, 6011, 6012, 6013, 6031, or 6037, and the regulations.

(12) *Specified domestic entity.*—[Reserved].

(b) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(c) *Expiration date.* The applicability of this section expires December 12, 2014.

■ **Par. 4.** Section 1.6038D–2T is added to read as follows:

§ 1.6038D–2T Requirement to report specified foreign financial assets (temporary).

(a) *Reporting requirement*—(1) *In general.* Except as otherwise provided, a specified person that has any interest in a specified foreign financial asset during the taxable year must attach Form 8938, ''Statement of Specified Foreign Financial Assets,'' to that specified person's annual return for the taxable year to report the information required by section 6038D and § 1.6038D–4T if the aggregate value of all such assets exceeds—

(i) $50,000 on the last day of the taxable year; or

(ii) $75,000 at any time during the taxable year.

(2) *Special rule for married specified individuals filing a joint annual return.* Except as provided in paragraph (a)(1)(4) of this section, married specified individuals that file a joint annual return for the taxable year must attach a single Form 8938 to their joint annual return to report the information required by section 6038D and § 1.6038D–4T if the aggregate value of all of the specified foreign financial assets in which either married specified individual has an interest exceeds—

(i) $100,000 on the last day of the taxable year; or

(ii) $150,000 at any time during the taxable year.

(3) *Special rule for certain specified individuals living abroad.* Except as provided in paragraph (a)(1)(4) of this section, a specified individual who is a qualified individual under section 911(d)(1) for the taxable year is required to attach a Form 8938 to the specified individual's annual return and report the information required by section 6038D and § 1.6038D–4T if the aggregate value of the specified foreign financial assets in which the specified individual has an interest exceeds—

(i) $200,000 on the last day of the taxable year; or

(ii) $300,000 at any time during the taxable year.

(4) *Special rule for qualified individuals filing a joint annual return.* A qualified individual under section 911(d)(1) and the qualified individual's spouse who file a joint annual return must attach Form 8938 to their joint annual return to report the information required by section 6038D and § 1.6038D–4T if the aggregate value of all of the specified foreign financial assets in which either married individual has an interest exceeds—

(i) $400,000 on the last day of the taxable year; or

(ii) $600,000 at any time during the taxable year.

(5) *Assets with no positive value.* A specified foreign financial asset is subject to reporting even if the specified foreign financial asset does not have a positive value. See § 1.6038D–5T(b) for reporting the maximum value of a specified foreign financial asset, including a specified foreign financial asset that does not have a positive value during the taxable year.

(6) *Excepted assets.* The value of any specified foreign financial asset in which a specified individual has an interest and that is excluded from reporting on Form 8938 pursuant to § 1.6038D–7T(a) is included for purposes of determining the aggregate value of specified foreign financial assets. The value of any specified foreign financial asset in which a specified individual has an interest and that is excluded from reporting under § 1.6038D–7T(b) or (c) is excluded for purposes of determining the aggregate value of specified foreign financial assets.

(7) *Form 8938 filed with annual return*—(i) *General rule.* A specified person, including a specified individual who is a bona fide resident of a U.S. possession, is not required to file Form 8938 with respect to a taxable year if the specified person is not required to file an annual return with the Internal Revenue Service with respect to such taxable year.

(ii) *Consolidated returns.* If a specified domestic entity is a member of an affiliated group of corporations that files a consolidated income tax return, the Form 8938 of the specified domestic entity must be filed with the affiliated group's annual return.

(8) *Reporting required regardless of tax result.* The Form 8938 required by section 6038D and this section must be furnished by a specified person even if none of the specified foreign financial assets that must be reported affect the specified person's tax liability under the Internal Revenue Code for the taxable year.

(9) *Reporting period.* The reporting period covered by Form 8938 is the specified person's taxable year, except the reporting period for a specified person who is a specified individual for less than an entire taxable year is the portion of the taxable year that the specified person is a specified individual.

(10) *Successor forms.* References to Form 8938 include any successor form.

(b) *Interest in a specified foreign financial asset*—(1) *In general.* A specified person has an interest in a specified foreign financial asset if any income, gains, losses, deductions, credits, gross proceeds, or distributions attributable to the holding or disposition of the specified foreign financial asset are or would be required to be reported, included, or otherwise reflected by the specified person on an annual return. A specified person has an interest in a specified foreign financial asset even if no income, gains, losses, deductions, credits, gross proceeds, or distributions are attributable to the holding or disposition of the specified foreign financial asset for the taxable year.

(2) *Special rule for parent making election under section 1(g)(7).* A parent that makes an election under section 1(g)(7) to include certain unearned income of a child in the parent's gross income has an interest in any specified foreign financial asset held by the child

for the purposes of section 6038D and the regulations.

(3) *Entities.* Except as provided in this paragraph, a specified person is not treated as having an interest in any specified foreign financial assets held by a corporation, partnership, trust, or estate solely as a result of the specified person's status as a shareholder, partner, or beneficiary of such entity. A specified person that is treated as the owner of a trust or any portion of a trust under sections 671 through 679, other than a domestic liquidating trust under § 301.7701–4(d) of this chapter created pursuant to a court order issued in a bankruptcy under Chapter 7 (11 U.S.C. 701 *et seq.*) or a confirmed plan under Chapter 11 (11 U.S.C. 1101 *et seq.*) of the Bankruptcy Code, or a domestic widely held fixed investment trust under § 1.671–5, is treated as having an interest in any specified foreign financial assets held by the trust or the portion of the trust. See § 1.6038D–3T(c) to determine whether an interest in a foreign trust or an interest in a foreign estate is a specified foreign financial asset. See § 1.6038D–5T(g) for rules to determine the maximum value of an interest in a foreign trust or estate.

(c) *Special rules for joint interests*—(1) *Aggregate value of assets*—(i) *Specified persons.* Except in the case of a specified person described in paragraph (c)(1)(ii) of this section, each specified person that is a joint owner of a specified foreign financial asset must include the entire value of the specified foreign financial asset (and not the value of the specified person's interest) for purposes of determining whether the aggregate value of the specified person's specified foreign financial assets exceeds the reporting thresholds set forth in § 1.6038D–2T(a).

(ii) *Married specified individuals.* Married specified individuals who file a joint annual return must include the value of a specified foreign financial asset that they jointly own or in which they have an interest under paragraph (b)(2) of this section only once in determining whether the aggregate value of all of the specified foreign financial assets in which either married specified individual has an interest exceeds the reporting thresholds set forth in § 1.6038D–2T(a). If a married specified individual files a separate annual return and his or her spouse is a specified individual, the married specified individual includes one-half of the value of a specified foreign financial asset that the married specified individual jointly owns with his or her spouse in determining whether the married specified individual has an interest in specified foreign financial assets the aggregate value of which exceeds the reporting thresholds set forth in § 1.6038D–2T(a).

(2) *Annual return filed by a married specified individual*—(i) *Joint annual return.* Married specified individuals that file a joint annual return must file a single Form 8938 to fulfill their reporting requirements under section 6038D and § 1.6038D–2T(a). The single Form 8938 must report all of the specified foreign financial assets in which either married specified individual has an interest. If the married specified individuals jointly own a specified foreign financial asset or if they have an interest in a specified foreign financial asset under paragraph (b)(2) of this section, the asset must be reported only once on the single Form 8938 filed for the taxable year.

(ii) *Separate annual return.* A married specified individual who files a separate annual return for the taxable year must fulfill the reporting requirements under section 6038D and § 1.6038D–2T(a) by filing a separate Form 8938 that reports all of the specified foreign financial assets in which the married specified individual has an interest, including assets jointly owned with the married specified individual's spouse.

(d) *Example.* The following example illustrates the application of paragraph (c) of this section:

Example. (1) *Facts.* Two married specified individuals, H and W, jointly own a specified foreign financial asset with a value of $90,000 at all times during the taxable year. H separately has an interest in a specified foreign financial asset with a value of $10,000 at all times during the taxable year. W separately has an interest in a specified foreign financial asset with a value of $1,000 at all times during the taxable year.

(2) *Filing requirement*—(i) *Married specified individuals filing a separate annual return.* If H and W file separate annual returns, the aggregate value of the specified foreign financial assets in which H has an interest at the end of the taxable year is $55,000, comprising one-half of the value of the jointly owned asset, $45,000, and the value of H's separately owned specified foreign financial asset, $10,000. The aggregate value of the specified foreign financial assets in which W has an interest at the end of the taxable year is $46,000, comprising one-half of the value of the jointly owned asset, $45,000, and the value of W's separately owned specified foreign financial asset, $1,000. H must file Form 8938 with his annual return for the taxable year because the aggregate value of the specified foreign financial assets in which H has an interest exceeds the applicable reporting threshold ($50,000) set forth in § 1.6038D–2T(a)(1). H must report the maximum value of the entire jointly owned asset, $90,000, and the maximum value of the separately owned asset, $10,000. See § 1.6038D–4T(b) regarding the maximum value of a jointly owned specified foreign financial asset to be reported by a specified person, including a married specified individual, that is a joint owner of an asset. The aggregate value of the specified foreign financial assets in which W has an interest, $46,000, does not exceed the applicable reporting threshold forth in § 1.6038D–2T(a)(1). W is not required to file Form 8938 with her separate annual return.

(ii) *Married specified individuals filing a joint annual return.* If H and W file a joint annual return, they must file a single Form 8938 with their joint annual return for the taxable year because the aggregate value of all of the specified foreign financial assets in which either H and W have an interest ($90,000 (included only once), $10,000, and $1000, or $101,000) exceeds the applicable reporting threshold ($100,000) set forth in § 1.6038D–2T(a)(2). The single Form 8938 must report the maximum value of the jointly owned specified foreign financial asset, $90,000, and the maximum value of the specified foreign financial assets separately owned by H and W, $10,000 and $1,000, respectively.

(e) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(f) *Expiration date.* The applicability of this section expires December 12, 2014.

■ **Par. 5.** Section 1.6038D–3T is added to read as follows:

§ 1.6038D–3T Specified foreign financial assets (temporary).

(a) *Financial accounts*—(1) *In general.* Except as otherwise provided in this section, a specified foreign financial asset includes any financial account maintained by a foreign financial institution. An asset held in a financial account maintained by a foreign financial institution is not required to be separately reported on Form 8938, ''Statement of Specified Foreign Financial Assets.''

(2) *Financial account in a U.S. possession.* A specified foreign financial asset includes a financial account maintained by a financial institution that is organized under the laws of a U.S. possession.

(3) *Excepted financial accounts*— (i) *Accounts maintained by U.S. payors.* A financial account maintained by a U.S. payor as defined in § 1.6049–5(c)(5)(i) (including assets held in such an account) is not a specified foreign financial asset for purposes of section 6038D and the regulations.

(ii) *Mark-to-market election under section 475.* A financial account is not a specified foreign financial asset if the rules of section 475(a) apply to all of the holdings in the account or an election

under section 475(e) or (f) is made with respect to all of the holdings in the account.

(b) *Other specified foreign financial assets*—(1) *In general.* Except as otherwise provided in this section, a specified foreign financial asset includes any of the following assets that are held for investment and not held in an account maintained by a financial institution —

(i) Stock or securities issued by a person other than a United States person;

(ii) A financial instrument or contract that has an issuer or counterparty which is other than a United States person; and

(iii) An interest in a foreign entity.

(2) *Mark-to-market election under section 475.* An asset is not a specified foreign financial asset if the rules of section 475(a) apply to the asset or an election under section 475(e) or (f) is made with respect to the asset.

(3) *Held for investment.* An asset is held for investment for purposes of section 6038D and the regulations if that asset is not used in, or held for use in, the conduct of a trade or business of a specified person.

(4) *Trade-or-business test.* For purposes of section 6038D and the regulations, an asset is used in, or held for use in, the conduct of a trade or business and not held for investment if the asset is—

(i) Held for the principal purpose of promoting the present conduct of a trade or business;

(ii) Acquired and held in the ordinary course of a trade or business, as, for example, in the case of an account or note receivable arising from that trade or business; or

(iii) Otherwise held in a direct relationship to the trade or business as determined under paragraph (b)(5) of this section.

(5) *Direct relationship between holding an asset and a trade or business*—(i) *In general.* In determining whether an asset is held in a direct relationship to the conduct of a trade or business by a specified person, principal consideration will be given to whether the asset is needed in the trade or business of the specified person. An asset shall be considered needed in a trade or business, for this purpose, only if the asset is held to meet the present needs of that trade or business and not its anticipated future needs. An asset shall be considered as needed in the trade or business if, for example, the asset is held to meet the operating expenses of the trade or business. Conversely, an asset shall be considered as not needed in the trade or business if, for example, the asset is held for the purpose of providing for future diversification into a new trade or business, future plant replacement, or future business contingencies. Stock is never considered used or held for use in a trade or business for purposes of applying this test.

(ii) *Presumption of direct relationship.* An asset will be treated as held in a direct relationship to the conduct of a trade or business of a specified person if—

(A) The asset was acquired with funds generated by the trade or business of the specified person or the affiliated group of the specified person, if any;

(B) The income from the asset is retained or reinvested in the trade or business; and

(C) Personnel who are actively involved in the conduct of the trade or business exercise significant management and control over the investment of such asset.

(c) *Special rule for interests in foreign trusts and foreign estates.* An interest in a foreign trust or a foreign estate is not a specified foreign financial asset of a specified person unless the person knows or has reason to know based on readily accessible information of the interest. Receipt of a distribution from the foreign trust or foreign estate constitutes actual knowledge for this purpose.

(d) *Examples.* Examples of assets other than financial accounts that may be considered other specified foreign financial assets include, but are not limited to—

(1) Stock issued by a foreign corporation;

(2) A capital or profits interest in a foreign partnership;

(3) A note, bond, debenture, or other form of indebtedness issued by a foreign person;

(4) An interest in a foreign trust;

(5) An interest rate swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement with a foreign counterparty; and,

(6) Any option or other derivative instrument with respect to any of the items listed as examples in this paragraph or with respect to any currency or commodity that is entered into with a foreign counterparty or issuer.

(e) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(f) *Expiration date.* The applicability of this section expires December 12, 2014.

■ **Par. 6.** Section 1.6038D–4T is added to read as follows:

§ 1.6038D–4T Information required to be reported (temporary).

(a) *Required information.* The following information must be reported on Form 8938, ''Statement of Specified Foreign Financial Assets,'' with respect to each specified foreign financial asset:

(1) In the case of a financial account maintained by a foreign financial institution, the name and address of the foreign financial institution and the account number of the account;

(2) In the case of stock or a security, the name and address of the issuer, and information that identifies the class or issue of which the stock or security is a part;

(3) In the case of a financial instrument or contract, information that identifies the financial instrument or contract, including the names and addresses of all issuers and counterparties;

(4) In the case of an interest in a foreign entity, information that identifies the interest, including the name and address of the entity;

(5) The maximum value of the specified foreign financial asset during the portion of the taxable year in which the specified person has an interest in the asset;

(6) In the case of a financial account that is a depository or custodial account under section 1471(d)(2), whether the account was opened or closed during the taxable year;

(7) The date, if any, on which the specified foreign financial asset, other than a financial account that is a depository or custodial account under section 1471(d)(2), was either acquired or disposed of (or both) during the taxable year;

(8) The amount of any income, gain, loss, deduction, or credit recognized for the taxable year with respect to the reported specified foreign financial asset, and the schedule, form, or return filed with the Internal Revenue Service on which the income, gain, loss, deduction, or credit, if any, is reported or included by the specified person;

(9) The foreign currency exchange rate and, if the source of such rate is other than as described in § 1.6038D–5T(d)(1), the source of the rate used to determine the specified foreign financial asset's U.S. dollar value, including maximum value; and

(10) For any specified foreign financial asset excepted from reporting on Form 8938 under § 1.6038D–7T(a),

the specified person must report the number of Forms 3520, ''Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts,'' Forms 3520–A, ''Annual Information Return of Foreign Trust With a U.S. Owner,'' Forms 5471, ''Information Return of U.S. Persons With Respect To Certain Foreign Corporations,'' Forms 8621, ''Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund,'' Forms 8865, ''Return of U.S. Persons With Respect To Certain Foreign Partnerships,'' Forms 8891, ''U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans,'' or such other form under Title 26 of the United States Code identified by the Secretary under § 1.6038D–7T(a), timely filed with the Internal Revenue Service on which excepted foreign financial assets are reported or reflected for the taxable year.

(b) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(c) *Expiration date.* The applicability of this section expires December 12, 2014.

■ **Par. 7.** Section 1.6038D–5T is added to read as follows:

§ 1.6038D–5T Valuation guidelines (temporary).

(a) *Fair market value.* Except as provided in paragraphs (c) and (e) of this section, the value of a specified foreign financial asset for purposes of determining the aggregate value of specified foreign financial assets held by a specified person and the maximum value of a specified foreign financial asset required to be reported on Form 8938, ''Statement of Specified Foreign Financial Assets,'' is the asset's fair market value.

(b) *Valuation of assets*—(1) *Maximum Value.* Except as provided in this section, the maximum value of a specified foreign financial asset means a reasonable estimate of the asset's maximum fair market value during the taxable year.

(2) *U.S. dollars.* For purpose of determining the aggregate value of specified foreign financial assets in which a specified person has an interest and determining the maximum value of a specified foreign financial asset, the value of a specified foreign financial asset denominated in a foreign currency during the taxable year must be determined in the foreign currency and then converted to U.S. dollars.

(3) *Asset with no positive value.* If the maximum fair market value of a specified foreign financial asset is less than zero, its value is treated as zero for purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest and determining the maximum value of the specified foreign financial asset,

(c) *Foreign currency conversion*—(1) *In general.* Except as provided in paragraph (d)(2) of this section, the U.S. Treasury Department's Financial Management Service foreign currency exchange rate is to be used to convert the value of a specified foreign financial asset into U.S. dollars for purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest and determining the maximum value of a specified foreign financial asset,

(2) *Other publicly available exchange rate.* If no U.S. Treasury Financial Management Service foreign currency exchange rate is available for a particular currency, another publicly available foreign currency exchange rate may be used to convert the value of a specified foreign financial asset into U.S. dollars. In such case, the source of the foreign currency exchange rate must be disclosed on Form 8938.

(3) *Currency exchange rate.* In converting the currency of a foreign country, the foreign currency exchange rate applicable for converting the currency into U.S. dollars (that is, to purchase U.S. dollars) must be used.

(4) *Determination date.* In converting the currency of a foreign country into U.S. dollars for purposes of determining the maximum value of a specified foreign financial asset and determining the aggregate value of specified foreign financial assets in which a specified person has an interest, the applicable foreign currency exchange rate is the rate on the last day of the taxable year of the specified person, even if the specified person sold or otherwise disposed of a specified foreign financial asset prior to the last day of such year.

(d) *Financial accounts.* A specified person may rely upon periodic account statements provided at least annually to determine a financial account's maximum value unless the specified person has actual knowledge or reason to know based on readily accessible information that the statements do not reflect a reasonable estimate of the maximum account value during the taxable year.

(e) *Asset held in a financial account.* The value of an asset held in a financial account maintained by a foreign financial institution is included in determining the value of that financial account for purposes of § 1.6038D–5T(a).

(f) *Other specified foreign financial assets*—(1) *General rule.* Except as provided in paragraphs (f)(2) and (f)(3) of this section, for specified foreign financial assets that are not held in a financial account maintained by a foreign financial institution, a specified person may use the value of the asset as of the last day of the taxable year on which the specified person has an interest in the asset as the maximum value of that asset, unless the specified person has actual knowledge or reason to know based on readily accessible information that the value does not reflect a reasonable estimate of the maximum value of the asset.

(2) *Interests in trusts that are specified foreign financial assets*—

(i) *Maximum value.* If a specified person is a beneficiary of a foreign trust, the maximum value of the specified person's interest in the trust is the sum of—

(A) the fair market value, determined as of the last day of the taxable year, of all of the currency or other property distributed from the foreign trust during the taxable year to the specified person as a beneficiary; and

(B) the value as of the last day of the taxable year of the specified person's right as a beneficiary to receive mandatory distributions from the foreign trust as determined under section 7520.

(ii) *Reporting threshold.* For purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest, if the specified person does not know or have reason to know based on readily accessible information the fair market value of the person's interest in a foreign trust during the taxable year, the value to be included in determining the aggregate value of the specified foreign financial assets is the maximum value of the specified person's interest in the foreign trust under paragraph (f)(2)(i) of this section.

(3) *Interests in estates, pension plans, and deferred compensation plans.*

(i) *Maximum value.* The maximum value of a specified person's interest in a foreign estate, foreign pension plan, or a foreign deferred compensation plan is the fair market value, determined as of the last day of the taxable year, of the specified person's beneficial interest in the assets of the foreign estate, foreign pension plan, or foreign deferred compensation plan. If the specified person does not know or have reason to know based on readily accessible information such fair market value, the

maximum value to be reported is the fair market value, determined as of the last day of the taxable year, of the currency and other property distributed during the taxable year to the specified person as a beneficiary or participant.

(ii) *Reporting threshold.* For purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest, if the specified person does not know or have reason to know based on readily accessible information the fair market value of the person's interest in a foreign estate, foreign pension plan, or foreign deferred compensation plan during the taxable year, the value to be included in determining the aggregate value of the specified foreign financial assets is the fair market value, determined as of the last day of the taxable year, of the currency and other property distributed during the taxable year to the specified person as a beneficiary or participant.

(g) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(h) *Expiration date.* The applicability of this section expires December 12, 2014.

■ **Par. 8.** Section 1.6038D–6T is added to read as follows:

§ 1.6038D–6T Specified domestic entities (temporary). [Reserved]

■ **Par. 9.** Section 1.6038D–7T is added to read as follows:

§ 1.6038D–7T Exceptions from the reporting of certain assets under Section 6038D (temporary).

(a) *Elimination of duplicative reporting of assets*—(1) *In general.* A specified person is not required to report a specified foreign financial asset on Form 8938, ''Statement of Specified Foreign Financial Assets,'' if the specified person—

(i) Reports the asset on at least one of the following forms timely filed with the Internal Revenue Service for the taxable year—

(A) Form 3520, ''Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts'' (in the case of a specified person who is the beneficiary of a foreign trust);

(B) Form 5471, ''Information Return of U.S. Persons With Respect to Certain Foreign Corporations'';

(C) Form 8621, ''Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund'';

(D) Form 8865, ''Return of U.S. Persons With Respect to Certain Foreign Partnerships''; or

(E) Form 8891, ''U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans''; or

(F) Any other form under Title 26 of the United States Code timely filed with the Internal Revenue Service and identified for this purpose by the Secretary in regulations or other guidance; and

(ii) Reports on Form 8938 the filing of the form on which the asset is reported.

(2) *Foreign grantor trusts.* A specified person that is treated as an owner of a foreign trust or any portion of a foreign trust under sections 671 through 679 is not required to report any specified foreign financial assets held by the foreign trust on Form 8938, provided—

(i) The specified person reports the trust on a Form 3520 timely filed with the Internal Revenue Service for the taxable year;

(ii) The trust timely files Form 3520–A, ''Annual Information Return of Foreign Trust With a U.S. Owner,'' with the Internal Revenue Service for the taxable year; and

(iii) The Form 8938 filed by the specified person for the taxable year reports the filing of the Form 3520 and Form 3520–A.

(b) *Owner of certain trusts.* A specified person that is treated as an owner of any portion of a domestic trust under sections 671 through 679 is not required to file Form 8938 to report any specified foreign financial asset held by the trust if the trust is—

(1) A widely-held fixed investment trust under § 1.671–5; or

(2) A liquidating trust within the meaning of § 301.7701–4(d) of this chapter that is created pursuant to a court order issued in a bankruptcy under Chapter 7 (11 U.S.C. 701 *et seq.*) or a confirmed plan under Chapter 11 (11 U.S.C. 1101 *et seq.*) of the Bankruptcy Code.

(c) *Bona fide resident of a U.S. possession.* A specified individual who is a bona fide resident of a U.S. possession and who is required to file Form 8938 with the Internal Revenue Service is not required to report the following specified foreign financial assets:

(1) A financial account maintained by a financial institution organized under the laws of the U.S. possession of which the specified individual is a bona fide resident;

(2) A financial account maintained by a branch of a financial institution not organized under the laws of the U.S. possession of which the specified individual is a bona fide resident, if the branch is subject to the same tax and information reporting requirements applicable to a financial institution organized under the laws of the U.S. possession;

(3) Stock or securities issued by an entity organized under the laws of the U.S. possession of which the specified individual is a bona fide resident;

(4) An interest in an entity organized under the laws of the U.S. possession of which the specified individual is a bona fide resident; and

(5) A financial instrument or contract held for investment, provided each issuer or counterparty that is not a United States person is—

(i) An entity organized under the laws of the U.S. possession of which the specified individual is a bona fide resident; or

(ii) A bona fide resident of the U.S. possession of which the specified individual is a bona fide resident.

(d) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(e) *Expiration date.* The applicability of this section expires December 12, 2014.

■ **Par. 10.** Section 1.6038D–8T is added to read as follows:

§ 1.6038D–8T Penalties for failure to disclose (temporary).

(a) *In general.* If a specified person fails to file a Form 8938, ''Statement of Specified Foreign Financial Assets,'' that includes the information required by section 6038D(c) and § 1.6038D–4T with respect to any taxable year at the time and in the manner described in section 6038D(a) and § 1.6038D–2T, a penalty of $10,000 will apply to that specified person.

(b) *Married specified individuals filing a joint annual return.* Married specified individuals who file a joint annual return and fail to file a required Form 8938, ''Statement of Specified Foreign Financial Assets,'' that includes the information required by section 6038D(c) and § 1.6038D–4T with respect to any taxable year at the time and in the manner described in section 6038D(a) and § 1.6038D–2T are subject to penalties under this section as if the married specified individuals are a single specified person. The liability of married specified individuals who file a joint annual return with respect to any penalties under this section is joint and several.

(c) *Increase in penalty.* If any failure to comply with the applicable reporting

requirement of section 6038D and the regulations continues for more than 90 days after the day on which the Commissioner or his delegate mails a notice of the failure to the specified person required to file the Form 8938, the specified person is required to pay an additional penalty of $10,000 for each 30-day period (or fraction thereof) during which the failure continues after the 90-day period has expired. The additional penalty imposed by section 6038D(d)(2) and this paragraph (c) is limited to a maximum of $50,000 for each such failure.

(d) *Presumption of aggregate value.* For the purpose of assessing penalties imposed under section 6038D(d), if the Commissioner or his delegate determines that a specified person has an interest in one or more specified foreign financial assets and the specified person does not provide sufficient information to demonstrate the aggregate value of the assets upon request by the Commissioner or his delegate, then the aggregate value of the assets is treated as being in excess of the applicable reporting threshold set forth in § 1.6038D–2T(a).

(e) *Reasonable cause exception*—(1) *In general.* If the failure to report the information required in section 6038D(c) and § 1.6038D–4T is shown to be due to reasonable cause and not due to willful neglect, no penalty will be imposed under section 6038D(d) or this section.

(2) *Affirmative showing required.* In order to show that the failure to disclose is due to reasonable cause and not due to willful neglect for purposes of section 6038D(g) and this section, the specified person must make an affirmative showing of all the facts alleged as reasonable cause for the failure to disclose.

(3) *Facts and circumstances taken into account.* The determination of whether a failure to disclose a specified foreign financial asset on Form 8938 was due to reasonable cause and not due to willful neglect is made on a case-by-case basis, taking into account all pertinent facts and circumstances. The fact that a foreign jurisdiction would impose a civil or criminal penalty on the specified person (or any other person) for disclosing the required information is not reasonable cause.

(f) *Penalties for underpayments attributable to undisclosed foreign financial assets*—(1) *Accuracy-related penalty.* For application of the accuracy-related penalty in the case of any portion of an underpayment attributable to any undisclosed foreign financial asset understatement, see section 6662(j).

(2) *Criminal penalties.* In addition to other penalties, failure to comply with the reporting requirements of section 6038D and the regulations, or any underpayment related to such failure, may result in criminal penalties under sections 7201, 7203, 7206, et seq., or other provisions of Federal law.

(g) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(h) *Expiration date.* The applicability of this section expires December 12, 2014.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: November 30, 2011.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2011–32263 Filed 12–14–11; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2011–0070]

RIN 0651–AC65

Changes To Implement the Prioritized Examination for Requests for Continued Examination

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The Leahy-Smith America Invents Act includes provisions for prioritized examination of patent applications. The United States Patent and Trademark Office (Office) implemented the Leahy-Smith America Invents Act prioritized examination provision following the prioritized examination track (Track I) of the proposed 3-Track examination process in a previous final rule. The final rule was made applicable to newly filed patent applications. In order to provide patent applicants with the flexibility to accelerate processing of their applications in which a request for continued examination has been filed, the Office is now permitting applicants to request prioritized examination for applications after the filing of a request for continued examination.

DATES: *Effective Date:* The changes in this final rule are effective on December 19, 2011.

Applicability Date: The changes in this final rule are applicable to any patent application in which a proper request for continued examination has been filed before, on, or after December 19, 2011.

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

SUPPLEMENTARY INFORMATION: Under the procedure set forth in this final rule, once the application is accorded special status after the filing of a request for continued examination it will be placed on the examiner's special docket throughout its entire course of continued prosecution before the examiner until a final disposition is reached in the application. The goal for handling applications under prioritized examination for request for continued examination is to, on average, provide a final disposition within twelve months of prioritized status being granted. For purposes of the twelve-month goal, ''final disposition'' can be any of the following: (1) Mailing of a notice of allowance; (2) mailing of a final Office action; (3) filing of a notice of appeal; (4) completion of examination as defined in 37 CFR 41.102; (5) filing of a subsequent request for continued examination; or (6) abandonment of the application. An application under prioritized examination, however, would not be accorded special status throughout its entire course of appeal or interference before the BPAI, or after the filing of a subsequent request for continued examination.

Filing an amendment to the application which results in more than four independent claims, more than thirty total claims, or a multiple dependent claim will terminate the prioritized examination. Upon termination of prioritized examination, the application will be removed from the examiner's special docket and placed on the examiner's regular docket in accordance with its stage of prosecution. As the termination of prioritized examination does not cause the prioritized examination fee to have been paid by mistake or in an amount in excess of that required, the termination of prioritized examination will not entitle the applicant to a refund of the prioritized examination fee. *See*

35 U.S.C. 42(d) and § 1.26(a) (permits refunds only for fees ''paid by mistake or any amount paid in excess of that required'').

As discussed previously, the submission of an amendment resulting in more than four independent claims or more than thirty total claims is not prohibited, but simply terminates the prioritized examination. Thus, upon mailing of a final rejection (at which point prioritized examination is terminated), applicants may amend the claims to place them in independent form where dependent claims were found allowable, or add new claims, subject only to the limitations applicable to any application under final rejection. *See* 37 CFR 1.116. Similarly, upon mailing of a notice of allowance, applicants may submit amendments to the claims, again subject only to the limitations applicable to any application that has been allowed. *See* 37 CFR 1.312.

The requirements for requesting prioritized examination after the filing of a request for continued examination are summarized below. A patent application may be granted prioritized examination status under the following conditions:

(1) The request for continued examination must be in an original utility or plant nonprovisional application filed under 35 U.S.C. 111(a) or that has entered the national stage under 35 U.S.C. 371.

(2) The request for prioritized examination must be filed via the Office's electronic filing system (EFS–Web), except in a plant application for which the request must be filed in paper (MPEP 502.05(II)(B)) prior to the mailing of a first Office action after the filing of the request for continued examination under 37 CFR 1.114. The request for prioritized examination may either be filed concurrently with, or subsequently to, the filing of a request for continued examination.

(3) At the time of the request for prioritized examination, the application must contain or be amended to contain no more than four independent claims and no more than thirty total claims. In addition, the application must not contain any multiple dependent claims. If an amendment is filed in an application that has been granted prioritized examination that results in more than four independent claims or thirty total claims, or a multiple dependent claim, then prioritized examination will be terminated.

(4) The request for prioritized examination must be accompanied by the prioritized examination fee set forth in 37 CFR 1.17(c), the processing fee set forth in 37 CFR 1.17(i), and if not previously paid, the publication fee set forth in 37 CFR 1.18(d). Applicants are advised to use the certification and request form PTO/SB/424 which is available on EFS–Web.

(5) The Leahy-Smith America Invents Act currently limits the number of requests for prioritized examination under § 1.102(e) that the Office may accept to a maximum of 10,000 per fiscal year. This includes both requests for prioritized examination for initial examination (37 CFR 1.102(e)(1)) and requests for prioritized examination after filing of a request for continued examination (37 CFR 1.102(e)(2)).

Discussion of Specific Rules

Title 37 of the Code of Federal Regulations, Part 1, is proposed to be amended as follows:

Section 1.102: Section 1.102(e) is revised to set out the general requirements for prioritized examination and the specific requirements for prioritized examination for initial examination (Track I) (37 CFR 1.102(e)(1)) and for prioritized examination after the filing of a request for continued examination (37 CFR 1.102(e)(2)).

Section 1.102(e) provides that a request for prioritized examination under § 1.102(e) must comply with the requirements of § 1.102(e) and be accompanied by the prioritized examination fee set forth in § 1.17(c), the processing fee set forth in § 1.17(i), and the publication fee set forth in § 1.18(d). Section 1.102(e) also provides that an application for which prioritized examination has been requested may not contain or be amended to contain more than four independent claims, more than thirty total claims, or any multiple dependent claim. Section 1.102(e) also provides that prioritized examination under this paragraph will not be accorded to international applications that have not entered the national stage under 35 U.S.C. 371, design applications, reissue applications, provisional applications, or reexamination proceedings. Finally, § 1.102(e) provides that a request for prioritized examination must also comply with the requirements of § 1.102(e)(1) or § 1.102(e)(2).

Section 1.102(e)(1) provides that a request for prioritized examination may be filed with an original utility or plant nonprovisional application under 35 U.S.C. 111(a) that is complete as defined by § 1.51(b), with any fees due under § 1.16 paid on filing. If the application is a utility application, it must be filed via the Office's electronic filing system (EFS–Web). The request for prioritized examination in compliance with § 1.102(e)(1) must be present upon filing. The discussion in the final rule to implement prioritized examination for initial examination (Track I) (*Changes to Implement the Prioritized Examination Track (Track I) of the Enhanced Examination Timing Control Procedures under the Leahy-Smith America Invents Act,* 76 FR 59050 (Sept. 23, 2011)) remains applicable to request for prioritized examination under § 1.102(e)(1).

Section 1.102(e)(2) provides that a request for prioritized examination may be filed with or after a request for continued examination in compliance with § 1.114. Only a single such request for prioritized examination under § 1.102(e)(2) may be granted in an application. If the application is a utility application, the request must be filed via the Office's electronic filing system (EFS–Web). The request must be filed before the mailing of the first Office action after the filing of the request for continued examination under § 1.114. The request must be accompanied by the prioritized examination fee set forth in § 1.17(c), the processing fee set forth in § 1.17(i), and if not already paid, the publication fee set forth in § 1.18(d).

Rule Making Considerations

A. Administrative Procedure Act

This final rule implements prioritized examination for applications after the filing of a request for continued examination under 35 U.S.C. 132(b) and 37 CFR 1.114. The changes in this final rule that implement the fee for prioritized examination and requirements specified in section 11(h) of the Leahy-Smith America Invents Act are merely interpretative. *See Gray Panthers Advocacy Comm.* v. *Sullivan,* 936 F.2d 1284, 1291–1292 (DC Cir. 1991) (regulation that reiterates statutory language does not require notice and comment procedures); *See Nat'l Org. of Veterans' Advocates* v. *Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed. Cir. 2001). The additional requirements (*e.g.,* filing via the Office's electronic filing system (EFS–Web)) merely specify the procedures that apply to applications for which an applicant has requested prioritized examination and are thus procedural and not substantive. *See JEM Broad. Co.* v. *FCC,* 22 F.3d 320, 326 (DC Cir. 1994) (''[T]he critical feature of the procedural exception [in 5 U.S.C. 553(b)(A)] is that it covers agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the

agency'') (quoting *Batterton* v. *Marshall,* 648 F.2d 694, 707 (DC Cir. 1980)). Specifying the procedures for according prioritized examination for an application in which a request for continued examination has been made concerns only the manner in which applicants interact with the Office and does not change the substantive rights (condition of patentability) of any patent applicant. *See Bachow Communications, Inc.* v. *F.C.C.,* 237 F.3d 683 (DC Cir. 2001) (rule permitting or suspending amendments to applications was procedural).

Accordingly, prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553(b)(A) or any other law. *See Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), do not require notice and comment rule making for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'') (quoting 5 U.S.C. 553(b)(A)). In addition, thirty-day advance publication is not required pursuant to 5 U.S.C. 553(d) or any other law. *See* 5 U.S.C. 553(d) (requiring thirty-day advance publication for substantive rules).

B. Regulatory Flexibility Act

As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 or any other law, neither a regulatory flexibility analysis nor a certification under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is required. *See* 5 U.S.C. 603.

C. Executive Order 12866 (Regulatory Planning and Review)

This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

D. Executive Order 13563 (Improving Regulation and Regulatory Review)

The Office has complied with Executive Order 13563 (Jan. 18, 2011). Specifically, the Office has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector and the public as a whole, and provided on-line access to the rule making docket; (7) attempted to promote coordination, simplification and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

E. Executive Order 13132 (Federalism)

This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

F. Executive Order 13175 (Tribal Consultation)

This rule making will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

G. Executive Order 13211 (Energy Effects)

This rule making is not a significant energy action under Executive Order 13211 because this rule making is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

H. Executive Order 12988 (Civil Justice Reform)

This rule making meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

I. Executive Order 13045 (Protection of Children)

This rule making does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

J. Executive Order 12630 (Taking of Private Property)

This rule making will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

K. Congressional Review Act

Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the United States Patent and Trademark Office will submit a report containing the final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this notice are not expected to result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this notice is not expected to result in a ''major rule'' as defined in 5 U.S.C. 804(2).

L. Unfunded Mandates Reform Act of 1995

The changes set forth in this notice do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

M. National Environmental Policy Act

This rule making will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

N. National Technology Transfer and Advancement Act

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rule making does not contain provisions which involve the use of technical standards.

O. Paperwork Reduction Act

This rule making implements a prioritized examination process. The primary impact on the public of this change is that applicants will have the option to request prioritized examination by paying appropriate fees, filing a request via the Office's electronic filing system (EFS–Web), and limiting their applications to four independent claims and thirty total

claims with no multiple dependent claims.

An applicant who wishes to participate in the program must submit a certification and request to participate in the prioritized examination program, preferably by using Form PTO/SB/424. The Office of Management and Budget (OMB) has determined that, under 5 CFR 1320.3(h), Form PTO/SB/424 does not collect ''information'' within the meaning of the Paperwork Reduction Act of 1995. Therefore, this rule making does not impose additional collection requirements under the Paperwork Reduction Act which are subject to further review by OMB.

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

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and record keeping requirements, Small Businesses.

For the reasons set forth in the preamble, 37 CFR part 1 is amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR Part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2).

■ 2. Section 1.102 is amended by revising paragraph (e) to read as follows:

§ 1.102 Advancement of examination.

* * * * *

(e) A request for prioritized examination under this paragraph must comply with the requirements of this paragraph and be accompanied by the prioritized examination fee set forth in § 1.17(c), the processing fee set forth in § 1.17(i), and if not already paid, the publication fee set forth in § 1.18(d). An application for which prioritized examination has been requested may not contain or be amended to contain more than four independent claims, more than thirty total claims, or any multiple dependent claim. Prioritized examination under this paragraph will not be accorded to international applications that have not entered the national stage under 35 U.S.C. 371, design applications, reissue applications, provisional applications, or reexamination proceedings. A request for prioritized examination must also comply with the requirements of paragraph (e)(1) or paragraph (e)(2) of this section.

(1) A request for prioritized examination may be filed with an original utility or plant nonprovisional application under 35 U.S.C. 111(a) that is complete as defined by § 1.51(b), with any fees due under § 1.16 paid on filing. If the application is a utility application, it must be filed via the Office's electronic filing system. The request for prioritized examination in compliance with this paragraph must be present upon filing of the application.

(2) A request for prioritized examination may be filed with or after a request for continued examination in compliance with § 1.114. If the application is a utility application, the request must be filed via the Office's electronic filing system. The request must be filed before the mailing of the first Office action after the filing of the request for continued examination under § 1.114. Only a single such request for prioritized examination under this paragraph may be granted in an application.

Dated: December 7, 2011.

David J. Kappos,

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

[FR Doc. 2011–32434 Filed 12–16–11; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AO05

Medical Benefits for Newborn Children of Certain Woman Veterans

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulation concerning the medical benefits package offered to veterans enrolled in the VA health care system. This rulemaking updates the regulation to conform to amendments made by the enactment of the Caregivers and Veteran Omnibus Health Services Act of 2010, which authorized VA to provide certain health care services to a newborn child of a woman veteran who is receiving maternity care furnished by VA. Health services for newborn care will be authorized for no more than seven days after the birth of the child if the veteran delivered the child in a VA facility or in another facility pursuant to a VA contract for maternity services.

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

Applicability Date: This regulation is applicable to medical care provided on or after May 5, 2010.

FOR FURTHER INFORMATION CONTACT: Holley Niethammer, Veterans Health Administration, 3773 Cherry Creek North Drive, Denver, Colorado 80209 (303) 370–5062. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On May 5, 2010, the President signed into law the Caregivers and Veterans Omnibus Health Services Act of 2010, Public Law 111–163. Section 206 of the public law, codified at 38 U.S.C. 1786, authorizes VA to ''furnish health care services * * * to a newborn child of a woman veteran who is receiving maternity care furnished by [VA] for not more than seven days after the birth of the child if the veteran delivered the child in—(1) a [VA] facility * * *; or (2) another facility pursuant to a [VA] contract for services relating to such delivery.'' We note that the statutory authority does not extend to newborn children of female partners or relatives of veterans who are not veterans receiving maternity care from VA. In other words, this benefit is exclusive to newborn children of female veterans who themselves have been receiving maternity care from VA prior to the birth of the child and who otherwise meet the requirements of the law. We recognize that in some cases a newborn child of a woman veteran may be placed for adoption at the time of birth or shortly thereafter, or may be abandoned. Notwithstanding that the birth mother may not be willing or able to raise the child following birth, VA will provide newborn care for the date of birth and the first seven calendar days of life to any child delivered by a woman veteran who is receiving care under § 17.38(a)(1)(xiii). This is the broadest reasonable interpretation of the statutory authorization to provide care to the newborn child of a woman veteran, because the statute does not clearly require that the woman veteran be, or continue to be, the child's legal parent or guardian after birth.

We interpret section 1786 to mean that newborn care is one of the health care services authorized by Congress in 38 U.S.C. 1710. This rulemaking implements this interpretation of section 1786. We note that we have been providing this care since the effective date of the statute, May 5, 2010.

VA implemented section 1710 in current 38 CFR 17.38, which prescribes the types of medical care that are included in what is known as the VA ''medical benefits package.'' This rulemaking amends § 17.38(a) to include newborn care as a service provided under the medical benefits package. Pursuant to current § 17.38(b), care ''will be provided to individuals only if it is determined by appropriate healthcare professionals that the care is needed to promote, preserve, or restore the health of the individual and is in accord with generally accepted standards of medical practice.''

For the above reasons, we amend 38 CFR 17.38(a)(1) consistent with section 1786 to provide: Newborn care, post delivery, for a newborn child for the date of birth plus seven calendar days after the birth of the child when the birth mother is a woman veteran enrolled in VA health care and receiving maternity care furnished by VA or under authorization from VA and the child is delivered either in a VA facility, or in another facility pursuant to a VA authorization for maternity care at VA expense. VA will cover all medically necessary care for the newborn(s) for the date of birth plus the first seven calendar days after birth, beginning on the day after the child is born and ending at midnight on the seventh full calendar day thereafter. This is the broadest reasonable interpretation of the statute, which authorizes needed care ''for not more than seven days after the birth of the child.'' 38 U.S.C. 1786(a). The newborn care will include post-delivery care, including newborn care, determined by appropriate healthcare professionals necessary to promote, preserve or restore the health of the child in accordance with generally accepted standards of medical practice (§ 17.38(b)).

Finally, for clarity and continuity, we are renumbering current § 17.38(a)(1)(xiv), which addresses the completion of forms, to § 17.38(a)(1)(xv) and inserting newborn care at § 17.38(a)(1)(xiv) to follow pregnancy and delivery services at § 17.38(a)(1)(xiii).

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures on this subject are authorized. All VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Administrative Procedure Act

This rulemaking is VA's interpretive regulatory guidance on a statutory amendment to 38 U.S.C. 1786. This rule does not create any new rights or duties. Accordingly, this rule is being published as a final rule pursuant to 5 U.S.C. 553(b)(A), which exempts interpretive rules from the notice-and-comment requirements of 5 U.S.C. 553. Because this rule merely interprets a statute, it is effective as of the date of the statute it interprets, i.e., May 5, 2010, pursuant to 5 U.S.C. 553(d)(2), which exempts interpretive rules from the delayed effective date requirements of 5 U.S.C. 553.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget (OMB) as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This final rule will have no such effect on State, local, or tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The initial and final regulatory flexibility analyses requirements of sections 603 and 604 of the Regulatory Flexibility Act, 5 U.S.C. 601–612, are not applicable to this rule, because a notice of proposed rulemaking is not required for this rule. Even so, the Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. This final rule will not directly affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this final rule are Veterans Medical Care Benefits; 64.010.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on November 4, 2011, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Caregivers program, Claims, Health care, Health facilities, Newborns, Pregnant women, Veterans.

Dated: December 13, 2011.

Robert C. McFetridge,

Director of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, VA amends 38 CFR Part 17 as follows:

PART 17—MEDICAL

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

Authority: 38 U.S.C. 501, and as noted in specific sections.

■ 2. Amend § 17.38 by:

■ a. Redesignating paragraph (a)(1)(xiv) as paragraph (a)(1)(xv).

■ b. Adding a new paragraph (a)(1)(xiv).

■ c. Revising the authority citation at the end of the section.

The addition and revision read as follows:

§ 17.38 Medical benefits package.

(a) * * *

(1) * * *

(xiv) Newborn care, post delivery, for a newborn child for the date of birth plus seven calendar days after the birth of the child when the birth mother is a woman veteran enrolled in VA health care and receiving maternity care furnished by VA or under authorization from VA and the child is delivered either in a VA facility, or in another facility pursuant to a VA authorization for maternity care at VA expense.

* * * * *

(Authority 38 U.S.C. 101, 501, 1701, 1705, 1710, 1710A, 1721, 1722, 1782, 1786)

[FR Doc. 2011–32264 Filed 12–16–11; 8:45 am]

BILLING CODE 8302–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2008–0155; A–1–FRL–9248–1]

Approval and Promulgation of State Implementation Plans: Oregon

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is approving State Implementation Plan (SIP) revisions submitted by the State of Oregon, Department of Environmental Quality (ODEQ). These revisions pertain to the Clean Air Act (CAA) section 110(a) maintenance plans prepared by ODEQ, to maintain the 8-hour national ambient air quality standard (NAAQS) for ozone, in the Portland portion of the Portland/Vancouver Air Quality Maintenance Area (Pdx/Van AQMA), and the Salem-Keizer Area Transportation Study Air Quality Area (SKATS). The 110(a)(1) maintenance plans for these areas meet CAA requirements and demonstrate that each of the above mentioned areas will be able to remain in attainment for the 1997 and 2008 8-hour ozone NAAQS through 2015. As SKATS appears to be significantly impacted by emissions from the Portland area, an approved plan for the Pdx/Van AQMA is one of the control strategies for SKATS. Therefore, EPA is approving the section 110(a) plans for the Portland portion of the Pdx/Van AQMA and SKATS at the same time.

Additionally, the EPA is approving SIP revisions submitted by ODEQ that phase out the State's Vehicle Inspection Program (VIP) enhanced BAR–31 test, and eliminate the Gas Cap Pressure Test and the Evaporative Purge Tests.

DATES: This action is effective on January 18, 2012.

ADDRESSES: The EPA has established a docket for this action under Docket Identification Number: EPA–R10–OAR–2008–0155. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information may not be 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 in *www.regulations.gov* or in hard copy during normal business hours at EPA Region 10, Office of Air, Waste, and Toxics (AWT–107), 1200 Sixth Avenue, Seattle, Washington 98101. The EPA requests that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Region 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: Krishna Viswanathan, (206) 553–2684, or by email at *viswanathan.krishna@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean the EPA. Information is organized as follows:

Table of Contents

I. Background
II. Final Action
III. Statutory and Executive Order Reviews

I. Background

On May 6, 2010 (75 FR 24844), EPA proposed to approve the State of Oregon's State Implementation Plan (SIP) revision that establishes a maintenance plan for ozone in the Portland portion of the Portland/Vancouver Air Quality Maintenance Area (Pdx/Van AQMA) and the Salem-Keizer Area Transportation Study Air Quality Area (SKATS). This plan provides measures that enable continued attainment of the 8-hour ozone NAAQS for at least 10 years after designation, and includes a 2002 base-year emissions inventory. EPA also proposed approval of SIP revisions submitted by Oregon Department of Environmental Quality (ODEQ) that phase out the State's VIP enhanced BAR–31 test, and eliminate the Gas Cap Pressure Test and the Evaporative Purge Tests. No comments were received on the proposed approval of this plan. EPA is, accordingly, taking final action in this notice to approve the plan as discussed in the proposed action without change.

II. Final Action

EPA is approving the section 110(a)(1) maintenance plan and supporting rules for Portland and Salem, Oregon submitted on May 22, 2007, and described further in the Technical Support document, as revisions to the Oregon SIP. EPA is approving the maintenance plan and supporting rules for the Portland Portion of the Pdx/Van AQMA and SKATS. EPA is also taking final action to approve revisions to the Oregon SIP pertaining to motor vehicle testing provisions (Oregon SIP: Volume 2—section 5.4.7—Test Procedures and Standards and supporting rules). These revisions will not interfere with the attainment or maintenance of the current CO or ozone NAAQS and meet the requirements of section 110(a)(1) and section 110(l) of the CAA.

EPA will retain the tables in 40 CFR part 81 that identify the 1-hour ozone designation and classification status of each area as of the effective date of the 8-hour designations. (See 70 FR 44471.) Therefore, although the SKATS area is a State maintenance area for the 1-hour ozone standard, 40 CFR part 81 will retain the nonattainment designation for the SKATS area. EPA believes that the CAA does not require a separate 110(l) analysis to replace 1-hour nonattainment NSR with PSD once an area has been redesignated to attainment for the 1997 8-hour ozone standard, or has an approved 110(a)(1) maintenance plan for that standard. (See 75 FR 64677). In sum, EPA does not require

the continued application of 1-hour anti-backsliding nonattainment NSR in the SKATS area as long as Oregon interprets its SIP as applying PSD to this area.

EPA is incorporating by reference the revisions submitted by the State to the Oregon Administrative Rules, Chapter 340 as identified below. Certain other provisions of the Oregon SIP are addressed and approved by this action but are not being incorporated by reference into 40 CFR Part 52 to avoid potential conflict with EPA's independent authorities. See also 68 FR 2891, 2900–2901 (January 22, 2003) for a discussion of Oregon's underlying statutory authority.

III. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 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 in 40 CFR Part 52

Environmental protection, Air pollution control, Ozone, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 9, 2011.

Dennis J. McLerran,

Regional Administrator, Region 10.

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

PART 52—[AMENDED]

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

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

Subpart MM—Oregon

■ 2. Section 52.1970 is amended by adding paragraph (c)(152) to read as follows:

§ 52.1970 Identification of plan.

* * * * *

(c) * * *

(152) On August 9, 2005, and May 22, 2007, the Oregon Department of Environmental Quality submitted revisions to the Oregon State Implementation Plan. The revisions provide an ozone maintenance plan under section 110(a)(1) of the CAA for the Portland portion of the Portland-Vancouver Air Quality Maintenance Area and the Salem-Keizer Area Transportation Study Air Quality Area, and phase out of the State's VIP enhanced BAR–31 test, the elimination of the Gas Cap Pressure Test and the Evaporative Purge Test. The State's maintenance plan revisions meet the requirements of the Clean Air Act.

(i) Incorporation by reference.

(A) The following revised sections of the Oregon Administrative Rules, Chapter 340, effective April 12, 2007:

(*1*) Division 200, General Air Pollution Procedures and Definitions: Rule 0025, Abbreviations and Acronyms;

(*2*) Division 202, Ambient Air Quality Standards and PSD Increments: Rule 0090, Ozone;

(*3*) Division 204, Designation of Air Quality Areas: Rule 0010, Definitions; Rule 0030, Designation of Nonattainment Areas, the undesignated introductory text, (2); Rule 0040, Designation of Maintenance Areas, the undesignated introductory text, (2);

(*4*) Division 224, Major New Source Review: Rule 0050, Requirements for Sources in Nonattainment Areas; Rule 0060, Requirements for Sources in Maintenance Areas;

(*5*) Division 225, Air Quality Analysis Requirements; Rule 0090, Requirements for Demonstrating a Net Air Quality Benefit;

(*6*) Division 232, Emission Standards for VOC Point Sources: Rule 0010, Introduction; Rule 0020, Applicability;

(*7*) Division 242, Rules Applicable to the Portland Area, Employee Commute Options Program: Rule 0010, What is the Employee Commute Options Program?; Rule 0020, Who is Subject to ECO?; Rule 0030, What Does ECO require?; Rule 0040, How Does the Department Enforce ECO?; Rule 0050, Definitions of Terms Used in These Rules; Rule 0070, What are the Major Requirements of ECO?; Rule 0080, What are the Registration Requirements?; Rule 0090, What are the Requirements for an Employee Survey?; Rule 0110, What if an Employer Does Not Meet the Target Auto Trip Rate?; Rule 0120, How Will Employers Demonstrate Progress Toward the Target Auto Trip Rate?; Rule 0160, What Should Be Included in an Auto Trip Reduction Plan?; Rule 0180, What is a Good Faith Effort?; Rule 0190, How Does the ECO Program Affect New Employees, Expanding Employers and Employers Relocating within the Portland AQMA?; Rule 0200, Can a New or Relocating Employer Comply with ECO Through Restricted Parking Ratios?; Rule 0210, Can an Existing Employer Comply with ECO Through Restricted Parking Ratios?; Rule 0220, What if an Employer Has More Than One Work Site Within the Portland AQMA?; Rule 0240, Are There Alternatives to Trip Reduction?; Rule 0260, Can Employers Get Credit for Existing Trip Reduction Programs?; Rule 0270, Are Exemptions Allowed if an Employer is Unable to Reduce Trips or Take Advantage of Alternate Compliance Options?; Rule 0280, Participation in the Industrial Emission Management Program; Rule 0290, What Kind of Records Must be Kept and for How Long?;

(*8*) Division 242, Rules Applicable to the Portland Area, Industrial Emission Management Program: Rule 0400, Applicability; Rule 0410, Definition of Terms; Rule 0420, Unused PSEL Donation Program; Rule 0430, Industrial Growth Allowances; Rule 0440, Industrial Growth Allowance Allocation.

(B) The following revised sections of the Oregon Administrative Rules, Chapter 340, effective July 12, 2005;

(*1*) Division 256, Motor Vehicles, Rule 0010, Definitions;

(*2*) Division 256, Motor Vehicles, Visible Emissions: Rule 0100, Visible Emissions—General Requirements, Exclusions; Rule 0130, Motor Vehicle Fleet Operation;

(*3*) Division 256, Motor Vehicles, Emission Control System Inspection: Rule 0300, Scope; Rule 0310, Government-Owned Vehicle, Permanent Fleet Vehicle and United States Government Vehicle Testing Requirements; Rule 0340, Light Duty Motor Vehicle and Heavy Duty Gasoline Motor Vehicle Emission Control Test Method for Basic Program; Rule 0350, Light Duty Motor Vehicle Emission Control Test Method for Enhanced Program; Rule 0380, Light Duty Motor Vehicle Emission Control Test Criteria for Basic Program; Rule 0390, Heavy Duty Gasoline Motor Vehicle Emission Control Test Criteria.

(ii) Additional material.

(A) SIP Volume 2 Section 5.4.7: Test Procedures and Standards, as effective July 12, 2005.

■ 3. Section 52.1973 is amended by revising paragraph (d) to read as follows:

§ 52.1973 Approval of plans.

* * * * *

(d) *Ozone.* (1) EPA approves as a revision to the Oregon State Implementation Plan, the section 110(a)(1) ozone maintenance plans for Portland and Salem, submitted to EPA on May 22, 2007.

(2) [Reserved]

* * * * *

[FR Doc. 2011–32173 Filed 12–16–11; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register

Vol. 76, No. 243

Monday, December 19, 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–2011–1322; Directorate Identifier 2011–NM–211–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 all The Boeing Company Model 767 airplanes. This proposed AD was prompted by reports of cracks of the underwing longeron fittings in the wing center section which could result in loss of the primary load path between the fuselage and the wing box, and consequent catastrophic damage to the wing box and failure of the wing. This proposed AD would require repetitive high frequency eddy current (HFEC) inspections of the underwing longeron fitting for cracking, and related investigative and corrective actions if necessary. We are proposing this AD to detect and correct the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 2, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; phone: (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 (phone: (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6577; fax: (425) 917–6590; email: *Berhane.Alazar@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1322; Directorate Identifier 2011–NM–211–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 three reports of cracks of the underwing longeron fittings in the wing center section. One operator reported finding cracks in the underwing longeron fittings of the left and right wing center section. The cracks found were in the same location on both fittings and appeared to run through the entire thickness of the forward edge of the fitting at the radius corner of the vertical/horizontal flange. The lengths of cracks were approximately 0.300 to 0.375 inch long. The airplane had accumulated 37,000 total flight cycles. Similar cracks were found on a fatigue test airplane at these locations. Boeing estimates that it would take 25,000 flight cycles for the cracks to grow from 0.375 inch to 1.8 inches. Another operator reported finding a crack in the underwing longeron fitting of the left wing center section during normal maintenance. The crack was approximately one inch long and started from the radius of the fitting flange. The airplane had accumulated 16,655 total flight cycles.

Such cracking, if not detected and corrected, could result in loss of the primary load path between the fuselage and the wing box, and consequent catastrophic damage to the wing box and failure of the wing.

Relevant Service Information

We reviewed Boeing Alert Service Bulletin 767–57A0126, dated August 12, 2011. This service information describes procedures for repetitive HFEC inspections to detect cracking of the underwing longeron fitting, and related investigative and corrective actions if necessary. The related investigative action is an HFEC inspection to detect cracking of the tension bolt hole and the front spar lower chord. The corrective actions include replacing the underwing longeron fitting, and contacting The Boeing Company for repair instructions and doing the repair.

The compliance times are dependent on the total number of flight hours and flight cycles accumulated on the airplane. For certain airplanes, the initial compliance time is within 3,000 flight cycles or 7,000 flight hours

(whichever is first) after the date of the service bulletin. For other airplanes, the initial compliance time is the later of: (1) Before 16,000 total flight cycles or 35,000 total flight hours (whichever is first), and (2) within 6,000 flight cycles or 14,000 flight hours (whichever is first) after the date of the service bulletin.

The repetitive inspection interval is 12,000 flight cycles or 28,000 flight hours (whichever is first). The first repetitive inspection for airplanes on which the underwing longeron fitting is replaced is 16,000 flight cycles or 35,000 flight hours (whichever is first) after replacement.

We have also reviewed Boeing Service Bulletin 767–57A0126, Revision 1, dated November 9, 2011 (short form revision), which changes the part number of a certain washer.

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 previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.''

Differences Between the Proposed AD and the Service Information

Boeing Alert Service Bulletin 767–57A0126, dated August 12, 2011, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Interim Action

We consider this proposed AD interim action. The design approval holder is currently developing a modification that will address the unsafe condition identified in this AD. Once this modification is developed, approved, and available, we might consider additional rulemaking.

Costs of Compliance

We estimate that this proposed AD affects 417 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
Repetitive HFEC inspection.	3 work-hours × $85 per hour = $255 per inspection cycle.	$0	$255 per inspection cycle.	$106,335 per inspection cycle.

We estimate the following costs to do any necessary inspections 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 on-condition actions.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Tension bolt hole and the front spar lower chord HFEC inspection and fitting replacement.	104 work-hours × $85 per hour = $8,840	Up to $11,551	Up to $20,391.

We have received no definitive data that would enable us to provide cost estimates for cracking repairs specified in this proposed AD.

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–2011–1322; Directorate Identifier 2011–NM–211–AD.

(a) Comments Due Date

We must receive comments by February 2, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 767–200, –300, –300F, and –400ER series airplanes; certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of cracks of the underwing longeron fittings in the wing center section. We are issuing this AD to detect and correct such cracking, which could result in loss of the primary load path between the fuselage and the wing box, and consequent catastrophic damage to the wing box and failure of the wing.

(f) Compliance

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

(g) Inspections, Related Investigative Actions, and Corrective Actions

Except as provided by paragraphs (h)(2) and (h)(3) of this AD, at the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 767–57A0126, dated August 12, 2011: Do a high frequency eddy current (HFEC) inspection to detect cracking of the underwing longeron fitting; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 767–57A0126, dated August 12, 2011, as revised by Boeing Service Bulletin 767–57A0126, Revision 1, dated November 9, 2011 (short form revision), except as provided by paragraph (h)(1) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the inspection of the underwing longeron fitting thereafter at the applicable time and intervals specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 767–57A0126, dated August 12, 2011.

(h) Exceptions to Paragraph (g) of This AD

(1) If, during accomplishment of the related investigative action required by this AD, any cracking is found, and Boeing Alert Service Bulletin 767–57A0126, dated August 12, 2011, specifies to contact Boeing for repair instructions: Before further flight, do the repair using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(2) Where Paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 767–57A0126, dated August 12, 2011, specifies a compliance time ''after the original issue date of this service bulletin,'' this AD requires compliance within the specified compliance time ''after the effective date of this AD.''

(3) The Condition column of Paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 767–57A0126, dated August 12, 2011, refers to total flight cycles and total flight hours ''as of the original issue date of this service bulletin.'' However, this AD applies to the airplanes with the specified total flight cycles or total flight hours ''as of the effective date of this AD.''

Note 1: The service bulletin accomplishment instructions might refer to other procedures. When the words ''refer to'' are used and the operator has an accepted alternative procedure, the accepted alternative procedure can be used to comply with the AD. When the words ''in accordance with'' are included in the instruction, the procedure in the service bulletin must be used to comply with the AD.

(i) Alternative Methods of Compliance (AMOCs)

(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.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6577; fax: (425) 917–6590; email: *Berhane.Alazar@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; phone: (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.

Issued in Renton, Washington, on December 9, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–32387 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1275; Airspace Docket No. 11–ANM–26]

Proposed Amendment of Class E Airspace; Hugo, CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Hugo, CO. Decommissioning of the Hugo Tactical Air Navigation System (TACAN) has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations in the vicinity of the Hugo Very High Frequency Omni-Directional Radio Range/Distance Measuring Equipment (VOR/DME). This action also would make a minor adjustment to the geographic coordinates of the VOR/DME and make a correction to the regulatory text.

DATES: Comments must be received on or before February 2, 2012.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2011–1275; Airspace Docket No. 11–ANM–26, at the beginning of your comments. You may

also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2011–1275 and Airspace Docket No. 11–ANM–26) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2011–1275 and Airspace Docket No. 11–ANM–26''. The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace extending upward from 700 feet above the surface in the vicinity of the Hugo VOR/DME, CO. The airspace update is necessary due to the decommissioning of the Hugo TACAN, changing to a VOR/DME. Also during the review process it was discovered that there was a mistake in the regulatory text, this action will make a correction by replacing V–19 with V–83. Also, the geographic coordinates of the VOR/DME would be updated to coincide with the FAA's aeronautical database. Controlled airspace is necessary for the safety and management of IFR operations in the vicinity of the Hugo VOR/DME.

Class E airspace designations are published in paragraph 6005, of FAA Order 7400.9V, dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposal is within the scope of that authority as it would amend controlled airspace at Hugo, CO.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth

* * * * *

ANM CO E5 Hugo, CO [Amended]

Hugo VOR/DME

(Lat. 38°49′03″ N., long. 103°37′17″ W.)

That airspace south and east of the Hugo VOR/DME extending upward from 8,500 feet MSL, bounded on the west by V–83, on the northwest by V–108 and V–169, on the north by V–4, on the northeast by V–17, on the southeast by V–216, and on the south by V–210, excluding the airspace within Federal Airways.

Issued in Seattle, Washington, on December 12, 2011.

John Warner,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2011–32450 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF STATE

22 CFR Parts 120, 122, 126, 127, and 129

RIN 1400–AC37

[Public Notice 7732]

Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State proposes to amend part 129 of the International Traffic in Arms Regulations (ITAR) relating to brokers and brokering activities. Amendments are also to be made to related provisions of the ITAR. The proposed revisions are intended to clarify registration requirements, the scope of brokering activities, prior approval requirements and exemptions, procedures for obtaining prior approval and guidance, and reporting and recordkeeping of such activities. Conforming and technical changes would be made to other parts of the ITAR that affect export as well as brokering activities.

DATES: The Department will accept comments on this proposed rule until February 17, 2012.

ADDRESSES: Interested parties may submit comments within 60 days of the date of publication by one of the following methods:

- *Email: DDTCResponseTeam@state.gov* with the subject line, ''Brokering Rule Comments.''
- *Internet:* At *www.regulations.gov,* search for this notice by using this rule's RIN (1400–AC37).

Comments received after that date will be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal emails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov.* Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov,* leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Daniel L. Cook, Chief, Compliance and Registration Division, Office of Defense Trade Controls Compliance, Department of State, 12th Floor, SA–1, 2401 E Street NW., Washington, DC 20037; or email: *DDTCResponseTeam@state.gov,* with the subject line ''Brokering Rule Comments.''

SUPPLEMENTARY INFORMATION: This proposed rule would make changes to part 129 and other related sections of the ITAR that regulate brokers and brokering activities and implement the brokering amendment to the Arms Export Control Act (AECA) (Sec. 38(b)(1)(A)(ii) of the AECA, 22 U.S.C. 2778(b)(1)(A)(ii)).

Background

The Arms Export Control Act was amended in 1996 (Pub. L. 104–164) to provide for the regulation of brokering activities. The following year, implementing regulations were added to the ITAR in part 129. These regulations have remained unchanged except for two minor technical changes.

In 2003, in a report to Congress, the Department of State noted that it was beginning a review of the brokering regulations. The purpose of the review was to assess the need to modify the regulations in light of the experience gained in administering them. The changes proposed in this notice stem from this experience. They were also shaped by comments received from other agencies and industry, including the Defense Trade Advisory Group, a Department of State advisory committee.

Revisions Relevant to Industry Concerns

Changes are proposed to key provisions involving definitions, registration, licensing, exemptions, and reporting procedures. Some of these changes will result in a reduction of burden to the affected public. New exemptions are proposed, requirements for prior notification would be eliminated, and detailed guidance on obtaining a brokering authorization would be provided. The proposed changes also provide additional specificity regarding the applicability of these regulations to foreign brokers operating overseas.

Summary of Major Changes

Definitions of Broker and Brokering Activities

The definitions in current § 129.2(a) and (b) would be amended to clarify the terms ''broker'' and ''brokering activities.'' The revision also would more closely track the statutory definition of brokering activities in the Arms Export Control Act, which provides that brokering activities shall include the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service. The proposal would delete the phrase ''who acts as an agent for others'' that is in the current regulatory definition of ''broker,'' but is not in the definition of ''brokering activities'' in the Arms Export Control Act. Under current definitions, part 129 applies to U.S. persons who conduct brokering activities in the U.S. or abroad. It also applies to foreign persons who conduct brokering activities in the U.S., or abroad if subject to U.S. jurisdiction. Proposed § 129.2(d)(3)–(5) clearly indicate when a foreign person's brokering activities are subject to the ITAR.

New § 129.2(e)(3) would clarify that brokering does not include activities that do not extend beyond administrative services such as providing or arranging office space and equipment, hospitality, advertising, or clerical, visa, or translation services, or does not include activities beyond the provision of legal advice by an attorney to his client.

Brokering and U.S. Government Employees

New § 129.2(e)(1) would continue to exclude from the definition of ''brokering activities'' actions by U.S. persons in the United States that are limited to facilitating U.S. domestic sales or transfers. New § 129.2 (e)(2) would add a new exclusion from the definition of ''brokering activities'' for such activities by employees of the U.S. Government acting in an official capacity. The proposed exclusion would clarify that the U.S. Government and its officers or employees acting in an official capacity are not merely exempt from the requirements to register and obtain licenses, but rather are not covered by part 129 at all.

Registration Requirements and Exemptions

Editorial and technical revisions would be made to certain registration and related registration exemption provisions in § 129.3.

Persons exclusively in the business of insuring would be added to those persons exempt from registration in § 129.3(b)(2), as their insuring activity is similar to that of banks and financing. Such persons would also be exempt from the requirements in § 129.6 for prior approval for brokering activities, as well as reporting and recordkeeping requirements in §§ 129.10 and 129.11.

New § 129.3(b)(3) concerns persons registered pursuant to part 122 of this subchapter, including their U.S. subsidiaries, joint ventures, and other affiliates listed in their Statement of Registration, their bona fide and full-time regular employees, and their eligible foreign person brokers listed and identified as their exclusive brokers in their Statement of Registration, whose brokering activities: (a) Involve only the defense articles or services that are currently subject to export licenses obtained by the part 122 registrant or will require a license prior to their export by the registrant; or, (b) are on behalf of the part 122 registrant and involve only defense articles and defense services that are located and obtained from a manufacturer or source in the United States for export outside the United States under an export approval. Such persons are not required to obtain a separate part 129 registration, and would be exempt from the requirements in § 129.6 for prior approval for brokering activities as well as reporting requirements in § 129.10, but would still have recordkeeping requirements as specified in § 129.11.

New § 129.3(b)(4) would exempt from registration persons whose activities do not extend beyond acting as an end-user of a defense article or defense service exported pursuant to a license or approval under parts 123, 124, or 125, or subsequently acting as a reexporter or retransferor of such article or service under such license or approval or under an approval under § 123.9. Such persons would also be exempt from the requirements in § 129.6 for prior approval for brokering activities, as well as reporting and recordkeeping requirements in §§ 129.10 and 129.11.

New § 129.3(c) would specify that persons exempt from registration are subject to the policy of embargoes and other proscriptions in § 129.5.

New § 129.3(d) would specify that if new § 129.3(b)(3) is not applicable, U.S. persons who are registered as a manufacturer or exporter in accordance with part 122, including their U.S. or foreign subsidiaries, joint ventures, and other affiliates listed and covered on their Statement of Registration, and who are required to register under part 129, are not required to submit a separate broker registration or pay a separate broker registration fee as long as they have listed and identified themselves as brokers within their manufacturer or exporter Statement of Registration. All other requirements of part 129 would apply to such brokers and their brokering activities.

Registration Statement and Fees

The revisions would consolidate most broker registration requirements in § 129.4 rather than referring to certain requirements in part 122 (*e.g.,* notification of changes in information in registration submissions, notice of transfer of ownership or control to foreign persons and special provisions for mergers and acquisitions). In addition, the requirements for submissions by foreign person brokers are clarified. A broker not otherwise exempt from registration or not listed under a part 129 registration submission in accordance with § 129.4(c) would continue to be required to register and pay a registration fee of $2,250 per year (*see* § 129.4(a)). The Statement of Registration would be required to be signed by a senior officer who has been empowered by the intended registrant to sign such documents (*see* § 129.4(a)). The registrant must also submit documentation that it is incorporated or otherwise authorized to do business in the United States or, in the case of a foreign person registrant, in the relevant foreign jurisdiction (*see* § 129.4(a)).

Section 129.4(b) would be revised to reflect that a person who is required to register as a broker must do so annually and pay a registration fee of $2,250. This revision was made so readers would no longer need to refer to § 122.3. In addition, nearly half of the brokers registered with the Directorate of Defense Trade Controls (DDTC) are foreign persons whose first language is not English and who are not accustomed to U.S. regulations. We therefore want to consolidate most broker-related requirements in one section and make the navigation of the ITAR simpler.

Section 129.4(c) would be revised to reflect that there is no longer a requirement for a separate transmittal letter. The new requirements for intended broker registrants are certain certifications to be made on the Statement of Registration that previously were provided via the transmittal letter.

In § 129.4(c)(1), specific references to certain senior officers or officials would be added. In order for DDTC to obtain a certification of eligibility status as to all parties listed in a registration, this paragraph would also expressly require certifications to cover the registrant's parent or any subsidiary, joint venture, other affiliate, or other persons required to be listed in the Statement of Registration. In addition, this paragraph would clarify that disclosure is required of any form of charge of listed U.S. criminal statutes as well as indictment in order to eliminate uncertainty or misinterpretation of whether someone who has waived indictment and is criminally charged by ''information'' must notify DDTC. Certification requirements would be supplemented with a provision for part 129 registrants to disclose any convictions or indictments or other charges for violating foreign criminal statutes dealing with subject matter similar to the listed U.S. statutes or ineligibility under the laws of a foreign country to participate in export, import, or brokering activities. (A similar requirement is added to a broker's application for prior approval of brokering activities (*see* § 129.8(a)).

Section 129.4(c)(2) would contain the certification on whether the registrant is subject to foreign ownership or control and would add clarifications on when this requirement applies and would specifically require a foreign owned or controlled registrant to explain such ownership or control, including the identities of all ultimate owners or control persons.

New § 129.4(d) would recognize expressly the discretion of DDTC to permit a broker that is a parent of a U.S. or foreign person registered as a broker under part 129 to be covered by the registrant's Statement of Registration, provided that such broker parent is listed in the registrant's Statement of Registration and meets the same certification and other requirements set forth in this section.

New § 129.4(e) would specify that notifications of changes in registration information be signed by a senior officer, and provide that certain changes be communicated within five days of the event and other material changes at the time of annual registration renewal.

New § 129.4(f) would require notice 60 days in advance of any transfer to foreign ownership or control of a broker, any parent, subsidiary, or other affiliate listed and in the Statement of Registration.

New § 129.4(g) would provide procedures that must be followed in the

case of an acquisition or merger involving a registered broker.

Policy on Embargoes and Other Proscriptions

Section 129.5 would be amended to provide explicitly that exemptions from prior approval in § 129.7 do not apply to brokering activities involving countries or other persons subject to embargoes and other proscriptions cited in § 129.5 (*e.g.,* those involving countries or other persons referred to in § 126.1 or subject to a restriction published in the **Federal Register**). A provision in current paragraph (d) would be removed because it is redundant of paragraph (b); paragraphs would be re-designated, accordingly.

Exemptions From Prior Approval Requirement

The exemption for brokering activities undertaken for an agency of the U.S. Government would be amended to make clear that the exemption applies only to persons under direct contract with a U.S. Government agency for the sole use by the U.S. Government agency or for carrying out a foreign assistance or sales program authorized by law and subject to the control of the President by other means. In the latter case, use of this exemption requires either prior concurrence from DDTC or the contract at issue must contain an explicit clause stating the contract supports a foreign assistance or sales program authorized by law and the contracting agency has established control of the activity covered by the contract by other means equivalent to that established under the ITAR.

The exemption for brokering activities arranged within the North Atlantic Treaty Organization (NATO), NATO member countries, Australia, Japan, New Zealand, or the Republic of Korea would be amended to make it clear that the brokering activities must be undertaken wholly within these countries, and the defense articles and services must be located within and destined for NATO or such countries (*see* § 129.7(c)).

A new exemption would be added for brokering activities outside of NATO member countries, Australia, Japan, New Zealand, or the Republic of Korea that involve U.S.-origin defense articles that are not significant military equipment (SME) and where the end-use is limited to foreign government and international organization end-users (*see* § 129.7(d)).

The list of excluded items in § 129.7(e) would be expanded to cover certain sensitive defense articles and services (*e.g.,* man-portable air defense systems or ''MANPADS,'' night vision equipment, spacecraft items that are SME, submersible vessels, directed energy weapons, and miscellaneous articles in U.S. Munitions List Category XXI). Additional technical and clarifying changes would also be made to various exclusions.

Prior Notification

The proposed revision would delete the requirement for prior notification in its entirety in the current § 129.8. While nominally a notice provision, this section had the effect of being a prior approval requirement and proved to be confusing and difficult to administer. The revisions would re-title § 129.8 and modify procedures for obtaining prior approval.

Procedures for Obtaining Prior Approval

The information required in a request for prior approval submitted by a broker is revised and clarified in proposed new § 129.8. A provision adding a certification would be added in § 129.8(a) so that a request must include a statement on whether the broker applicant or its senior officers or officials have been indicted or otherwise charged (*e.g.,* by information) or convicted by foreign governments for violating any national statutes similar to those listed in § 120.27 or are ineligible to contract with, or to receive a license or other form of authorization or otherwise participate in defense trade under the laws of a foreign country. (*See* similar requirement in § 129.4 for a broker's Statement of Registration certification.)

The proposal would provide more specific guidance on the information required in a request (*e.g.,* identities of all entities and individuals who would participate in the brokering activities, information regarding the defense articles and services and any fee, commission, or other consideration). In this connection, the requirement for brokers to disclose fees, commissions, or other consideration is separate from and additional to the disclosure requirements imposed on exporters, suppliers, and vendors under part 130.

Proposed § 129.8 recognizes that some of the information to be required by that section may not be available at the time a request for prior approval is submitted (*e.g.,* the quantity and value of defense articles or services to be brokered). The broker would be required to identify what information is omitted and provide an explanation. DDTC has the discretion to take such circumstances into account in deciding whether to approve the request with or without conditions or to deny the request.

A provision would be added specifying that the validity period of a prior approval may not exceed four years.

Guidance

Section 129.9 would be re-titled and would revise the provision that enables persons to seek guidance from DDTC regarding the applicability of part 129 to their activities. It would provide the procedures for obtaining guidance and specify that such guidance shall not substitute for prior approval when required under § 129.8. As revised, this provision would be self-contained and would no longer reference the provision for advisory opinions in ITAR § 126.9.

Reports

Section 129.10 would be re-titled and revised to require that reports be submitted annually with the registration renewal submission, or within 30 days after expiration of registration if not renewing, for brokering activities the preceding year and to clarify the information required in the reports. Currently, the regulations do not provide a specific time period for submission of these reports, but via the DDTC Web site we have requested submissions in January. We are proposing this new reporting schedule in order to consolidate registration renewal with report submission, which we believe will improve reporting accountability and lessen the burden on industry.

Records

New § 129.11 would provide that records on brokering activities must be maintained in accordance with § 122.5.

Examples of Brokering Activities and License Application or Other Approval Requirements

Described below are several examples of conduct that constitute brokering activities and how the ITAR applies to such activities. These examples are illustrative only and are not exhaustive.

Example 1: A U.S. person learns of an upcoming U.S. Government solicitation for procurement of foreign defense articles that are significant military equipment (SME) and located abroad for delivery to a foreign government in South America. The solicitation will not be in support of a U.S. Government foreign assistance or sales program otherwise authorized by law. In advance of the solicitation, the U.S. person contacts several foreign manufacturers, personally visits their facilities to assess their capabilities to meet product specifications, and obtains guidance on the export procedures of the governments of the

countries where the defense articles are manufactured. Upon being awarded the contract by the U.S. Government, the U.S. person arranges for delivery from the manufacturers in the foreign countries to the South American government identified in the U.S. Government contract. The U.S. person is engaged in brokering activities and would be required to register under part 129 prior to initiating such activities. If the U.S. person is already registered as a manufacturer or exporter under part 122, it could meet part 129 registration requirements simply by amending its form DS–2032 Statement of Registration to add broker as a registration type and other required information (*e.g.,* U.S. and foreign subsidiaries and affiliates also engaged in brokering activities); there would be no requirement for a separate broker registration submission or fee.

Example 2: A foreign person signs an agreement with a U.S. manufacturer/exporter registered with DDTC under part 122 to act as a broker exclusively for the registrant and is listed on the registrant's statement of registration as an exclusive broker. The agreement obligates the foreign person to purchase and distribute (or resell) to specified foreign governments in the Middle East the SME defense articles of the part 122 registrant. The part 122 registrant has obtained a DSP–5 license for technical data and a Warehouse & Distribution Agreement authorizing the foreign person to receive and present technical data to promote sales and to warehouse and distribute the defense articles. The foreign person is engaged in brokering activities, but assuming the foreign person meets eligibility and other criteria, he would be exempt under § 129.3(b)(3) from separate registration, prior approval, and reporting under part 129 with respect to the foregoing activities on behalf of the part 122 registrant. However, the foreign person would be subject to the policies and proscriptions of § 129.5 as well as recordkeeping requirement of proposed § 129.11.

Example 3: A foreign person seeks buyers for certain U.S.-origin SME defense articles previously exported through commercial channels to a foreign government of a NATO-member country. The foreign person enters into a representational arrangement with the foreign government to find a buyer. The foreign person contacts potential buyers in the U.S. and overseas and ultimately identifies a foreign government in Southeast Asia that wishes to procure the defense articles. The foreign person arranges for an in-country demonstration of the defense articles and negotiates the terms of the sale. The foreign person has engaged in brokering activities and would be required to register under part 129 and to obtain DDTC approval prior to initiating such activities. In addition, the foreign government seller would be required to obtain a reexport authorization under ITAR § 123.9(d) before reselling or reexporting such defense articles.

Example 4: A U.S. manufacturer/exporter, registered with DDTC under part 122, provided U.S. SME defense articles for export by the U.S. Department of Defense through the Foreign Military Sales Program to a foreign government in the Middle East. Several years later, the foreign government asks the U.S. manufacturer/exporter to find buyers for the defense articles. The foreign government will use proceeds from the sale to upgrade its inventory with more modern defense articles from the same U.S. manufacturer. The U.S. company solicits and identifies a foreign government buyer in a sub-Saharan African country and negotiates the terms of sale on behalf of the Middle Eastern government. The U.S. manufacturer/exporter company is engaged in brokering activities and would be required to register under part 129 and obtain approval from DDTC under part 129 prior to engaging in such activities. As provided in proposed § 129.3(d), the manufacturer/exporter, having already registered under part 122, would not be required to file a separate broker registration or pay a separate fee, provided that it discloses that it engages in brokering activities in its registration. The Middle Eastern government owner would also be required to obtain reexport authorization for the FMS-origin defense articles from the Department of State's Office of Regional Security and Arms Transfers prior to reselling or reexporting such defense articles.

Example 5: A U.S. manufacturer of a defense article enters into a sales contract with a government end-user in a South American country and then obtains an export license from DDTC to export the defense article. The manufacturer engages a freight forwarder to arrange pick-up, containerization, transportation, and delivery to the end-user. The freight forwarder is engaged in brokering activities. However, so long as activities do not extend beyond freight forwarding, the freight forwarder will not be required to register, as provided by proposed § 129.3(b)(2). The freight forwarder, as well as any other person exempt from registration, must still comply with § 129.5 (policy on embargoes and other proscriptions).

Example 6: A bank in a Caribbean island country approaches a U.S. manufacturer of a defense article. The bank proposes to provide financing, through letters of credit that the bank issues, for the sale of the manufacturer's defense articles to a government end-user in Asia. As an inducement to perform the financing, the bank arranges introductions with a procurement official of the Asian government. The bank is performing activities beyond financing and is engaged in brokering activities (*i.e.,* arranging introductions). The bank would be required to register with DDTC under part 129 and would be required to obtain prior approval unless its activities qualify for an exemption under § 129.7.

Example 7: A European manufacturer of a defense article incorporates U.S. origin defense articles (*i.e.,* parts and components on the U.S. Munitions List). The European manufacturer negotiates a sales contract with a government end-user in a Middle Eastern country. In doing so, the European manufacturer employs a foreign person from that country to perform translation services during the negotiation. The foreign person is not engaged in brokering so long as that person's activity does not extend beyond administrative services such as translation pursuant to proposed § 129.2(e)(3). Release to the foreign person of technical data on the U.S.-origin defense articles would require a license from DDTC. In addition, the European manufacturer would be exempt from registration, prior approval, reporting, and recordkeeping requirements under part 129, assuming all of the conditions of § 129.3(b)(4) are met. However, the policies and proscriptions of § 129.5 would apply.

Other Revisions

Conforming and other changes would be made to a number of other parts of the ITAR related to brokering activities.

Section 120.1(a) would be amended to add reference to ''other relevant authorities in the Arms Export Control Act (22 U.S.C. 2751 *et seq.*)'' that are implemented by the ITAR. Sections 120.1(a)–(c) would be amended to update the title of the Deputy Assistant Secretary.

Section 120.1(c)'s heading would be changed to ''Receipt of Licenses and Eligibility'' and the text would be restructured into two subparagraphs. Subparagraph (1) would identify the kinds of licenses and other approvals that U.S. and/or foreign persons are qualified to receive and would add a clarification that foreign as well as U.S. persons may receive prior approvals for brokering activities. Subparagraph (2) would list the circumstances that would make a person generally ineligible to be involved in activities regulated under the ITAR. The latter provision would include clarification that it applies to foreign as well as U.S. persons and that ineligibility also attaches to a criminal charge (*e.g.,* by information) as well as indictment, an interim suspension under § 127.8, or policy of denial under § 126.7(a).

Section 120.1(d) would be amended to clarify that exemptions provided by the ITAR do not apply to transactions in which the source or manufacturer, broker, or other participant in brokering activities (in addition to the exporter or party to the export) is generally ineligible, unless prior authorization granted by the DDTC. Also, an obsolete reference to § 126.7(c) would be deleted.

Section 120.20 would be amended to add ''or other approval'' to the title and provide a definition for ''other approval.''

Section 120.25(a)(4)(i), the definition of ''Empowered Official,'' would be amended to add a reference to brokering activities. Paragraph (b) would be added to clarify that the empowered official of a foreign person broker may be a foreign person who otherwise meets the criteria for such an official in paragraph (a). Paragraph (c) would be added to specify that a person may not serve as an empowered official if such person is

ineligible under § 120.1(c)(2); has been convicted of violating any foreign criminal statutes similar to that referred to in that section; is ineligible to contract with, or to receive an import or export license from any foreign government agency; or is a citizen or national of any country or is a person referred to in § 126.1.

New § 120.40 would add a definition of ''affiliate.''

Section 122.2(b)(1) would be amended to add specific references to certain senior officers or officials, including secretary, partner, or member. This paragraph would also expressly require certifications to cover the registrant's parent or any subsidiary, joint venture, other affiliate, or other persons required to be listed in the Statement of Registration. This paragraph would also be clarified to require disclosure of any criminal charge (*e.g.,* an information), as well as indictment of a listed crime. Paragraph (b)(2) of this section would be amended by adding a provision that would specifically require a foreign owned or controlled registrant to explain such ownership or control, including the identities of all ultimate owners or control persons. Also, a redundant provision concerning U.S. incorporation documentation would be deleted from this paragraph.

Section 122.4(a) would be amended to specify that notifications of changes in registration information be signed by a senior officer, and to provide that certain changes be notified within five days of the event and other material changes at the time of annual registration renewal.

The authority citation for part 126 would be amended to add a reference to § 40A of the Arms Export Control Act (22 U.S.C. 2781). Section 126.1(a) would be amended to clarify that the reference to the exception to the prohibition on use of exemption is found in paragraphs (c) through (e) of § 123.17. It would also add a reference to § 129.5 that contains restrictions imposed on brokering activities involving countries, areas, and persons referred to in § 126.1.

Section 126.1(b) would be amended to add after ''[a] defense article licensed'' the words ''or otherwise authorized for export, temporary import, reexport, or retransfer.''

Section 126.13 would be amended by re-designating paragraph (c) as (d) and adding a new paragraph (c) that would require all applications for license or approval to identify all brokers and described their activities with respect to the transaction subject to the application.

Section 127.1(b) would be amended to specify that responsibilities imposed on a person granted a license also apply to a person who ''acts pursuant to an exemption,'' and that such responsibilities include acts of brokers.

Section 127.1(c) would be amended to change the reference from § 120.1(c) to § 120.1(c)(2) and to clarify that this provision applies to ineligible persons themselves. Section 127.1(c)(1) would be amended to delete the words ''debarred, suspended, or'' before ''ineligible person,'' as an ineligible person includes one who has been debarred or suspended. Also, § 127.1(c)(2) would be amended to add a reference to ''or brokering activities'' after ''defense article, defense service''; delete the words ''the furnishing of any'' before ''defense service''; replace reference to ''for which a license or approval is required'' with ''subject to this subchapter''; and delete the words ''debarred, suspended, or'' before ''ineligible person.''

Section 127.2(b)(13) would be amended to add a reference to ''brokering activities'' to the definition of documents to which the prohibition against misrepresentation and omission of facts in § 127.1(a) applies.

Section 127.7(a) would be amended to add a specific reference to brokering activities to the scope of debarment and to replace the words ''for which a license or approval is required by this subchapter'' with ''subject to this subchapter.''

Section 127.8 would be amended to add a reference to brokering activities to the scope of an interim suspension order and to delete obsolete references to notice and other provisions relating to § 127.7(c). Also, the words ''for which a license or approval is required by this subchapter'' would be replaced with ''subject to this subchapter.''

Regulatory Analysis and Notices

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from § 553 (Rulemaking) and § 554 (Adjudications) of the Administrative Procedure Act. Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 60-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function.

Regulatory Flexibility Act

Since this proposed rule is not subject to the notice-and-comment procedures of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Act of 1995

This proposed rule does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not affect significantly or uniquely small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Act of 1995.

Executive Order 13175

The Department has determined that this proposed rule will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed rule 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. Therefore, in accordance with Executive Order 13132, this proposed rule does not have sufficient federalism implications to require consultation or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding inter-governmental consultation on Federal programs and activities do not apply to this proposed rule.

Executive Order 12866

The Department is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules governing the conduct of this function are exempt from the requirements of Executive Order 12866. However, the Department

has reviewed the proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Order.

Executive Order 13563

The Department of State has considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Executive Order 12988

The Department of State has reviewed the proposed rule in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Paperwork Reduction Act

The Paperwork Reduction Act (''PRA,'' 44 U.S.C. 3501 *et seq.*) requires all Federal agencies to analyze proposed regulations for potential burdens on the regulated community created by provisions in the proposed regulations that require the submission or retention of information. The information collection requirements must be submitted to the Office of Management and Budget (OMB) for approval. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of its continuing effort to reduce paperwork and respondent burden, and to conform with the requirements as set forth in this proposed rule, the Department of State proposes to change the reporting requirements on the following collections: DS–2032, Statement of Registration (approved by the Office of Management and Budget [OMB] under control number 1405–0002); the Annual Brokering Report (OMB control number 1405–0141); and Brokering Prior Approval (OMB control number 1405–0142). This notice serves to inform the general public and Federal agencies of the opportunity to comment on these information collections in accordance with the PRA.

Summary of Proposed Collections: The Department of State is seeking OMB approval for the information collections described below.

- *Title of Information Collection: DS–2032 Statement of Registration.*
- *OMB Control Number:* 1405–0002.
- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, *Directorate of Defense Trade Controls, PM/DDTC.*
- *Form Number:* DS–2032.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 12,000.
- *Estimated Number of Responses:* 12,000.
- *Average Hours per Response:* 1 hour.
- *Total Estimated Burden:* 12,000 hours.
- *Frequency:* Annually and on occasion.
- *Obligation to Respond:* Mandatory.
- *Title of Information Collection:* Annual Brokering Report.
- *OMB Control Number:* 1405–0141.
- *Type of Request:* Extension of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- *Form Number:* None.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 1,515.
- *Estimated Number of Responses:* 1,515.
- *Average Hours per Response:* 2 hours.
- *Total Estimated Burden:* 3,030 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Mandatory.
- *Title of Information Collection:* Brokering Prior Approval (License).
- *OMB Control Number:* 1405–0142.
- *Type of Request:* Extension of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- *Form Number:* None.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 1,515.
- *Estimated Number of Responses:* 150.
- *Average Hours per Response:* 2 hours.
- *Total Estimated Burden:* 300 hours.
- *Frequency:* On Occasion.
- *Obligation To Respond:* Required to Obtain Benefits.

DATES: The Department will accept comments from the public on these information collections up to 60 days from date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Comments and questions regarding the collections listed in this notice should be directed to Daniel L. Cook, Chief, Compliance and Registration Division, Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls, Department of State, 12th Floor, SA–1, 2401 E Street NW., Washington, DC 20037; or email *DDTCResponseTeam@state.gov,* with the subject line ''Brokering Rule Information Collections.''

Abstract of Proposed Collections: The export, temporary import, temporary export and brokering of defense articles, defense services and related technical data are licensed by the Directorate of Defense Trade Controls in accordance with the International Traffic in Arms Regulations (22 CFR parts 120–130) and Section 38 of the Arms Export Control Act. Those of the public who manufacture or export defense articles, defense services, and related technical data, or the brokering thereof, must register with the Department of State. Persons desiring to engage in brokering activities must submit an application or written request to conduct the transaction to the Department to obtain a decision whether it is in the interests of U.S. foreign policy and national security to approve the transaction. Also, registered brokers must submit annual reports regarding all brokering activity that was transacted, and registered manufacturers and exporter must maintain records of defense trade activities for five years. We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Methodology: These forms/information collections may be sent to the Directorate of Defense Trade Controls via mail, personal delivery, or fax.

Summary of Proposed Changes to the Information Collections: The proposed changes to the DS–2032, Statement of Registration, follow the proposed changes to ITAR part 129 that would allow manufacturers/exporters to register as brokers on the same form, with one registration fee. In addition, the form will ask for more information regarding company structure, specifically for information on intermediary parents, if applicable. Finally, the form will have a separate statement of certification for those registering as brokers.

The revised regulations provide that the Annual Brokering Report collection would be submitted with the DS–2032, as an attachment. New information that is to be required on the report includes the following: brokering registration code; signature and certification of the report by an empowered official; identification of all parties involved in the brokering transaction (currently, the regulations require only the identification of purchasers and recipients); and identification of the source of any consideration paid for the brokering transaction.

Clarification of the requirements for obtaining Brokering Prior Approval will result in the applicant providing additional information, to include the following: Categorization of the types of defense articles and services to be brokered, including whether the items are significant military equipment; identification of the type of sale that is to be brokered (commercial or under the Foreign Military Sales program); listing of any consideration expected to be received; and signature of an empowered official certifying the information provided is complete and accurate.

List of Subjects

22 CFR Part 120

Arms and munitions, Classified information, Exports.

22 CFR Part 122

Arms and munitions, Exports, Reporting and record-keeping requirements.

22 CFR Part 126

Arms and munitions, Exports.

22 CFR Part 127

Arms and munitions, Crime, Exports, Penalties, Seizures and forfeitures.

22 CFR Part 129

Arms and munitions, Exports, Technical assistance.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 120, 122, 126, 127, and 129 are proposed to be amended as follows:

PART 120—PURPOSE AND DEFINITIONS

1. The authority citation for part 120 continues to read as follows:

Authority: Sections 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; E.O. 11958, 42 FR 4311; E.O. 13284, 68 FR 4075; 3 CFR, 1977 Comp. p.79; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920.

2. Section 120.1 is amended by revising the section heading and paragraphs (a), (b)(1), (b)(2), (c), and (d), and adding paragraphs (c)(1), (c)(1)(i), (c)(1)(ii), (c)(1)(iii), and (c)(2), to read as follows:

§ 120.1 General authorities, receipt of licenses, and ineligibility.

(a) Section 38 of the Arms Export Control Act (22 U.S.C. 2778) authorizes the President to control the export and import of defense articles and defense services. The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State by Executive Order 11958, as amended. This subchapter implements that authority, as well as other relevant authorities in the Arms Export Control Act (22 U.S.C. 2751 et seq.). By virtue of delegations of authority by the Secretary of State, these regulations are primarily administered by the Deputy Assistant Secretary for Defense Trade and Regional Security and the Managing Director, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs.

(b)(1) *Authorized officials.* All authorities conferred upon the Deputy Assistant Secretary for Defense Trade and Regional Security or the Managing Director of Defense Trade Controls by this subchapter may be exercised at any time by the Under Secretary of State for Arms Control and International Security or the Assistant Secretary of State for Political-Military Affairs unless the Legal Adviser or the Assistant Legal Adviser for Political-Military Affairs of the Department of State determines that any specific exercise of this authority under this paragraph may be inappropriate. (2) In the Bureau of Political-Military Affairs, there is a Deputy Assistant Secretary for Defense Trade and Regional Security (DAS—Defense Trade and Regional Security) and a Managing Director of Defense Trade Controls (MD—Defense Trade Controls). The DAS—Defense Trade and Regional Security and the MD—Defense Trade Controls are responsible for exercising the authorities conferred under this subchapter. The DAS—Defense Trade and Regional Security is responsible for oversight of the defense trade controls function. The MD—Defense Trade Controls is responsible for the Directorate of Defense Trade Controls, which oversees the subordinate offices described in paragraphs (b)(2)(i) through (b)(2)(iv) of this section.

* * * * *

(c) *Receipt of Licenses and Eligibility.*

(1) A U.S. person may receive a license or other approval pursuant to this subchapter. A foreign person may not receive such a license or other approval, except as follows:

(i) A foreign governmental entity in the United States may receive an export license or other export approval;

(ii) A foreign person may receive a reexport or retransfer approval; and

(iii) A foreign person may receive a prior approval for brokering activities.

Requests for a license or other approval other than by a person referred to in paragraphs (c)(1)(i) and (c)(1)(ii) of this section will be considered only if the applicant has registered with the Directorate of Defense Trade Controls pursuant to part 122 or 129 of this subchapter, as appropriate.

(2) Persons who have been convicted of violating the criminal statutes enumerated in § 120.27 of this subchapter, who have been debarred pursuant to part 127 or 128 of this subchapter, who are subject to indictment or are otherwise charged (*e.g.,* by information) for violating the criminal statutes enumerated in § 120.27 of this subchapter, who are ineligible to contract with or to receive a license or other form of authorization to import defense articles or defense services from any agency of the U.S. Government, who are ineligible to receive an export license or other approval from any other agency of the U.S. Government, or who are subject to a Department of State policy of denial, suspension, or revocation under § 126.7(a) of this subchapter, or to interim suspension under § 127.8 of this subchapter, are generally ineligible to be involved in activities regulated under the subchapter.

(d) The exemptions provided in this subchapter do not apply to transactions in which the exporter, any party to the export (as defined in § 126.7(e) of this subchapter), any source or manufacturer, broker or other participant in the brokering activities, is generally ineligible as set forth in paragraph (c)(2) of this section, unless prior written authorization has been granted by the Directorate of Defense Trade Controls.

3. Section 120.20 is amended by revising the title and text to read as follows:

§ 120.20 License or other approval.

License means a document bearing the word ''license'' issued by the Managing Director, Directorate of Defense Trade Controls, or his authorized designee that permits the export, temporary import, or brokering

of a specific defense article or defense service controlled by this subchapter.

Other approval means a document issued by the Managing Director, Directorate of Defense Trade Controls, or his authorized designee, that approves an activity regulated by this subchapter (*e.g.,* approvals for brokering activities or retransfer authorizations), or the use of an exemption to the license requirements as described in this subchapter.

4. Section 120.25 is amended by revising paragraph (a)(4)(i), removing paragraph (b) from reserved status, and adding paragraph (b) and (c), to read as follows:

§ 120.25 Empowered Official.

(a) * * *

* * * * *

(4) * * *

(i) Enquire into any aspect of a proposed export, temporary import, or brokering activity by the applicant, and

* * * * *

(b) For the purposes of a broker who is a foreign person, the empowered official may be a foreign person who otherwise meets the criteria for an empowered official in paragraph (a) of this section.

(c) A person who is ineligible within the meaning of § 120.1(c)(2) of this subchapter, or who is the subject of an indictment or has otherwise been charged (*e.g.,* by information) for or has been convicted of violating any foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in § 120.27 of this subchapter, or who is ineligible to contract with any foreign government agency, or to receive a license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country, or who is a citizen or national of a country or other person referred to in § 126.1 of this subchapter, may not be an empowered official.

5. Section 120.40 is added to read as follows:

§ 120.40 Affiliate.

An *affiliate* of a registrant is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such registrant.

PART 122—REGISTRATION OF MANUFACTURERS AND EXPORTERS

6. The authority citation for part 122 continues to read as follows:

Authority: Sections 2 and 38, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778); E.O. 11958, 42 FR 4311; 1977 Comp., p. 79; 22 U.S.C. 2651a.

7. Section 122.1 is amended by revising paragraphs (a), (b), (b)(1), (b)(2), and (b)(3) to read as follows:

§ 122.1 Registration requirements.

(a) Any person who engages in the United States in the business of manufacturing or exporting defense articles or furnishing defense services is required to register with the Directorate of Defense Trade Controls under § 122.2 of this subchapter. For the purpose of this subchapter, engaging in such a business requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service. A manufacturer who does not engage in exporting must nevertheless register. (*See* part 129 of this subchapter for requirements for registration of persons who engage in brokering activities.)

(b) *Exemptions.* The registration requirements of paragraph (a) of this section do not apply to:

(1) Officers and employees of the U.S. Government acting in an official capacity;

(2) Persons whose pertinent business activity is confined to the production of unclassified technical data only;

(3) Persons all of whose manufacturing and export activities are licensed under the Atomic Energy Act of 1954, as amended; or

(4) * * *

Note: Persons who qualify for the exemptions in paragraphs (b)(2) or (b)(4) of this section remain subject to the requirements for licenses or other approvals for exports of defense articles (including technical data) and defense services and may not receive an export license or approval unless registered under § 122.2 of this subchapter.

* * * * *

8. Section 122.2 is amended by revising paragraphs (b)(1), (b)(1)(i), and (b)(2) to read as follows:

§ 122.2 Submission of registration statement.

* * * * *

(b) * * *

(1) Whether the intended registrant, chief executive officer, president, vice-presidents, secretary, partner, member, other senior officers or officials (*e.g.,* comptroller, treasurer, general counsel), or any member of the board of directors of the registrant or of its parent, subsidiary, joint venture, or other affiliate or other persons required to be listed in the Statement of Registration:

(i) Has ever been indicted or otherwise charged (*e.g.,* by information) for or convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(ii) * * *

(2) Whether the intended registrant is foreign owned or foreign controlled (as defined in § 120.37 of this subchapter). If the intended registrant is foreign owned or foreign controlled, the certification shall include an explanation of such ownership or control, including the identities of all foreign persons who ultimately own or control the registrant.

9. Section 122.4 is amended by revising paragraphs (a) and (a)(2) to read as follows:

§ 122.4 Notification of changes in information furnished by registrants.

(a) A registrant must, within five days of the event, provide the Directorate of Defense Trade Controls a written notification, signed by a senior officer (*e.g.,* chief executive officer, president, secretary, partner, member, treasurer, general counsel), if:

(1) * * *

(2) There is a change in the following information contained in the Statement of Registration: (i) Registrant's name, (ii) registrant's address, (iii) registrant's legal organization structure, (iv) ownership or control, (v) the establishment, acquisition, or divestment of a U.S. or foreign subsidiary, joint venture, or other affiliate who is engaged in manufacturing defense articles, exporting defense articles or defense services, or otherwise required to be listed on registrant's Statement of Registration.

Note: All other changes in the Statement of Registration must be provided as part of annual registration renewal.

* * * * *

PART 126—GENERAL POLICIES AND PROVISIONS

10. The authority citation for part 126 is revised to read as follows:

Authority: Sections. 2, 38, 40, 40A, 42, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2781, 2791, and 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp., p.79; 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p. 899; Sec. 1225, Pub. L. 108–375; Sec. 7089, Pub. L. 111–117.

11. Section 126.1 is amended by revising paragraphs (a) and (b) to read as follows:

§ 126.1 Prohibited exports, imports, and sales to or from certain countries.

(a) *General.* It is the policy of the United States to deny licenses and other approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries. This policy applies to

Belarus, Cuba, Eritrea, Iran, North Korea, Syria, and Venezuela. This policy also applies to countries with respect to which the United States maintains an arms embargo (*e.g.,* Burma, China, and the Republic of the Sudan) or whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States. Information regarding certain other embargoes appears elsewhere in this section. Comprehensive arms embargoes are normally the subject of a State Department notice published in the **Federal Register**. The exemptions provided in the regulations in this subchapter, except § 123.17(c) through § 123.17(e) of this subchapter, do not apply with respect to articles originating in or for export to any proscribed countries, areas, or other persons referred to in this § 126.1 or to brokering activities involving such countries, areas or persons. (*See* § 129.5 of this subchapter, which imposes restrictions on brokering activities similar to those in this section.)

(b) *Shipments.* A defense article licensed or otherwise authorized for export, temporary import, reexport, or retransfer under this subchapter may not be shipped on a vessel, aircraft, spacecraft, or other means of conveyance that is owned by, operated by, leased to, or leased from any of the proscribed countries, areas, or other persons referred to in this section.

* * * * *

12. Section 126.13 is amended by re-designating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

§ 126.13 Required information.

* * * * *

(c) All applications for licenses or other approvals under this subchapter and amendments thereto shall identify all brokers and describe the brokering activities involved in the transaction subject to such application or prior notification.

(d) In cases when foreign nationals are employed at or assigned to security-cleared facilities, provision by the applicant of a Technology Control Plan will facilitate processing.

PART 127—VIOLATIONS AND PENALTIES

13. The authority citation for part 127 continues to read as follows:

Authority: Sections 2, 38, and 42, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2791); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp., p. 79; 22 U.S.C. 401; 22 U.S.C. 2651a; 22 U.S.C. 2779a; 22 U.S.C. 2780.

14. Section 127.1 is amended by revising paragraphs (b), (c), (c)(1), and (c)(2) to read as follows:

§ 127.1 Violations.

* * * * *

(b) Any person who is granted a license or other approval or acts pursuant to an exemption under this subchapter is responsible for the acts of employees, agents, brokers, and all authorized persons to whom possession of the defense article or technical data has been entrusted regarding the operation, use, possession, transportation, and handling of such defense article or technical data abroad. All persons abroad subject to U.S. jurisdiction who obtain custody of a defense article exported from the United States or produced under an agreement described in part 124 of this subchapter, and irrespective of the number of intermediate transfers, are bound by the regulations of this subchapter in the same manner and to the same extent as the original owner or transferor.

(c) A person who is ineligible pursuant to § 120.1(c)(2) of this subchapter, or a person with knowledge that another person is ineligible pursuant to § 120.1(c)(2), may not, directly or indirectly, in any manner or capacity, without prior disclosure of the facts to and written authorization from the Directorate of Defense Trade Controls:

(1) Apply for, obtain, or use any export control document as defined in § 127.2(b) of this subchapter for such ineligible person; or

(2) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any manner in any transaction that may involve any defense article, including technical data, defense service, or brokering activities subject to this subchapter where such ineligible person may obtain any benefit there from or have any direct or indirect interest therein.

* * * * *

15. Section 127.2 is amended by revising paragraph (b)(13) to read as follows:

§ 127.2 Misrepresentation and omission of facts.

* * * * *

(b) * * *

(13) Any other document used in the regulation or control of a defense article, including technical data, defense service, or brokering activities regulated by this subchapter.

16. Section 127.7 is amended by revising paragraph (a) to read as follows:

§ 127.7 Debarment.

(a) *Debarment.* In implementing § 38 of the Arms Export Control Act, the Assistant Secretary of State for Political-Military Affairs may prohibit any person from participating directly or indirectly in the export of defense articles, including technical data, in the furnishing of defense services, or in brokering activities that are subject to this subchapter for any of the reasons listed below. Any such prohibition is referred to as a debarment for purposes of this subchapter. The Assistant Secretary of State for Political-Military Affairs shall determine the appropriate period of time for debarment, which shall generally be for a period of three years. Reinstatement is not automatic, however, and in all cases the debarred persons must submit a request for reinstatement and be approved for reinstatement before engaging in any export or brokering activities subject to the Arms Export Control Act or this subchapter.

* * * * *

17. Section 127.8 is amended by revising paragraph (a) to read as follows:

§ 127.8 Interim suspension.

(a) The Managing Director of the Directorate of Defense Trade Controls or the Director of the Office of Defense Trade Controls Compliance is authorized to order the interim suspension of any person when the Managing Director or Director of Compliance believes that grounds for debarment (as defined in § 127.7 of this subchapter) exist and where and to the extent the Managing Director or Director of Compliance, as applicable, finds that interim suspension is reasonably necessary to protect world peace or the security or foreign policy of the United States. The interim suspension order prohibits that person from participating directly or indirectly in the export of any defense article or defense service or in brokering activities subject to this subchapter. A copy of the interim suspension order will be served upon the suspended person in the same manner as provided in § 128.3(b) of this subchapter. The interim suspension order may be made immediately effective, without prior notice. The order will state the relevant facts, the grounds for issuance of the order, and describe the nature and duration of the interim suspension. No person may be suspended for a period exceeding 60 days, absent extraordinary circumstances, (*e.g.,* unless proceedings under part 128 of this subchapter, or criminal proceedings, are initiated).

* * * * *

PART 129—REGISTRATION AND LICENSING OF BROKERS

18. Section Contents for part 129 is revised to read as follows:

Contents

Sec.
129.1 Purpose.
129.2 Definitions.
129.3 Requirement to register.
129.4 Submission of Statement of Registration, registration fees, and notification of changes in information furnished by registrants.
129.5 Policy on embargoes and other proscriptions.
129.6 Requirement for prior approval.
129.7 Exemptions from prior approval.
129.8 Procedures for obtaining prior approval.
129.9 Guidance.
129.10 Reports.
129.11 Maintenance of brokering records by registrants.

19. The authority citation for part 129 continues to read as follows:

Authority: Section 38, Pub. L. 104–164, 110 Stat. 1437, (22 U.S.C. 2778).

20. Section 129.2 is amended by revising paragraphs (a), (b), and (c) and adding paragraphs (b)(1), (b)(2), (d), (e), and (f) to read as follows:

§ 129.2 Definitions.

(a) *Broker* means any person (as defined by § 120.14 of this subchapter) who engages in brokering activities.

(b) *Brokering activities* means any action to facilitate the manufacture, export, reexport, import, transfer, or retransfer of a defense article or defense service. Such action includes, but is not limited to:

(1) Financing, insuring, transporting, or freight forwarding defense articles and defense services, or

(2) Soliciting, promoting, negotiating, contracting for, arranging, or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service.

(c) For the purposes of this subchapter, engaging in the business of brokering activities requires only one action as described above.

(d) The activities subject to part 129 include brokering activities:

(1) by any U.S. person wherever located;

(2) by any foreign person located in the United States;

(3) by any foreign person located outside the United States involving a U.S.-origin defense article or defense service;

(4) by any foreign person located outside the United States involving the import into the United States of any defense article or defense service; or

(5) by any foreign person located outside the United States acting on behalf of a U.S. person.

(e) Brokering activities do not include:

(1) Activities by a U.S. person in the United States that are limited exclusively to U.S. domestic sales or transfers (*e.g.,* not for export, which includes transfer in the United States to a foreign person);

(2) Activities by employees of the U.S. Government acting in an official capacity; or

(3) Activities that do not extend beyond administrative services, such as providing or arranging office space and equipment, hospitality, advertising, or clerical, visa, or translation services, or activities by an attorney that do not extend beyond providing legal advice to a broker.

(f) The term *''foreign defense article or defense service''* means any non-U.S.-origin article or service described on the U.S. Munitions List. Unless otherwise provided in this part, the terms *''defense article''* and *''defense service''* refer to both U.S. and foreign origin defense articles and defense services described on the U.S. Munitions List. A ''defense article'' and ''defense service'' are determined exclusively in accordance with the ITAR, irrespective of any designation (either affirming or contrary) that may be attributed to same article by any foreign government or international organization.

21. Section 129.3 is amended by revising paragraphs (a), (b), (b)(1), (b)(2), (b)(3), and by adding paragraphs (b)(4), (c), (d), and (e) to read as follows:

§ 129.3 Requirement to register.

(a) Except as provided in § 129.3(b) of this subchapter, any person who engages in brokering activities, as defined by § 129.2 of this subchapter, is required to register with the Directorate of Defense Trade Controls. Registration under this section is generally a precondition for the issuance of prior approval for brokering activities required under part 129 of this subchapter or the use of exemptions from prior approval.

(b) *Exemptions.* Registration, prior approval, or reporting under this section is not required as provided in paragraphs (b)(1) through (b)(4):

(1) Employees of foreign governments or international organizations acting in an official capacity are exempt from registration. Such employees are also exempt from the requirements in § 129.6 of this subchapter for prior approval for brokering activities, as well as reporting and recordkeeping requirements.

(2) Persons exclusively in the business of financing, insuring, transporting, or freight forwarding, whose activities do not extend beyond financing, insuring, transporting, or freight forwarding, are exempt from registration. Examples include air carriers or other freight forwarders who merely transport or arrange transportation for licensed U.S. Munitions List items, and banks or credit companies who merely provide commercially available lines or letters of credit to persons registered or required to register in accordance with parts 122 or 129 of this subchapter. Such persons exempt from registration are also exempt from the requirements in § 129.6 of this subchapter for prior approval for brokering activities, as well as reporting and record-keeping requirements. However, banks, firms, or other persons providing financing for defense articles or defense services are required to register under certain circumstances, such as when the bank or its employees are directly involved in arranging transactions involving defense articles or defense services or hold title to defense articles, even when no physical custody of defense articles is involved.

(3) Persons registered pursuant to part 122 of this subchapter, their U.S. person subsidiaries, joint ventures, and other affiliates listed and covered in their Statement of Registration, their bona fide and full-time regular employees, and their eligible (*see* § 120.1 of this subchapter) foreign person brokers listed and identified as their exclusive brokers in their Statements of Registration, whose brokering activities (A) involve only such registered persons' defense articles or defense services that are currently subject to an export approval under this subchapter obtained by the part 122 registrant or will require such an approval prior to their export, or (B) are on behalf of the part 122 registrant and involve only defense articles and defense services that are located and obtained from a manufacturer or source in the United States for export outside the United States under an export approval under this subchapter. Such persons are registered under part 129 but are not required to submit a separate broker registration or pay a separate broker registration fee and are exempt from prior approval and reporting, but are still required to perform the record-keeping requirements of part 129 (*see* § 129.11 of this subchapter).

(4) Persons (including their bona fide regular employees) whose activities do not extend beyond acting as an end-user of a defense article or defense service exported pursuant to a license or approval under parts 123, 124, or 125 of this subchapter, or subsequently acting

as a reexporter or retransferor of such article or service under such license or approval or under an approval under § 123.9 of this subchapter are exempt from registration. Such persons exempt from registration are also as to these activities generally exempt from the requirements in § 129.6 of this subchapter for prior approval for brokering activities, as well as reporting and record-keeping requirements.

(c) Persons exempt from registration, prior approval, or reporting as provided in paragraphs (a) and (b) of this section are subject to the policy on embargoes and other proscriptions as outlined in § 129.5 of this subchapter.

(d) If § 129.3(b)(3) of this subchapter is not applicable, U.S. persons who are registered as a manufacturer or exporter in accordance with part 122 of this subchapter, including their U.S. or foreign subsidiaries, joint ventures, and other affiliates listed on their Statement of Registration who are required to register under part 129, are not required to submit a separate broker registration or pay a separate broker registration fee as long as they have listed and identified themselves as brokers within their manufacturer or exporter Statement of Registration. All other requirements of part 129 apply to such brokers and their brokering activities.

(e) Registration under this section is generally a precondition for the issuance of prior approval for brokering activities required under this section or the use of exemptions from prior approval.

22. Section 129.4 is amended by revising the section heading, paragraphs (a), (b), and (c), and adding paragraphs (c)(1), (c)(1)(i), (c)(1)(ii), (c)(2), and (d) through (h) to read as follows:

§ 129.4 Submission of registration statement, registration fees, and notification of changes in information furnished by registrants.

(a) An intended registrant must submit a Department of State form DS–2032 (Statement of Registration) by registered or overnight mail delivery to the Office of Defense Trade Controls Compliance, and must submit an electronic payment via Automated Clearing House (ACH) or Society for Worldwide Interbank Financial Telecommunications (SWIFT), payable to the Department of State of a registration fee as set forth in paragraph (b) of this section. ACH is an electronic network used to process financial transactions in the United States and SWIFT is the messaging service used by financial institutions worldwide to issue international transfers for foreign accounts. Payment methods (*i.e.,* ACH and SWIFT) are dependent on the source of the funds (U.S. or foreign bank) drawn from the applicant's account and not a third party's account. Intended registrants should access the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov* for detailed guidelines on submitting an ACH and SWIFT electronic payment. Payments, including from foreign brokers, must be in U.S. currency and must be payable through a U.S. financial institution. Cash, checks, foreign currency, or money orders will not be accepted. The Statement of Registration must be signed by a senior officer (*e.g.,* chief executive officer, president, secretary, partner, member, treasurer, general counsel) who has been empowered by the intended registrant to sign such documents. The intended registrant, whether a U.S. or foreign person, shall submit documentation that demonstrates it is incorporated or otherwise authorized to do business in its respective country. Foreign persons who are required to register shall provide information that is substantially similar in content to that which a U.S. person would provide under this provision (*e.g.,* foreign business license or similar authorization to do business). The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package. Registrants may not establish new entities for the purpose of reducing registration fees.

(b) A person who is required to register must do so on an annual basis upon submission of a completed Form DS–2032 and a fee of $2,250. Registrants are not required to submit a separate statement of registration and pay an additional fee when provisions in §§ 129.3(b)(3) or 129.4(c) of this subchapter are met.

(c) *Statement of Registration Certification.* The Statement of Registration of the intended registrant shall include a certification by an authorized senior officer of the following:

(1) Whether the intended registrant, chief executive officer, president, vice presidents, secretary, partner, member, other senior officers or officials (*e.g.,* comptroller, treasurer, general counsel), or any member of the board of directors of the intended registrant, or of any parent, subsidiary, or other affiliate or other person required to be listed in the Statement of Registration:

(i) Is the subject of an indictment or has otherwise been charged (*e.g.,* by information) for or has been convicted of violating any U.S. criminal statutes enumerated in § 120.27 of this subchapter or foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(ii) Is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government, or is ineligible to contract with, or to receive a license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country; or

(2) Whether the intended registrant is foreign owned or foreign controlled (*see* § 120.37 of this subchapter). If the intended registrant is foreign owned or foreign controlled, the certification shall include an explanation of such ownership or control, including the identities of the foreign person or persons who ultimately own or control the registrant. This requirement applies to a registrant who is a U.S. person and is owned or controlled by a foreign person. It also applies to a registrant who is a foreign person and is owned or controlled by a foreign person from the same country or a foreign person from another country.

(d) A broker that is the parent of a person registered in accordance with part 129 may upon request to the Directorate of Defense Trade Controls be covered by the registrant's Statement of Registration, provided that the broker is listed in the registrant's Statement of Registration and meets the same certification requirements in § 129.4(b) of this section as the registrant. If the broker is a foreign person, it must provide the registrant with a written certification signed by a senior officer acknowledging that it will be subject to the requirements of this subchapter, to include part 129. The registrant must maintain the letter as part of its record-keeping requirements in § 129.11 of this subchapter. The foreign person broker is subject to the same eligibility and certification criteria as the registrant.

(e) A registrant must, within five days of the event, provide the Directorate of Defense Trade Controls a written notification, signed by a senior officer (*e.g.,* chief executive officer, president, secretary, partner, member, treasurer, general counsel) if:

(1) Any of the persons referred to in § 129.4(b)(1) of this subchapter are indicted or otherwise charged (*e.g.,* by information) for or convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this

subchapter or foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in § 120.27; or become ineligible to contract with, or to receive a license or other approval to export or import defense articles or defense services from any agency of the U.S. government; or are ineligible to contract with, or to receive a license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country; or

(2) There is a change in the following information contained in the Statement of Registration: (i) Registrant's name, (ii) registrant's address, (iii) registrant's legal organization structure, (iv) ownership or control, or (v) the establishment, acquisition or divestment of a U.S. or foreign subsidiary or other affiliate who is engaged in brokering activities or otherwise required to be listed registrant's Statement of Registration.

All other changes in the Statement of Registration must be provided as part of annual registration renewal.

(f) A U.S. or foreign registrant must provide written notification to the Directorate of Defense Trade Controls at least sixty (60) days in advance of any intended sale or transfer to a foreign person of ownership or control of the registrant or any parent, subsidiary, joint venture, or other affiliate listed and covered in their Statement of Registration. This requirement applies to a foreign person required to register pursuant to this part who intends to sell or transfer ownership or control to a foreign person from the same country or to a foreign person from another country. Such notice does not relieve the registrant from obtaining any prior approval required under this subchapter.

(g) The new entity formed when a registrant merges with another company or acquires, or is acquired by, another company or a subsidiary or division of another company, shall advise the Directorate of Defense Trade Controls of the following:

(1) The new firm name and all previous firm names being disclosed;

(2) The registration number that will survive and those that are to be discontinued (if any); and

(3) The numbers of all approvals for brokering activities under the surviving registration number, since any approval not the subject of notification will be considered invalid.

(h) A registrant whose registration lapses because of failure to renew and, after an intervening period, seeks to register again must pay registration fees for any part of such intervening period during which the registrant engaged in the business of brokering activities.

23. Section 129.5 is amended by revising paragraphs (a), (b), (c) and (d) and removing paragraph (e) to read as follows:

§ 129.5 Policy on embargoes and other proscriptions.

(a) This section applies to brokering activities defined in § 129.2 of this subchapter, regardless of whether the person involved in such activities has registered or is exempt from registration under § 129.3 of this subchapter. The exemptions in § 129.7 of this subchapter from the requirement for prior approval are not applicable to brokering activities subject to this section.

(b) No person may engage in or make a proposal to engage in brokering activities that involve any country, area, or other person referred to in § 126.1 of this subchapter without first obtaining the approval of the Directorate of Defense Trade Controls.

(c) No person may engage in or make a proposal to engage in brokering activities without the prior approval of the Directorate of Defense Trade Controls if such activities involve other countries or persons identified from time to time by the Department of State through notice in the **Federal Register**, with respect to which certain limitations on defense articles or defense services are imposed for reasons of U.S. national security, foreign policy, or law enforcement interests (*e.g.,* an individual subject to debarment pursuant to § 127.7 of this subchapter). (*See* § 127.1(c) of this subchapter for additional disclosure and approval requirements applicable to brokering activities.)

(d) It is the policy of the Department of State to deny requests for approval of brokering activities or proposals to engage in brokering activities involving the countries or other persons referred to in paragraph (b) or (c) of this section. Any person who knows or has reason to know of brokering activities involving such countries or other persons must immediately inform the Directorate of Defense Trade Controls.

24. Section 129.6 is amended by revising the section heading, removing paragraphing, and revising the text to read as follows:

§ 129.6 Requirement for prior approval.

Except as provided in § 129.7 of this subchapter, no person who is required to register as a broker pursuant to § 129.3 of this subchapter may engage in the business of brokering activities without the prior approval of the Directorate of Defense Trade Controls.

25. Section 129.7 is amended by revising the section heading and paragraphs (a), (a)(1), (a)(2), (b), (b)(1), (b)(2), (c), and (d), removing paragraphs (a)(1)(i) through (a)(1)(vii), (a)(2)(i) through (a)(2)(iv), and adding paragraphs (a)(3), (b)(2)(i), (b)(2)(ii), (c)(1), (c)(2), (d)(1), (d)(2), (e), (e)(1) through (e)(14), and (f), to read as follows:

§ 129.7 Exemptions from prior approval.

(a) The exemptions in this section from prior approval requirements for certain brokering activities may not be used if:

(1) The broker is not registered as required by § 129.3 of this subchapter;

(2) The broker or any person who has a direct or indirect interest in or may benefit from the brokering activities, including any related defense article or defense service transaction, is ineligible as defined in § 120.1(c)(2) of this subchapter; or

(3) A country or other person referred to in § 126.1 of this subchapter is involved in the brokering activities or such activities are otherwise subject to § 129.5 of this subchapter.

(b) Brokering activities are exempt from the requirement for prior approval if undertaken for an agency of the U.S. Government pursuant to a contract between the broker and that agency provided that:

(1) The brokering activities concern defense articles or defense services solely for the use of the agency; or

(2) The brokering activities are undertaken for carrying out a foreign assistance or sales program authorized by law and subject to control by the President by other means, as demonstrated by one of the following conditions being met:

(i) The U.S. Government agency contract with the broker contains an explicit provision stating the contract supports a foreign assistance or sales program authorized by law and the contracting agency has established control of the activity covered by the contract by other means equivalent to that established under the International Traffic in Arms Regulations; or

(ii) The Directorate of Defense Trade Controls provides written concurrence in advance that the condition is met.

(c) Brokering activities are exempt from the requirement for prior approval if:

(1) The brokering activities are undertaken wholly within and involve defense articles or defense services located within and destined exclusively for the North Atlantic Treaty

Organization (NATO), any member country of that organization, Australia, Japan, New Zealand, or the Republic of South Korea; and

(2) The brokering activities do not pertain to the defense articles or defense services that are excluded from this exemption by paragraph (e) of this section.

(d) Brokering activities are exempt from the requirement of prior approval if they involve U.S. defense articles or defense services that are not designated as significant military equipment as defined by § 120.7 of this subchapter and are for end-use by an international organization or foreign government. This exemption does not apply to brokering activities pertaining to:

(1) Defense articles or defense services excluded from this exemption by paragraph (e) of this section; or

(2) Defense articles or defense services valued at or greater than $25 million.

(e) The exemptions in paragraphs (c) and (d) of this section do not apply to brokering activities pertaining to the following defense articles or associated defense services:

(1) Firearms and other weapons of a nature described by Category I(a) through (d), Category II(a) and (d), and Category III(a) of part 121 of this subchapter;

(2) Rockets, bombs and grenades as well as launchers for such defense articles of a nature described by Category IV(a), and launch vehicles and missile and anti-missile systems of a nature described by Category IV(b) of part 121 of this subchapter;

(3) Nuclear weapons strategic delivery systems and all components, parts, accessories, or attachments specifically designed for such weapons and associated equipment;

(4) Naval nuclear propulsion equipment of a nature described by Category VI(e) of part 121 of this subchapter;

(5) Night vision-related defense articles and inertial platform, sensor, and guidance-related systems of a nature described by Category XII(c) and (d) of part 121 of this subchapter;

(6) Chemical agents and precursors described by Category XIV(a), (c), and (e) of part 121 of this subchapter, biological agents and biologically derived substances described by Category XIV(b), and equipment described by Category XIV(f) for dissemination of the chemical agents and biological agents described by Category XIV(a), (b), and (e) of part 121 of this subchapter;

(7) Spacecraft of a nature described by Category XV of part 121 of this subchapter that is significant military equipment;

(8) Nuclear weapons design and test equipment of a nature described by Category XVI of part 121 of this subchapter;

(9) Directed energy weapons of a nature described by Category XVIII of part 121 of this subchapter;

(10) Submersible vessels, oceanographic and associated equipment of a nature described by Category XX of part 121 of this subchapter;

(11) Miscellaneous articles of a nature described by Category XXI of part 121 of this subchapter;

(12) Classified defense articles, related technical data, and defense services;

(13) Missile Technology Control Regime Annex items in § 121.16 of this subchapter; or

(14) Foreign defense articles and defense services of a nature that are described in various categories of § 121.1 of this subchapter other than those that are involved in brokering activities meeting the criteria of paragraphs (c)(1) and (c)(2) of this section.

(f) Brokers who use the exemptions in this section must comply with all other provisions of part 129 of this subchapter.

26. Section 129.8 is amended by revising the section heading and paragraphs (a) and (b), and adding paragraphs (a)(1), (a)(2), (a)(2)(i) through (a)(2)(iii), (b)(1) through (b)(5)(iii), (c), (d), and (e), to read as follows:

§ 129.8 Procedures for obtaining prior approval.

(a) All requests for prior approval of brokering activities must be made to the Directorate of Defense Trade Controls, be signed by an empowered official, and include the following information:

(1) The applicant's name, address and registration code;

(2) A certification on whether:

(i) The applicant, chief executive officer, president, vice president, secretary, partner, member, other senior officers or officials (*e.g.,* comptroller, treasurer, general counsel), or any member of the board of directors of the registrant or of its parent, subsidiary, joint venture, or other affiliate required to be listed in the Statement of Registration is the subject of an indictment or has been otherwise charged (*e.g.,* by information) for, or has been convicted of, violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter, or is the subject of an indictment or has otherwise been charged (*e.g.,* by information) for or has been convicted of violating any foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in § 120.27 of this subchapter;

(ii) The applicant, chief executive officer, president, vice president, secretary, partner, member, other senior officers or officials (*e.g.,* comptroller, treasurer, general counsel), or any member of the board of directors of the registrant or of its parent, subsidiary, joint venture, or other affiliate required to be listed in the Statement of Registration is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government, or is ineligible to contract with any foreign government agency, or to receive an export license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country; and

(iii) To the best of the applicant's knowledge, any other person involved in the brokering activities that are the subject of the request for prior approval as defined in § 129.2 of this subchapter is the subject of an indictment or has been otherwise charged (*e.g.,* by information) for or has been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter, or is the subject of an indictment or has otherwise been charged (*e.g.,* by information) for or has been convicted of violating any foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in § 120.27 of this subchapter, or is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from any agency of the U.S. Government, or is ineligible to contract with any foreign government agency, or to receive an export license or other form of authorization or otherwise participate in defense trade under the laws of a foreign country.

(b) The request for prior approval shall describe fully the brokering activities that will be undertaken, including:

(1) The action to be taken by the applicant to facilitate the manufacture, export, import, or transfer of a defense article or defense service (which may be referred to as a ''defense article or defense service transaction'');

(2) The name, nationality and country where located of all persons who may participate in the brokering activities;

(3) A description of each defense article or defense service that may be involved, including:

(i) The U.S. Munitions List category and sub-category;

(ii) Name or military nomenclature of the defense article;

(iii) Whether the article or service is significant military equipment;

(iv) Estimated quantity of defense articles;

(v) Estimated U.S. dollar value of defense articles and defense services;

(vi) Security classification; and

(vii) End-user and end-use;

(4) A statement whether the brokering activities are related to a sale through commercial channels or under the U.S. Foreign Military Sales Program or other activity in support of the U.S. Government; and

(5) The type of consideration received or expected to be received, directly or indirectly (consideration includes, for example, any fee, commission, loan, gift, donation, political contribution, or other payment made, or offered or agreed to be made, directly or indirectly, in cash or in kind):

(i) by the applicant;

(ii) by other persons who may participate in such brokering activities from or at the direction of the applicant, and the identity of such other persons; and

(iii) the U.S. dollar value amount and source thereof.

(c) The empowered official signing the request for prior approval shall include a certification that the request is complete and accurate.

(d) If at the time of submission certain information required by paragraph (b) of this section is not yet available, this fact must be stated and explained in the certification required by paragraph (c) of this section. The Directorate of Defense Trade Controls will take any such explanation into account in deciding whether or not to approve the request.

(e) The period of validity for a prior approval may not exceed four years.

27. Section 129.9 is amended by revising the section heading and text, to include new paragraphs (a), (b), and (c), to read as follows:

§ 129.9 Guidance.

(a) Any person desiring guidance on whether an activity constitutes a brokering activity within the scope of part 129 of this subchapter may request in writing guidance from the Directorate of Defense Trade Controls. The request for guidance shall identify the applicant and registrant code (if applicable) and describe fully the activities that will be undertaken, including:

(1) The specific activities to be undertaken by the applicant and any other U.S. or foreign person;

(2) The name, nationality, and country where located of all U.S. and foreign persons who may participate in the activities;

(3) A description of the item, including name or military nomenclature, or the service and a complete copy of the data that may be involved in potential transactions;

(4) End-user and end-use;

(5) The type of consideration offered, expected to be made, paid or received, directly or indirectly, to or by the applicant in connection with such activity, and the amount and source thereof (consideration includes, for example, any fee, commission, loan, gift, donation, political contribution, or other payment, in cash or in kind); and

(6) A copy of any agreement or documentation between or among the requester and other persons who will be involved in the activity or related transactions that describes the activity to be taken by such persons.

(b) If at the time of submission certain information is not yet available, this circumstance must be stated and explained. The Directorate of Defense Trade Controls will take the completeness of the information into account in providing guidance on whether or not the activities constitute brokering activities. The guidance will constitute an official determination by the Department of State. The guidance shall not substitute for prior approval when required under § 129.8 of this subchapter.

(c) Persons desiring guidance on other aspects of part 129 may also request guidance from the Directorate of Defense Trade Controls in a similar manner by submitting a description of the relevant facts or copies of relevant documentation.

28. Section 129.10 is amended by revising the section heading and text, to include new paragraphs (a), (b), and (c), to read as follows:

§ 129.10 Reports.

(a) Any person required to register under this part (including those registered in accordance with § 129.3(d) of this subchapter) shall provide to the Directorate of Defense Trade Controls on an annual basis a report of its brokering activities in the previous calendar year. Such report shall be submitted along with the registrant's annual renewal submission or, if not renewing, within 30 days after expiration of registration.

(b) The report shall include brokering activities that received or were exempt from prior approval as follows:

(1) The report shall identify the broker's name, address, and registration code and be signed by an empowered official who shall certify that the report is complete and accurate. The report shall describe each of the brokering activities, including the number of the prior approval or the exemption claimed; and

(2) For each of the brokering activities, the report shall identify all persons who participated in the activities, including each person's name, address, nationality, and country where located and role or function; the quantity, description, and U.S. dollar value of the defense articles or defense services; the type and U.S. dollar value of any consideration received or expected to be received, directly or indirectly, by any person who participated in the brokering activities, and the source thereof.

(c) If there were no brokering activities, the report shall certify that there were no such activities.

29. Section 129.11 is added to read as follows:

§ 129.11 Maintenance of Brokering Records by Registrants.

A person who is required to register pursuant to this part (including those registered in accordance with § 129.3(d) of this subchapter) must maintain records concerning brokering activities in accordance with § 122.5 of this subchapter.

Dated: December 12, 2011.

Ellen O. Tauscher,

Under Secretary, Arms Control and International Security, Department of State.

[FR Doc. 2011–32432 Filed 12–16–11; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–124627–11]

RIN 1545–BK43

Corporate Reorganizations; Guidance on the Measurement of Continuity of Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations concerning the continuity of interest requirement for corporate reorganizations. The guidance is necessary to clarify the manner in which the continuity of interest

requirement is measured in particular circumstances. The proposed regulations affect corporations and their shareholders.

DATES: Written or electronic comments and requests for a public hearing must be received by March 19, 2012.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–124627–11), room 5205, Internal Revenue Service, 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–124627–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or electronically, via the Federal e-Rulemaking Portal at *http://www.regulations.gov/* (IRS REG–124627–11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Richard Starke (202) 622–3497, and concerning submission of comments, Oluwafunmilayo Taylor (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This notice of proposed rulemaking accompanies publication of final regulations regarding the continuity of interest requirement (COI) for corporate reorganizations that are published in this issue of the **Federal Register** (the 2011 regulations). In general, the 2011 regulations provide the circumstances under which the consideration to be exchanged for the proprietary interests in the target corporation is valued on the last business day before the first date there is a binding contract (the signing date rule). The preamble explains that the signing date rule is based on the principle that where a binding contract provides for fixed consideration, the target corporation shareholders can generally be viewed as being subject to the economic fortunes of the issuing corporation as of the last business day before the signing date (the Pre-Signing Date). However, if the contract does not provide for fixed consideration, the signing date value of the issuing corporation stock is not relevant for purposes of determining the extent to which a proprietary interest in the target corporation is preserved. For additional background regarding the signing date rule, see the preamble to the 2011 regulations published elsewhere in this issue of the **Federal Register**.

Explanation of Provisions

In response to comments, the IRS and the Treasury Department have reconsidered the scope of the signing date rule, and agree that its underlying principles support additional methods for determining whether COI is satisfied. For example, a contract to effect a potential reorganization may provide that the amount of an item of consideration will vary as the value of issuing corporation stock declines between the stock's Pre-Signing Date value and some lower value provided for in the contract (Floor Price), but will not vary below the Floor Price. If the closing date value is less than the Floor Price in such a case, the target shareholders have been subjected to the economic fortunes of owning the consideration received in the exchange in the same manner as if the contract had fixed the consideration based upon the contract's stated Floor Price. Accordingly, these proposed regulations generally provide that if, pursuant to a binding contract, an item of consideration varies as the value of issuing corporation stock declines between the stock's Pre-Signing Date value and a Floor Price, and the closing date value is less than the Floor Price, COI is determined as if the consideration that would have been delivered at the Floor Price were issued and valued based upon the Floor Price. Applying the same principle, these proposed regulations provide that if, pursuant to a binding contract, an item of consideration varies as the value of issuing corporation stock increases between the stock's signing date value and some higher value provided for in the contract (Ceiling Price), and the closing date value is greater than the Ceiling Price, COI is determined as if the consideration that would have been delivered at the Ceiling Price were issued and valued based upon the Ceiling Price. For purposes of this rule, the Closing Date means the date upon which the exchange of consideration in the potential reorganization occurs.

In response to comments, these proposed regulations also permit, in lieu of the value of issuing corporation stock on the Closing Date, the use of an average value for issuing corporation stock in certain circumstances. The proposed regulations provide that an average value may be used if it is based upon issuing corporation stock values occurring after the signing date and before the Closing Date, and the binding contract utilizes the average price, so computed, in determining the number of shares of each class of stock of the issuing corporation, the amount of money, and the other property to be exchanged for all the proprietary interests in the target corporation, or to be exchanged for each proprietary interest in the target corporation. This rule also applies signing date rule principles because the average value fixes the number of shares and amount of other consideration. Accordingly, the target shareholders become subject to the fortunes of the issuer's stock across the range of dates being averaged.

Request for Comments

As previously stated, the signing date rule and these proposed regulations are based upon the concept that for purposes of measuring COI, in certain circumstances an item of consideration provided by the issuing corporation can generally be valued on the date that the target shareholders become subject to the economic fortunes of owning the item, assuming the exchange ultimately occurs. Depending upon the contract's terms, this may occur on a date between the signing date and the closing date, and may occur for different items of consideration on different dates. Accordingly, for purposes of COI, it may be appropriate to value an item of consideration on a date between the signing date and the closing date, and to value different items on different dates. For example, future guidance could provide that an item of consideration is valued for COI purposes at the earliest date on which the target shareholders (in the aggregate) become fully subject to the appreciation and depreciation in the value of that item pursuant to a binding contract to effect the potential reorganization, but not later than the date of the reorganization exchange. In determining whether the target shareholders are fully subject to market appreciation and depreciation, certain circumstances, such as the risk of not closing, would be disregarded. The IRS and the Treasury Department request comments on the propriety of such an approach.

Effective Date

These regulations are proposed to apply to transactions occurring on or after the date the regulations are published as final regulations in the **Federal Register**, unless completed pursuant to a binding agreement that was in effect immediately before the date such final regulations are published and all times afterwards.

Special Analysis

It has been determined that this notice of proposed rulemaking 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 has also been determined that 5 U.S.C. 553(b)

does not apply to these regulations and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small entities.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and 8 copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department 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 will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Richard Starke of the Office of Associate Chief Counsel (Corporate), IRS. However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.368–1 is amended by adding new paragraphs (e)(2)(vi), (e)(2)(vii), and revising (e)(9) to read as follows:

§ 1.368–1 Purpose and scope of exception of reorganization exchanges.

* * * * *

(e) * * *

(2) * * *

(vi) *Special Rules*—(A) *Floors.* This paragraph (e)(2)(vi)(A) applies if, pursuant to a binding contract, the amount of an item of consideration to be exchanged for all the proprietary interests in the target corporation, or to be exchanged for each proprietary interest in the target corporation, changes as the value of a share of the issuing corporation varies above a specified price (Floor Price), but does not vary below the Floor Price. If the value of the share is greater than or equal to the Floor Price on the Pre-Signing Date (as defined in paragraph (e)(2)(i) of this section) but below the Floor Price on the Closing Date (as defined in paragraph (e)(2)(vi)(D) of this section), whether a proprietary interest is preserved is determined as if the consideration was issued and valued based upon the Floor Price.

(B) *Ceilings.* This paragraph (e)(2)(vi)(B) applies if, pursuant to a binding contract, the amount of an item of consideration to be exchanged for all the proprietary interests in the target corporation, or to be exchanged for each proprietary interest in the target corporation, changes as the value of a share of the issuing corporation varies below a specified price (Ceiling Price), but does not vary above the Ceiling Price. If the value of the share is less than or equal to the Ceiling Price on the Pre-Signing Date (as defined in paragraph (e)(2)(i) of this section) but above the Ceiling Price on the Closing Date (as defined in paragraph (e)(2)(vi)(D) of this section), whether a proprietary interest is preserved is determined as if the consideration was issued and valued based upon the Ceiling Price.

(C) *Closing Date value—average values between signing date and Closing Date.* In determining the Closing Date value of issuing corporation stock for purposes of determining whether a proprietary interest in the target corporation is preserved, an average of prices may be used in lieu of the Closing Date price if—

(*1*) The average price is based upon prices of issuing corporation stock occurring after the signing date and before the Closing Date, and

(*2*) The binding contract utilizes the average price, so computed, in determining the number of shares of each class of stock of the issuing corporation, the amount of money, and the other property to be exchanged for all the proprietary interests in the target corporation, or to be exchanged for each proprietary interest in the target corporation.

(D) *Closing Date.* For purposes of paragraphs (e)(2)(vi) and (e)(2)(vii) of this section, the *Closing Date* means the date upon which the exchange of consideration in the potential reorganization occurs.

(vii) *Examples.* For purposes of the examples in this paragraph (e)(2)(vii), P is the issuing corporation, T is the target corporation, each corporation has only one class of stock outstanding, no transactions other than those described occur, and the transactions are not otherwise subject to recharacterization. The following examples illustrate the application of paragraph (e)(2)(vi) of this section:

Example 1. Price adjustment to provide more or less cash. (i) *Facts.* On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged into P. Pursuant to the contract, the T shareholders will receive 50 shares of P stock and $50 cash in exchange for all of the outstanding shares of T stock, subject to the following price adjustment:

(A) If the average price of P stock over the five-day period prior to the Closing Date exceeds $1, the amount of cash will be reduced by 50 times the excess of that price over $1, and

(B) If the average price of P stock during the specified period is less than $1, the amount of cash will be increased by 50 times the excess of $1 over that price, provided that in no event will P deliver cash of less than $40 or more than $60 to the T shareholders. This adjustment ensures that the T shareholders will be entitled to receive aggregate consideration with a value of $100 on the closing date if the average price of P stock during the specified period is between $.80, at which point the T shareholders would receive $60 of cash ($50 + (($1 − $.80) × 50)), and $1.20, at which point the T shareholders would receive $40 of cash ($50 − (($1.20 − $1) × 50)).

(C) On January 2 of year 1, the value of the P stock is $1 per share. On June 1 of year 1, T merges into P, when the value of P stock is $.25 per share. The average price of P stock during the specified period is also $.25 per share. In the merger, the T shareholders receive $60 cash and 50 shares of P stock with a value (determined as of the Closing Date) of $12.50.

(ii) *COI determined at the Floor Price.* For purposes of determining whether a proprietary interest in the target corporation is preserved, the rules of paragraph (e)(2)(vi)(A) of this section apply because, pursuant to a binding contract, the amount of cash to be exchanged for all the proprietary interests in the target corporation varies above a Floor Price of $.80 but does not vary below the Floor Price, the Pre-Signing Date value exceeds the Floor Price, and the value on the Closing Date is less than the Floor Price. Accordingly, whether a proprietary interest is preserved is determined as if the consideration that would have been delivered at the Floor Price was issued and valued based upon the Floor Price value. At the Floor Price, the T shareholders would have received, in the aggregate, $60 of cash and $40 of P stock. Therefore, the transaction satisfies the continuity of interest requirement.

Example 2. No Floor Price. The facts are the same as in *Example 1,* except that the Pre-Signing Date value is $.50, the Closing Date value is $1.50, and there is no limitation on the amount of additional cash that the T shareholders may receive (that is, there is no Floor Price). For purposes of determining whether a proprietary interest in the target corporation is preserved, the rules of paragraph (e)(2)(vi)(B) of this section apply because, pursuant to a binding contract, the amount of cash to be exchanged for all the proprietary interests in the target corporation varies below a Ceiling Price of $1.20 but does not vary above the Ceiling Price, the Pre-Signing Date value is less than the Ceiling Price, and the value on the Closing Date exceeds the Ceiling Price. Accordingly, whether a proprietary interest is preserved is determined as if the consideration that would have been delivered at the Ceiling Price was issued and valued based upon the Ceiling Price. At the Ceiling Price, the T shareholders would have received, in the aggregate, $40 of cash and $60 of P stock. Therefore, the transaction satisfies the continuity of interest requirement.

Example 3. No Floor or Ceiling Price. (i) *Facts.* On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged into P. Pursuant to the contract, the T shareholders will receive $50 cash and $50 of P stock based upon the P stock value on the Closing Date. On January 2 of year 1, the Pre-Signing Date, the value of the P stock is $1 per share. On June 1 of year 1, when the value of P stock is $5 per share, T merges into P.

(ii) *COI determined on the Closing Date.* For purposes of determining whether a proprietary interest in the target corporation is preserved, the rules of paragraph (e)(2)(vi) of this section do not apply because the contract does not provide for either a Floor Price or a Ceiling Price. There is no Floor Price because there is not a value below which the amount of P stock will not vary. There is no Ceiling Price because there is not a value above which the amount of P stock will not vary. Because the transaction does not satisfy the requirements of paragraph (e)(2)(vi) of this section and does not satisfy the definition of fixed consideration, the consideration will be valued on the Closing Date. The transaction satisfies the continuity of interest requirement because the T shareholders receive, in the aggregate, $50 cash and $50 of P stock.

* * * * *

(9) *Effective/Applicability date.* Paragraphs (e)(2)(vi) and (e)(2)(vii) are proposed to apply to transactions occurring on or after the date the regulations are published as final regulations in the **Federal Register**, unless completed pursuant to a binding agreement that was in effect immediately before the date such final regulations are published and at all times afterwards.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2011–32079 Filed 12–16–11; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–130302–10]

RIN 1545–BJ69

Reporting of Specified Foreign Financial Assets

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to the requirement that individuals attach a statement to their income tax return to provide required information regarding foreign financial assets in which they have an interest. The text of the temporary regulations also serves as the text of these proposed regulations. This notice of proposed rulemaking also includes a proposed regulation setting forth requirements for certain domestic entities to report foreign financial assets in the same manner as an individual.

DATES: Written or electronic comments and requests for a public hearing must be received by March 19, 2012. Comments on the collection of information should be received by February 17, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–130302–10), Room 5205, Internal Revenue Service, 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–130302–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC., or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–130302–10).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Joseph S. Henderson, (202) 622–3880; concerning submission of comments and/or requests for a hearing, *Richard.A. Hurst@irscounsel.treas.gov,* (202) 622–7180 (not a toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by February 17, 2012. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance and purchase of service to provide information.

The collection of information in these proposed regulations is in §§ 1.6038D–2 and 1.6038D–4. The collection of information is mandatory with respect to a specified person that has an interest in specified foreign financial assets and the value of those assets is more than the applicable reporting threshold. The respondents are U.S. citizens, U.S. residents, certain nonresidents and, to the extent provided in future regulations, certain domestic entities. The collection of information is satisfied by filing Form 8938, ''Statement of Specified Foreign Financial Assets,'' OMB No. 1545–2195, with the respondent's income tax return.

Estimated total annual reporting burden: 378,000 hours.

Estimated annual burden per respondent: 1 hour and 5 minutes.

Estimated number of respondents: 350,000.

Estimated annual frequency of responses: once.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

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.

Background

Section 6038D was enacted by section 511 of the Hiring Incentives to Restore Employment (HIRE) Act, Public Law 111–147 (124 Stat. 71). Section 6038D(a) requires an individual who holds any interest in a specified foreign financial asset during the taxable year to attach a statement to that individual's return of tax imposed by subtitle A of the Internal Revenue Code (Code) to report the information identified in section 6038D(c), if the aggregate value of the specified foreign financial assets in which the individual holds an interest exceeds $50,000 for the taxable year, or such higher dollar amount as the Secretary may prescribe.

Section 6038D(f) provides that, to the extent provided by the Secretary in regulations or other guidance, section 6038D shall apply to any domestic entity which is formed of availed of for purposes of holding, directly or indirectly, specified foreign financial assets, in the same manner as if the entity were an individual.

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** contain amendments to the Income Tax Regulations (26 CFR part 1) providing guidance to individuals required to report specified foreign financial assets with their annual return pursuant to section 6038D of the Code. The text of those regulations also serves as the text of the regulations contained in this document that are proposed by cross-reference to the temporary regulations, that is §§ 1.6038D–0 through 1.6038D–5, § 1.6038D–7, and § 1.6038D–8. The preamble to the temporary regulations explains the amendments added by the temporary regulations.

This document also contains a proposed amendment to the Income Tax Regulations (26 CFR part 1) that sets out the conditions under which a domestic entity will be considered a ''specified domestic entity.'' A domestic entity that is a specified domestic entity pursuant to Prop. Reg. § 1.6038D–6 is required to report specified foreign financial assets in which it holds an interest.

Explanation of Provisions

1. Application of Section 6038D to Domestic Entities

Under the proposed regulations, domestic entities that are subject to the reporting requirements of section 6038D are designated as specified domestic entities and include certain domestic corporations, domestic partnerships, and trusts described in section 7701(a)(30)(E), generally referred to as domestic trusts for purposes of this explanation. Specified domestic entities do not include domestic estates.

A. Domestic Corporations and Partnerships

For a domestic corporation or partnership to be considered a specified domestic entity, it must satisfy three conditions. First, the domestic corporation or domestic partnership must have an interest in specified foreign financial assets (other than assets excepted from reporting as provided in § 1.6038D–7T) with an aggregate value exceeding the reporting threshold in § 1.6038D–2T(a)(1). Second, it must be closely held by a specified individual (as defined in § 1.6038D–1T(a)(2)). A domestic corporation is closely held if a specified individual owns at least 80 percent of the corporation's stock (by vote or value) on the last day of the corporation's taxable year. A domestic partnership is closely held if a specified individual owns at least 80 percent of the capital or profits interest in the partnership on the last day of its taxable year. Direct, indirect, and constructive ownership rules apply in determining whether the corporation or partnership is closely held for this purpose.

Finally, a domestic corporation or partnership must also meet either of the following two conditions:

(A) At least 50 percent of the corporation's or partnership's gross income for the taxable year is passive income or at least 50 percent of the assets held by the corporation or partnership at any time during the taxable year are assets that produce or are held for the production of passive income; or

(B) At least 10 percent of the corporation's or partnership's gross income for the taxable year is passive income or at least 10 percent of the assets held by the corporation or partnership at any time during the taxable year are assets that produce or are held for the production of passive income, and the corporation or partnership is formed or availed of by a specified individual with a principal purpose of avoiding the reporting obligations under section 6038D. The determination of whether a corporation or partnership is formed or availed of with a principal purpose of avoiding reporting under section 6038D takes into account all facts and circumstances.

Two different aggregation rules apply for purposes of determining whether a domestic corporation or domestic partnership is a specified domestic entity. First, in determining whether a domestic corporation or domestic partnership meets the reporting thresholds in § 1.6038D–2T(a)(1), domestic corporations and domestic partnerships that are closely held by the same specified individual are treated as a single entity. Second, for purposes of determining whether a corporation or partnership meets the passive income or asset test, domestic corporations and domestic partnerships that are closely held by the same individual and that are connected through stock or partnership interest ownership with a common parent corporation or partnership are treated as a single entity.

The determination of whether a corporation or partnership is a specified domestic entity is made annually for each taxable year of such corporation or partnership.

B. Domestic Trusts

A domestic trust is considered a specified domestic entity if it has an interest in specified foreign financial assets (other than assets excepted from reporting as provided in § 1.6038D–7T) with an aggregate value exceeding the reporting threshold in § 1.6038D–2T(a)(1) and one or more specified persons as current beneficiaries. For purposes of section 6038D, a current beneficiary is any person who, during the taxable year, is entitled to, or at the discretion of any person may receive, a distribution from the principal or income of the trust (determined without regard to any power of appointment to the extent that such power remains unexercised at the end of the taxable year). As discussed in section 2 of this explanation, certain domestic trusts are not specified domestic entities.

The determination of whether a domestic trust is a specified domestic entity is made annually for each taxable year of such trust.

2. Excepted Specified Domestic Entities

A domestic entity is not considered to be a specified domestic entity if it is

described in section 1473(3) and the regulations as excepted from the definition of the term ''specified United States person''. This exception does not apply to any trust that is exempt from tax under section 664(c).

A domestic trust is not considered a specified domestic entity if the trustee or executor is a bank, financial institution, or domestic corporation that is subject to certain examination, oversight or registration requirements, has supervisory authority over or fiduciary obligations with regard to the trust's specified foreign financial assets, and files income tax returns and information returns on behalf of the trust. In addition, a domestic trust or any portion of the trust that is treated as owned by one or more specified persons under sections 671 through 679 and the regulations issued under those sections is not considered to be a specified domestic entity.

Proposed Effective Date

Section 1.6083D–6 is proposed to apply to taxable years beginning after December 31, 2011.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

It is hereby certified that the collection of information in this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Small entities generally hold specified foreign financial assets (that is, financial accounts, stocks, securities, financial instruments, contracts, or interests in foreign entities) for use in their trade or business and therefore generally would not have a filing requirement. The burden is further reduced because small entities that do hold specified foreign financial assets generally will be excepted from reporting such assets under these proposed rules if the assets are reported on one or more of the following forms: Form 3520, ''Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts''; Form 3520–A, ''Annual Information Return of Foreign Trust With a U.S. Owner''; Form 5471, ''Information Return of U.S. Persons With Respect To Certain Foreign Corporations''; Form 8621, ''Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund''; Form 8865, ''Return of U.S. Persons With Respect to Certain Foreign Partnerships''; or Form 8891, ''U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans.'' Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act is not required. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses. The Internal Revenue Service invites the public to comment on this certification.

Comments and Requests for 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 Department of the Treasury and the Internal Revenue Service request comments on all aspects of the proposed regulations. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Joseph S. Henderson, Office of Associate Chief Counsel (International). However, other personnel from the Internal Revenue Service and the Department of the Treasury participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.6038D–1 also issued under 26 U.S.C. 6038D

Section 1.6038D–2 also issued under 26 U.S.C. 6038D

Section 1.6038D–3 also issued under 26 U.S.C. 6038D

Section 1.6038D–4 also issued under 26 U.S.C. 6038D

Section 1.6038D–5 also issued under 26 U.S.C. 6038D

Section 1.6038D–6 also issued under 26 U.S.C. 6038D

Section 1.6038D–7 also issued under 26 U.S.C. 6038D

Section 1.6038D–8 also issued under 26 U.S.C. 6038D* * *

Par. 2. Section 1.6038D–0 is added to read as follows:

§ 1.6038D–0 Outline of regulation provisions.

The text of proposed § 1.6038D–0 is the same as the text of § 1.6038D–0T published elsewhere in this issue of the **Federal Register**.

Par. 3. Section 1.6038D–1 is added to read as follows:

§ 1.6038D–1 Reporting with respect to specified foreign financial assets, definition of terms.

The text of proposed § 1.6038D–1 is the same as the text of paragraphs (a) and (b) in § 1.6038D–1T published elsewhere in this issue of the **Federal Register**.

Par. 4 Section 1.6038D–2 is added to read as follows:

§ 1.6038D–2 Requirement to report specified foreign financial assets.

The text of proposed § 1.6038D–2 is the same as the text of paragraphs (a) through (e) in § 1.6038D–2T published elsewhere in this issue of the **Federal Register**.

Par. 5 Section 1.6038D–3 is added to read as follows:

§ 1.6038D–3 Specified foreign financial assets.

The text of proposed § 1.6038D–3 is the same as the text of paragraphs (a) through (e) in § 1.6038D–3T published elsewhere in this issue of the **Federal Register**.

Par. 6. Section 1.6038D–4 is added to read as follows:

§ 1.6038D–4 Information required to be reported.

The text of proposed § 1.6038D–4 is the same as the text of paragraphs (a) and (b) in § 1.6038D–4T published elsewhere in this issue of the **Federal Register**.

Par. 7. Section 1.6038D–5 is added to read as follows:

§ 1.6038D–5 Valuation guidelines.

The text of proposed § 1.6038D–5 is the same as the text of paragraphs (a) through (g) in § 1.6038D–5T published

elsewhere in this issue of the **Federal Register**.

Par. 8. Section 1.6038D–6 is added to read as follows:

§ 1.6038D–6 Specified domestic entities.

(a) *Specified domestic entity.* A specified domestic entity is a domestic corporation, a domestic partnership, or a trust described in section 7701(a)(30)(E), if such corporation, partnership, or trust is formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets. Whether a domestic corporation, a domestic partnership, or a trust described in section 7701(a)(30)(E) is a specified domestic entity is determined annually.

(b) *Corporations and partnerships*—(1) *Formed or availed of.* Except as otherwise provided in paragraph (d) of this section, a domestic corporation or a domestic partnership is formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets if and only if—

(i) The corporation or partnership has an interest in specified foreign financial assets (other than assets excepted from reporting as provided in § 1.6038D–7T) with an aggregate value exceeding the reporting threshold in § 1.6038D–2T(a)(1);

(ii) The corporation or partnership is closely held by a specified individual as determined under paragraph (b)(3) of this section; and

(iii) One of the following two conditions is satisfied:

(A) At least 50 percent of the corporation's or partnership's gross income for the taxable year is passive income or at least 50 percent of the assets held by the corporation or partnership at any time during the taxable year are assets that produce or are held for the production of passive income; or

(B)(*1*) At least 10 percent of the corporation's or partnership's gross income for the taxable year is passive income or at least 10 percent of the assets held by the corporation or partnership at any time during the taxable year are assets that produce or are held for the production of passive income, and

(*2*) The corporation or partnership is formed or availed of by the specified individual identified in paragraphs (b)(1)(ii) and (b)(3) of this section with a principal purpose of avoiding the reporting obligations under section 6038D. For purposes of determining whether a corporation or partnership is formed or availed of with a principal purpose of avoiding reporting under section 6038D, all facts and circumstances are taken into account.

(2) *Passive income.* For purposes of paragraph (b) of this section, passive income means the portion of gross income that consists of—

(i) Dividends;

(ii) Interest;

(iii) Rents and royalties, other than rents and royalties derived in the active conduct of a trade or business conducted by employees of the corporation or partnership;

(iv) Annuities;

(v) The excess of gains over losses from the sale or exchange of property that gives rise to passive income described in paragraphs (b)(2)(i) through (iv) of this section;

(vi) The excess of gains over losses from transactions (including futures, forward, and similar transactions) in any commodity, but not including any commodity hedging transaction described in section 954(c)(5)(A) determined by treating the corporation or partnership as a controlled foreign corporation;

(vii) The excess of foreign currency gains over foreign currency losses (as defined in section 988(b)) attributable to any section 988 transaction; and

(viii) Net income from notional principal contracts.

(3) *Closely held*—(i) *Domestic corporation.* A domestic corporation is closely held by a specified individual for purposes of paragraph (b)(1)(ii) of this section if at least 80 percent of the total combined voting power of all classes of stock of the corporation entitled to vote, or at least 80 percent of the total value of the stock of the corporation, is owned, directly, indirectly, or constructively, by one specified individual on the last day of the corporation's taxable year.

(ii) *Domestic partnership.* A partnership is closely held by a specified individual for purposes of paragraph (b)(1)(ii) of this section if at least 80 percent of the capital or profits interest in the partnership is held, directly, indirectly, or constructively, by one specified individual on the last day of the partnership's taxable year.

(iii) *Constructive ownership.* For purposes of paragraphs (b)(1)(ii) and (b)(3) of this section, section 267(c) and (e)(3) apply for the purpose of determining the interest of a specified individual in a corporation or partnership, except that section 267(c)(4) is applied as if the family of an individual includes the spouses of the individual's family members.

(iv) *Example.* The following example illustrates the application of paragraph (b)(3) of this section:

Example. (1) *Facts.* DC1 is a domestic corporation the total value of the stock of which is owned 60% by A, a specified individual, 30% by B, a member of A's family for purposes of section 267(c)(2) who is not a specified individual, and 10% by FC1, a foreign corporation. DC1 owns 90% of the total value of the stock of DC2, a domestic corporation. FC2, a foreign corporation, owns 10% of DC2. Neither A nor B owns, directly, indirectly, or constructively, any stock in FC1 or FC2.

(2) *Ownership determination.* DC2 is closely held by A within the meaning of paragraphs (b)(1)(ii) and (b)(3) of this section because A, a specified person, owns more than 80% of its total value. A is considered to own 81% of the total value of DC2 by application of the rules of section 267(c) and this section.

(4) *Treatment of related corporations and partnerships*—(i) *Determination of reporting threshold.* For purposes of applying paragraph (b)(1)(i) of this section and determining whether a domestic corporation or domestic partnership satisfies the reporting threshold in § 1.6038D–2T(a)(1), all domestic corporations and domestic partnerships that have an interest in any specified foreign financial asset and are closely held by the same specified individual as determined under paragraphs (b)(1)(ii) and (b)(3) of this section are treated as a single entity, and each such related corporation or partnership will be treated as owning the specified foreign financial assets held by all such related corporations or partnerships.

(ii) *Determination of passive income and asset thresholds.* For purposes of applying the passive income and asset thresholds of paragraph (b)(1)(iii) of this section, all domestic corporations and domestic partnerships that are closely held by the same specified individual as determined under paragraphs (b)(1)(ii) and (b)(3) of this section and that are connected through stock or partnership interest ownership with a common parent corporation or partnership (as determined under this paragraph (b)(4)(ii)) are treated as a single entity. A domestic corporation or a domestic partnership is considered connected through stock or partnership interest ownership with a common parent corporation or partnership if stock representing at least 80 percent of the voting power or value of each such corporation, or partnership interests representing at least 80 percent of the profits interests or capital interests of the partnership, in each case other than stock of or partnership interests in the common parent, is owned by one or more of the other connected corporations, connected partnerships, or the common parent. For purposes of

applying paragraph (b)(1)(iii) of this section, each member of a closely held and connected group as determined under this paragraph (b)(4)(ii) is treated as owning the combined assets and receiving the combined income of all members of that group. For purposes of the preceding sentence, any contract, equity, or debt existing between members of such a group, as well as any items arising under or from such contract, equity, or debt relevant to the determination of the passive income percentage under paragraph (b) of this section, are eliminated.

(5) *Examples.* The following examples illustrate the application of the rules of paragraph (b) of this section:

Example 1. (1) *Facts.* L is a specified individual. In Year X, L wholly owns DC1, a domestic corporation, and also owns a 90% capital interest in DP, a domestic partnership. DC1 owns 80% of the sole class of stock of DC2, a domestic corporation. DC1 has no assets other than its interest in DC2. DC2's only assets are assets that produce passive income, with a maximum value in Year X of $40,000 on October 12. DC2's assets are comprised in relevant part on October 12, Year X, of $15,000 of specified foreign financial assets. DP's only assets are assets that produce passive income and that are specified foreign financial assets with a maximum value of $90,000 on October 12, Year X and have a value of $20,000 on December 31, Year X. DC1 and DC2 do not file a consolidated annual return.

(2) *Determination of reporting threshold.* DC1, DC2, and DP are closely held by L for purposes of applying paragraph (b)(1)(ii) and (b)(3) of this section. Under § 1.6038D–3T, DC2 and DP each has an interest in specified foreign financial assets; DC1 does not have an interest in specified foreign financial assets. For purposes of applying paragraph (b)(1)(i) of this section and § 1.6038D–2T(a)(1)—

(i) *DC1.* DC1 is not treated as a single entity with DC2 and DP under paragraph (b)(4)(i) of this section. As a result, DC1 does not satisfy the reporting threshold of paragraph (b)(1)(i) of this section; and

(ii) *DC2 and DP.* DC2 and DP are treated as a single entity under paragraph (b)(4)(i) of this section. Therefore, for purposes of applying the reporting threshold of § 1.6038D–2T(a)(1), DC2 is considered as owning in addition to its own assets the assets of DP, and DP is considered as owning in addition to its own assets the assets of DC2. As a result, DC2 and DP each satisfies the reporting threshold of § 1.6038D–2T(a)(1), because the value of the specified foreign financial assets each is considered as owning under paragraph (b)(4)(i) of this section exceeds $100,000 on October 12, Year X.

(3) *Determination of passive income or passive asset percentage*—(i) *DC1 and DC2.* DC1 and DC2 are treated as members of a closely held and connected group of entities under paragraph (b)(4)(ii) of this section, because DC1 and DC2 are closely held by L, and DC2 is connected with DC1 though DC1's ownership of stock of DC2 representing at least 80% of the voting power or value of DC2. As a result, DC1 and DC2 are considered a single entity for purposes of applying paragraph (b)(1)(iii) of this paragraph, and each of DC1 and DC2 is considered as owning the combined assets, and receiving the combined income, of both DC1 and DC2 (under paragraph (b)(4)(ii) of this section). Therefore, DC1 and DC2 each satisfies the passive asset threshold of paragraph (b)(1)(iii)(A) of this section.

(ii) *DP.* DP is not treated as a member of the DC1 and DC2 closely held and connected group of entities because DC1 and DP are not owned by a common parent corporation or partnership. Therefore, whether the passive income or passive asset threshold of paragraph (b)(1)(iii) of this section is met with respect to DP is determined solely by reference to DP's separately earned passive income and separately held passive assets. DP has only passive assets on October 12, Year X, and, therefore, satisfies paragraph (b)(1)(iii)(A) of this section.

(4) *Reporting requirements*—(i) *DC1.* DC1 is not a specified domestic entity for Year X, and is not required to file Form 8938, because DC1 does not satisfy the reporting threshold of paragraph (b)(1)(i) of this section and § 1.6038D–2T(a)(1).

(ii) *DC2 and DP.* DC2 and DP are specified domestic entities for Year X, because they each meet the conditions of paragraph (b)(1) of this section: Each is closely held by L, a specified individual; each has an interest in specified foreign financial assets with an aggregate value exceeding the reporting threshold of § 1.6038D–2T(a)(1); and each satisfies the passive asset threshold. DC2 and DP must each file Form 8938 for Year X to report their respective specified foreign financial assets and disclose their maximum values as provided in § 1.6038D–4T.

Example 2. (1) *Facts.* The facts are the same as in Example 1, except that DC2 also has assets and income from a trade or business. The income from such business is not passive income and constitutes 60% of the gross income generated by DC2 in Year X. The assets attributable to such trade or business constitute at least 60% of the value of DC2's assets at all times during Year X. Assume that neither DC1 nor DC2 is formed or availed of by L with a principal purpose of avoiding the reporting obligations under section 6038D.

(2) *Determination of reporting threshold.* DC1, DC2, and DP are closely held by L for purposes of applying paragraph (b)(1)(ii) and (b)(3) of this section. Under § 1.6038D–3T, DC2 and DP each has an interest in specified foreign financial assets; DC1 does not have an interest in specified foreign financial assets. For purposes of applying paragraph (b)(1)(i) of this section and § 1.6038D–2T(a)(1)—

(i) *DC1.* DC1 is not treated as a single entity with DC2 and DP under paragraph (b)(4)(i) of this section. As a result, DC1 does not satisfy the reporting threshold of paragraph (b)(1)(i) of this section; and

(ii) *DC2 and DP.* DC2 and DP are treated as a single entity under paragraph (b)(4)(i) of this section. Therefore, for purposes of applying the reporting threshold of § 1.6038D–2T(a)(1), DC2 is considered as owning in addition to its own assets the assets of DP, and DP is considered as owning in addition to its own assets the assets of DC2. As a result, DC2 and DP each satisfies the reporting threshold of § 1.6038D–2T(a)(1) because the value of the specified foreign financial assets each is considered as owning under paragraph (b)(4)(i) of this section exceeds $100,000 on October 12, Year X.

(3) *Determination of passive income or passive asset percentage*—(i) *DC1 and DC2.* DC1 and DC2 are treated as members of a closely held and connected group of entities under paragraph (b)(4)(ii) of this section, because DC1 and DC2 are closely held by L, and DC2 is connected with DC1 though DC1's ownership of stock of DC2 representing at least 80% of the voting power or value of DC2. As a result, DC1 and DC2 are considered a single entity for purposes of applying paragraph (b)(1)(iii) of this paragraph, and each of DC1 and DC2 is considered as owning the combined assets, and receiving the combined income, of both DC1 and DC2 (as determined under paragraph (b)(4)(ii) of this section). DC1 and DC2 do not have sufficient passive income or passive assets to satisfy the thresholds of paragraph (b)(1)(iii)(A) of this section. In addition, because neither DC1 nor DC2 is formed or availed of by L with a principal purpose of avoiding the reporting obligations under section 6038D, neither DC1 nor DC2 meets the conditions described in paragraph (b)(1)(iii)(B) of this section.

(ii) *DP.* DP is not treated as a member of the DC1 and DC2 closely held and connected group of entities, because DC1 and DP are not owned by a common parent corporation or partnership. Therefore, whether the passive income or asset threshold of paragraph (b)(1)(iii) of this section is met with respect to DP is determined solely by reference to DP's separately earned passive income and separately held passive assets. DP has only passive assets that are specified foreign financial assets on October 12, Year X, and satisfies paragraph (b)(1)(iii)(A) of this section.

(4) *Reporting requirements*—(i) *DC1.* DC1 is not a specified domestic entity for Year X, and is not required to file Form 8938, because DC1 does not satisfy the reporting threshold of paragraph (b)(1)(i) of this section and § 1.6038D–2T(a)(1).

(ii) *DC2.* DC2 is not a specified domestic entity for Year X, and is not required to file Form 8938, because DC2 does not satisfy the passive income or passive asset threshold of paragraph (b)(1)(iii)(A) of this section and is not formed or availed of with a principal purpose of avoiding the reporting obligations under section 6038D.

(iii) *DP.* DP is a specified domestic entity for Year X because DP meets the conditions of paragraph (b)(1) of this section: DP is closely held by L, a specified individual; DP has an interest in specified foreign financial assets with an aggregate value exceeding the reporting threshold of § 1.6038D–2T(a)(1); and DP satisfies the passive asset threshold of paragraph (b)(1)(iii)(A) of this section. DP must file Form 8938 for Year X to report its specified foreign financial assets and disclose their maximum value as provided in § 1.6038D–4T.

(c) *Domestic trusts.* Except as provided in paragraph (d) of this

section, a trust described in section 7701(a)(30)(E) is a specified domestic entity that is formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets if and only if the trust—

(1) Has an interest in specified foreign financial assets (other than assets excepted from reporting as provided in § 1.6038D–7T) with an aggregate value exceeding the reporting threshold in § 1.6038D–2T(a)(1), and

(2) Has one or more specified persons as a current beneficiary. For purposes of this paragraph (c)(2), the term current beneficiary means, with respect to the taxable year, any person who at any time during such taxable year is entitled to, or at the discretion of any person may receive, a distribution from the principal or income of the trust (determined without regard to any power of appointment to the extent that such power remains unexercised at the end of the taxable year).

(d) *Excepted domestic entities.* An entity is not considered to be a specified domestic entity if the entity is—

(1) *Certain persons described in section 1473(3).* An entity, except for a trust that is exempt from tax under section 664(c), that is excepted from the definition of the term ''specified United States person'' under section 1473(3) and the regulations issued under that section;

(2) *Certain domestic trusts.* A trust described in section 7701(a)(30)(E) provided that the trustee of the trust—

(i) Has supervisory authority over or fiduciary obligations with regard to the specified foreign financial assets held by the trust;

(ii) Timely files (including any applicable extensions) annual returns and information returns on behalf of the trust; and

(iii) Is —

(A) A bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Association;

(B) A financial institution that is registered with and regulated or examined by the Securities and Exchange Commission; or

(C) A domestic corporation described in section 1473(3)(A) or (B), and the regulations issued under that section.

(3) *Domestic trusts owned by one or more specified persons.* A trust described in section 7701(a)(30)(E) to the extent such trust or any portion thereof is treated as owned by one or more specified persons under sections 671 through 679 and the regulations issued under those sections.

(e) *Effective/applicability dates.* This section applies to taxable years beginning after December 31, 2011.

Par. 9. Section 1.6038D–7 is added to read as follows:

§ 1.6038D–7 Exceptions from the reporting of certain assets under Section 6038D.

The text of proposed § 1.6038D–7 is the same as the text of paragraphs (a) through (d) in § 1.6038D–7T published elsewhere in this issue of the **Federal Register**.

Par. 10. Section 1.6038D–8 is added to read as follows:

§ 1.6038D–8 Penalties for failure to disclose.

The text of proposed § 1.6038D–8 is the same as the text of paragraphs (a) through (g) in § 1.6038D–8T published elsewhere in this issue of the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2011–32254 Filed 12–14–11; 4:15 pm]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 122

[EPA–HQ–OW–2011–0188; FRL–9608–3]

RIN 2040–AF22

National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of public comment period.

SUMMARY: On October 21, 2011 (76 FR 65431) (FRL–9481–7) EPA published a proposed rule entitled, National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule. As initially published in the **Federal Register**, written comments on the proposal were to be submitted to EPA on or before December 20, 2011 (a 60-day public comment period). Since publication, EPA has received several requests for additional time to submit comments. Therefore, the public comment period is being extended for 30 days and will now end on January 19, 2012.

DATES: Comments may be submitted until January 19, 2012.

ADDRESSES:

Comments: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2011–0188, by one of the following methods: *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

Email: ow-docket@epa.gov, Attention Docket ID No. EPA–HQ–OW–2011–0188.

Fax: (202) 566–9744.

Mail: Water Docket, Environmental Protection Agency, Mailcode: 28221T, Attention Docket ID No. EPA–HQ–OW–2011–0188, 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 West, Room 3334, 1301 Constitution Avenue NW., Washington, DC, Attention Docket ID No. EPA–HQ–OW–2011–0188. Such deliveries are accepted only during the Docket Center's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2011–0188. EPA's policy is that all comments received will be included in the public docket without change and could be made available online at *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 *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means that 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 *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 because of technical difficulties and cannot contact you for clarification, EPA might not be able to consider your comment. Electronic files should avoid the use of

special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding federal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: For additional information contact, Becky Mitschele, Water Permits Division, Office of Wastewater Management (4203M), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–6418; fax number (202) 564–6384; email address: *mitschele.becky@epa.gov.*

SUPPLEMENTARY INFORMATION: This supplementary information is organized as follows:

I. General Information

A. Does this action apply to me?

This proposed rulemaking would apply to concentrated animal feeding operations (CAFOs) as defined in the National Pollutant Discharge Elimination System (NPDES) regulations at 40 CFR 122.23(b)(2), pursuant to section 502(14) of the Clean Water Act (''CWA''). An animal feeding operation (AFO) is a CAFO if it meets the regulatory definition of a Large or Medium CAFO (40 CFR 122.23(b)(4) or (6)) or has been designated as a CAFO (40 CFR 122.23(c)) by the NPDES permitting authority or by EPA. The following table provides the size thresholds for Large, Medium and Small CAFOs in each animal sector.

TABLE 1—SUMMARY OF CAFO SIZE THRESHOLDS FOR ALL SECTORS

Sector	Large	Medium [1]	Small [2]
Cattle or cow/calf pairs	1,000 or more	300–999	Less than 300.
Mature dairy cattle	700 or more	200–699	Less than 200.
Veal calves	1,000 or more	300–999	Less than 300.
Swine (weighing over 55 pounds)	2,500 or more	750–2,499	Less than 750.
Swine (weighing less than 55 pounds)	10,000 or more	3,000–9,999	Less than 3,000.
Horses	500 or more	150–499	Less than 150.
Sheep or lambs	10,000 or more	3,000–9,999	Less than 3,000.
Turkeys	55,000 or more	16,500–54,999	Less than 16,500.
Laying hens or broilers (liquid manure handling system)	30,000 or more	9,000–29,999	Less than 9,000.
Chickens other than laying hens (other than a liquid manure handling system).	125,000 or more	37,500–124,999	Less than 37,500.
Laying hens (other than a liquid manure handling system)	82,000 or more	25,000–81,999	Less than 25,000.
Ducks (other than a liquid manure handling system)	30,000 or more	10,000–29,999	Less than 10,000.
Ducks (liquid manure handling system)	5,000 or more	1,500–4,999	Less than 1,500.

Notes:

[1] May be designated or must meet one of the following two criteria to be defined as a medium CAFO: (A) Discharges pollutants through a man-made device; or (B) directly discharges pollutants into waters of the United States which pass over, across, or through the facility or otherwise come into direct contact with the confined animals. 40 CFR 122.23(b)(6).

[2] Not a CAFO by regulatory definition, but may be designated as a CAFO on a case-by-case basis. 40 CFR 122.23(b)(9).

That table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this proposed rulemaking. The table lists the types of entities that EPA is currently aware of that could be regulated by this action. Other types of entities not listed in the table could also be CAFOs. The owners or operators of AFOs that have not been designated and that do not confine the required number of animals to meet the definition of a Large or Medium CAFO are not required to submit information.

To determine whether your operation is a CAFO, you should carefully examine the applicability criteria in 40 CFR 122.23. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How can I get copies of these documents and other related information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. EPA–HQ–OW–2011–0188. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. Although all documents in the docket are listed in an index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available in hard copy at the EPA Docket Center Public Reading Room, 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 Water Docket is (202) 566–2426.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the United States government online source for Federal regulations at *http://www.regulations.gov.* Electronic versions of the proposed rule and factsheet are available on EPA's NPDES Web site at *http://cfpub.epa.gov/npdes/afo/aforule.cfm.* An electronic version of the public docket is available through the EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.regulations.gov* to submit or view public comments, access the index

listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.* Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility identified in Section I.B.1.

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

1. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency might ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Make sure to submit your comments by the comment period deadline identified.

2. *Submitting Comments to EPA.*

Direct your comments to Docket ID No. EPA–HQ–OW–2011–0188. EPA's policy is that all comments received will be included in the public docket without change and could 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. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means that 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 because of technical difficulties and cannot contact you for clarification, EPA might 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.*

3. *Submitting Confidential Business Information.*

Do not submit CBI information to EPA through *www.regulations.gov* or email. Clearly mark the part of or all 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.

II. Extension of Comment Period for the NPDES CAFO Reporting Rule

A. Proposed NPDES CAFO Reporting Rule

On October 21, EPA published in the **Federal Register** the proposed NPDES CAFO Reporting Rule for public comment. EPA is requesting public comment on the proposed rule options for gathering the information identified in the proposal and the alternative approaches to achieve water quality protection. Copies of the proposal are available on EPA's Web site at *http://www.epa.gov/npdes/regulations/cafo_fr_proposed_reporting_rule.pdf.* More information regarding the NPDES permitting program for CAFOs can be found at *http://cfpub.epa.gov/npdes/home.cfm?program_id=7.*

B. Extension of Comment Period

EPA is extending the deadline for submitting comments on the proposed NPDES CAFO Reporting Rule to January 19, 2012. The original deadline for comments, based on a 60-day comment period, was December 20, 2012. EPA's decision responds to a request from several organizations to extend the comment deadline in order to provide a longer period of time in which to provide comments. EPA believes that this 30-day extension will assist in providing an adequate amount of additional time for these organizations as well as other members of the public to review the proposal and to provide written comments.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: December 13, 2011.

Nancy K. Stoner,

Acting Assistant Administrator, Office of Water.

[FR Doc. 2011–32472 Filed 12–16–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2011–0102; 4500030113]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Western Glacier Stonefly as Endangered With Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the western glacier stonefly (*Zapada glacier*) in Montana as endangered under the Endangered Species Act of 1973, as amended (Act), and to designate critical habitat. Based on our review, we find that the petition presents substantial scientific or commercial information indicating that listing the western glacier stonefly may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing the western glacier stonefly is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding this species. Based on the status review, we will issue a 12-month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act. We will make a determination on

critical habitat for this species if and when we initiate a listing action.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before February 17, 2012. The deadline for submitting an electronic comment using the Federal eRulemaking Portal (see **ADDRESSES** section, below) is 11:59 p.m. Eastern Time on this date. After February 17, 2012, you must submit information directly to the Montana Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section below). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

ADDRESSES: You may submit information by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Keyword or ID box, enter FWS–R6–ES–2011–0102, which is the docket number for this action. Then click on the Search button. You may submit a comment by clicking on ''Submit a Comment.''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R6–ES–2011–0102; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will not accept email or faxes. We will post all information we receive on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Request for Information section below for more details).

FOR FURTHER INFORMATION CONTACT: Mark Wilson, Field Supervisor, Montana Ecological Services Field Office, 585 Shepard Way, Helena, MT; telephone (406) 449–5225. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Request for Information

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the western glacier stonefly from governmental agencies, Native American tribes, the scientific community, industry, and any other interested parties. We seek information on:

(1) The species' biology, range, and population trends, including:

(a) Habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures and programs for the species, its habitat, or both.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(3) Information specific to the western glacier stonefly in Glacier National Park (GNP):

(a) Documentation that the species still exists in GNP, including confirmed records of individuals collected after 1979;

(b) Methodology of previous surveys for the species, including specific locations and site characteristics where it has been found;

(c) Habitat requirements and physical description of the aquatic juvenile or larval forms; and

(d) Hydrology of the streams where the species has been documented to determine the contribution of glacier meltwater to its habitat.

If, after the status review, we determine that listing the western glacier stonefly is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act), in accordance with section 4 of the Act, to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, we also request data and information on:

(1) What may constitute ''physical or biological features essential to the conservation of the species'' within the geographical range currently occupied by the species;

(2) Where these features are currently found;

(3) Whether any of these features may require special management considerations or protection;

(4) Specific areas outside the geographical area occupied by the species that are ''essential for the conservation of the species;'' and

(5) What, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of section 4 of the Act.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and supporting documentation that we received and used in preparing this finding will be available for public inspection at *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Montana Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly commence a review of the status of the species, which is subsequently summarized in our 12-month finding.

Petition History

On January 10, 2011, we received a petition dated December 30, 2010, prepared by Jordan *et al.* (petition) on behalf of The Xerces Society for Invertebrate Conservation and The Center for Biological Diversity (petitioners) requesting that the western glacier stonefly be given immediate protection and listed as endangered under the Act and that critical habitat be designated. The petition clearly identified itself as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a). In an August 3, 2011, letter to the petitioners (Walsh 2011, entire), we responded that we had reviewed the information presented in the petition and determined that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act was not warranted. We stated further that due to staff and budget limitations it was not practicable to fully address the petition at the time it was received. This finding addresses the petition.

Previous Federal Actions

There are no previous Federal actions involving the western glacier stonefly.

Species Information

Species Description and Taxonomy

The western glacier stonefly is a slender, elongate insect with filamentous antennae and large eyes. The adults are generally brown in color with yellowish brown legs and possess two sets of translucent wings (Baumann and Gaufin 1971, p. 275). Adults range from 6.5 to 10.0 millimeters (mm) (0.26 to 0.39 inches (in.)) in body length with the larger forewings measuring 7.0 to 11.0 mm (0.28 to 0.43 in.) in length (Baumann and Gaufin 1971, p. 275). Females are larger than males. The nymphs (immature or larval forms) have not been identified and no physical description is available. In general, juveniles of the *Zapada* genus, which includes this species, differ from adults in the presence of large whorled spines on their legs (Baumann 1975, p. 31). The western glacier stonefly is referred to as a member of the *Z. oregonensis* group, which all have similar shape and unbranched structure of the cervical gills (Stagliano *et al.* 2007, p. 60).

The western glacier stonefly is in the phylum Arthropoda, class Insecta, order Plecoptera (stoneflies), and family Nemouridae (Baumann 1975, pp. 1, 31; Service 2011, p. 18688). The family Nemouridae is the largest in the order, comprising more than 370 species in 17 genera (Baumann 1975, p. 1). Members of the *Zapada* genus (also known as *Nemoura* genus) are the most common of the Nemouridae family (Baumann 1975, p. 31).

The western glacier stonefly was first described in 1971 from adult specimens collected from five locations in GNP, Glacier County, Montana, in the 1960s (Baumann and Gaufin 1971, p. 277), and is recognized as a valid species by the scientific community (Baumann 1975, p. 30; Stark 1996, entire; Stark *et al.* 2009, p. 8). We consider the western glacier stonefly (*Zapada glacier*) to be a valid species and, therefore, a listable entity under the Act.

Habitat and Life History

There is little information available on the biology of the western glacier stonefly. However, we assume that the western glacier stonefly is likely to be similar to other closely related stoneflies in terms of its habitat needs and life history traits. In general, insects in the order Plecoptera (stoneflies), and the family Nemouridae in particular, are primarily associated with clean, cool or cold, running waters (Baumann 1979, pp. 242–243; Stewart and Harper 1996, p. 217). Depending on the information source, cool or cold waters are defined as those with a mean temperature below 16 °C (60.8 °F) (Baumann 1979, p. 242) or 19 °C (66.2 °F) (Grafe *et al.* 2002, p. A1). Members of the Nemouridae family, which includes the western glacier stonefly, are usually the dominant Plecopteran found in mountain-river ecosystems both in total biomass and in numbers of species present (Baumann 1975, p. 1).

Stonefly larvae usually have specific habitat requirements with respect to water body size, temperature range, and substrate type (Stewart and Harper 1996, p. 217). Most aquatic invertebrates in stream environments in the northern Rocky Mountains exhibit very strong presence or abundance distribution patterns according to elevation gradients and, therefore, temperature gradients (Fagre *et al.* 1997, pp. 761–763; Lowe and Hauer 1999, p. 1642; Hauer *et al.* 2007, p. 110). Species in the *Zapada* genus are most likely to be found in aquatic environments not exceeding 16 °C (60.8 °F) (Baumann 1979, p. 243); however, optimal mean summer water temperatures are usually lower (Grafe *et al.* 2002, pp. A1–A2). The specific thermal tolerance of the western glacier stonefly is not known; however, abundance patterns for other species in the *Zapada* genus in GNP indicate preferences for the coolest environmental temperatures, such as those found at high elevation in proximity to the headwater source (Hauer *et al.* 2007, p. 110).

Nemourid stonefly larvae are typically herbivores or detritivores, and their feeding mode is generally that of a shredder or collector-gatherer (Baumann 1975, p. 1; Stewart and Harper 1996, pp. 218, 262). We assume this also is true of western glacier stonefly larvae.

We have no specific information on the longevity of the western glacier stonefly, but in general stoneflies complete their life cycles within a single year (univoltine) or in 2 to 3 years (semivoltine) (Stewart and Harper 1996, pp. 217–218). Eggs and larvae of all North American species of stoneflies are aquatic (Stewart and Harper 1996, p. 217). Mature stonefly nymphs emerge from the water and complete their development to short-lived adults on and around streamside vegetation or other structures (Hynes 1976, pp. 135–136; Stewart and Harper 1996, p. 217). Either temperature or photoperiod, or a combination of temperature and light, influence the timing of Plecopteran emergence in the Rocky Mountains (Nebeker 1971 cited in Hynes 1976, p. 137). Western glacier stonefly nymphs have never been collected, but adult forms have been collected from early July through mid-August (Baumann and Gaufin 1971, p. 277). Therefore, emergence may start sometime before this period.

Plecopterans inhabiting flowing water disperse longitudinally (up or down stream) or laterally to the stream bank from their benthic (larval) source, and this phenomenon has been reported for some members of the Nemouridae family (Hynes 1976, p. 138; Griffith *et al.* 1998, p. 195; Petersen *et al.* 2004, pp. 944–945). Generally, adult stoneflies stay close to the channel of their source stream (Petersen *et al.* 2004, p. 946), and lateral movement into neighboring uplands is confined to less than 80 meters (262 feet) from the stream (Griffith *et al.* 1998, p. 197).

Adult male and female stoneflies are mutually attracted by a drumming sound produced by tapping their abdomens on a substrate (Hynes 1976,

p. 140). After mating, females deposit a mass of fertilized eggs in water where they are widely dispersed or attached to substrates by sticky coverings or specialized anchoring devices (Hynes 1976, p. 141; Stewart and Harper 1996, p. 217). Eggs may hatch within a few weeks or remain in diapause (dormancy) for much longer periods if environmental conditions, such as temperature, are not conducive to development (Hynes 1976, p. 142). Environmental conditions also may affect the growth and development of hatchlings (Stewart and Harper 1996, p. 217).

Distribution and Abundance

Species in the *Zapada* genus are found throughout western North America (Baumann 1975, p. 74), but the western glacier stonefly has been collected only in the vicinity of five glacier-fed streams east of the Continental Divide in GNP, Montana (Baumann and Gaufin 1971, p. 277). Only 23 adult specimens (20 female and 3 male), all collected between 1963 and 1969, have been documented in publication (Baumann and Gaufin 1971, p. 277). There also is a report of one male collected in 1979 near the site of a previous 1966 collection (Schweiger pers. comm. cited in Jordan *et al.* 2010, pp. 6, 19); this detection is the last known on record. Only one to three individuals were collected per survey effort at any of the collection sites (Baumann and Gaufin 1971, p. 277). Baumann and Gaufin (1971, p. 277) indicated that the original collection efforts in the 1960s were limited in scope and suggested that collections at lower elevation and earlier in the season could expand the known range of the taxon.

Aquatic invertebrate surveys conducted in GNP between 1997 and 2010 did not detect the western glacier stonefly. However, only one drainage (Cataract Creek) previously known to be inhabited by the western glacier stonefly was surveyed during this period (Muhlfeld *et al.* 2011, p. 341). Although the species was not detected in or around Cataract Creek in 2010, the survey date of mid-September may have been too late in the season to detect identifiable forms of the species.

To our knowledge, there are no population numbers or trends known for the western glacier stonefly. There are no recent survey data for most of the known range, and the species' presence has not been documented for over 30 years. Richard Baumann, the professional entomologist who first described the western glacier stonefly, expects that it still exists in most areas where it was collected in the 1960s and 1970s (Jordan *et al.* 2010, p. 6). However, we are concerned that there is no recent record of the species, and we intend to seek documentation that the species is extant during the status review process. Overall, the limited information we have on the western glacier stonefly at this stage suggests that the species is generally limited in geographic distribution and rare in quantity where it has been collected in the past.

Evaluation of Information for This Finding

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR part 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species may warrant listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact the species negatively may not be sufficient to compel a finding that listing may be warranted. The information shall contain evidence sufficient to suggest that these factors may be operative threats that act on the species to the point that the species may meet the definition of threatened or endangered under the Act.

In making this 90-day finding, we evaluated whether information regarding threats to the western glacier stonefly, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Information Provided in the Petition

The petition asserts that the western glacier stonefly is threatened by habitat loss due to climate change and provides several references about the effects of climate change in general to support this claim. The petition explains that human-induced climate change is causing global increases of ambient temperatures, increased summer water temperatures, altered precipitation and snow melt patterns, and contributing to the ongoing melting and loss of glaciers in GNP (Selkowitz *et al.* 2002, p. 3651; Fagre 2005, p. 1; Hall and Fagre 2003, p. 139; Intergovernmental Panel on Climate Change (IPCC) 2007a, p. 9; Pederson *et al.* 2010, pp. 133–134; U.S. Geological Survey (USGS) 2010, entire). These conditions are likely to continue (IPCC 2007a, pp. 8–15; IPCC 2007 cited in Saunders *et al.* 2008, p. iv–v; USGS 2010, entire). The petition also asserts that winter snow deposition cannot compensate for the loss of glaciers and warming summer water temperatures because snow cannot act as a source of cold water through the entire summer (Baumann 2010, pers. comm. cited in Jordan *et al.* 2010, p. 9), especially in light of increased summer temperatures, earlier snowmelt, and the decreased water equivalent held in seasonal snowpack (Fagre 2005, p. 1; USGS 2010, entire).

According to the petition, the disappearance of glaciers is a ''concern for this species'' (Baumann 2010, pers. comm. cited in Jordan *et al.* 2010, p. 9). The petition reasons that the western glacier stonefly is adapted to cold temperatures and high dissolved oxygen concentrations because its known occurrences are only from glacier-fed streams (Baumann 2010, pers. comm. cited in Jordan *et al.* 2010, p. 9). Species in the *Z. oregonensis* group, in which the western glacier stonefly is included, have a preferred temperature (8.8 °C (47.8 °F)), which is a relatively cool optimum temperature within the range of Plecopteran tolerance limits (Grafe *et al.* 2002, pp. A1–A2; Baumann 2010,

pers. comm. cited in Jordan *et al.* 2010, p. 9). Increasing water temperatures would likely render the habitat unsuitable by decreasing dissolved oxygen to levels beyond the physiological limits of the species or preventing temperature-sensitive larval development (Sweeney *et al.* 1990, pp. 169–170; Grafe *et al.* 2002, pp. A1–A2; Baumann 2010, pers. comm. cited in Jordan *et al.* 2010, p. 9).

The petition did not include any supporting material to show that climate change would alter the specific streams inhabited by the western glacier stonefly by inducing temperatures beyond the tolerance limits of the species or the *Z. oregonensis* group in general, but only speculated that the projected increases in air and water temperatures would be detrimental to the species' normal functions (Gaufin 1973, p. 110; Baumann 1979, p. 242; McLaughlin *et al.* 2002, p. 6073; USGS 2010, entire). The petition supported this conclusion by inference from projected climate change impacts to aquatic invertebrates in the eastern United States. Projected climate change scenarios are expected to increase water temperatures by 4 °C (7.2 °F) for first through fifth-order streams and rivers in eastern North America, which essentially shifts the thermal regime of a given stream to one that is presently 680 kilometers (km) (422 miles (mi)) south (Sweeney *et al.* 1990, pp. 144–145). A species with a limited geographic range at the headwaters of cold-water streams would be unlikely to persist with such a shift in thermal regime (Baumann 2010, pers. comm. cited in Jordan *et al.* 2010, p. 9).

The petitioners state that dispersal ability is important for the survival of freshwater taxa in general (Bilton *et al.* 2001, p. 161) and is especially important in light of the elevated temperatures and the shifting of habitat that are expected with climate change (Sweeney *et al.* 1990, p. 143). Glaciers are the primary source of cold-water streams in GNP, and recent models of carbon dioxide (CO_2) induced global warming predicts the complete loss of glaciers in GNP by 2030 (Hall and Fagre, 2003, p. 131; Fagre 2005, p. 1; USGS 2010, entire). Aquatic invertebrates, in general, are expected to migrate or disperse northward or to higher elevations with the changing water regimes expected with climate change (Sweeney *et al.* 1990, p. 147). The petitioners state that glacier-dependent species existing at high-elevation headwaters, including the cold-water dependent western glacier stonefly, even if possessing unlimited dispersal potential and intact landscapes, have no options if the glaciers and the streams they support are destroyed by climate change (Jordan *et al.* 2010, pp. 7–10).

The petition also indicates that climate change may alter the growth rate of the species by transforming the type or nutrient quality of streamside foraging vegetation, which has been documented to diminish recruitment and the likelihood of population persistence in other Plecopteran species (Sweeney *et al.* 1990, pp. 163–164).

Evaluation of Information Provided in the Petition and Available in Service Files

Consideration of climate change is a component of our analyses under the Endangered Species Act. The term ''climate change'' refers to a change in the state of the climate that can be identified by changes in the mean or variability of its properties (e.g., temperature, precipitation) and that persists for an extended period, typically decades or longer, whether the change occurs due to natural variability or as a result of human activity (IPCC 2007b, p. 30).

Scientific measurements taken over several decades demonstrate that changes in climate are occurring. Examples include warming of the global climate system over recent decades, and substantial increases in precipitation in some regions of the world and decreases in other regions (for these and other examples see IPCC 2007b, p. 30; Solomon *et al.* 2007, pp. 35–54, 82–85).

Scientific analyses show that most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is ''very likely'' (defined by the IPCC as 90 percent or higher probability) due to the observed increase in greenhouse gas (GHG) concentrations in the atmosphere as a result of human activities, particularly carbon dioxide emissions from fossil fuel use (IPCC 2007b, p. 5 and Figure SPM.3; Solomon *et al.* 2007, pp. 21–35). Therefore, scientists use a variety of climate models (which include consideration of natural processes and variability) in conjunction with various scenarios of potential levels and timing of GHG emissions in order to project future changes in temperature and other climate conditions (e.g., Meehl *et al.* 2007 entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529).

The projected magnitude of average global warming for this century (as well as the range of projected values, which reflects uncertainty) is very similar under all combinations of models and emissions scenarios until about 2030. Thereafter, despite the projections showing greater divergence in projected magnitude, the overall trajectory is one of increased warming under all scenarios, including those which assume a reduction of GHG emissions (Meehl *et al.* 2007, pp. 760–764; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529). (See IPCC 2007c, p. 8, for other global climate projections.)

Various types of changes in climate may have direct or indirect effects and these may be positive or negative depending on the species and other relevant considerations, such as interactions of climate with non-climate variables (e.g., habitat fragmentation). Identifying likely effects often involves climate change vulnerability analysis. Vulnerability refers to the degree to which a species (or system) is susceptible to, and unable to cope with, adverse effects of climate change, including variability and extremes; it is a function of the type, magnitude, and rate of climate change and variation to which a species is exposed, its sensitivity, and its adaptive capacity (IPCC 2007b, p. 89; see also Glick *et al.* 2011, pp. 19–22). Because exposure, sensitivity, and adaptive capacity can vary by species and situation, there is no single method for conducting such analyses (Glick *et al.* 2011, p. 3). We use our expert judgment and appropriate analytical approaches to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change that are relevant to the western glacier stonefly.

Projected changes in climate and related impacts can vary substantially across and within different regions of the world (e.g., IPCC 2007b, pp. 8–12). Thus, although global climate projections are informative, and in some cases are the only or the best scientific information available, to the extent possible we use ''downscaled'' climate projections. Those projections provide higher-resolution information that is more relevant to the spatial scales used to assess impacts to a given species (see Glick *et al.* 2011, pp. 58–61 for a discussion of downscaling). With regard to our analysis for the western glacier stonefly, downscaled projections of climate are available.

Downscaled projection information we have in our files supports the petition's assertions that climate change may threaten habitat for the western glacier stonefly in GNP. Specifically, global warming appears to be very pronounced in alpine regions where the western glacier stonefly has been known to occur (Hall and Fagre 2003, p. 134 and references therein). Since 1900, the

mean annual air temperature for GNP and the surrounding region has increased 1.33 °C (2.4 °F), which is 1.8 times the global mean increase (USGS 2010, p. 1). Glaciers in GNP are disappearing. Only 27 of the 150 glaciers estimated to have existed in GNP in 1910 exist today (Fagre 2005, p. 1). Glaciers and perennial snowpack (snow that persists from year to year) are expected to be gone from GNP by 2030 based on projected greenhouse gas emissions, temperature, and precipitation scenarios, eliminating them as a cooling source for natural springs or as a sole source of cool, running water (Hall and Fagre 2003, p. 137; Fagre 2005, p. 7).

With the complete loss of glaciers in GNP, high-alpine wetlands could be reduced, changed from perennial to ephemeral, or eliminated by decreased winter snow or accelerated snowfield melt due to elevated summer temperatures (Hauer *et al.* 2007, p. 109). Glaciers store water that is then released during dry periods of the year or through extended drought. Thus, streams that would otherwise dry-up in warm, dry seasons are assured a continual flow where glaciers persist. Although the juvenile form of the western glacier stonefly has not been described, it is presumed to be aquatic because eggs and larvae of all other Plecopteran insects are dependent on aquatic environments for their survival and development to adults (Stewart and Harper 1996, p. 217). The collection of adult western glacier stoneflies solely in and bordering glacier-fed streams, and the limited dispersal ability of Plecopterans, would suggest that the persistence of these streams is important to the persistence of the species (Baumann and Gaufin 1971, p. 277; Brown *et al.* 2009 cited in Muhlfeld *et al.* 2011, p. 343).

The information in our files supports the petitioners' assertion that the loss of glaciers in GNP may alter habitat for glacier-dependent or cool-water-adapted aquatic invertebrates. The specific habitat requirements or range of tolerance to environmental temperatures is not known for the western glacier stonefly, but glacier and perennial snowfield loss is expected to decrease the available habitat for another cool-water dependent stonefly endemic to GNP, the meltwater lednian stonefly (*Lednia tumana*) (Hall and Fagre 2003, p. 138). The meltwater lednian stonefly is limited in distribution by mean and maximum aquatic temperatures of 10 °C (50 °F) and 18 °C (64.4 °F), respectively, with the majority of collection locations in close proximity to high-elevation glaciers or permanent snowfields (Muhlfeld *et al.* 2011, p. 341). Western glacier stonefly collections indicate a similar pattern of proximity to high-elevation glacier-fed streams or glacier lake sources (Baumann and Gaufin 1971, p. 271). In addition, the thermal tolerances for the *Z. oregonensis* group, which includes the western glacier stonefly, are within the measured range of the lednian species (Grafe *et al.* 2002, p. A2).

In a previous finding, the Service evaluated the status of the meltwater lednian stonefly and determined it was warranted but precluded for listing under the Act based on the effects of the projected loss of glaciers in altering habitat in high-alpine streams by higher water temperatures, seasonal or permanent stream dewatering, and changes in the timing and volume of snowmelt (76 FR 18694, April 5, 2011). A separate evaluation and habitat model further supported predictions of habitat loss by up to 80 percent by 2030 for the meltwater lednian stonefly in GNP (Muhlfeld *et al.* 2011, p. 343). Based on this information, it is reasonable to expect that habitat for the western glacier stonefly might be similarly affected by warmer or curtailed stream flows due to glacier and snowfield loss associated with a changing climate. Given the limited information available on the distribution and population status of the western glacier stonefly, we cannot predict the extent to which the species would be affected or even if the species still exists in GNP; however, we will assess this factor more thoroughly during our status review for the species.

Information in our files also confirms the petitioners' statements that with increasing temperatures the type of streamside foraging vegetation present in GNP could be transformed, and GNP could see an increase in tree growth rates and evapotranspiration, which would reduce soil moisture and streamflow (Fagre 2005, p. 8). However, these projections are based on broad trends for the region, and we cannot predict at this scale how these scenarios would contribute to the loss or deterioration of western glacier stonefly habitat or how these changes would diminish recruitment and the likelihood of population persistence. We will assess this factor more thoroughly during our status review for the species. The transition of habitat and its effects on the physiology and phenology of the western glacier stonefly is discussed under Factor E.

Summary of Factor A

Based on the information provided in the petition, as well as other information readily available in our files, we find that the petition presents substantial scientific or commercial information indicating that the western glacier stonefly may warrant listing due to the present or threatened destruction, modification, or curtailment of the species' habitat or range. Little information is available on the ecology and biology of the western glacier stonefly, but it is described as a cool-water stonefly species based on its collection in or near glacier-fed streams. There is adequate information on the adverse effects of warming air and water temperatures projected to occur with climate change on habitat for cool-water stoneflies in general, and specifically through research conducted on another endemic stonefly in GNP—the meltwater lednian stonefly. Increased summer water temperatures and altered precipitation and snow melt patterns due to climate change contribute to the ongoing shrinking and projected loss of glaciers and perennial snowfields in GNP, which are sources of stream habitats on which the western glacier stonefly may depend. We will assess these stressors and habitat requirements more thoroughly during our status review in order to better quantify potential effects on the western glacier stonefly.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The petition notes that the western glacier stonefly is not used commercially and is not at risk of overcollection (Jordan *et al.* 2010, p. 10). Neither the petition nor information within our files presents substantial scientific or commercial information that collection was, or is, occurring at a level that impacts the overall status of the species. Therefore, we find the petition does not present substantial scientific or commercial information to indicate that overutilization for commercial, recreational, scientific, or educational purposes may present a threat to the western glacier stonefly such that the petitioned action may be warranted. However, we will assess this factor more thoroughly during our status review for the species.

C. Disease or Predation

Information Provided in the Petition

The petition notes that disease and predation are not known to threaten the western glacier stonefly, although the threats from disease and predation have never been assessed (Jordan *et al.* 2010, p. 10). The petition asserts that the rarity and limited range of the species make it more vulnerable to extinction

from normal population fluctuations that could result from predation or disease episodes (Jordan *et al.* 2010, p. 11).

Evaluation of Information in the Petition and Available in Service Files

We address the potential risks due to a small population size under Factor E. We reviewed information in our files and the information provided by the petition and did not find substantial information to indicate that disease or predation on the western glacier stonefly are occurring outside the natural range of variation, such that they may be considered a threat. Therefore, we find the petition does not present substantial scientific or commercial information to indicate that disease or predation may present a threat to the western glacier stonefly such that the petitioned action may be warranted. We will assess this factor more thoroughly during our status review for the species.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

The petition claims that the western glacier stonefly is threatened by the inadequacy of existing regulatory mechanisms, because it receives no recognition or protection under Federal or State law (Jordan *et al.* 2010, p. 11). The petition cites several references to show that adequate regulations do not exist to control or reduce greenhouse gas emissions from the burning of fossil fuels, the leading cause of global climate change and increasing average global temperatures, which the petitioners conclude contribute to the loss of western glacier stonefly habitat (Fagre 2005, p. 1; Hansen *et al.* 2008, p. 16; Jones *et al.* 2009, p. 484; Smith *et al.* 2009, p. 4135; Jordan *et al.* 2010, p. 11). The petitioners cite the Service's 2008 listing of the polar bear (*Ursus maritimus*), which concluded that there are no regulatory mechanisms that address the anthropogenic causes of climate change (e.g., greenhouse gas emissions) and the impact of warming temperatures and altered precipitation patterns on diminishing sea ice (73 FR 28288, May 15, 2008).

The petition explains that a reduction in atmospheric CO2, a greenhouse gas, to 350 parts per million or below is necessary to avoid dangerous climate change and maintain the conditions to which humanity, wildlife, and the biosphere are adapted (Hansen et al. 2008, p. 16). Current atmospheric CO2 is at approximately 385 ppm (Hansen *et al.* 2008, p. 16), and regulations are necessary to achieve the lower emission level. The petition also states that existing domestic laws which grant authority to require greenhouse gas emissions reductions (e.g., Clean Air Act, Clean Water Act, Endangered Species Act, Energy Policy and Conservation Act) are not exercised to their fullest extent (Jordan *et al.* 2010, p. 12); however, there is no explanation in the petition of how the majority of these laws apply to controlling emissions. The petition includes an example of the U.S. Environmental Protection Agency's (EPA's) application of the Clean Air Act to lower emissions by requiring improved fuel economy and higher emission standards for light-duty vehicles (75 FR 25324, May 7, 2010), but states that the majority of other Clean Air Act programs are not fully implemented to address the greenhouse gas emission problem (75 FR 17004, April 2, 2010).

The petition also refers to sources indicating that the international agreements to address greenhouse gas emissions (e.g., United Nations Framework Convention on Climate Change, Kyoto Protocol) rely on nonbinding and ineffective controls (Jordan *et al.* 2010, p. 13; Pew 2010, entire; Rogelj *et al.* 2010, p. 464).

Evaluation of Information Provided in the Petition and Available in Service Files

While the information in our files supports the petitioners' claim that the western glacier stonefly currently receives no direct protection under Federal or State law, we do not necessarily consider the absence of a regulatory mechanism to be a threat. The western glacier stonefly is ranked ''S1'' by the Montana Natural Heritage Program, indicating that it is vulnerable to extinction due to limited range, habitat, or population size (Montana Natural Heritage Program 2011, entire); however, this designation does not confer any legal protections for the species or its habitat. After examining the available information in the petition and in our files, we believe that the species is found only at high-altitude headwaters on Federal property in GNP and is not known to occur on State or private lands. Therefore, the western glacier stonefly and its habitat are not likely to be impacted directly or affected by State regulations. We conclude that there is not substantial information in the petition and our files to show that the western glacier stonefly may be threatened by inadequate State-level regulatory mechanisms.

Information in our files indicates that all known occurrences of the species are on National Park Service (NPS) land, which is protected indirectly by several Federal laws and regulations directing how NPS lands are managed. Projects conducted within the species' range may be subject to the National Environmental Policy Act of 1970 (42 U.S.C. 4321 *et seq.*) (NEPA). All Federal agencies are required to adhere to NEPA for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR parts 1500–1518) state that agencies shall include a discussion on the environmental impacts of the various project alternatives, any adverse environmental effects which cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR part 1502). The NEPA is a disclosure law which does not require subsequent minimization or mitigation measures by the Federal agency involved. Although Federal agencies may include conservation measures for sensitive species as a result of the NEPA process, any such measures are typically voluntary in nature and are not required by the statute.

The NPS Organic Act of 1916 (16 U.S.C. 1 *et seq.*), as amended, states that the NPS ''shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations * * * to conserve the scenery and the national and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.'' The current distribution of the western glacier stonefly is entirely within the boundaries of GNP; therefore, the NPS Organic Act is one Federal law of particular relevance to the species. We do not have information readily available in our files to indicate that GNP has a management plan specific to the western glacier stonefly, or if a plan which targets this species explicitly is necessary in order to conserve the species. Management in GNP conducted under the NPS Organic Act may provide adequate protection for the species and its habitat from direct destruction or modification by most human activities. However, the NPS Organic Act does not regulate national or international greenhouse gas emissions. At this phase of the review process we cannot seek input from outside agencies such as the NPS or other additional information sources. We will contact the NPS and other agencies during the status review process to gather information to determine how and to what extent the existing regulations provide protection.

The petitioners referred to the limited application of the Clean Air Act by the EPA to effectively regulate greenhouse gas emissions. Information in our files indicate that, on December 15, 2009, EPA announced that current and projected concentrations of six greenhouse gases in the atmosphere threaten the public health and welfare of current and future generations (74 FR 66496). In effect, the EPA concluded that the greenhouse gases linked to climate change are pollutants whose emissions can be subject to the Clean Air Act (42 U.S.C. 7401 *et seq.*). Specific regulations to limit greenhouse gas emissions under the Clean Air Act were only proposed in 2010. The Service stated previously that there is no basis to conclude that implementation of the Clean Air Act will substantially reduce the current rate of global climate change through regulation of greenhouse gas emissions (76 FR 18694, April 5, 2011). As greenhouse gases are considered a major contributor to global climate change and increasing average global temperatures (Hansen *et al.* 2008, p. 16), which is believed to be the cause of the projected loss of glaciers and other environmental changes in GNP (Hall and Fagre 2003 p. 131; Fagre 2005, p. 8; Hauer *et al.* 2007; pp. 107–113), existing regulatory mechanisms may be inadequate to address potential changes to the western glacier stonefly's habitat as discussed under Factor A.

Summary of Factor D

Based upon the information provided in the petition, as well as other information readily available in our files, we find that there is substantial scientific or commercial information indicating that the western glacier stonefly may warrant listing due to the inadequacy of existing regulatory mechanisms that pertain to the primary potential threat to the species identified in Factor A: Habitat loss due to the environmental changes caused by climate change. Since the known distribution of the species lies within the boundaries of GNP, management of lands are subject to several Federal laws and regulations that protect the species' habitat from direct destruction or modification. Given the level of information we have at this 90-day finding stage, it is unclear whether these Federal laws and regulations are adequate as they pertain to addressing the potential threats to the habitat of the western glacier stonefly due to climate change. We will assess all the relevant regulatory mechanisms more thoroughly during the status review for the species.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Information Provided in the Petition

The petition asserts that the western glacier stonefly population sizes are unknown but are believed to be small because of the rarity of detection, and claims that the risks associated with this small population size represent a threat to the species (Jordan *et al.* 2010, p. 13). The petition cites Shaffer (1981, p. 31) as evidence that small and fragmented populations, in general, are at greater risk of extinction from normal population fluctuations, natural disasters, and loss of genetic diversity (Jordan *et al.* 2010, p. 13).

In addition to small population effects, the petition claims that increases in water temperature due to climate change may impact western glacier stonefly populations by causing direct larval mortality and altered phenology (timing of life events tied to seasons or climate), which has caused impaired development, behavior, dispersal, fecundity, and reproductive success in other stonefly species (Lillehammer *et al.* 1989, p. 173; Baumann 2010, pers. comm. cited in Jordan *et al.* 2010, p. 10; Sweeney *et al.* 1990, entire). The petition included these assertions under Factor A, but because they are physiological effects rather than habitat effects, we discuss them under Factor E.

Evaluation of Information Provided in the Petition and Available in Service Files

Small Population Size—The population size, trend, current status, or geographic extent of the western glacier stonefly is unknown. Based on the information presented in the petition and available in our files, the species is known to have occurred in five hydrological drainages on the east side of the Continental Divide in GNP. Only one to three individuals were collected per survey effort at each collection site (Baumann and Gaufin 1971, p. 277). Although there is limited recent survey data for these five drainages, aquatic invertebrate surveys conducted between 1997 and 2010 in many locations in GNP, including cold-water streams, did not detect additional occurrences of the western glacier stonefly (Stagliano *et al.* 2007, p. 60; Jordan *et al.* 2010, pp. 6–7; Muhlfeld *et al.* 2011, p. 339). Presuming the species is extant, we conclude that it is rare and limited in distribution.

In general, small populations are vulnerable to extinction from systematic pressures or stochastic (random) disruptions (Shaffer 1981, p. 131). Potential stochastic disruptions could include natural catastrophes such as flood, fire, drought, and landslides or genetic changes caused by a loss of genetic diversity. The petition presents no information and we have no information in our files to indicate that the western glacier stonefly is likely to be affected by these kinds of natural events or is experiencing a loss of genetic diversity. We do not consider the species' apparently restricted range to be a threat in itself. However, the vulnerability of small populations with limited range may be increased when threats are present. As discussed under Factor A, information in the petition and in our files would indicate that the effects of climate change on glaciers and perennial snowpack in GNP may contribute to habitat loss or deterioration by seasonal or permanent stream dewatering and changes in timing and volume of snowmelt. Considering the apparent limited range and rarity of the western glacier stonefly and the potential threat of habitat loss and deterioration, we find that the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to small population size.

Climate Change—In addition to habitat alteration induced by changing climate conditions, as discussed under Factor A, changing climate conditions may have physiological and behavioral effects on some species. Aquatic insects, in general, may be isolated by limited dispersal ability or physiological requirements for specific thermal criteria (Stewart and Harper 1996, p. 217; Griffith *et al.* 1998, p. 199; Hauer *et al.* 2007, pp. 109–110). However, discerning the impacts to aquatic organisms from global warming may be complicated and vary greatly at the species level (Williams and Feltmate 1992, p. 287). Aquatic insects may respond to elevated temperatures in two ways: (1) Behaviorally, by emigrating from or changing distribution within stressed regions; or (2) physiologically, by adjusting the duration and extent of growth and development in immature stages, and by adjusting their ultimate size, condition, and fecundity as adults (Williams and Feltmate 1992, pp. 285–286). It would be speculative to assess the degree to which the western glacier stonefly would respond behaviorally or physiologically to climate alterations, due to a lack of information regarding the ecological requirements and characteristics of the species. However, we will assess this factor more thoroughly during our status review for the species. Therefore, we find that the petition does not present substantial

information that the western glacier stonefly would be impacted behaviorally or physiologically by warming temperatures associated with projected climate change.

Summary for Factor E

We find that the information provided in the petition, as well as other information readily available in our files, presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to other natural or manmade factors affecting the continued existence of the western glacier stonefly, such as its apparent limited distribution and small population size. While we do not consider the species' apparently restricted range alone to be a risk, there is substantial information that it may be significant given the stressors the species may face from the loss or deterioration of habitat due to climate change. Though the species' habitat may be impacted by the loss of glaciers and perennial snowpack as discussed under Factor A, the species' behavioral or physiological responses and ability to adjust to increased temperatures caused by climate change cannot be predicted given the available information. We will assess these factors further and more thoroughly during the status review for the western glacier stonefly.

Finding

On the basis of our determination under section 4(b)(3)(A) of the Act, we determine that the petition presents substantial scientific or commercial information indicating that listing the western glacier stonefly throughout its entire range may be warranted. This finding is based on information provided under Factors A, D, and E. We determine that the information provided under Factors B and C is not substantial.

Because we have found that the petition presents substantial information indicating that listing the western glacier stonefly may be warranted, we are initiating a status review to determine whether listing the western glacier stonefly under the Act is warranted.

The ''substantial information'' standard for a 90-day finding differs from the Act's ''best scientific and commercial data'' standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding does not constitute a status review under the Act. In a 12-month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will result in a warranted finding.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Montana Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section above).

Author

The primary authors of this document are the staff members of the Montana Ecological Services Field Office.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 6, 2011.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–32431 Filed 12–16–11; 8:45 am]

BILLING CODE P

Notices

Federal Register

Vol. 76, No. 243

Monday, December 19, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Reduce the Frequency of Rice and Potato Stocks Surveys and All Associated Reports

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice of reduction in data collection and publication.

SUMMARY: This notice announces the intention of the National Agricultural Statistics Service (NASS) to reduce the currently approved information collections for rice and potato stocks that are currently approved under OMB # 0535–0007.

Under the current OMB approval the Potato Stocks Survey is conducted on a monthly basis from December through June of each year. Under this reduction NASS plans to discontinue the collecting and publishing of potato stock data for the months of January, March and May. In the four remaining months (December, February, April and June) there will be no changes to the surveys or the publications.

The Rice Stocks Survey is currently conducted in January, March, June, August, September, and October (only California for October). Under this reduction, NASS plans to discontinue the collection of data in September, along with the related publication.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333, or through the NASS OMB Clearance Officer at *ombofficer@nass.usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Reduction in the Frequency of Rice and Potato Stocks Surveys and Publications.

OMB Control Numbers: 0535–0007.

Expiration Dates of Approval: November 30, 2012.

Type of Request: To reduce the frequency of the rice and potato stocks surveys along with the resulting publications.

Abstract: The primary functions of the National Agricultural Statistics Service include the collection of data and the preparation and issuance of state and national estimates of crop and livestock production, disposition, prices, and environmental and economic factors.

Timeline: NASS will suspend this information collection as of December 19, 2011 due to budget constraints. NASS will not issue any publications that would normally be generated from any of the suspended stocks surveys, unless there is a change in the anticipated budget shortfall.

Authority: These data were collected under authority of 7 U.S.C. 2204(a) (General Duties of the Secretary of Agriculture). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents.

Estimate of Burden: There will be no further public reporting burden for this collection of information.

Signed at Washington, DC, on October 25, 2011.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. 2011–32342 Filed 12–16–11; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Suspend the Nursery Production, the Nursery and Floriculture Chemical Use, and the Christmas Tree Production Surveys and All Associated Reports

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice of suspension of data collection and publication.

SUMMARY: This notice announces the intention of the National Agricultural Statistics Service (NASS) to suspend currently approved information collections for all Nursery and Christmas Tree Production Surveys along with the Nursery and Floriculture Chemical Use Survey approved under OMB # 0535–0244.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333, or through the NASS OMB Clearance Officer at *ombofficer@nass.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Suspension of All Nursery and Christmas Tree Production Surveys Along with the Nursery and Floriculture Chemical Use Survey and All Related Publications.

OMB Control Numbers: 0535–0244.

Expiration Dates of Approval: June 30, 2013.

Type of Request: To suspend the currently approved information collections for Nursery and Christmas Tree Production Surveys and the Nursery and Floriculture Chemical Use Survey and the resulting publications.

Abstract: The primary functions of the National Agricultural Statistics Service include the collection of data and the preparation and issuance of state and national estimates of crop and livestock production, disposition, prices, and environmental and economic factors.

Timeline: NASS will suspend this information collection as of December 19, 2011 due to budget constraints. NASS will not issue any publications that would normally be generated from any of the nursery production or chemical use surveys, unless there is a change in the anticipated budget shortfall.

Authority: These data were collected under authority of 7 U.S.C. 2204(a) (General Duties of the Secretary of Agriculture). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents.

Estimate of Burden: There will be no further public reporting burden for this collection of information.

Signed at Washington, DC, October 25, 2011.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. 2011–32339 Filed 12–16–11; 8:45 am]

BILLING CODE 3410–20–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Meetings

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meetings.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) plans to hold its regular committee and Board meetings in Washington, DC, Monday through Wednesday, January 9–11, 2012 on the times and location listed below.

DATES: The schedule of events is as follows:

Monday, January 9, 2012

10:45–11:15 a.m.—Budget Committee
11:15–Noon—Technical Programs Committee
1:30–4 p.m.—Strategic Planning

Tuesday, January 10, 2012

9:00–3:15 p.m.—Ad Hoc Committee Meetings: Closed to Public
3:30–4:30—Ad Hoc Committee on Frontier Issues

Wednesday, January 11, 2012

1:30–3 p.m.—Board Meeting

ADDRESSES: Meetings will be held at the Access Board Conference Room, 1331 F Street NW., Suite 800, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meetings, please contact David Capozzi, Executive Director, (202) 272–0010 (voice); (202) 272–0054 (TTY).

SUPPLEMENTARY INFORMATION: At the Board meeting scheduled on the afternoon of Wednesday, January 11, 2012, the Access Board will consider the following agenda items:

- Approval of the draft November 9, 2011 meeting minutes (vote)
- Budget Committee Report
- Technical Programs Committee Report
- Planning and Evaluation Committee Report
- Ad Hoc Committee Reports:
  - Ad Hoc Committee on Passenger Vessels (vote)
  - Ad Hoc Committee on Medical Diagnostic Equipment; Federal Advisory Committee charter (vote)
- Executive Director's Report
- Public Comment, Open Topics

All meetings are accessible to persons with disabilities. An assistive listening system, computer assisted real-time transcription (CART), and sign language interpreters will be available at the Board meeting and committee meetings. Persons attending Board meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants (see *http://www.access-board.gov/about/policies/fragrance.htm* for more information).

David M. Capozzi,

Executive Director.

[FR Doc. 2011–32359 Filed 12–16–11; 8:45 am]

BILLING CODE 8150–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Data Collection on Marine Protected and Managed Areas.

OMB Control Number: 0648–0449.

Form Number(s): NA.

Type of Request: Regular submission (request for extension and revision of a current information collection).

Number of Respondents: 100.

Average Hours per Response: 30 minutes.

Burden Hours: 50.

Needs and Uses: This request is for extension and revision of a current information collection. The inventory data form has been revised so that the average response time is significantly shorter.

Executive Order 13158 directs the Department of Commerce (DOC) and the Department of the Interior (DOI) to work with partners to strengthen the protection of U.S. oceans and coastal resources by developing a national system of marine protected areas (MPAs). These departments are working closely with state, territorial, local, and tribal governments, as well as other stakeholders, to identify and inventory the nation's existing MPAs. Toward this end, the DOC's National Oceanic and Atmospheric Administration (NOAA) and DOI have created the Marine Protected Areas Inventory, an online spatial database that provides detailed information on MPAs nationwide. The inventory stores data on over 1,600 sites, across different management programs and all levels of government. In order to keep this data resource current and accurate with the latest status and information on MPAs nationwide, the MPA Center has created an online site data form, posted at *http://www.mpa.gov,* that can be used to provide feedback regarding the accuracy of the MPA Inventory data and a mechanism to receive updates, additions or changes to existing database information. The online form can be used to identify new sites that should be added to the database or to provide clarification on the data stored in the existing version of the online MPA Inventory. An additional nomination checklist form is also posted at *http://www.mpa.gov* to collect information from eligible federal, state, territorial, local and tribal governments seeking to nominate their MPA to be part of the national system of MPAs. MPA programs (approximately five new each year) provide information on how their nominated sites meet the goals and objectives of the national system of MPAs.

Affected Public: State, local and tribal governments.

Frequency: One time and on occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 13, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–32364 Filed 12–16–11; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Coral Reef Conservation Program Administration.

OMB Control Number: 0648–0448.

Form Number(s): NA.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 28.

Average Hours per Response: Match waiver request, 30 minutes; proposal comment, one and one-half hours.

Burden Hours: 112.

Needs and Uses: This request is for extension of a current information collection.

The Coral Reef Conservation Act of 2000 (Act) was enacted to provide a framework for conserving coral reefs. The Coral Reef Conservation Grant Program, under the Act, provides funds to broad-based applicants with experience in coral reef conservation to conduct activities to protect and conserve coral reef ecosystems. The information submitted is used to determine: (1) Whether the applicant qualifies for a waiver of matching funds, and (2) if a proposed project is consistent with the coral reef conservation priorities of authorities with jurisdiction over the area where the project will be carried out.

Affected Public: State, local and tribal governments.

Frequency: Annually.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: OIRA_Submission@omb.eop.gov.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 13, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–32365 Filed 12–16–11; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–502]

Certain Welded Carbon Steel Standard Pipes and Tubes From India: Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from an interested party, the Department of Commerce (the Department) initiated an administrative review of the antidumping duty order on certain welded carbon steel standard pipes and tubes from India. The period of review is May 1, 2010, through April 30, 2011. As a result of the withdrawal of the request for review, the Department is rescinding this review.

DATES: *Effective Date:* December 19, 2011.

FOR FURTHER INFORMATION CONTACT: Catherine Cartsos or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1757 or (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 28, 2011, and in accordance with 19 CFR 351.213(g) and 19 CFR 351.221(b)(1), the Department published a notice of initiation of an administrative review of the antidumping duty order on certain welded carbon steel standard pipes and tubes from India. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 76 FR 37781 (June 28, 2011) (*Notice of Initiation*). Based on a request for review from United States Steel Corporation, we initiated reviews of Arihant Domestic Appliances Ltd., Good Luck Steel Tubes Ltd. and all affiliates, Good Luck Industries, Innoventive Industries Ltd., Jindal Group and all affiliates, Jindal Industries Ltd., Jindal Saw Ltd., Jindal Steel and Power Ltd., JSL Ltd., JSW Steel Ltd.[1], Jotindra Steel and Tubes Ltd., Lloyds Group and all affiliates, Lloyds Metals & Engineers Ltd., Lloyds Steel Industries Ltd., Welspun Group and all affiliates, Welspun Corp. Ltd., Welspun Trading Ltd., Welspun Steel Ltd., and Welspun Investments and Commercials Ltd.

Rescission of Review

In accordance with 19 CFR 351.213(d)(1), the Department will rescind an administrative review, ''in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.'' On September 23, 2011, United States Steel Corporation withdrew its request for a review of the order with respect to Arihant Domestic Appliances Ltd., Good Luck Steel Tubes Ltd. and all affiliates, Good Luck Industries, Innoventive Industries Ltd., Jindal Group and all affiliates, Jindal Industries Ltd., Jindal Saw Ltd., Jindal Steel and Power Ltd., JSL Ltd., JSW Steel Ltd., Jotindra Steel and Tubes Ltd., Lloyds Group and all affiliates, Lloyds Metals & Engineers Ltd., Lloyds Steel Industries Ltd., Welspun Group and all affiliates, Welspun Corp. Ltd., Welspun Trading Ltd., Welspun Steel Ltd., and Welspun Investments and Commercials Ltd. Because we received no other requests for review of these companies and United States Steel Corporation withdrew its request within 90 days of the date of publication of the *Notice of Initiation,* we are rescinding the administrative review of the order with respect to Arihant Domestic Appliances Ltd., Good Luck Steel Tubes Ltd. and all affiliates, Good Luck Industries, Innoventive Industries Ltd., Jindal Group and all affiliates, Jindal Industries Ltd., Jindal Saw Ltd., Jindal Steel and Power Ltd., JSL Ltd., JSW Steel Ltd., Jotindra Steel and Tubes Ltd., Lloyds Group and all affiliates, Lloyds Metals & Engineers Ltd., Lloyds Steel Industries Ltd., Welspun Group and all affiliates, Welspun Corp. Ltd., Welspun Trading Ltd., Welspun Steel Ltd., and Welspun Investments and Commercials Ltd. This rescission is in accordance with 19 CFR 351.213(d)(1). The Department intends to issue appropriate assessment instructions to U.S. Customs and Border Protection 15 days after publication of this notice.

Notifications

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to

[1] In the *Notice of Initiation,* when listing JSW Steel Ltd., we inadvertently spelled the word ''steel'' with a lowercase ''s'' instead of an uppercase ''s.'' *See Notice of Initiation,* 76 FR at 37783.

comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning destruction of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is published in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: December 13, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–32445 Filed 12–16–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–835]

Furfuryl Alcohol From the People's Republic of China: Final Results of Expedited Third Sunset Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 1, 2011, the Department of Commerce (''Department'') initiated the third five-year (''sunset'') review of the antidumping duty order on furfuryl alcohol from the People's Republic of China (''PRC'') pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). On the basis of a notice of intent to participate, and an adequate substantive response filed on behalf of the domestic interested party, as well as a lack of response from respondent interested parties, the Department conducted an expedited sunset review of the antidumping duty order, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1). As a result of the sunset review, the Department finds that revocation of the antidumping duty order on furfuryl alcohol from the PRC would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Review'' section of this notice.

DATES: *Effective Date:* December 19, 2011.

FOR FURTHER INFORMATION CONTACT: Jennifer Moats, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5047.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2011, the Department initiated the third sunset review of the antidumping duty order on furfuryl alcohol from the PRC, pursuant to section 751(c) of the Act and 19 CFR 351.218(c)(2).[1] The Department received a notice of intent to participate from Penn A Kem LLC (''the domestic interested party'') within the deadline specified in 19 CFR 351.218(d)(1)(i). The domestic interested party claimed interested party status under section 771(9)(C) of the Act, as a manufacturer of a domestic like product in the United States.

We received a complete substantive response from the domestic interested party within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i). We received no responses from respondent interested parties. As a result, the Department conducted an expedited sunset review of the *Order,* pursuant to 19 CFR 351.218(e)(1).

Scope of the Order

The merchandise covered by the order is furfuryl alcohol ($C_4H_3OCH_2OH$). Furfuryl alcohol is a primary alcohol, and is colorless or pale yellow in appearance. It is used in the manufacture of resins and as a wetting agent and solvent for coating resins, nitrocellulose, cellulose acetate, and other soluble dyes.

The product subject to the order is classifiable under subheading 2932.13.00 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Analysis of Comments Received

All issues raised in this review are addressed in the ''Issues and Decision Memorandum for the Final Results of the Expedited Third Sunset Review of the Antidumping Duty Order on Furfuryl Alcohol from the People's Republic of China'' (''Decision Memorandum'') from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, dated concurrently with and hereby adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margins likely to prevail if the order was to be revoked. Parties may find a complete discussion of all issues raised in the review and the corresponding recommendations in this public memorandum which is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Services System (''IA ACCESS''). Access to IA ACCESS is available in the Central Records Unit Room 7046 of the main Commerce building. In addition, a complete version of the Decision Memorandum can be access directly on the Web at *http://ia.ita.doc.gov/frn.* The signed Decision Memorandum and the electronic versions of the Decision Memorandum are identical in content.

Final Results of Review

We determine that revocation of the *Order* would be likely to lead to continuation or recurrence of dumping at the following weighted-average percentage margins:

Manufacturers/exporters/producers	Weighted-average margin (percent)
Qingdao Chemicals & Medicines & Health Products Import & Export Company	50.43
Sinochem Shandong Import and Export Company	43.54
PRC-Wide Entity	45.27

Notice Regarding Administrative Protective Order (''APO'')

This notice also serves as the only reminder to parties subject to APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return of 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.

[1] *See Initiation of Five-Year (''Sunset'') Review,* 76 FR 54430 (September 1, 2011); *see also Notice of Antidumping Duty Order: Furfuryl Alcohol From the People's Republic of China (''PRC''),* 60 FR 32302 (June 21, 1995) (''*Order*'').

This sunset review and notice are in accordance with sections 751(c), 752, and 771(i)(1) of the Act.

Dated: December 12, 2011.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2011–32442 Filed 12–16–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–810, A–583–815]

Welded ASTM A–312 Stainless Steel Pipe From South Korea and Taiwan: Continuation of Antidumping Duty Orders

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (Department) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty orders on welded ASTM A–312 stainless steel pipe from South Korea (Korea) and Taiwan would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing a notice of continuation of these antidumping duty orders.

DATES: *Effective Date:* December 19, 2011.

FOR FURTHER INFORMATION CONTACT: Jacqueline Arrowsmith or Dana Mermelstein, AD/CVD Operations Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–5255 and (202) 482–1391, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 30, 1992, the Department published the antidumping duty orders on welded ASTM A–312 stainless steel pipe from Korea and Taiwan.[1] On July 1, 2011, the Department published a notice of initiation of its third five-year (sunset) reviews of the antidumping duty orders on welded ASTM A–312 stainless steel pipe from Korea and Taiwan. *See Initiation of Five-Year (''Sunset'') Review,* 76 FR 38613 (July 1, 2011).

As a result of these sunset reviews, the Department determined that revocation of the antidumping duty orders on welded ASTM A–312 stainless steel pipe from Korea and Taiwan would likely lead to continuation or recurrence of dumping and, therefore, notified the ITC of the magnitude of the margins likely to prevail should these orders be revoked. *See Welded ASTM A–312 Stainless Steel Pipe From South Korea and Taiwan: Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders,* 76 FR 67673 (November 2, 2011) and accompanying Issues and Decision Memorandum.

On December 7, 2011, the ITC published its determination in the **Federal Register**, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act), that revocation of the antidumping duty orders on subject merchandise would likely lead to a continuation or recurrence of material injury to an industry in the United Sates within a reasonably foreseeable time. *See Certain Welded Stainless Steel Pipe From Korea and Taiwan,* 76 FR 76437 (December 7, 2011), and USITC Publication 4280 (December 2011), titled Certain Welded Stainless Steel Pipe from Korea and Taiwan (Investigation Nos. 731–TA–540 and 541 (Third Review)).

Scope of the Orders

The merchandise subject to the antidumping duty orders is welded austenitic stainless steel pipe that meets the standards and specifications set forth by the American Society for Testing and Materials (ASTM) for the welded form of chromium-nickel pipe designated ASTM A–312. The merchandise covered by the scope of the orders also includes austenitic welded stainless steel pipes made according to the standards of other nations which are comparable to ASTM A–312.

Welded ASTM A–312 stainless steel pipe is produced by forming stainless steel flat-rolled products into a tubular configuration and welding along the seam. Welded ASTM A–312 stainless steel pipe is a commodity product generally used as a conduit to transmit liquids or gases. Major applications for steel pipe include, but are not limited to, digester lines, blow lines, pharmaceutical lines, petrochemical stock lines, brewery process and transport lines, general food processing lines, automotive paint lines, and paper process machines. Imports of Welded ASTM A–312 stainless steel pipe are currently classifiable under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 7306.40.5005, 7306.40.5015, 7306.40.5040, 7306.40.5062, 7306.40.5064, and 7306.40.5085.[2] Although these subheadings include both pipes and tubes, the scope of the antidumping duty orders is limited to welded austenitic stainless steel pipes. The HTSUS subheadings are provided for convenience and customs purposes. However, the written description of the scope of the orders is dispositive.

Continuation of the Orders

As a result of the determinations by the Department and the ITC that revocation of the antidumping duty orders would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty orders on welded ASTM A–312 stainless steel pipe from Korea and Taiwan.

U.S. Customs and Border Protection will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of these orders will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next sunset reviews of these orders not later than 30 days prior to the fifth anniversary of the effective date of continuation.

These sunset reviews and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: December 14, 2011.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2011–32521 Filed 12–16–11; 8:45 am]

BILLING CODE 3510–DS–P

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[1] *See Antidumping Duty Order and Clarification of Final Determination: Certain Welded Stainless Steel Pipes From Korea,* 57 FR 62301 (December 30, 1992), as amended in *Notice of Amended Final Determination and Antidumping Duty Order: Certain Welded Stainless Steel Pipe From the Republic of Korea,* 60 FR 10064 (February 23, 1995); and *Amended Final Determination and Antidumping Duty Order; Certain Welded Stainless Steel Pipe From Taiwan,* 57 FR 62300 (December 30, 1992), as amended in *Notice of Amended Final Determination and Antidumping Duty Order: Certain Welded Stainless Steel Pipes From Taiwan,* 59 FR 6619 (February 11, 1994).

[2] HTSUS 7306.40.5065 previously listed in the scope of the orders for this product is no longer a valid reporting number, having been replaced by 7306.40.6052 and 7306.40.6054 as of January 1, 1996.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–853, C–523–802, C–520–806, C–552–810]

Circular Welded Carbon-Quality Steel Pipe From India, the Sultanate of Oman, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Countervailing Duty Investigations

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 19, 2011.

FOR FURTHER INFORMATION CONTACT: Joshua Morris, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1779.

Background

On November 15, 2011, the Department of Commerce (the ''Department'') initiated countervailing duty investigations of circular welded carbon-quality steel pipe (''certain steel pipe'') from India, the Sultanate of Oman (''Oman''), The United Arab Emirates (''the UAE''), and the Socialist Republic of Vietnam (''Vietnam''). *See Circular Welded Carbon-Quality Steel Pipe From India, the Sultanate of Oman, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigations,* 76 FR 72173 (November 22, 2011). Currently, the preliminary determinations are due no later than January 19, 2012.

Postponement of Due Date for Preliminary Determinations

On December 6, 2011, the Department received a request from Wheatland Tube (one of the petitioners in these investigations) to postpone the preliminary determinations of the countervailing duty investigations of certain steel pipe from India, Oman, the UAE, and Vietnam. Under section 703(c)(1)(A) of the Tariff Act of 1930, as amended (''the Act''), the Department may extend the period for reaching a preliminary determination in a countervailing duty investigation until no later than the 130th day after the date on which the administering authority initiates an investigation if the petitioner makes a timely request. In accordance with 19 CFR 351.205(e), Wheatland Tube's request for postponement of the preliminary determinations was made 25 days or more before the scheduled date of the preliminary determinations. Thus, we are fully extending the due date for the preliminary determinations to no later than 130 days after the day on which the investigations were initiated (*i.e.,* March 24, 2012). However, March 24, 2012, falls on a Saturday and it is the Department's long-standing practice to issue a determination the next business day when the statutory deadline falls on a weekend, federal holiday, or any other day when the Department is closed. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005). Accordingly, the deadline for completion of the preliminary determinations is now no later than March 26, 2012.

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(e).

Dated: December 12, 2011.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2011–32443 Filed 12–16–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Permitting, Vessel Identification, and Reporting Requirements for Deepwater Shrimp Fisheries in the Western Pacific Region

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before February 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 and instructions should be directed to Walter Ikehara, (808) 944–2275 or *Walter.Ikehara@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

Under the Code of Federal Regulations in Title 50, Part 665, all vessel owners who fish for deepwater shrimp (*Heterocarpus* spp.), or land these species in ports, in the western Pacific region must obtain a Federal permit from the National Marine Fisheries Service (NMFS). They must also mark their vessels for identification. Vessel operators must submit NMFS logbook reports of their fishing activity to NMFS within 72 hours of the end of each fishing trip.

The information collected is used to identify participants in the fishery, document fishing activities and landings, determine the conditions of the stocks, assess the effectiveness of management measures, evaluate the benefits and costs of changes in management measures, and monitor and respond to accidental takes of protected species, including seabirds, turtles, and marine mammals.

Vessel owners must identify their vessels to assist in aerial and at-sea enforcement of fishing regulations.

The currently approved permit application, vessel identification, and logbook reporting requirements are being renewed without change.

II. Method of Collection

Respondents submit paper forms for permit applications and logbook reports to NMFS. Permits are valid for one calendar year and may be renewed annually. Logbook forms provided by NMFS are completed by the vessel operator and submitted to NMFS no later than 72 hours after the end of the trip. Methods of submittal at this time include mail, email and facsimile transmission of paper forms. In the future, email of electronic forms or online access to web-based forms will be available.

III. Data

OMB Control Number: 0648–0586.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved collection).

Affected Public: Individuals or households, businesses or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 10.

Estimated Time per Response: Permit application, 30 minutes; logbook report, 10 minutes per vessel per fishing day; vessel identification, 45 minutes.

Estimated Total Annual Burden Hours: 180.

Estimated Total Annual Cost to Public: $930 in application fees, identification, mailing, faxing, and copying costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 13, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–32366 Filed 12–16–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 11–46]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

SUPPLEMENTARY INFORMATION: The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 11–46 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: December 13, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

DEC 12 2011

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 11-46, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to Iraq for defense articles and services estimated to cost $2.3 billion. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

William E. Landay III
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified Document Provided Under Separate Cover)

Transmittal No. 11–46

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Iraq

(ii) *Total Estimated Value:*

Major Defense Equipment*	$1.3 billion.
Other	1.0 billion.
TOTAL	2.3 billion.

* as defined in Section 47(6) of the Arms Export Control Act.

(iii) *Description and Quantity or Quantities of Articles or Services Under Consideration for Purchase:* (18) F–16IQ aircraft, (24) F100–PW–229 or F110–GE–129 Increased Performance Engines, (120) LAU–129/A Common Rail Launchers, (24) APG–68(V)9 radar sets, (19) M61 20mm Vulcan Cannons, (100) AIM–9L/M–8/9 SIDEWINDER Missiles, (150) AIM–7M–F1/H SPARROW Missiles, (50) AGM–65D/G/H/K MAVERICK Air to Ground Missiles, (200) GBU–12 PAVEWAY II Laser Guided Bomb Units (500 pound), (50) GBU–10 PAVEWAY II Laser Guided Bomb Units (2000 pound), (50) GBU–24 PAVEWAY III Laser Guided Bomb Units (2000 pound), (22) ALQ–211 Advanced Integrated Defensive Electronic Warfare

Suites (AIDEWS), or Advanced Countermeasures Electronic Systems (ACES) (ACES includes the ALQ–187 Electronic Warfare System and AN/ALR–93 Radar Warning Receiver), (20) AN/APX–113 Advanced Identification Friend or Foe (AIFF) Systems (without Mode IV), (20) Global Positioning Systems (GPS) and Embedded GPS/Inertial Navigation Systems (INS), (Standard Positioning Service (SPS) commercial code only), (20) AN/AAQ–33 SNIPER or AN/AAQ–28 LITENING Targeting Pods, (4) F–9120 Advanced Airborne Reconnaissance Systems (AARS) or DB–110 Reconnaissance Pods (RECCE), (22) AN/ALE–47 Countermeasures Dispensing Systems (CMDS), (20) Conformal Fuel Tanks (pairs), (120) Joint Helmet Mounted Cueing Systems (JHMCS), (20) AN/ARC–238 Single Channel Ground and Airborne Radio Systems, (10,000) PGU–27A/B Ammunition, (30,000) PGU–28 Ammunition, (230) MK–84 2000 lb General Purpose Bombs, and (800) MK–82 500lb General Purpose Bombs. Also included: LAU–117 Maverick Launchers, site survey support equipment, Joint Mission Planning System, Ground Based Flight Simulator, tanker support, ferry services, Cartridge Actuated Devices/Propellant Actuated Devices (CAD/PAD), repair and return, modification kits, spares and repair parts, construction, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor technical, engineering, and logistics support services, ground based flight simulator, and other related elements of logistics support.

(iv) *Military Department:* Air Force (SAH).

(v) *Prior Related Cases, if any:* FMS case SAG: $1.4B: 21 Sep 11.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex attached.

(viii) *Date Report Delivered to Congress:* 12 December 2011.

POLICY JUSTIFICATION

Iraq—F–16 Aircraft

The Government of Iraq has requested a possible sale of (18) F–16IQ aircraft, (24) F100PW–229 or F110–GE–129 Increased Performance Engines, (120) LAU–129/A Common Rail Launchers, (24) APG–68(V)9 radar sets, (19) M61 20mm Vulcan Cannons, (100) AIM–9L/M–8/9 SIDEWINDER Missiles, (150) AIM–7M–F1/H SPARROW Missiles, (50) AGM–65D/G/H/K MAVERICK Air to Ground Missiles, (200) GBU–12 PAVEWAY II Laser Guided Bomb Units (500 pound), (50) GBU–10 PAVEWAY II Laser Guided Bomb Units (2000 pound), (50) GBU–24 PAVEWAY III Laser Guided Bomb Units (2000 pound), (22) ALQ–211 Advanced Integrated Defensive Electronic Warfare Suites (AIDEWS), or Advanced Countermeasures Electronic System (ACES) (ACES includes the ALQ–187 Electronic Warfare System and AN/ALR–93 Radar Warning Receiver), (20) AN/APX–113 Advanced Identification Friend or Foe (AIFF) Systems (without Mode IV), (20) Global Positioning Systems (GPS) and Embedded GPS/Inertial Navigation Systems (INS), (Standard Positioning Service (SPS) commercial code only), (20) AN/AAQ–33 SNIPER or AN/AAQ–28 LITENING Targeting Pods, (4) F–9120 Advanced Airborne Reconnaissance Systems (AARS) or DB–110 Reconnaissance Pods (RECCE), (22) AN/ALE–47 Countermeasures Dispensing Systems (CMDS), (20) Conformal Fuel Tanks (pairs), (120) Joint Helmet Mounted Cueing Systems (JHMCS), (20) AN/ARC–238 Single Channel Ground and Airborne Radio Systems, (10,000) PGU–27A/B Ammunition, (30,000) PGU–28 Ammunition, (230) MK–84 2000 lb General Purpose Bombs, and (800) MK–82 500lb General Purpose Bombs. Also included: LAU–117 Maverick Launchers, site survey support equipment, Joint Mission Planning System, Ground Based Flight Simulator, tanker support, ferry services, Cartridge Actuated Devices/Propellant Actuated Devices (CAD/PAD), repair and return, modification kits, spares and repair parts, construction, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor technical, engineering, and logistics support services, ground based flight simulator, and other related elements of logistics support. The estimated cost is $2.3 billion.

The proposed sale will contribute to the foreign policy and national security objectives of the United States by enhancing the capability of Iraq's Air Force. The proposed aircraft and accompanying weapon systems will greatly enhance Iraq's interoperability with the U.S. and other NATO nations, making it a more valuable partner in an important area of the world, as well as supporting Iraq's legitimate need for its own self-defense.

The proposed sale will allow the Iraqi Air Force to modernize its air force by acquiring western interoperable fighter aircraft, thereby enabling Iraq to support both its own air defense needs and coalition operations. The country will have no difficulty absorbing these aircraft into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractors will be:

BAE Advanced Systems	Greenlawn, New York.
Boeing Corporation	Seattle, Washington.
Boeing Integrated Defense Systems (three locations)	St Louis, Missouri. Long Beach, California. San Diego, California.
Raytheon Company (two locations)	Lexington, Massachusetts. Goleta, California.
Raytheon Missile Systems	Tucson, Arizona.
Lockheed Martin Aeronautics Company	Fort Worth, Texas.
Lockheed Martin Missile and Fire Control	Dallas, Texas.
Lockheed Martin Simulation, Training And Support	Fort Worth, Texas.
Northrop-Grumman Electro-Optical Systems	Garland, Texas.
Northrop-Grumman Electronic Systems	Baltimore, Maryland.
Pratt & Whitney United Technology Company	East Hartford, Connecticut.
General Electric Aircraft Engines	Cincinnati, Ohio.
Goodrich ISR Systems	Danbury, Connecticut.
L3 Communications	Arlington, Texas.
ITT Defense Electronics and Services	McLean, Virginia.
Symetrics Industries	Melbourne, Florida.

There are no known offset agreements in connection with this proposed sale.

Implementation of this proposed sale will require multiple trips to Iraq involving U.S. Government and contractor representatives for technical reviews/support, program management, and training over a period of 15 years.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 11–46

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. This sale will involve the release of sensitive technology to Iraq. The F–16IQ is Unclassified, except as noted below. The aircraft utilizes the F–16 airframe and features advanced avionics and systems. It contains the Pratt and Whitney F–100–PW–229 or the General Electric F–110–GE–129 engine, AN/APG–68(V)9 radar, digital flight control systems, internal electronic warfare equipment, Advanced IFF (without Mode IV), operational flight program, and software computer programs.

2. Sensitive and/or classified (up to Secret) elements of the F–16IQ aircraft proposed for sale include hardware, accessories, components, and associated software: AN/APG–68(V)9 Radar, AN/APX–113 Advanced Identification Friend or Foe (AIFF) without Mode IV capability, AN/ALE–47 Countermeasures (Chaff and Flare) set, SNIPER and/or LITENING Targeting Pods, F–9120 Advanced Airborne Reconnaissance Systems (AARS) and/or DB–110 RECCE Pods, Embedded Global Positioning System/Inertial Navigation System with Standard Positioning Service (SPS) commercial code only, Advanced Countermeasures Electronic System (ACES), Advanced Interference Blanker Unit, Modular Mission Computer, Have Glass I Digital Flight Control System, and F–100 or F–110 engines. Additional sensitive areas include operating manuals and maintenance technical orders containing performance information, operating and test procedures, and other information related to support operations and repair. The hardware, software, and data identified are classified to protect vulnerabilities, design and performance parameters, and other similar critical information.

3. The AN/APG–68(V)9 radar is the latest model of the APG–68 radar and was specifically designed for foreign military sales. This model contains the latest digital technology available for a mechanically scanned antenna, including higher processor power, higher transmission power, more sensitive receiver electronics, and a new capability, Synthetic Aperture Radar (SAR), which creates higher-resolution ground maps from a much greater distance than previous versions of the APG–68. The upgrade features a 30% increase in detection range of air targets, a five-fold increase in processing speed, a ten-fold increase in memory, as well as significant improvements in all modes, jam resistance and false alarm rates. Complete hardware is classified Confidential; major components and subsystems are classified Confidential; software is classified Secret; and the technical data and documentation are classified up to Secret.

4. The AN/AAQ–33 SNIPER Targeting System is Unclassified but contains state-of-the-art technology. Information on performance and inherent vulnerabilities is classified Secret. The software (object code) is classified Confidential. Sensitive elements include the Forward Looking Infrared (FLIR) sensors, and the AGM–65 Missile Boresight Correlator.

5. The AN/AAQ–28 LITENING Targeting System hardware is Unclassified but contains state-of-the-art technology. Information on performance and inherent vulnerabilities is classified Secret. The software (object code) is classified Confidential. Sensitive elements include the Forward Looking Infrared (FLIR) sensors, and the AGM–65 Missile Boresight Correlator.

6. The AN/ALE–47 Countermeasures Dispensing System is a software reprogrammable dispenser of chaff and flares. It provides for either automatic (via integrated Missile Warning System input) or aircrew commanded response dispense capabilities. Specific dispense routines are sensitive. The export version uses a country unique ''look-up decision tree'' for determining dispense routines. This software when loaded in the ALE–47 is classified Confidential. Increased risk of exploitation is significantly reduced given that the software is in executable form only, i.e., binary code, and the actual dispense routines can be gained through visual observation.

7. The AN/APX–113 Advanced Identification Friend or Foe System is Unclassified unless MODE IV operational evaluator parameters are loaded into the equipment.

8. The AN/ALQ–187 Advanced Countermeasures Electronic System (ACES) provides passive radar warning, wide spectrum radio frequency jamming, and control and management of the entire electronic warfare (EW) system. It is an internally mounted suite. The commercially developed system software and hardware is Unclassified. The system is classified Secret when loaded with a U.S. derived EW database.

9. The AIM–9M–8/9 SIDEWINDER is a supersonic, heat-seeking, air-to-air missile carried by fighter aircraft. Advanced technology in the AIM–9M includes Active Optical Target Detector, Gyro Optics Assembly within the Guidance Control Section, Infrared Countermeasures, Detection and Rejection Circuitry, and a reduced smoke rocket motor. The hardware, software, and maintenance are classified Confidential. Pilot training, technical data and documentation, which are necessary for performance and operating information, are classified Secret.

10. The AIM–7M (F or H Build) SPARROW is a semiactive, medium range air-to-air missile designed to be either rail or ejection launched. Semiactive, continuous wave, homing radar, and hydraulically-operated control surfaces direct and stabilize the missile on a proportional navigational course to the target. The highest classification level for the AIM–7 missile is Secret.

11. The PAVEWAY II/III (GBU–10/12/24) series of laser guided bombs consists of a guidance kit that converts existing unguided free-fall bombs into precision-guided ''smart'' munitions. At the core of each PAVEWAY II/III Munitions Kit is a dumb bomb. A laser guidance kit is integrated with each dumb bomb to add the requisite level of accuracy. The kit consists of a computer-controlled group at the front end of the weapon and an airfoil group at the back. When a target is illuminated by a laser, either airborne or ground-based, the guidance fins react to signals from the control group and steer the weapon to the target. This precision-guided munition offers improved accuracy over free-fall bombs, thus providing the potential for reduced collateral damage.

12. The AGM–65D/G/H/K MAVERICK air-to-ground missile has an overall classification of Secret. The Secret aspects of the Maverick system are tactics, information revealing its vulnerability to countermeasures, and counter-countermeasures. Manuals and technical documents, which are necessary for operational use and organizational maintenance have portions that are classified Confidential. Performance and operating logic of the countermeasures circuits are Secret.

13. The Joint Helmet Mounted Cueing System (JHMCS) is a modified HGU–55/P helmet that incorporates a visor-

projected Heads-Up Display (HUD) to cue weapons and aircraft sensors to air and ground targets. This system projects visual targeting and aircraft performance information on the back of the helmet's visor, enabling the pilot to monitor this information without interrupting his field of view through the cockpit canopy. This provides significant improvement for close combat targeting and engagement. The JHMCS hardware is Unclassified; technical data and documentation are classified up to Secret.

14. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 2011–32284 Filed 12–16–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Notice of Intent To Grant an Exclusive License; Voltage Networking, LLC; Correction

AGENCY: National Security Agency, Department of Defense (DoD).

ACTION: Notice; correction.

SUMMARY: On November 10, 2011 (76 FR 70117–70118), DoD published a notice titled Notice of Intent to Grant an Exclusive License; Voltage Networking, LLC. In the **SUMMARY** section, in the fourth line, the word ''non-assignable'' was incorrectly published. This notice corrects that error.

FOR FURTHER INFORMATION CONTACT: Marian T. Roche, Director, Technology Transfer Program, 9800 Savage Road, Suite 6541, Fort George G. Meade, MD 20755–6541, telephone (443) 479–9569.

SUPPLEMENTARY INFORMATION: On November 10, 2011, DoD published a notice titled Notice of Intent to Grant an Exclusive License; Voltage Networking, LLC. Subsequent to the publication of that notice, DoD discovered that the word ''non-assignable'' in the fourth line of the **SUMMARY** section had been inadvertently published.

Correction

In the notice (FR Doc. 2011–29064) published on November 10, 2011 (76 FR 70117–70118), make the following correction. On page 70117, in the third column, in the **SUMMARY** section, beginning in the first line, the text ''The National Security Agency hereby gives notice of its intent to grant Voltage Networking, LLC a revocable, non-assignable, exclusive, license to practice the following Government-Owned inventions as described in the following:'' should read ''The National Security Agency hereby gives notice of its intent to grant Voltage Networking, LLC a revocable exclusive license to practice the following Government-Owned inventions as described in the following:''.

Dated: December 14, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–32405 Filed 12–16–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Uniform Formulary Beneficiary Advisory Panel

AGENCY: Assistant Secretary of Defense (Health Affairs), DoD.

ACTION: Notice of meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (Title 5, United States Code (U.S.C.), Appendix, as amended) and the Government in the Sunshine Act of 1976 (Title 5, U.S.C., Section (Sec.) 552b, as amended) the Department of Defense (DoD) announces the following Federal Advisory Committee Meeting:

Name of Committee: Uniform Formulary Beneficiary Advisory Panel (hereafter referred to as the Panel).

DATES: January 12, 2012, from 9 a.m.–1 p.m.

ADDRESSES: Naval Heritage Center Theater, 701 Pennsylvania Avenue NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: CDR Joseph Lawrence, DFO, Uniform Formulary Beneficiary Advisory Panel, 4130 Stanley Road, Suite 208, Building 1000, San Antonio, TX 78234–6012; Telephone: (210) 295–1271 Fax: (210) 295–2789; Email Address: *Baprequests@tma.osd.mil.*

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: The Panel will review and comment on recommendations made to the Director of TRICARE Management Activity, by the Pharmacy and Therapeutics Committee, regarding the Uniform Formulary.

Meeting Agenda

1. Sign-In.
2. Welcome and Opening Remarks.
3. Public Citizen Comments.
4. Scheduled Therapeutic Class Reviews (Comments will follow each agenda item):
   a. Antidepressants and Non-Opioid Pain Syndrome Agents.
   b. Pulmonary-1 Agents: Short Acting Beta Agonists.
   c. Phosphodiesterase-5 Inhibitors for Erectile Dysfunction.
   d. Designated Newly Approved Drugs in Already-Reviewed Classes.
   e. Pertinent Utilization Management Issues.
5. Panel Discussions and Vote.

Meeting Accessibility: Pursuant to Title 5, U.S.C., Sec. 552b, as amended, and Title 41, Code of Federal Regulations (CFR), Sec. 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is limited and will be provided only to the first 220 people signing-in. All persons must sign-in legibly.

Administrative Work Meeting: Prior to the public meeting, the Panel will conduct an Administrative Work Meeting from 7:30 a.m. to 9 a.m. to discuss administrative matters of the Panel. The Administrative Work Meeting will be held at the Naval Heritage Center, 701 Pennsylvania Avenue NW., Washington, DC 20004. Pursuant to Title 41, CFR, § 102–3.160, the Administrative Work Meeting will be closed to the public.

Written Statements: Pursuant to Title 41, CFR, §§ 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the membership of the Panel at any time or in response to the stated agenda of a planned meeting. Written statements should be submitted to the Panel's Designated Federal Officer (DFO). The DFO's contact information can be obtained from the General Services Administration's Federal Advisory Committee Act Database at *https://www.fido.gov/facadatabase/public.asp.*

Written statements that do not pertain to the scheduled meeting of the Panel may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than 5 business days prior to the meeting in question. The DFO will review all submitted written statements and provide copies to all the committee members.

Public Comments: In addition to written statements, the Panel will set aside 1 hour for individuals or interested groups to address the Panel. To ensure consideration of their

comments, individuals and interested groups should submit written statements as outlined in this notice; but if they still want to address the Panel, then they will be afforded the opportunity to register to address the Panel. The Panel's DFO will have a ''Sign-Up Roster'' available at the Panel meeting for registration on a first-come, first-serve basis. Those wishing to address the Panel will be given no more than 5 minutes to present their comments, and at the end of the 1 hour time period, no further public comments will be accepted. Anyone who signs-up to address the Panel, but is unable to do so due to the time limitation, may submit their comments in writing; however, they must understand that their written comments may not be reviewed prior to the Panel's deliberation.

To ensure timeliness of comments for the official record, the Panel encourages that individuals and interested groups consider submitting written statements instead of addressing the Panel.

Dated: December 14, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–32283 Filed 12–16–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before January 18, 2012.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or emailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: December 12, 2011.

Darrin King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Federal Student Aid

Type of Review: Extension.

Title of Collection: Teacher Education Assistance for College and Higher Education Grant Program (TEACH Grant Program) Agreement to Serve.

OMB Control Number: 1845–0083.

Agency Form Number(s): N/A.

Frequency of Responses: On Occasion.

Affected Public: Individuals or households.

Total Estimated Number of Annual Responses: 37,266.

Total Estimated Annual Burden Hours: 18,633.

Abstract: The College Cost Reduction and Access Act (Pub. L. 110–84) (the CCRAA) established the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program under Part A of the Higher Education Act of 1965, as amended (the HEA). As a condition for receiving a Teacher Education Assistance for College and Higher Education (TEACH) Grant, a student must sign an Agreement to Serve. A new Agreement to Serve must be signed for each award year during which a student wishes to receive a TEACH Grant. By signing the Agreement to Serve, a TEACH Grant recipient agrees to meet the teaching service obligation and other terms and conditions of the TEACH Grant Program that are described in the Agreement to Service. In accordance with these terms and conditions, if a TEACH Grant recipient does not fulfill the required teaching service obligation or otherwise fails to meet the requirements of the TEACH Grant Program, any TEACH Grant funds the individual received will be converted to a Direct Unsubsidized Loan that the grant recipient must repay in full, with interest. The Agreement to Serve also explains the repayment terms and conditions that will apply if a TEACH Grant is converted to a Direct Unsubsidized Loan.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4727. When you access the information collection, click on ''Download Attachments ''to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to (202) 401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339.

[FR Doc. 2011–32350 Filed 12–16–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Upward Bound Program (Regular Upward Bound (UB))

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

Overview Information:

Upward Bound Program; Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.047A.

DATES: *Applications Available:* December 19, 2011.

Deadline for Transmittal of Applications: January 30, 2012.

Deadline for Intergovernmental Review: March 30, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Upward Bound (UB) Program is one of the seven programs known as the Federal TRIO Programs. The UB Program is a discretionary grant program that supports projects designed to provide the skills and motivation necessary to complete a program of secondary education and to enter and succeed in a program of postsecondary education. There are three types of grants under the UB Program: Regular UB grants; Veterans UB grants; and UB Math and Science grants. This notice only announces deadlines and other information for regular UB grants.

The President has set a clear goal for our education system: By 2020, the United States will once again lead the world in college attainment. The Department views the UB Program as a critical component in the effort to improve the quality of student outcomes so that more students are well prepared for college and careers. To more strategically align UB with overarching reform strategies for postsecondary completion, the Department is announcing three competitive preference priorities for this competition.

Priorities: There are three competitive preference priorities: Competitive Preference Priority 1—Turning Around Persistently Lowest-Achieving Schools; Competitive Preference Priority 2—Enabling More Data-Based Decision-Making; and Competitive Preference Priority 3—Improving Productivity. The three priorities are from the Department's notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637).

For FY 2012 and any subsequent year in which the Department makes awards from the list of unfunded applicants from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award up to an additional five points to an application that meets Competitive Preference Priority 1, up to an additional five points to an application that meets Competitive Preference Priority 2, and up to an additional five points to an application that meets Competitive Preference Priority 3, depending on how well the application meets these priorities. The maximum competitive preference points an application can receive under this competition is 10.

Note: Applicants must include in the one-page abstract submitted with the application a statement indicating which competitive preference priorities they have addressed. The priorities addressed in the application must also be listed on the UB Program Profile Sheet.

These priorities are:

Competitive Preference Priority 1—Turning Around Persistently Lowest-Achieving Schools (Up to 5 Additional Points)

Background

The Department is using Competitive Preference Priority 1 because an essential element in strengthening our education system is dramatic improvement of student performance in each State's persistently lowest-achieving schools. Overwhelming evidence shows that students enrolled in persistently lowest-achieving schools are most likely not to persist from one grade to the next; be ready for college when they graduate from high school; or enroll in a program of postsecondary education. Due to the fact that many UB-eligible students are enrolled in the nation's lowest-performing high schools, the Department believes UB has an important role to play in furthering the goals of improving academic performance and college access for students attending these high schools.

Priority

Projects that are designed to address the following priority area—providing services to students enrolled in persistently lowest-achieving schools (as defined in this notice).

Note: Applicants addressing this priority might want to consider focusing on a small number of target high school(s) that meet the definition of ''persistently lowest-achieving school'' and consider striving to ensure that not less than 40 percent of its recommended number of participants will be students attending these persistently lowest-achieving target high school(s). The Department is interested in seeing strong plans to support improvements in student achievement and outcomes within these high schools.

Competitive Preference Priority 2—Enabling More Data-Based Decision-Making (Up to 5 Additional Points)

Background

The Department is using Competitive Preference Priority 2 because data can be crucial to helping programs better serve the needs of participating students and increase the odds that participating students will pursue and succeed in postsecondary education. For UB grantees, data—particularly information from postsecondary education data systems about the outcomes of prior students the grantee has served—provides an important and immediate way to gauge effectiveness and guide decisions regarding resource allocation and improvements. It is also important to note that the quality of data is extremely important in providing accurate and trustworthy information to guide decisions. Data from State or reliable third-party sources is more likely to provide timely and high-quality information than self-reported data from surveys or interviews.

Priority

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in: (a) Improving postsecondary student outcomes relating to enrollment, persistence, and completion and leading to career success, and (b) providing reliable and comprehensive information on the implementation of Department of Education programs, and participant outcomes in these programs, by using data from State longitudinal data systems or by obtaining data from reliable third-party sources.

Note: Applicants addressing this priority might want to consider discussing how they plan to work with high-quality third-party data systems that track students from secondary through postsecondary education—such as a State longitudinal data system—to obtain high-quality, timely, accurate, and reliable data on postsecondary enrollment, course taking, persistence, and completion. Applicants may also want to consider discussing how they would incorporate outcome data from high-quality longitudinal data systems into their projects to increase transparency and improve decision making on the part of students and families, especially with respect to preparing for, evaluating, and selecting a program of postsecondary education.

Competitive Preference Priority 3—Improving Productivity (Up to 5 Additional Points)

Background

The Department is using Competitive Preference Priority 3 because it believes that it is more important than ever to support projects that are designed to significantly increase efficiency in the use of resources while improving student outcomes. A key performance measure for the UB Program is the efficiency measure-cost per successful outcome, where a successful outcome is defined by the percentage of students persisting in secondary school or

enrolling in, persisting in, or completing postsecondary education. Applicants proposing projects designed to decrease their cost per participant while improving student outcomes will be more likely to perform well on this efficiency measure.

Priority

Projects that are designed to significantly increase efficiency in the use of time, staff, money, or other resources while improving student learning or other educational outcomes (i.e., outcome per unit of resource). Such projects may include innovative and sustainable uses of technology, modification of school schedules and teacher compensation systems, use of open educational resources (as defined in the notice), or other strategies.

Note: Applicants addressing this priority might want to consider explaining how they will serve the same or an increased number of students at a lower cost per participant while improving or keeping steady student outcomes. Applicants might also want to consider describing how they will achieve this productivity by increasing efficiency in the use of resources.

Definitions: These definitions are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637), and they apply to the competitive preference priorities in this notice.

Open educational resources means teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use or repurposing by others.

Persistently lowest-achieving schools means, as determined by the State: (i) Any Title I school in improvement, corrective action, or restructuring that (a) is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or (b) is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and (ii) any secondary school that is eligible for, but does not receive, Title I funds that: (a) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or (b) is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

To identify the persistently lowest-achieving schools, a State must take into account both: (i) The academic achievement of the ''all students'' group in a school in terms of proficiency on the State's assessments under Section 1111(b)(3) of the Elementary and Secondary Education Act in reading/language arts and mathematics combined; and (ii) the school's lack of progress on those assessments over a number of years in the ''all students'' group.

Privacy requirements means the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations in 34 CFR part 99, the Privacy Act, 5 U.S.C. 552a, as well as all applicable Federal, State, and local requirements regarding privacy.

Program Authority: 20 U.S.C. 1070a–11 and 20 U.S.C. 1070a–13.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75 (except for 75.215 through 75.221), 77, 79, 80, 82, 84, 85, 86, 97, 98, and 99. (b) The regulations for this program in 34 CFR part 645. (c) The notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486) and corrected on May 12, 2011 (76 FR 27637).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $920,089,000 for the Federal TRIO Programs for FY 2012, of which we intend to use an estimated $305,289,000 for new UB awards under this competition and $19,613,000 for continuation awards. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2013 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $250,000 to $1,000,000.

Estimated Average Size of Awards: $330,000.

Maximum Award:

For new grantees or existing grantees proposing to serve a new target area, the maximum award is equal to $250,000 to serve at least 60 students.

For Existing Grantees: For an applicant currently receiving a UB Program grant and applying for a grant to serve the same target area or schools, the maximum award amount is determined based upon the applicant's proposed per participant cost, as follows:

- If an applicant's proposed per participant cost is at or below $4,200, then the applicant's maximum award is equal to the applicant's grant award amount for FY 2007, the first year of the previous grant cycle, plus 5 percent.
- If an applicant's proposed per participant cost is at or below $4,500 and above $4,200, then the applicant's maximum award is equal to the applicant's grant award amount for FY 2007, the first year of the previous grant cycle, to serve a number of participants such that the per participant cost is $4,500 or less.
- If an applicant's proposed per participant cost is above $4,500, then the applicant's maximum award is equal to $250,000 to serve at least 50 students.
- An applicant should ensure that its cost per participant will allow the grant to serve students well and produce quality outcomes in terms of high school graduation and postsecondary entry and completion. Applicants proposing to serve students at a lower cost per participant than that of their existing project should consider selecting a level at which they will be able to sustain or improve student outcomes.

Pursuant to 34 CFR 645.43(a), we will reject any application that proposes a budget exceeding the maximum amount described in this section for a single budget period of 12 months. Pursuant to 34 CFR 645.43(a), we will also reject any application that proposes a budget to serve less than 50 participants.

Estimated Number of Awards: 982.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education; public and private agencies and organizations, including community-based organizations with experience in serving disadvantaged youth; combinations of these

institutions, agencies, and organizations; and secondary schools.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other:* An applicant may submit more than one application for a UB grant as long as each application describes a project that serves a different target area or target school (34 CFR 645.20(a)). The Secretary is not designating any additional populations for which an applicant may submit a separate application under this competition (34 CFR 645.20(b)).

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet by downloading the package from the program Web site at: *http://www2.ed.gov/programs/trioupbound/index.html.*

You can also request a copy of the application package from: Ken Waters, Upward Bound Programs, U.S. Department of Education, 1990 K Street NW., Room 7000, Washington, DC 20006–8510. Telephone: (202) 502–7600 or by email: *TRIO@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–(800) 877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative (Part III) to no more than 60 pages. However, any application addressing the competitive preference priorities may include up to four additional pages for each priority addressed (a total of 12 pages if all three priorities are addressed) in a separate section of the application submission to discuss how the application meets the competitive preference priority or priorities. These additional pages cannot be used for or transferred to the project narrative. Partial pages will count as a full page toward the page limit. For purpose of determining compliance with the page limit, each page on which there are words will be counted as one full page. Applicants must use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, except titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.

The page limits do not apply to Part I, the Application for Federal Assistance (SF 424); Part II, the budget information summary form (ED Form 524); the assurances and certifications; the UB Program Profile; or the one-page Project Abstract narrative. If you include any attachments or appendices, these items will be counted as part of Part III, the application narrative, for purposes of the page-limit requirement. You must include your complete response to the selection criteria, which also includes the budget narrative, in Part III, the application narrative.

We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: December 19, 2011.

Deadline for Transmittal of Applications: January 30, 2012.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to Section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in Section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice. Deadline for Intergovernmental Review: March 30, 2012.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We specify unallowable costs in 34 CFR 645.41. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Upward Bound Grant Competition, CFDA number 84.047A, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Upward Bound Grant competition at *www.Grants.gov*. You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.047, not 84.047A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable .PDF file. If you upload a file type other than a read-only, non-modifiable .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–(800) 518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Ken Waters, U.S. Department of Education, 1990 K St. NW., Room 7000, Washington, DC 20006–8510. Fax: (202) 502–7857.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.047A), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.047A), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 645.31 and are listed in the application package.

Note: With the changes made to section 402A(f)(3)(B) of the Higher Education Act of 1965, as amended, by the Higher Education Opportunity Act, Public Law 110–315, the UB Program objectives have been standardized, and the Department has updated 34 CFR 645.31(b) accordingly. 75 FR 65712, 65786–65787 (October 26, 2010). Please note that applicants are required to use these objectives to measure performance under the program. Specifically, the ''Objectives'' section of the selection criterion is worth nine points, and applicants should address the standardized objectives related to: Academic performance (GPA) (1 point), academic performance (standardized test scores)(1 point), secondary school retention and graduation (with regular secondary school diploma)(2 points), Completion of a rigorous secondary school program of study (1 point), postsecondary enrollment (3 points), and postsecondary completion (1 point).

2. *Review and Selection Process:* A panel of non-Federal readers will review each application in accordance with the selection criteria and the competitive preference priorities, pursuant to 34 CFR 645.30. Readers will be trained by the Department and given guidance on how to evaluate applications in a method that is both uniform and rigorous. The individual scores of the readers will be added and the sum divided by the number of readers to determine the reader score received in the review process. In accordance with 34 CFR 645.32, the Secretary will evaluate the prior experience (PE) of applicants that received a UB Program project grant for project years 2008–2009, 2009–2010, and 2010–2011. Based upon that evaluation, the Secretary will add PE points earned to the application's averaged reader score to determine the total score for each application. The Secretary makes new grants in rank order on the basis of the total scores of the reader scores and PE points awarded to each application. Pursuant to 34 CFR 645.30(c), if there are insufficient funds for all applications with the same total score, the Secretary will choose among the tied applications so as to serve geographical areas that have been underserved by the UB Program. The Secretary will not make a new grant to an applicant if the applicant's prior project involved the fraudulent use of program funds.

We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The success of the UB Program is measured by the percentage of UB participants who enroll in and complete postsecondary education. The following performance measures have been developed to track progress toward achieving program success:

1. The percentage of UB students who take two years of mathematics beyond Algebra I by the 12th grade;
2. The percentage of UB students that enrolled in postsecondary education;
3. The percentage of UB students who enrolled in a program of postsecondary education by the fall term following graduation from high school who in the first year of postsecondary education placed into college-level math and English without need for remediation;
4. The percentage of UB students who enroll in a program of postsecondary education and graduate on time—within four years for the bachelor's degree and within two years for the associate's degree;
5. The percentage of UB participants who enrolled in a program of postsecondary education and attain either an associate's degree within three years or a bachelor's degree within six years;
6. The percentage of UB students expected to graduate high school in the reporting year that complete a Free Application for Federal Student Aid (FAFSA); and
7. The cost per successful participant.

Note: Because calculating some of these performance measures requires the use of data that is not already reported, the Department will be asking grantees to collect data in addition to what is already provided each year on annual reports. The data is:

- *Remediation Courses:* Whether or not a student in higher education placed into college-level math and English or needed remediation in those subjects.

The Department will determine the sixth performance measure on FAFSA completion by using its own databases and so does not need additional information from grantees. To assess the seventh performance measure on efficiency of the program, the Department will track the average cost, in Federal funds, of achieving a successful outcome, where success is defined as enrollment in postsecondary education of UB students immediately after high school graduation.

Grant recipients must collect and report data on steps they have taken toward achieving these goals. Accordingly, we request that applicants include these performance measures in conceptualizing the design, implementation, and evaluation of their proposed projects.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Ken Waters, Upward Bound Program, U.S. Department of Education, 1990 K St. NW., Room 7000, Washington, DC 20006–8510. Telephone: (202) 502–7586 or by email: *ken.waters@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–(800) 877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in Section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at this site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: December 14, 2011.

Eduardo M. Ochoa,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2011–32452 Filed 12–16–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13124–003]

Copper Valley Electric Association, Inc.; Notice of Application and Applicant-Prepared EA Accepted for Filing, Soliciting Motions To Intervene and Protests, and Soliciting Comments, and Final Terms and Conditions, Recommendations, and Prescriptions

Take notice that the following hydroelectric application and applicant-prepared environmental assessment has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Major License.

b. *Project No.:* P–13124–003.

c. *Date filed:* August 30, 2011.

d. *Applicant:* Copper Valley Electric Association, Inc.

e. *Name of Project:* Allison Creek Hydroelectric Project.

f. *Location:* On Allison Creek, near the Town of Valdez, Alaska.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Robert A. Wilkinson, CEO, Copper Valley Electric Association, Inc., P.O. Box 45, Mile 187 Glenn Highway Glennallen, AK 99588, (907) 822–3211.

i. *FERC Contact:* Kim A. Nguyen, *kim.nguyen@ferc.gov,* (202) 502–6105.

j. Deadline for filing motions to intervene and protests, comments, and final terms and conditions, recommendations, and prescriptions: 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–(866) 208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. The Allison Creek Project consists of: (1) A 16-foot-high, 95-foot-wide concrete gravity diversion structure spanning Allison Creek with a 50-foot-wide spillway section; (2) a screen intake; (3) a 42-inch-diameter, 500-foot-long buried and 7,200-foot-long surface steel penstock; (4) a 65 foot x 65 foot powerhouse with one 6.5-megawatt turbine/generating unit; (5) a permanent 550-foot-long access road to the powerhouse; (6) a 3.8-mile-long, 34.5-kilovolt transmission line connecting to the Copper Valley switching station near the Petro Star facility along Dayville Road; and (7) appurtenant facilities. The average annual generation is estimated to be 23.3 gigawatt-hours.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant(s) named in this public notice.

Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION,'' ''COMPETING APPLICATION,'' ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Dated: December 9, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32375 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1920–001; ER10–1928–001; ER10–2720–001; ER10–1971–004.

Applicants: FPL Energy Oklahoma Wind, LLC, FPL Energy Sooner Wind, LLC, Minco Wind, LLC, NextEra Energy Power Marketing, LLC.

Description: NextEra Resources Entities Notification of Non-material Change in Status.

Filed Date: 12/8/11.

Accession Number: 20111208–5127.

Comments Due: 5 p.m. ET 12/29/11.

Docket Numbers: ER12–579–000.

Applicants: Nevada Power Company.

Description: Rate Schedule No. 48 Cancellation to be effective 2/7/2012.

Filed Date: 12/8/11.

Accession Number: 20111208–5106.

Comments Due: 5 p.m. ET 12/29/11.

Docket Numbers: ER12–580–000.

Applicants: Tampa Electric Company.

Description: Tampa Electric Company submits tariff filing per 35.13(a)(2)(iii: Amendment of Cost-Based Power Sales Tariff to be effective 12/10/2011.

Filed Date: 12/9/11.

Accession Number: 20111209–5065.

Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–581–000.

Applicants: Carolina Power & Light Company.

Description: Notice of Cancellation of Rate Schedule No. 179 of Carolina Power & Light Company.

Filed Date: 12/9/11.

Accession Number: 20111209–5107.

Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–582–000.

Applicants: Idaho Power Company.

Description: Idaho Power Company submits tariff filing per 35.13(a)(2)(iii: Idaho Power Reserve Energy Service Tariff to be effective 12/16/2011.

Filed Date: 12/9/11.

Accession Number: 20111209–5116.

Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–583–000.

Applicants: PacifiCorp.

Description: Cancellation of First Revised Service Agreement Nos. 358, 359, and 360 for Long-Term Firm Point-to-Point Transmission Service between PPM Energy, Inc and PacifiCorp.

Filed Date: 12/9/11.

Accession Number: 20111209–5158.

Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–584–000.

Applicants: Dayton Power and Light Company, Indianapolis Power & Light Company.

Description: Notices of Termination of Service Agreements by The Dayton Power and Light Company, *et al.*

Filed Date: 12/9/11.

Accession Number: 20111209–5173.

Comments Due: 5 p.m. ET 12/30/11.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES12–8–000.

Applicants: Minco Wind Interconnection Services, LLC.

Description: Application of Minco Wind Interconnection Services, LLC for Blanket Authorization under FPA Section 204 and 18 CFR part 34.

Filed Date: 12/9/11.

Accession Number: 20111209–5147.

Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ES12–9–000.

Applicants: National Grid USA.

Description: Supplemental Application of National Grid USA on Behalf of Certain of its Subsidiaries and Affiliates for Certain Authorizations under Section 204 of the Federal Power Act and Request for Shortened Comment Period.

Filed Date: 12/9/11.

Accession Number: 20111209–5186.

Comments Due: 5 p.m. ET 12/30/11.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 9, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–32404 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP12–225–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: 12/08/11 Negotiated Rates—Citigroup Energy Inc. to be effective 12/8/2011.

Filed Date: 12/8/11.

Accession Number: 20111208–5102.

Comments Due: 5 p.m. ET 12/20/11.

Docket Numbers: RP12–226–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: 12/08/11 Negotiated Rates—Freepoint Commodities, LLC to be effective 12/8/2011.

Filed Date: 12/8/11.

Accession Number: 20111208–5103.

Comments Due: 5 p.m. ET 12/20/11.

Docket Numbers: RP12–227–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: 12/08/11 Negotiated Rates—Societe Generale Energy Corp.—RTS to be effective 12/8/2011.

Filed Date: 12/8/11.

Accession Number: 20111208–5104.

Comments Due: 5 p.m. ET 12/20/11.

Docket Numbers: RP12–228–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: 12/08/11 Negotiated Rates—United Energy Trading, LLC—RTS to be effective 12/8/2011.

Filed Date: 12/8/11.

Accession Number: 20111208–5105.

Comments Due: 5 p.m. ET 12/20/11.

Docket Numbers: RP12–229–000.

Applicants: Petal Gas Storage, LLC.

Description: Baseline Filing of Second Revised Volume 1 to be effective 12/1/2011.

Filed Date: 12/9/11.

Accession Number: 20111209–5048.

Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: RP12–230–000.

Applicants: Petal Gas Storage, LLC.

Description: Cancel First Revised Volume No. 1 Tariff to be effective 12/9/2011.

Filed Date: 12/9/11.

Accession Number: 20111209–5112.

Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: RP12–231–000.

Applicants: Viking Gas Transmission Company.

Description: Part 5.0 Correction to be effective 12/1/2011.

Filed Date: 12/9/11.
Accession Number: 20111209–5115.
Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: RP12–232–000.
Applicants: Tennessee Gas Pipeline Company, LLC.
Description: Actual Tariff Record Scheduling Provisions (Rate Case non-rate issues) to be effective 2/1/2012.
Filed Date: 12/9/11.
Accession Number: 20111209–5146.
Comments Due: 5 p.m. ET 12/21/11.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP12–20–001.
Applicants: Millennium Pipeline Company, LLC.
Description: Negotiated Rate Service Agreement Compliance Filing to be effective 11/1/2011.
Filed Date: 12/8/11.
Accession Number: 20111208–5107.
Comments Due: 5 p.m. ET 12/20/11.

Docket Numbers: RP12–13–001.
Applicants: Williston Basin Interstate Pipeline Company.
Description: Compliance Filing—Transfer Language to be effective 11/10/2011.
Filed Date: 12/9/11.
Accession Number: 20111209–5047.
Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: RP12–149–001.
Applicants: Eastern Shore Natural Gas Company.
Description: Revised Storage Tracker RP12–149–001 to be effective 10/1/2011.
Filed Date: 12/12/11.
Accession Number: 20111212–5003.
Comments Due: 5 p.m. ET 12/27/11.

Docket Numbers: RP12–150–001.
Applicants: Eastern Shore Natural Gas Company.
Description: Revised Storage Tracker RP12–150–001 to be effective 11/1/2011.
Filed Date: 12/12/11.
Accession Number: 20111212–5004.
Comments Due: 5 p.m. ET 12/27/11.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 12, 2011.

Nathaniel J. Davis, Sr.

Deputy Secretary

[FR Doc. 2011–32403 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–4158–001.
Applicants: Entergy Arkansas, Inc.
Description: Compliance Filing ER11–4158 to be effective 9/27/2011.
Filed Date: 12/9/11.
Accession Number: 20111209–5217.
Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER11–4416–001.
Applicants: Entergy Power, LLC.
Description: ER11–4416 Compliance Filing to be effective 11/1/2011.
Filed Date: 12/9/11.
Accession Number: 20111209–5197.
Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–347–001.
Applicants: DB Energy Trading LLC.
Description: December 9, 2011 Amendment Filing to be effective 11/4/2011.
Filed Date: 12/9/11.
Accession Number: 20111209–5218.
Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–585–000.
Applicants: BE Louisiana LLC.
Description: Compliance Filing to be effective 12/9/2011.
Filed Date: 12/9/11.
Accession Number: 20111209–5209.
Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–586–000.
Applicants: Cedar Brakes I, LLC.
Description: Compliance Filing to be effective 12/9/2011.
Filed Date: 12/9/11.
Accession Number: 20111209–5210.
Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–587–000.
Applicants: Cedar Brakes II, LLC.
Description: Compliance Filing to be effective 12/9/2011.
Filed Date: 12/9/11.
Accession Number: 20111209–5213.
Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–588–000.
Applicants: Utility Contract Funding, LLC.
Description: Compliance Filing to be effective 12/9/2011.
Filed Date: 12/9/11.
Accession Number: 20111209–5216.
Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–589–000.
Applicants: Southern California Edison Company.
Description: Radial Lines Agreement Mojave Solar Project—Mojave Solar, LLC to be effective 2/8/2012.
Filed Date: 12/9/11.
Accession Number: 20111209–5232.
Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ER12–590–000.
Applicants: Public Service Company of New Mexico.
Description: Public Service Company of New Mexico requests waiver of Section 6.2.1 to the Second Revised Network Integration Transmission Service Agreement with Incorporated County of Las Alamos, New Mexico.
Filed Date: 12/9/11.
Accession Number: 20111209–5273.
Comments Due: 5 p.m. ET 12/30/11.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES12–10–000.
Applicants: Kansas Gas and Electric Company.
Description: Application of Kansas Gas and Electric Company for authority under Section 204 of the Federal Power Act to issue securities and pledge mortgage bonds to secure such securities.
Filed Date: 12/9/11.
Accession Number: 20111209–5271.
Comments Due: 5 p.m. ET 12/30/11.

Docket Numbers: ES12–11–000.
Applicants: Kansas Gas and Electric Company.
Description: Application of Kansas Gas and Electric Company under Section 204 to issue and pledge securities and to issue guarantees to secure certain indebtedness of its sole shareholder.
Filed Date: 12/9/11.
Accession Number: 20111209–5272.
Comments Due: 5 p.m. ET 12/30/11.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and

385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 12, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–32402 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2210–207]

Appalachian Power Company; Notice of Designation of Certain Commission Personnel as Non-Decisional

Commission staff members Jon Cofrancesco (Office of Energy Projects (202) 502–8951; *jon.cofrancesco@ferc.gov*) and Elizabeth Molloy (Office of the General Counsel; (202) 502–8771; *elizabeth.molloy@ferc.gov*) are assigned to help resolve issues associated with development of a settlement agreement for the Smith Mountain 2011 updated Shoreline Management Plan.

As ''non-decisional'' staff, Mr. Cofrancesco and Ms. Molloy will not participate in an advisory capacity in the Commission's review of any offer of settlement or settlement agreement, or deliberations concerning the disposition of the 2011 updated Shoreline Management Plan.

Different Commission ''advisory staff'' will be assigned to review any offer of settlement or settlement agreement, and to process the 2011 updated Shoreline Management Plan, including providing advice to the Commission with respect to the agreement and the plan. Non-decisional staff and advisory staff are prohibited from communicating with one another concerning the settlement and the 2011 updated Shoreline Management Plan.

Dated: December 9, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32374 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–18–000]

Questar Pipeline Company; Notice of Intent To Prepare an Environmental Assessment for the Proposed Mainline 103 Extension Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Mainline 103 Extension Project involving construction and operation of facilities by Questar Pipeline Company (Questar) in Uintah County, Utah. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Details on how to submit comments are in the Public Participation section of this notice. Please note that the scoping period will close on January 18, 2012.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with State law.

Questar provided landowners with a fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site (*www.ferc.gov*).

Summary of the Proposed Project

Questar seeks authorization to abandon about 8.3 miles of its 14-inch-diameter Mainline 68 and replace it with about 8.5 miles of 20-inch-diameter Mainline 103 in Uintah County, Utah. Questar is replacing this portion of Mainline 68 because it has been undermined and exposed by flash flooding. Questar would extend Mainline 103 away from flood areas in Weaver Canyon, which would result in the replacement being 0.2 mile longer than Mainline 68. Mainline 68 would remain in operation throughout Questar's extension of Mainline 103. Questar would abandon its Mainline 68 in place, with the exception of areas that are currently exposed, which would be removed. Questar would also construct a pig launcher/receiver [1] facility at its new Mainline 103/68 junction.

The general location of the project facilities is shown in appendix 1.[2]

Land Requirements for Construction

Construction of the proposed facilities would disturb about 120 acres of land for the pipeline and aboveground facilities. Following construction, Questar would maintain about 52 acres for permanent operation of the project's facilities; the remaining acreage would be restored and revert to former uses. The proposed pipeline route generally parallels existing pipeline, utility, or road rights-of-way.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [3] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this

[1] A pipeline ''pig'' is a device used to clean or inspect the pipeline. A pig launcher/receiver is an aboveground facility where pigs are inserted or retrieved from the pipeline.

[2] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *http://www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[3] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Vegetation and wildlife;
- Water resources, fisheries, and wetlands;
- Endangered and threatened species;
- Cultural resources;
- Land use;
- Air quality and noise; and
- Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section beginning on page 5.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA.[4] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice. Currently, the U.S. Fish and Wildlife Service and the Bureau of Indian Affairs have expressed their intention to participate as a cooperating agency in the preparation of the EA to satisfy their NEPA responsibilities related to this project.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with applicable State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[5] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Questar. This preliminary list of issues may be changed based on your comments and our analysis.

- Geotechnical issues with crossing the White River;
- Effects on the Colorado pikeminnow, White River beardtongue, and Graham's penstemon; and
- Crossing public, tribal, and private lands.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before January 18, 2012.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP12–18–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes: Federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor'' which is an official party to the Commission's

[4] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, § 1501.6.

[5] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., CP12–18). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/Event Calendar/EventsList.aspx* along with other related information.

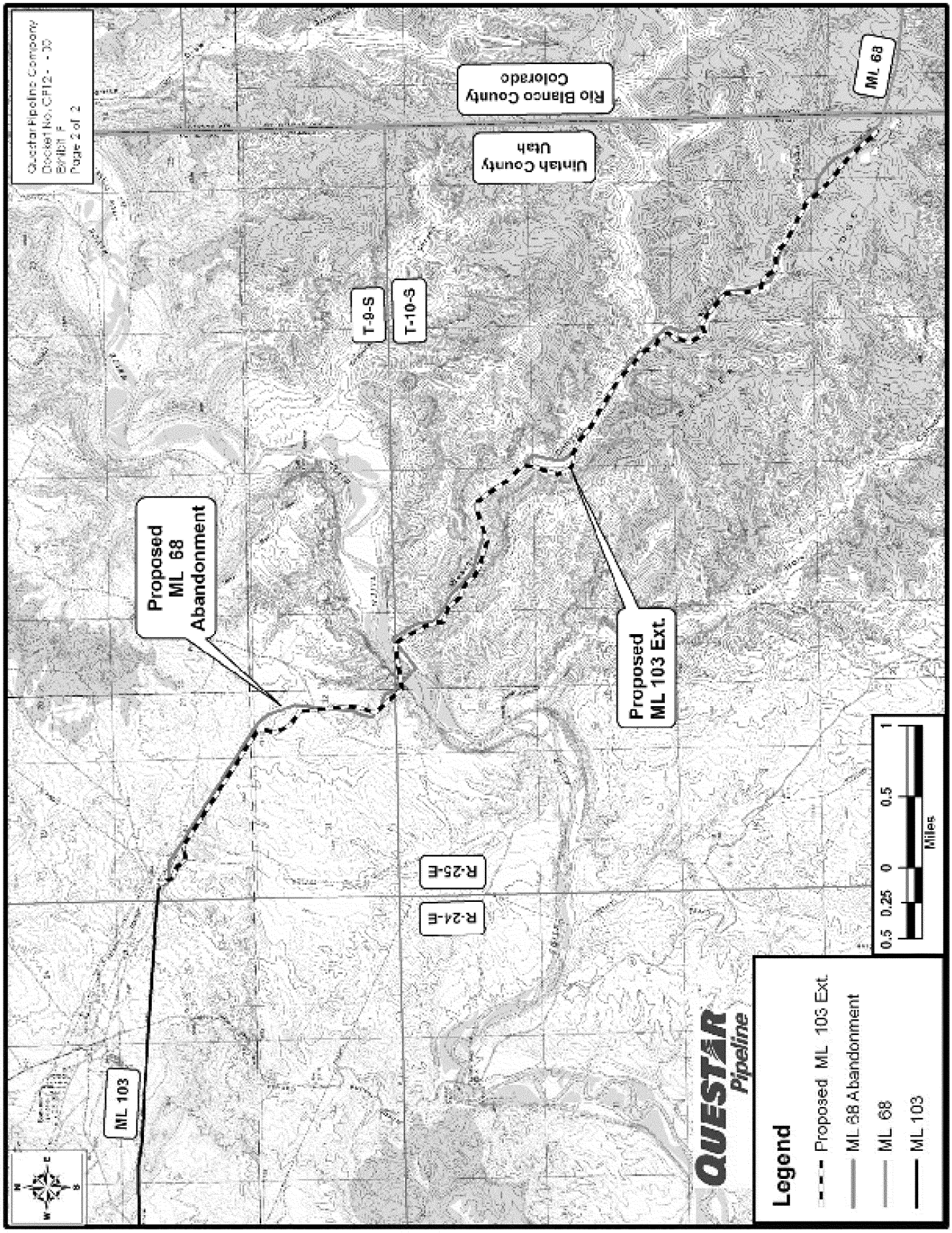
Dated: December 13, 2011.

Kimberly D. Bose,

Secretary

Appendix 1

BILLING CODE 6717–01–P


Questar Pipeline Company
Docket No. CP12- -00
Exhibit F
Page 2 of 2
Rio Blanco County
Colorado
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Docket No. CP12-18-000 Appendix 2

INFORMATION REQUEST

Mainline 103 Extension Project

Name_____

Agency_____

Address_____

City_____**State**_____ **Zip Code**_____

☐ **Please send me a paper copy of the published NEPA document**

☐ **Please remove my name from the mailing list**

FROM_____

_____

_____

_____

ATTN: OEP - Gas 1, PJ - 11.1
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Docket No. CP12-18-000

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[FR Doc. 2011–32372 Filed 12–16–11; 8:45 am]
BILLING CODE 6717–01–C

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–481–000]

Southern Star Central Gas Pipeline, Inc.; Supplemental Notice of Intent To Prepare an Environmental Assessment for the Proposed Alden Gas Storage Field Expansion Project and Request for Comments On Environmental Issues

As previously noticed on July 8, 2011, and supplemented herein, the staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Alden Gas Storage Field Expansion Project, involving the expansion of the certificated boundary and buffer zone of the existing Alden Gas Storage Field by Southern Star Central Gas Pipeline, Inc. (Southern Star) in Rice County, Kansas. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

This Supplemental Notice of Intent announces the opening of a limited scoping period the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues need to be evaluated in the EA. Details on how to submit written comments are provided in the Public Participation section of this notice. Please note that the limited scoping period will close on January 13, 2012.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives are asked to notify their constituents of this project and encourage them to comment on their areas of concern.

If you are a landowner or owner of mineral rights receiving this notice, you may be contacted by a storage company representative about the acquisition of mineral rights and an easement to convert, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if negotiations to obtain an easement or mineral rights fail to produce an agreement, the company could initiate condemnation proceedings where compensation would be determined in accordance with state or federal law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' was attached to the project notice Southern Star provided to landowners and owners of mineral rights. This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site (*www.ferc.gov*).

Summary of the Proposed Project

Southern Star requests authorization to expand its existing certificated boundary and buffer zone of its existing Alden Gas Storage Field located in Rice County, Kansas to ensure the field's integrity and protection. The certified storage boundary/buffer currently encompasses 3,540 acres and operates with a maximum storage capacity of 14.7 billion cubic feet (Bcf) with a working capacity of 4.2 Bcf. Southern Star states it will attempt to acquire all mineral rights from the base of the

Kansas City Limestone to the top of the Arbuckle Limestone in this area to prevent any further production that could compromise the integrity of the Alden Storage Field.

Southern Star proposes to expand the storage field boundary and buffer zone by an additional 1,592 acres for its storage reservoir in the Misener Sandstone and to acquire gas storage rights and related mineral rights in the Simpson Sandstone for 2,480 acres, which is below the Misener Sandstone. About 1,680 acres of the 2,480 acres in the Simpson Sandstone is within the currently certificated boundary of the Alden Storage Field. The total acreage affected by the requested authorizations is 3,272 acres.

Southern Star also requests to convert two active oil/gas production wells within the planned expansion acreage, called the Rama Wellman #1 Well and the Langston Wellman Ranch #2 Well, into pressure observation wells. Southern Star states that the conversion of these production wells to observation wells is necessary because the wells are currently producing gas from its Alden Storage Field. Southern Star would also remove two existing tank battery facilities dedicated to each of the production wells. Southern Star's proposal would not change the current operational parameters or capabilities of the storage field.

Pursuant to its blanket certificate, within 6 months of the receipt of the authority requested, Southern Star would install a small compressor unit of less than 50 horsepower and construct about 0.75 mile of 4-inch-diameter pipeline parallel to an existing Southern Star 16-inch-diameter pipeline to recover storage gas from the Simpson formation through an existing well, called the O–5 well, which would function as a gas recovery well to recycle gas back to the Misener reservoir.

Within a year of receiving the authorizations requested, Southern Star would drill an observation well within the current boundaries of the northeast section of the Alden Storage Field in the Simpson Sandstone to monitor for storage gas migration. The location of this new observation well would be at the structural high in the Simpson formation, but the exact location has not yet been determined. Southern Star would obtain the required environmental clearances for this observation well and file a 30-day advance notice with the Commission in accordance with section 2.55(a)(2)(ii) of the Commission's regulations.

The general location of the project area is shown in appendix 1.[1]

Land Requirements for Construction

Construction of the Rama Wellman #1 Well would disturb about 0.9 acre of land including the temporary workspaces and access road for the well conversion and to remove associated tank battery facilities. Construction of the proposed Langston Wellman Ranch #2 Well would disturb about 2.3 acres of land that includes the temporary workspaces and an access road for this well conversion and to remove tank battery facilities. Following construction, about 0.3 acre would be maintained for permanent operation of each of the observation wells; the remaining acreage would be restored and allowed to revert to former uses. Permanent access roads at each observation well are proposed.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [2] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping''. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. All comments received will be considered during the preparation of the EA.

In the EA, we will discuss impacts that could occur as a result of the removal, coversion, and operation of those facilities related to the proposed expansion of the storage field boundary and buffer zone under these general headings:

- Geology and soils;
- Land use;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Air quality and noise;
- Endangered and threatened species; and
- Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section beginning on page 5.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the Kansas State Historic Preservation Office (SHPO), and to solicit its views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project is further developed. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic

[1] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, § 1501.6.

[4] The Advisory Council on Historic Preservation's regulations are at Title 36 of the Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register for Historic Places.

properties and summarize the status of consultations under section 106.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send them so that the Commission receives them in Washington, DC on or before January 13, 2012.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP11–481–000) with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You can file your comments electronically using the eComment feature on the Commission's Web site at *www.ferc.gov* under the link to Documents and Filings. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically by using the eFiling feature on the Commission's Web site at *www.ferc.gov* under the link to Documents and Filings. With eFiling you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property or mineral rights may be used permanently or temporarily for project purposes, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs at (866) 208–FERC, or on the FERC Web site at *www.ferc.gov* using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., CP11–481). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Any public meetings or additional site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: December 9, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32376 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–11–000]

Elba Express Company, L.L.C; Notice of Intent To Prepare an Environmental Assessment for the Proposed Coldwater Compressor Station Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Coldwater Compressor Station Project, involving construction and operation of facilities by Elba Express Company, L.L.C (Elba Express) in Elbert County, Georgia. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Please note that the scoping period will close on January 20, 2012.

You may submit comments in written form or verbally. Further details on how to submit written comments are in the Public Participation section of this notice. In lieu of or in addition to sending written comments, the Commission invites you to attend the public scoping meeting scheduled as follows:

FERC PUBLIC SCOPING MEETING COLDWATER COMPRESSOR STATION PROJECT

Date and time	Location
January 10, 2012, 7 p.m.	Elbert County Government Complex, 45 Forest Avenue, Elberton, GA 30635.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

Elba Express provided landowners with a fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?''. This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site (*www.ferc.gov*).

Summary of the Proposed Project

Elba Express proposes to amend its authorization for Phase B of the Elba Express Pipeline Project in Docket No. CP06–471–000 by changing a previously approved compression site in Jenkins, Georgia, to a new site in Elbert County, Georgia. Elba Express now proposes to construct the previously approved 10,000-horsepower compressor station (Coldwater Compressor Station) on a 30.8-acre site at milepost 184 on Elba Express' pipeline. The proposed site is located along the east side of Craft Road, about 0.8 mile southeast of the Craft Road/Montevideo Road intersection in northern Elbert County. Minor auxiliary modifications would also be made at Elba Express' Rincon Gate metering facility.

Elba Express states that the new compressor station site accommodates customer receipt and delivery point changes, which have taken place since the pipeline was originally authorized. The project would provide up to 220 million cubic feet per day of transportation capacity, a decrease from the initially approved 230 million cubic feet per day.

The general location of the project facilities is shown in appendix 1.[1]

Land Requirements for Construction

Construction of the Coldwater Compressor Station facilities would disturb about 22.7 acres of the 30.8-acre parcel. Following construction, about 5.07 acres would be maintained for permanent operation of the station's facilities; the remaining acreage would be restored and allowed to revert to pre-construction conditions. An existing graveled access road from Craft Road would be used during construction and operation. Elba Express would also construct a permanent graveled access road to access the proposed station.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [2] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA, we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Land use;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Air quality and noise;
- Endangered and threatened species; and
- Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section below.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the potential environmental issues of this project to formally cooperate with us in the preparation of the EA.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the Georgia State Historic Preservation Office (SHPO), and to solicit its views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include the construction right-of-way, contractor/pipe storage yards, and access roads). Our EA for this project will document our findings on the impacts of historic properties and summarize the status of consultations under section 106.

[1] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, § 1501.6.

[4] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before January 20, 2012.

For your convenience, there are three methods, which you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP12–11–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing;'' or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor,'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *www.ferc.gov* using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., CP12–11). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

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Finally, public meetings or site visits will be posted on the Commission's calendar at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: December 9, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32377 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. PR12–8–000 and PR12–9–000]

Hattiesburg Industrial Gas Sales, L.L.C.; Notice of Filing

Take notice that on December 9, 2011, Hattiesburg Industrial Gas Sales, L.L.C. (Hattiesburg) filed in PR12–8–000 a Statement of Operating Conditions (SOC) with Tariff title ''*Tariff*'' for services provided under Section 311 of the Natural Gas Policy Act of 1978 (''NGPA''). In PR12–9–000, Hattiesburg filed to cancel its currently effective SOC with Tariff title ''*NGPA GAS,*'' as more fully described in the filings.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public

Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Thursday, December 22, 2011.

Dated: December 12, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32385 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RC11–1–002; Docket No. RC11–2–002]

Cedar Creek Wind Energy, LLC, Milford Wind Corridor Phase I, LLC; Notice of Filing

Take notice that on December 2, 2011, the North American Electric Reliability Corporation (NERC) submitted a compliance filing in accordance with the directives in the Federal Energy Regulatory Commission's (Commission) June 16, 2011 Order.[1]

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

[1] *Cedar Creek Wind Energy, LLC and Milford Wind Corridor Phase I, LLC,* 135 FERC ¶ 61,241 (2011).

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 23, 2011.

Dated: December 12, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32384 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD12–7–000]

Southwestern Gas Storage Technical Conference; Notice of Public Conference

Take notice that on February 16, 2012 at 9 a.m. MST, the Staff of the Federal Energy Regulatory Commission (FERC or Commission) will convene a technical conference with interested parties to discuss issues related to natural gas storage development in the southwestern United States. The conference will be held at the Radisson Fort McDowell Resort, 10438 North Fort McDowell Rd., Scottsdale, AZ 85264 (*http://www.radissonfortmcdowellresort.com*).

As discussed in more detail in the joint FERC and NERC *Report on Outages and Curtailments During the Southwest Cold Weather Event of February 1–5, 2011: Causes and Recommendations,* ''[a]dditional gas storage capacity in the downstream market areas closer to demand centers in Arizona and New Mexico could have prevented most of the outages that occurred by making additional supply available in a more timely manner during peak demand periods.'' The Commission is interested in exploring the potential of storage development in the Southwest,[1] and this technical conference will provide information useful to the Commission as it reviews its current policies on storage proposals.

[1] The joint report focused on the natural gas and electricity shortages that occurred in the Southwest in early February 2011 and seriously affected three states: Arizona, New Mexico and Texas. However, for the purpose of this conference the Southwest is generally defined as west Texas, New Mexico, Arizona, southern Nevada and southern California.

In order to more clearly focus the discussion at the conference, potential presenters should consider the following questions and present their responses at the conference:

What potential projects are currently under consideration by the industry for developing gas storage in the Southwest?

What new policies can the Commission institute that would help incent storage development?

What types of storage services are necessary or envisioned? Who will contract for these services?

What type of storage facilities can physically be constructed (*i.e.* salt cavern, depleted oil/gas reservoirs, aquifer type, *etc.*)?

What environmental and cultural resources issues would affect the development of gas storage facilities in the Southwest?

Persons interested in speaking or making a presentation should indicate their interest no later than January 5, 2012 and should refer to Docket No. AD12–7–000. Each request to participate must include the name of a contact person, who they represent, and their telephone number and email address. There is no need to provide advance notice to the Commission simply to attend the conference.

Comments addressing or identifying Southwestern natural gas storage issues may also be filed by January 12, 2012. Every effort will be made to accommodate requests to make presentations, but depending on the number of requests received, a limit may have to be placed on the number of presenters and the time allowed for presentations. To provide for a more productive conference, where practicable interested persons/parties should coordinate their efforts and choose one spokesperson to make a statement on behalf of a group where interests coincide.

In a subsequent notice, we will provide further details on the conference, including the agenda and a list of participants, as plans evolve. For additional information, please contact Berne Mosley in the Office of Energy Projects, phone: (202) 502–8700, email: *berne.mosley@ferc.gov.*

Dated: December 13, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32373 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF09–11–000]

TransCanada Alaska Company, LLC; Notice of Public Scoping Meetings for the Planned Alaska Pipeline Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will conduct public scoping meetings as part of their preparation of an environmental impact statement (EIS) on the Alaska Pipeline Project (APP). The APP is a planned natural gas pipeline system that would transport gas produced on the Alaska North Slope to the Alaska-Canada border to connect with a pipeline system in Canada for onward delivery to markets in North America. The APP is being advanced jointly by TransCanada Alaska Company, LLC and ExxonMobil Alaska Midstream Gas Investments, LLC.

More information about the Commission's EIS and the APP is available in the *Notice of Intent to Prepare an Environmental Impact Statement for the Planned Alaska Pipeline Project and Request for Comments on Environmental Issues* (NOI), issued August 1, 2011. The NOI describes the scoping process that is under way seeking public participation in the environmental review of this planned project. The public scoping meetings, listed below, provide an opportunity to submit verbal comments in addition to, or in lieu of, written comments on issues of environmental concern related to the APP. Please note that the scoping period for the APP will close on February 27, 2012.

The NOI and additional information regarding the pre-filing review of this planned project is available from FERC's Office of External Affairs at (866) 208–FERC (3372) or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search,'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., PF09–11). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

SCHEDULE AND LOCATIONS FOR THE APP PUBLIC SCOPING MEETINGS

Date and time	Location
January 18, 2012, 7:00 p.m.	Dena'ina Center, Kahtu Room, 600 West 7th Avenue Anchorage, AK.
January 30, 2012, 7:00 p.m.	Carlson Center, Arthur Buswell Pioneer North Star Room, 2010 2nd Avenue Fairbanks, AK.
January 31, 2012, 7:00 p.m.	Delta Community Center, 2287 Deborah Street Delta Junction, AK.
February 1, 2012, 7:00 p.m.	Tok School, Multipurpose Room, Jon Summar Way Tok, AK.
February 6, 2012, 7:00 p.m.	Inupiat Heritage Center, Multipurpose Room, 5421 North Star Street Barrow, AK.
February 7, 2012, 7:00 p.m.	Kisik Community Center, 2230 2nd Avenue Nuiqsut, AK.
February 8, 2012, 4:30 p.m.	Kaktovik Community Center, 2051 Barter Avenue Kaktovik, AK.

Dated: December 9, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32383 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ12–2–000]

City of Riverside, CA; Notice of Petition For Declaratory Order

Take notice that on December 1, 2011, pursuant to Rule 205 and 207 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.205, 385.207 (2011), and consistent with the provisions of the TO Tariff of the City of Riverside, California (Riverside), Riverside filed a Petition for Declaratory Order, seeking a declaratory order to (1) revise Riverside's 2012 Transmission Revenue Requirement, (2) accept revisions to its Transmission Revenue Balancing Account Adjustment, (3) approve the annual update costs of its Existing Transmission Contracts with Southern California Edison Company, (3) recover true up cost through the ETC Pass-through Clause contained in Riverside's TO Tariff, (4) waive the sixty-day notice requirement, (5) and waive the filing fee and any other fees associated with the requested revisions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 3, 2012.

Dated: December 9, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32378 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13242–001]

Whitman River Dam, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On October 19, 2011, Whitman River Dam, Inc. filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Westminster Dam Hydroelectric Project (Westminster Project or project) to be located on the Whitman River, near Westminster, Worcester County, Massachusetts. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) An earthen and masonry dam, 31-foot-high and 1,500-foot-long, (2) a head pond with storage of 870.0 acre-feet, (3) two existing 30-inch diameter discharge pipes, and (4) a new powerhouse located in the vicinity of the discharge pipes containing one generating unit having a capacity of 35 kilowatts. The estimated annual generation of the Westminster Project would be 218,000 kilowatt-hours.

Applicant Contact: Mr. Robert Francis, President, Whitman River Dam, Inc., P.O. Box 145, 10 Tommy Francis Road, Westminster, MA 01473.

FERC Contact: Jeff Browning; phone: (202) 502–8677.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–(866) 208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13242–001) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: December 9, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32379 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13292–001]

Whitman River Dam, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On November 1, 2011, Whitman River Dam, Inc. filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Round Meadow Pond Hydroelectric Project (Round Meadow Project or project) to be located on the Whitman River, near Westminster, Worcester County, Massachusetts. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would utilize the existing Round Meadow Pond Dam and would consist of: (1) An existing 250-foot-long, 5-foot-high earthen embankment and masonry dam and spillway, (2) an existing intake structure, (3) a proposed 1,400-foot-long, 16-inch-diameter metal penstock; (4) a proposed powerhouse which would contain one generating unit with a total installed capacity of 100 kW, (5) a proposed 100-foot-long, 4.1 kV transmission line connecting to existing power lines, and (6) appurtenant facilities. The estimated annual generation of the Round Meadow Project would be 560,000 kilowatt-hours.

Applicant Contact: Mr. Robert Francis, President, Whitman River Dam, Inc., P.O. Box 145, 10 Tommy Francis Road, Westminster, MA 01473.

FERC Contact: Jeff Browning; phone: (202) 502–8677.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact *FERC Online Support at FERCOnlineSupport@ferc.gov* or toll free at 1–(866) 208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13292–001) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: December 9, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32382 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13256–001]

Whitman River Dam, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On November 1, 2011, Whitman River Dam, Inc. filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Snows Mill Pond Hydroelectric Project (Snows Mill Project or project) to be located on the Whitman River, near Fitchburg, Worcester County, Massachusetts. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would utilize the existing Snows Mill Pond Dam and would consist of: (1) A new 42 inch diameter, 1,100 foot long penstock; (2) a powerhouse containing one turbine generator unit with a total installed capacity of 0.25 MW; (3) a 500 foot long, 0.6 kV transmission line and; (4) appurtenant facilities. The estimated annual generation of the Snows Mill Project would be 1,516,000 kilowatt-hours.

Applicant Contact: Mr. Robert Francis, President, Whitman River Dam, Inc., P.O. Box 145, 10 Tommy Francis Road, Westminster, MA 01473.

FERC Contact: Jeff Browning; phone: (202) 502–8677.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–(866) 208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13256–001) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: December 9, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32381 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13244–001]

Whitman River Dam, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On November 1, 2011, Whitman River Dam, Inc., filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Wampanoag Dam Hydroelectric Project (Wampanoag Project or project) to be located on the Whitman River, near Ashburnham, Worcester County, Massachusetts. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) An earthen dam, 22-foot-high and 660-foot-long, (2) a head pond with storage of 1420.0 acre-feet, (3) one existing 24-inch diameter discharge pipe, and (4) a new powerhouse located in the vicinity of the discharge pipe containing one generating unit having a capacity of 10 kilowatts. The estimated annual generation of the Wampanoag Project would be 53,000 kilowatt-hours.

Applicant Contact: Mr. Robert Francis, President, Whitman River Dam, Inc., P.O. Box 145, 10 Tommy Francis Road, Westminster, MA 01473.

FERC Contact: Jeff Browning; phone: (202) 502–8677.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–(866) 208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13244–001) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: December 9, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32380 Filed 12–16–11; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL COMMUNICATIONS COMMISSION

[AU Docket No. 11–146; DA 11–1845]

Auction of FM Broadcast Construction Permits Scheduled for March 27, 2012; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 93

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the auction of certain FM broadcast construction permits. This document establishes the procedures and other requirements for Auction 93.

DATES: Applications to participate in Auction 93 must be filed prior to 6 p.m. Eastern Time (ET) on January 12, 2012. Bidding for construction permits in Auction 93 is scheduled to begin on March 27, 2012.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* For auction legal questions: Lynne Milne at (202) 418–0660; for general auction questions: Jeff Crooks at (202) 418–0660 or Linda Sanderson at (717) 338–2868. *Media Bureau, Audio Division:* for FM service rule questions: Lisa Scanlan or Tom Nessinger at (202) 418–2700.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction 93 Procedures Public Notice* released on November 8, 2011. The complete texts of the *Auction 93 Procedures Public Notice,* including its attachment, and related Commission documents, are available for public inspection and copying from 8 a.m. to 4:30 p.m. ET Monday through Thursday or from 8 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The *Auction 93 Procedures Public Notice* and related Commission documents also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (202) 488–5300, fax (202) 488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide FCC document number DA 11–1845 for the *Auction 93 Procedures Public Notice.* The *Auction 93 Procedures Public Notice* and related documents also are available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions/93/*, or by using the search function for AU Docket No. 11–146 on the Commission's Electronic Comment Filing System (ECFS) Web page at *http://www.fcc.gov/cgb/ecfs/.*

I. General Information

A. Introduction

1. On September 12, 2011, the Wireless Telecommunications and Media Bureaus (collectively, the Bureaus) released the Auction 93 Comment Public Notice, 76 FR 60830, September 30, 2011, seeking comment on competitive bidding procedures to be used in Auction 93. One party submitted a comment in response to the *Auction 93 Comment Public Notice.*

i. Construction Permits in Auction 93

2. Auction 93 will offer 119 construction permits in the FM broadcast service as listed in Attachment A of the *Auction 93 Procedures Public Notice.* These construction permits are for new, vacant FM allotments, reflecting FM channels assigned to the FM Table of Allotments.

3. The Bureaus have removed four construction permits from the list of construction permits that were proposed for inclusion in this auction and listed in Attachment A of the *Auction 93 Comment Public Notice.* More information about the construction permits removed from this auction was provided in the *Auction 93 Procedures Public Notice.*

4. Applicants may apply for any vacant FM allotment listed in Attachment A of the *Auction 93 Procedures Public Notice.* When two or more short-form applications (FCC Form 175) specifying the same FM allotment are accepted for filing, mutual exclusivity exists for auction purposes, and thus, that construction permit must be awarded by competitive bidding procedures. Once mutual exclusivity exists for auction purposes, even if only one applicant for a particular construction permit submits an upfront payment, that applicant is required to submit a bid in order to obtain the permit.

B. Rules and Disclaimers

i. Relevant Authority

5. Prospective applicants must familiarize themselves thoroughly with the Commission's general competitive bidding rules, including recent amendments and clarifications, as well as Commission decisions in proceedings regarding competitive bidding procedures, application requirements, and obligations of Commission licensees. Broadcasters should also familiarize themselves with the Commission's rules relating to the FM broadcast service contained in 47 CFR 73.201–73.333 and 73.1001–73.5009. Prospective bidders must also be familiar with the rules relating to broadcast auctions and competitive bidding proceedings contained in 47 CFR 1.2101–1.2112 and 73.5000–73.5009. All bidders must also be thoroughly familiar with the procedures, terms and conditions contained in the Auction 93 Procedures Public Notice and the public notices and orders referenced in it.

6. The terms contained in the Commission's rules, relevant orders, and public notices are not negotiable. The Commission may amend or supplement the information contained in its public notices at any time, and will issue public notices to convey any new or supplemental information to applicants. It is the responsibility of all applicants to remain current with all Commission rules and with all public notices pertaining to this auction.

ii. Prohibited Communications and Compliance With Antitrust Laws

7. 47 CFR 1.2105(c) prohibits auction applicants for construction permits in any of the same geographic license areas from communicating with each other about bids, bidding strategies, or settlements unless such applicants have identified each other on their short-form applications (FCC Form 175) as parties with whom they have entered into agreements pursuant to 47 CFR 1.2105(a)(2)(viii).

a. Entities Subject to Section 1.2105(c)

8. The prohibition on certain communications in 47 CFR 1.2105(c) will apply to any applicants that submit short-form applications seeking to participate in a Commission auction for construction permits in the same geographic license area. Thus, unless they have identified each other on their short-form applications as parties with whom they have entered into agreements under 47 CFR 1.2105(a)(2)(viii), applicants for any of the same geographic license areas must affirmatively avoid all communications with or disclosures to each other that affect or have the potential to affect bids or bidding strategy. In some instances, this prohibition extends to communications regarding the post-auction market structure. This prohibition applies to all applicants regardless of whether such applicants become qualified bidders or actually bid. For the FM service, the geographic license area is the market designation, which is the particular vacant FM

allotment. In Auction 93, this rule would apply to applicants designating any of the same FM allotments on the short-form application.

9. For purposes of this prohibition, 47 CFR 1.2105(c)(7)(i) defines applicant as including all officers and directors of the entity submitting a short-form application to participate in the auction, all controlling interests of that entity, as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application. For example, where an individual served as an officer for two or more applicants, the Bureaus have found that the bids and bidding strategies of one applicant are conveyed to the other applicant, and, absent a disclosed bidding agreement, an apparent violation of 47 CFR 1.2105(c) occurs.

10. Individuals and entities subject to 47 CFR 1.2105(c) should take special care in circumstances where their employees may receive information directly or indirectly relating to any competing applicant's bids or bidding strategies.

11. 47 CFR 1.2105(c)(4) permits a non-controlling interest holder to obtain an interest in more than one competing applicant without violating 47 CFR 1.2105(c) provided specified conditions are met (including a certification that no prohibited communications have occurred or will occur), but that exception does not extend to a controlling interest holder.

12. Auction 93 applicants are encouraged not to use the same individual as an authorized bidder. A violation of 47 CFR 1.2105(c) could occur if an individual acts as the authorized bidder for two or more competing applicants, and conveys information concerning the substance of bids or bidding strategies between such applicants. Also, if the authorized bidders are different individuals employed by the same organization (*e.g.,* law firm or engineering firm or consulting firm), a violation similarly could occur. In such a case, at a minimum, applicants should certify on their applications that precautionary steps have been taken to prevent communication between authorized bidders, and that the applicant and their bidding agents will comply with 47 CFR 1.2105(c).

b. Prohibition Applies Until Down Payment Deadline

13. 47 CFR 1.2105(c)'s prohibition on certain communications begins at the short-form application filing deadline and ends at the down payment deadline after the auction closes, which will be announced in a future public notice.

c. Prohibited Communications

14. Applicants must not communicate directly or indirectly about bids or bidding strategy to other applicants in this auction. 47 CFR 1.2105(c) prohibits not only a communication about an applicant's own bids or bidding strategy, but also a communication of another applicant's bids or bidding strategy. While 47 CFR 1.2105(c) does not prohibit non-auction-related business negotiations among auction applicants, each applicant must remain vigilant so as not to directly or indirectly communicate information that affects, or could affect, bids or bidding strategy, or the negotiation of settlement agreements.

15. Applicants are cautioned that the Commission remains vigilant about prohibited communications taking place in other situations, including communications regarding capital calls or requests for additional funds in support of bids or bidding strategies. An applicant also may not use the Commission's bidding system to disclose its bidding strategy. Applicants also should use caution in their dealings with other parties, such as members of the press, financial analysts, or others who might become conduits for the communication of prohibited bidding information. Similarly, an applicant's public statement of intent not to participate in Auction 93 bidding could also violate the rule. Applicants are hereby placed on notice that public disclosure of information relating to bids, or bidding strategies, or to post auction market structures may violate 47 CFR 1.2105(c).

d. Disclosure of Bidding Agreements and Arrangements

16. The Commission's rules do not prohibit applicants from entering into otherwise lawful bidding agreements before filing their short-form applications, as long as they disclose the existence of the agreement(s) in their short-form applications. Applicants must identify in their short-form applications all parties with whom they have entered into any agreements, arrangements, or understandings of any kind relating to the construction permits being auctioned, including any agreements relating to post-auction market structure.

17. If parties agree in principle on all material terms prior to the short-form application filing deadline, each party to the agreement must identify the other party or parties to the agreement on its short-form application under 47 CFR 1.2105(c), even if the agreement has not been reduced to writing. If the parties have not agreed in principle by the short-form filing deadline, they should not include the names of parties to discussions on their applications, and they may not continue negotiation, discussion or communication with any other applicants after the short-form application filing deadline.

18. 47 CFR 1.2105(c) does not prohibit non-auction-related business negotiations among auction applicants. However, certain discussions or exchanges could touch upon impermissible subject matters because they may convey pricing information and bidding strategies. Such subject areas include, but are not limited to, issues such as management, sales, local marketing agreements, rebroadcast agreements, and other transactional agreements.

e. Section 1.2105(c) Certification

19. By electronically submitting a short-form application, each applicant in Auction 93 certifies its compliance with 47 CFR 1.2105(c) and 73.5002. In particular, an applicant must certify under penalty of perjury it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified in the application, regarding the amount of the applicant's bids, bidding strategies, or the particular construction permits on which it will or will not bid. However, the Bureaus caution that merely filing a certifying statement as part of an application will not outweigh specific evidence that a prohibited communication has occurred, nor will it preclude the initiation of an investigation when warranted. Any applicant found to have violated 47 CFR 1.2105(c) may be subject to sanctions.

f. Duty To Report Prohibited Communications

20. 47 CFR 1.2105(c)(6) provides that any applicant that makes or receives a communication that appears to violate 47 CFR 1.2105(c) must report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs. The Commission has clarified that each applicant's obligation to report any such communication continues beyond the five-day period after the communication is made, even if the report is not made within the five-day period.

21. In addition, 47 CFR 1.65 requires an applicant to report to the

Commission any communication the applicant has made to or received from another applicant after the short-form application filing deadline that affects or has the potential to affect bids or bidding strategy, unless such communication is made to or received from a party to an agreement identified under 47 CFR 1.2105(a)(2)(viii).

22. 47 CFR 1.65(a) and 1.2105(c) require each applicant in competitive bidding proceedings to furnish additional or corrected information within five days of a significant occurrence, or to amend its short-form application no more than five days after the applicant become aware of the need for amendment.

g. Procedure for Reporting Prohibited Communications

23. A party reporting any communication pursuant to 47 CFR 1.65, 1.2105(a)(2), or 1.2105(c)(6) must take care to ensure that any report of a prohibited communication does not itself give rise to a violation of 47 CFR 1.2105(c). For example, a party's report of a prohibited communication could violate the rule by communicating prohibited information to other applicants through the use of Commission filing procedures that would allow such materials to be made available for public inspection. This reporting process differs from filing procedures used in connection with other Commission rules and processes which may call for submission of filings to the Commission's Office of the Secretary or the Electronic Comment Filing System (ECFS). Filings through the Office of the Secretary or ECFS could allow the report to become publicly available and might result in the communication of prohibited information to other auction applicants.

24. 47 CFR 1.2105(c) requires reports to be filed consistent with the instructions set forth in the Auction 93 Procedures Public Notice. For Auction 93, a party must file a report concerning such a prohibited communication with the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau. Any such report should be submitted by email to Ms. Margaret W. Wiener at the following email address: *auction93@fcc.gov*. If a party chooses instead to submit a report by hard copy, such report must be delivered only to: Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street SW., Room 6423, Washington, DC 20554.

25. A party seeking to report such a prohibited communication should consider submitting its report with a request that the report or portions of the submission be withheld from public inspection by following the procedures specified in 47 CFR 0.459. Such parties also are encouraged to coordinate with the Auctions and Spectrum Access Division staff about the procedures for submitting such reports.

h. Winning Bidders Must Disclose Terms of Agreements

26. Each applicant that is a winning bidder will be required to disclose in its long-form applications the specific terms, conditions, and parties involved in any agreement it has entered into. This requirement applies to any bidding consortia, joint venture, partnership, or agreement, understanding, or other arrangement entered into relating to the competitive bidding process, including any agreement relating to the post-auction market structure. Failure to comply with the Commission's rules can result in enforcement action.

i. Additional Information Concerning Rule Prohibiting Certain Communications

27. A summary listing of documents issued by the Commission and the Bureaus addressing the application of 47 CFR 1.2105(c) may be found in Attachment D of the *Auction 93 Procedures Public Notice.* These documents are available on the Commission's auction Web page.

j. Antitrust Laws

28. Regardless of compliance with the Commission's rules, applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace. Compliance with the disclosure requirements of 47 CFR 1.2105(c) will not insulate a party from enforcement of the antitrust laws.

29. To the extent the Commission becomes aware of specific allegations that suggest that violations of the Federal antitrust laws may have occurred, the Commission may refer such allegations to the United States Department of Justice for investigation. If an applicant is found to have violated the antitrust laws or the Commission's rules in connection with its participation in the competitive bidding process, it may be subject to forfeiture of its upfront payment, down payment, or full bid amount and may be prohibited from participating in future auctions, among other sanctions.

iii. Due Diligence

30. Each potential bidder is solely responsible for investigating and evaluating all technical and marketplace factors that may have a bearing on the value of the construction permits for broadcast facilities it is seeking in this auction. Each bidder is responsible for assuring that, if it wins a construction permit, it will be able to build and operate facilities in accordance with the Commission's rules. The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC permittee in a broadcast service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular service, technology, or product, nor does an FCC construction permit or license constitute a guarantee of business success.

31. An applicant should perform its due diligence research and analysis before proceeding, as it would with any new business venture. Each potential bidder should review all underlying Commission orders, such as the specific order amending the FM Table of Allotments and allotting the FM channel(s) on which it plans to bid. An order adopted in an FM allotment rulemaking proceeding may include anomalies such as site restrictions or expense reimbursement requirements. Each potential bidder should perform technical analyses or refresh its previous analyses to assure itself that, should it be a winning bidder for any Auction 91 construction permit, it will be able to build and operate facilities that will fully comply with the Commission's technical and legal requirements. Each applicant should inspect any prospective transmitter sites located in, or near, the service area for which it plans to bid, confirm the availability of such sites, and familiarize itself with the Commission's rules regarding the National Environmental Policy Act at 47 CFR Chapter 1, Part 1, Subpart I.

32. Each applicant should conduct its own research prior to Auction 93 in order to determine the existence of pending administrative or judicial proceedings that might affect its decision to participate in the auction, including pending allocation rulemaking proceedings. Each participant in Auction 93 should continue such research throughout the auction. The due diligence considerations mentioned in the Auction 93 Procedures Public Notice do not comprise an exhaustive list of steps that should be undertaken prior to participating in this auction. As always, the burden is on the potential bidder to

determine how much research to undertake, depending upon specific facts and circumstances related to its interests.

33. Pending and future judicial proceedings, as well as certain pending and future Commission proceedings—including applications, applications for modification, petitions for rulemaking, requests for special temporary authority, waiver requests, petitions to deny, petitions for reconsideration, informal objections, and applications for review—may relate to particular applicants, incumbent permittees, incumbent licensees, or the construction permits available in Auction 93. Each prospective applicant is responsible for assessing the likelihood of the various possible outcomes and for considering the potential impact on construction permits available in this auction.

34. Applicants are solely responsible for identifying associated risks and for investigating and evaluating the degree to which such matters may affect their ability to bid on, otherwise acquire, or make use of the construction permits available in Auction 93. Each potential bidder is responsible for undertaking research to ensure that any permits won in this auction will be suitable for its business plans and needs. Each potential bidder must undertake its own assessment of the relevance and importance of information gathered as part of its due diligence efforts.

35. Applicants may research the Media Bureau's licensing database in order to determine which channels are already licensed to incumbent licensees or previously authorized to construction permittees. Licensing records are contained in the Media Bureau's Consolidated Data Base System (CDBS) and may be researched on the Internet at *http://www.fcc.gov/mb*.

36. The Commission makes no representations or guarantees regarding the accuracy or completeness of information in its databases or any third party databases, including court docketing systems, for example. To the extent the Commission's databases may not include all information deemed necessary or desirable by an applicant, it must obtain or verify such information from independent sources or assume the risk of any incompleteness or inaccuracy in said databases. The Commission makes no representations or guarantees regarding the accuracy or completeness of information that has been provided by incumbent licensees and incorporated into its databases.

iv. Use of Integrated Spectrum Auction System

37. Bidders will be able to participate in Auction 93 over the Internet using the Commission's web-based Integrated Spectrum Auction System (ISAS or FCC Auction System). The Commission makes no warranty whatsoever with respect to the FCC Auction System. In no event shall the Commission, or any of its officers, employees, or agents, be liable for any damages whatsoever (including, but not limited to, loss of business profits, business interruption, loss of business information, or any other loss) arising out of or relating to the existence, furnishing, functioning, or use of the FCC Auction System that is accessible to qualified bidders in connection with this auction. Moreover, no obligation or liability will arise out of the Commission's technical, programming, or other advice or service provided in connection with the FCC Auction System.

v. Environmental Review Requirements

38. Permittees or licensees must comply with the Commission's rules regarding implementation of the National Environmental Policy Act and other Federal environmental statutes. The construction of a broadcast facility is a Federal action and the permittee or licensee must comply with the Commission's environmental rules, 47 CFR 1.1301–1.1319, for each such facility. These environmental rules require, among other things, that the permittee or licensee consult with expert agencies having environmental responsibilities, including the U.S. Fish and Wildlife Service, the State Historic Preservation Office, the U.S. Army Corps of Engineers, and the Federal Emergency Management Agency (through the local authority with jurisdiction over floodplains). In assessing the effect of facility construction on historic properties, the permittee or licensee must follow the provisions of the FCC's Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process. The permittee or licensee must prepare environmental assessments for any facility that may have a significant impact in or on wilderness areas, wildlife preserves, threatened or endangered species, or designated critical habitats, historical or archaeological sites, Indian religious sites, floodplains, and surface features. In addition, the permittee or licensee must prepare environmental assessments for facilities that include high intensity white lights in residential neighborhoods or excessive radio frequency emission.

C. Auction Specifics

i. Bidding Methodology

39. The bidding methodology for Auction 93 will be a simultaneous multiple round format. The Commission will conduct this auction over the Internet using the FCC Auction System. Qualified bidders are permitted to bid electronically via the Internet or by telephone using the telephonic bidding option. All telephone calls are recorded.

ii. Pre-Auction Dates and Deadlines

40. The following dates and deadlines apply:

Auction Tutorial Available (via Internet)	January 3, 2012.
Short-Form Application (FCC Form 175). Filing Window Opens	January 3, 2012; 12 noon ET.
Short-Form Application (FCC Form 175). Filing Window Deadline	January 12, 2012; prior to 6 p.m. ET.
Upfront Payments (via wire transfer)	February 22, 2012; 6 p.m. ET.
Mock Auction	March 23, 2012.
Auction Begins	March 27, 2012.

iii. Requirements for Participation

41. Those wishing to participate in this auction must: (1) Submit a short-form application (FCC Form 175) electronically prior to 6 p.m. ET, on January 12, 2012, following the electronic filing procedures set forth in Attachment B of the *Auction 93 Procedures Public Notice;* (2) Submit a sufficient upfront payment and an FCC Remittance Advice Form (FCC Form 159) by 6 p.m. ET, on February 22, 2012, following the procedures and instructions set forth in Attachment C to the *Auction 93 Procedures Public Notice;* and (3) Comply with all provisions outlined in the *Auction 93*

Procedures Public Notice and applicable Commission rules.

II. Short-Form Application (FCC Form 175) Requirements

A. General Information Regarding Short-Form Applications

42. An application to participate in an FCC auction, referred to as a short-form application or FCC Form 175, provides information used to determine whether the applicant is legally, technically, and financially qualified to participate in Commission auctions for licenses or permits. The short-form application is the first part of the Commission's two-phased auction application process. In the first phase, parties desiring to participate in the auction must file a streamlined, short-form application in which they certify under penalty of perjury as to their qualifications. Each applicant must take seriously its duties and responsibilities and carefully determine before filing an application that it has the legal, technical and financial resources to participate in the auction, as well as to construct and operate an FM station if it becomes a licensee as a result of its participation in this auction. Eligibility to participate in bidding is based on the applicant's short-form application and certifications, as well as its upfront payment. In the second phase of the process, a winning bidder must file a more comprehensive long-form application.

43. Every entity and individual seeking a construction permit available in Auction 93 must file a short-form application electronically via the FCC Auction System prior to 6 p.m. ET on January 12, 2012, following the procedures prescribed in Attachment B of the *Auction 93 Procedures Public Notice.* If an applicant claims eligibility for a bidding credit, the information provided in its FCC Form 175 will be used to determine whether the applicant is eligible for the claimed bidding credit. Applicants filing a short-form application are subject to the Commission's anti-collusion rules beginning at the deadline for filing.

44. Applicants bear full responsibility for submitting accurate, complete and timely short-form applications. All applicants must certify on their short-form applications under penalty of perjury that they are legally, technically, financially and otherwise qualified to hold a license. Applicants should read carefully the instructions set forth in Attachment B of the *Auction 93 Procedures Public Notice* and should consult the Commission's rules to ensure that all the information required is included within their short-form application.

45. An individual or entity may not submit more than one short-form application for a single auction. If a party submits multiple short-form applications, only one application may be accepted for filing.

46. Applicants also should note that submission of a short-form application (and any amendments thereto) constitutes a representation by the certifying official that he or she is an authorized representative of the applicant, that he or she has read the form's instructions and certifications, and that the contents of the application, its certifications, and any attachments are true and correct. Applicants are not permitted to make major modifications to their applications; such impermissible changes include a change of the certifying official to the application. Submission of a false certification to the Commission may result in penalties, including monetary forfeitures, license forfeitures, ineligibility to participate in future auctions, and/or criminal prosecution.

B. Permit Selection

47. An applicant must select the construction permits on which it wants to bid from the Eligible Permits list on its short-form application. To assist in identifying construction permits of interest that will be available in Auction 93, the FCC Auction System includes a filtering mechanism that allows an applicant to filter the Eligible Permits list. Selections for one or more of the filter criteria can be made and the system will produce a list of construction permits satisfying the specified criteria. Any or all of the construction permits in the filtered results may be selected. Applicants will also be able to select construction permits from one set of filtered results and then filter on different criteria to select additional construction permits.

48. Applicants interested in participating in Auction 93 must have selected construction permit(s) available in this auction by the short-form application filing deadline. Applicants must review and verify their construction permit selections before the deadline for submitting short-form applications. Construction permit selections cannot be changed after the short-form application filing deadline. The FCC Auction System will not accept bids on construction permits that were not selected on the applicant's short-form application.

49. A commenter contends that the Commission's rules should be revised to require that an applicant submit a separate fee for each construction permit selected on its short-form application, to discourage applicants from selecting multiple or even all permits in one broadcast auction. The change advocated by the commenter would require an amendment of the Commission's rules and is thus outside of the scope of this proceeding, which is confined to establishing procedures for the conduct of this auction of FM construction permits.

C. New Entrant Bidding Credit

50. The interests of the applicant and of any individuals or entities with an attributable interest in the applicant, in other media of mass communications are considered when determining an applicant's eligibility for the New Entrant Bidding Credit. In Auction 93, the bidder's attributable interests, and thus, the applicant's maximum new entrant bidding credit eligibility, are determined as of the short-form application filing deadline. An applicant intending to divest a media interest or make any other ownership changes, such as resignation of positional interests, in order to avoid attribution for purposes of qualifying for the New Entrant Bidding Credit must have consummated such divestment transactions or have completed such ownership changes by no later than the short-form filing deadline. Each applicant has a duty to continuously maintain the accuracy of information submitted in its auction application, including accurate bidding credit information. Events occurring after the short-form filing deadline, such as the acquisition of attributable interests in media of mass communications, may cause diminishment or loss of the bidding credit, and must be reported immediately, and no less than five days after the event occurs.

51. Under traditional broadcast attribution rules, including 47 CFR 73.3555 Note 2, those entities or individuals with an attributable interest in a bidder include: (1) All officers and directors of a corporate bidder; (2) Any owner of 5 percent or more of the voting stock of a corporate bidder; (3) All partners and limited partners of a partnership bidder, unless the limited partners are sufficiently insulated; and (4) All members of a limited liability company, unless sufficiently insulated.

52. In cases where an applicant's spouse or close family member holds other media interests, such interests are not automatically attributable to the bidder. The Commission decides attribution issues in this context based on certain factors traditionally considered relevant. Applicants should

note that the mass media attribution rules were revised in 1999.

53. In 1999, the Commission further refined the eligibility standards for the New Entrant Bidding Credit, judging it appropriate to attribute the media interests held by very substantial investors in, or creditors of, an applicant claiming new entrant status. Specifically, the attributable mass media interests held by an individual or entity with an equity and/or debt interest in an applicant shall be attributed to that applicant for purposes of determining its eligibility for the New Entrant Bidding Credit, if the equity and debt interests, in the aggregate, exceed 33 percent of the total asset value of the applicant, even if such an interest is non-voting.

54. In the *Diversity Order,* 73 FR 28400, May 16, 2008, the Commission relaxed the equity/debt plus (EDP) attribution standard, to allow for higher investment opportunities in entities meeting the definition of eligible entities in 47 CFR 73.3555 Note 2(i). Consistent with a court decision issued in July 2011, the relaxed EDP rule for eligible entities as the basis for the New Entrant Bidding Credit will be unavailable in Auction 93.

55. A medium of mass communications is defined in 47 CFR 73.5008(b). Full service noncommercial educational stations, on both reserved and non-reserved channels, are included among media of mass communications as defined in 47 CFR 73.5008(b). Generally, media interests will be attributable for purposes of the New Entrant Bidding Credit to the same extent that such other media interests are considered attributable for purposes of the broadcast multiple ownership rules. However, attributable interests held by a winning bidder in existing low power television, television translator or FM translator facilities will not be counted among the applicant's other mass media interests in determining its eligibility for a New Entrant Bidding Credit.

D. Application Requirements

56. In addition to the ownership information required pursuant to 47 CFR 1.2105 and 1.2112, applicants seeking a New Entrant Bidding Credit are required to establish on their short-form applications that they satisfy the eligibility requirements to qualify for the bidding credit. In those cases, a certification under penalty of perjury must be provided in completing the short-form application. An applicant claiming that it qualifies for a 35 percent New Entrant Bidding Credit must certify that neither it nor any of its attributable interest holders have any attributable interests in any other media of mass communications. An applicant claiming that it qualifies for a 25 percent New Entrant Bidding Credit must certify that neither it nor any of its attributable interest holders has any attributable interests in more than three media of mass communications, and must identify and describe such media of mass communications.

i. Bidding Credits

57. Applicants that qualify for the New Entrant Bidding Credit, as specified in 47 CFR 73.5007, are eligible for a bidding credit that represents the amount by which a bidder's winning bid is discounted. The size of a New Entrant Bidding Credit depends on the number of ownership interests in other media of mass communications that are attributable to the bidder-entity and its attributable interest-holders. A 35 percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, has no attributable interest in any other media of mass communications, as defined in 47 CFR 73.5008. A 25 percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, has an attributable interest in no more than three mass media facilities, as defined in 47 CFR 73.5008. No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the broadcast permit proposed in the auction, as defined in 47 CFR 73.5007(b), or if the winning bidder, and/or any individual or entity with an attributable interest in the winning bidder, has attributable interests in more than three mass media facilities. For purposes of determining whether a broadcast permit offered in this auction is in the same area as an applicant's existing mass media facilities, the coverage area of the to-be-auctioned facility is calculated using maximum class facilities at the allotment reference coordinates, not any applicant-specified preferred site coordinates.

58. Bidding credits are not cumulative. Qualifying applicants receive either the 25 percent or the 35 percent bidding credit, but not both. Attributable interests are defined in 47 CFR 73.3555 and note 2 of that section. Applicants should note that unjust enrichment provisions apply to a winning bidder that utilizes a bidding credit and subsequently seeks to assign or transfer control of its license or construction permit to an entity not qualifying for the same level of bidding credit.

E. Ownership Disclosure Requirements

59. For purposes of determining eligibility to participate in a broadcast auction, all applicants must comply with the uniform Part 1 ownership disclosure standards and provide information required by 47 CFR 1.2105 and 1.2112. Specifically, in completing the short-form application, applicants will be required to fully disclose information on the real party- or parties-in-interest and ownership structure of the applicant, including both direct and indirect ownership interests of 10 percent or more. The ownership disclosure standards for the short-form application are prescribed in 47 CFR 1.2105 and 1.2112. Each applicant is responsible for ensuring that information submitted in its short-form application is complete and accurate.

60. In certain circumstances, an applicant's most current ownership information on file with the Commission, if in an electronic format compatible with the short-form application (FCC Form 175) (such as information submitted in an on-line FCC Form 602 or in an FCC Form 175 filed for a previous auction using the FCC Auction System) will automatically be entered into their short-form application. Each applicant must carefully review any information automatically entered to confirm that it is complete and accurate as of the deadline for filing the short-form application. Any information that needs to be corrected or updated must be changed directly in the short-form application.

F. Provisions Regarding Former and Current Defaulters

61. Current defaulters or delinquents are not eligible to participate in Auction 93, but former defaulters or delinquents can participate so long as they are otherwise qualified and, make upfront payments that are fifty percent more than would otherwise be necessary. An applicant is considered a current defaulter or a current delinquent when it, any of its affiliates, any of its controlling interests, or any of the affiliates of its controlling interests, is in default on any payment for any Commission construction permit or license (including a down payment) or is delinquent on any non-tax debt owed to any Federal agency as of the filing deadline for short-form applications. An applicant is considered a former defaulter or a former delinquent when it, any of its affiliates, any of its controlling interests, or any of the

affiliates of its controlling interests, have defaulted on any Commission construction permit or license or been delinquent on any non-tax debt owed to any Federal agency, but have since remedied all such defaults and cured all of the outstanding non-tax delinquencies.

62. On the short-form application, an applicant must certify under penalty of perjury that it, its affiliates, its controlling interests, and the affiliates of its controlling interests, as defined by 47 CFR 1.2110, are not in default on any payment for a Commission construction permit or license (including down payments) and that it is not delinquent on any non-tax debt owed to any Federal agency. Each applicant must also state under penalty of perjury whether it, its affiliates, its controlling interests, and the affiliates of its controlling interests, have ever been in default on any Commission construction permit or license or have ever been delinquent on any non-tax debt owed to any Federal agency. Submission of a false certification to the Commission is a serious matter that may result in severe penalties, including monetary forfeitures, license revocations, exclusion from participation in future auctions, and/or criminal prosecution.

63. Applicants are encouraged to review the Bureaus' previous guidance on default and delinquency disclosure requirements in the context of the short-form application process. For example, it has been determined that, to the extent that Commission rules permit late payment of regulatory or application fees accompanied by late fees, such debts will become delinquent for purposes of 47 CFR 1.2105(a) and 1.2106(a) only after the expiration of a final payment deadline. Therefore, with respect to regulatory or application fees, the provisions of 47 CFR 1.2105(a) and 1.2106(a) regarding default and delinquency in connection with competitive bidding are limited to circumstances in which the relevant party has not complied with a final Commission payment deadline. Parties are also encouraged to consult with the Wireless Telecommunications Bureau's Auctions and Spectrum Access Division staff if they have any questions about default and delinquency disclosure requirements.

64. The Commission considers outstanding debts owed to the United States Government, in any amount, to be a serious matter. The Commission adopted rules, including a provision referred to as the red light rule, that implement its obligations under the Debt Collection Improvement Act of 1996, which governs the collection of debts owed to the United States. Under the red light rule, applications and other requests for benefits filed by parties that have outstanding debts owed to the Commission will not be processed. In the same rulemaking order, the Commission explicitly declared, however, that its competitive bidding rules are not affected by the red light rule. As a consequence, the Commission's adoption of the red light rule does not alter the applicability of any of its competitive bidding rules, including the provisions and certifications of 47 CFR 1.2105 and 1.2106, with regard to current and former defaults or delinquencies.

65. Applicants are reminded that the Commission's Red Light Display System, which provides information regarding debts currently owed to the Commission, may not be determinative of an auction applicant's ability to comply with the default and delinquency disclosure requirements of 47 CFR 1.2105. Thus, while the red light rule ultimately may prevent the processing of long-form applications by auction winners, an auction applicant's lack of current red light status is not necessarily determinative of its eligibility to participate in an auction or of its upfront payment obligation.

66. Moreover, prospective applicants in Auction 93 should note that any long-form applications filed after the close of bidding will be reviewed for compliance with the Commission's red light rule, and such review may result in the dismissal of a winning bidder's long-form application. Applicants that have their long-form applications dismissed will be deemed to have defaulted and will be subject to default payments under 47 CFR 1.2104(g) and 1.2109(c).

G. Optional Applicant Status Identification

67. Applicants owned by members of minority groups and/or women, as defined in 47 CFR 1.2110(c)(3), and rural telephone companies, as defined in 47 CFR 1.2110(c)(4), may identify themselves regarding this status in filling out their short-form applications. This applicant status information is collected for statistical purposes only and assists the Commission in monitoring the participation of designated entities in its auctions.

H. Noncommercial Educational Status Election

68. Applications for noncommercial educational (NCE) FM stations on nonreserved spectrum, filed during an FM filing window, will be returned as unacceptable for filing if mutually exclusive with any application for a commercial station. Short-form applications specifying the same FM station construction permit are considered to be mutually exclusive. Accordingly, if an FCC Form 175 filed during the Auction 93 filing window identifying the application's proposed station as noncommercial educational is mutually exclusive with any application filed during that window for a commercial station, the NCE application will be returned as unacceptable for filing. For this reason, each prospective applicant in this auction should consider carefully if it wishes to propose NCE operation for any FM station acquired in this auction. This NCE election cannot be reversed after the initial application filing deadline. In contrast, a short-form application that does not identify the facilities proposed in the FCC Form 175 as NCE will be considered, as a matter of law, an application for a commercial broadcast station or stations.

I. Minor Modifications to Short-Form Applications

69. After the deadline for filing initial applications, an Auction 93 applicant is permitted to make only minor changes to its application. Permissible minor changes include, among other things, deletion and addition of authorized bidders (to a maximum of three) and revision of addresses and telephone numbers of the applicants and their contact persons. An applicant is not permitted to make a major modification to its application (*e.g.,* change of construction permit selection, change control of the applicant, change the certifying official, claim eligibility for a higher percentage of bidding credit, or change the identification of the application's proposed facilities as noncommercial educational) after the initial application filing deadline. Thus, any change in control of an applicant, resulting from a merger for example, will be considered a major modification and the application will consequently be dismissed. If an applicant's short-form application is dismissed, the applicant would remain subject to the communication prohibitions of 47 CFR 1.2105(c) until the down payment deadline.

70. If an applicant wishes to make permissible minor changes to its short-form application, such changes should be made electronically to its short-form application using the FCC Auction System whenever possible. For the change to be submitted and considered by the Commission, be sure to click on the SUBMIT button.

71. An applicant cannot use the FCC Auction System outside of the initial

and resubmission filing windows to make changes to its short-form application for other than administrative changes (*e.g.* changing certain contact information or the name of an authorized bidder). If these or other permissible minor changes need to be made outside of these windows, the applicant must submit a letter briefly summarizing the changes and subsequently update its short-form application in the FCC Auction System once it is available. Moreover, after the filing window has closed, the system will not permit applicants to make certain changes, such as the applicant's legal classification and the identification of the application's proposed facilities as noncommercial educational. Any letter describing changes to an applicant's short-form application must be submitted by email to *auction93@fcc.gov*.

72. Any application amendment and related statements of fact must be certified by (1) The applicant, if the applicant is an individual; (2) one of the partners if the applicant is a partnership; (3) an officer, director, or duly authorized employee, if the applicant is a corporation; (4) a member who is an officer, if the applicant is an unincorporated association; (5) the trustee, if the applicant is an amateur radio service club; or (6) a duly elected or appointed official who is authorized to make such certifications under the laws of the applicable jurisdiction, if the applicant is a governmental entity.

73. Applicants must not submit application-specific material through the Commission's Electronic Comment Filing System.

J. Maintaining Current Information in Short-Form Applications

74. 47 CFR 1.65 and 1.2105(b) requires an applicant to continually maintain the accuracy and completeness of information furnished in its pending application and in competitive bidding proceedings to furnish additional or corrected information to the Commission within five days of a significant occurrence, or to amend a short form application no more than five days after the applicant becomes aware of the need for the amendment. Changes that cause a loss of or reduction in the percentage of bidding credit specified on the originally-submitted application must be reported immediately, and no later than five business days after the change occurs. If an amendment reporting changes is a major amendment, as defined by 47 CFR 1.2105, the major amendment will not be accepted and may result in the dismissal of the application. After the short-form filing deadline, applicants may make only minor changes to their applications. For changes to be submitted and considered by the Commission, be sure to click on the SUBMIT button in the FCC Auction System. In addition, an applicant cannot update its short-form application using the FCC Auction System after the initial and resubmission filing windows close. If information needs to be submitted pursuant to 47 CFR 1.65 after these windows close, a letter briefly summarizing the changes must be submitted by email to *auction93@fcc.gov*. This email must include a subject or caption referring to Auction 93 and the name of the applicant.

III. Pre-Auction Procedures

A. Online Auction Tutorial—Available January 3, 2012

75. On Tuesday, January 3, 2012, an educational auction tutorial will be available on the Auction 93 web page for prospective bidders to familiarize themselves with the auction process. This online tutorial will provide information about pre-auction procedures, completing short-form applications, auction conduct, the FCC Auction Bidding System, auction rules, and broadcast services rules. The tutorial will also provide an avenue to ask FCC staff questions about the auction, auction procedures, filing requirements, and other matters related to this auction.

B. Short-Form Applications—Due Prior to 6 p.m. ET on January 12, 2012

76. In order to be eligible to bid in this auction, applicants must first follow the procedures set forth in Attachment B of the *Auction 93 Procedures Public Notice* to submit a short-form application (FCC Form 175) electronically via the FCC Auction System. This short-form application must be submitted prior to 6 p.m. ET on January 12, 2012. Late applications will not be accepted. No application fee is required, but an applicant must submit a timely upfront payment to be eligible to bid.

77. Applications may generally be filed at any time beginning at noon ET on January 3, 2012, until the filing window closes at 6 p.m. ET on January 12, 2012. Applicants are strongly encouraged to file early and are responsible for allowing adequate time for filing their applications. Applications can be updated or amended multiple times until the filing deadline on January 12, 2012.

78. An applicant must always click on the SUBMIT button on the Certify & Submit screen to successfully submit its FCC Form 175 and any modifications; otherwise the application or changes to the application will not be received or reviewed by Commission staff. Additional information about accessing, completing, and viewing the FCC Form 175 is included in Attachment B of the *Auction 93 Procedures Public Notice.* FCC Auctions Technical Support is available at (877) 480–3201, option nine; (202) 414–1250 or (202) 414–1255(TTY); hours of service are Monday through Friday, from 8 a.m. to 6 p.m. ET.

C. Application Processing and Minor Corrections

79. After the deadline for filing FCC Form 175 applications, the Commission will process all timely submitted applications to determine which are complete, and subsequently will issue a public notice identifying (1) Those that are complete; (2) those that are rejected; and (3) those that are incomplete or deficient because of minor defects that may be corrected. That public notice will include the deadline for resubmitting corrected applications.

80. Non-mutually exclusive applications will be listed in a subsequent public notice to be released by the Bureaus. Such applications will not proceed to auction, but will proceed in accordance with instructions set forth in that public notice. All mutually exclusive applications will be considered under the relevant procedures for conflict resolution. Mutually exclusive applications proposing commercial stations will proceed to auction.

81. After the application filing deadline on January 12, 2012, applicants can make only minor corrections to their applications. They will not be permitted to make major modifications (*e.g.,* change construction permit selection, change control of the applicant, change the certifying official, claim eligibility for a higher percentage of bidding credit, or change identification of the application's proposed facilities as NCE).

82. Commission staff will communicate only with an applicant's contact person or certifying official, as designated on the short-form application, unless the applicant's certifying official or contact person notifies the Commission in writing that applicant's counsel or other representative is authorized to speak on the applicant's behalf. Authorizations may be sent by email to *auction93@fcc.gov*. The FCC will not send auction registration material to anyone other than the contact person

listed on the applicant's FCC Form 175 or respond to a request for replacement registration material from anyone other than an authorized bidder, the contact person, or the certifying official listed on the applicant's FCC Form 175.

D. Upfront Payments—Due February 22, 2012

83. In order to be eligible to bid in this auction, an upfront payment must be submitted and accompanied by an FCC Remittance Advice Form (FCC Form 159). After completing its short-form application, an applicant will have access to an electronic version of the FCC Form 159 that can be printed and sent by fax to U.S. Bank in St. Louis, Missouri. All upfront payments must be made as instructed in the Auction 93 Procedures Public Notice and must be received in the proper account at U.S. Bank before 6 p.m. ET on February 22, 2012.

i. Making Upfront Payments by Wire Transfer

84. Wire transfer payments must be received before 6 p.m. ET on February 22, 2012. No other payment method is acceptable. To avoid untimely payments, applicants should discuss arrangements (including bank closing schedules) with their bankers several days before they plan to make the wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline.

85. At least one hour before placing the order for the wire transfer (but on the same business day), applicants must fax a completed FCC Form 159 (Revised 2/03) to U.S. Bank at (314) 418–4232. On the fax cover sheet, write Wire Transfer—Auction Payment for Auction 93. In order to meet the upfront payment deadline, an applicant's payment must be credited to the Commission's account for Auction 93 before the deadline.

86. Each applicant is responsible for ensuring timely submission of its upfront payment and for timely filing of an accurate and complete FCC Remittance Advice Form (FCC Form 159). An applicant should coordinate with its financial institution well ahead of the due date regarding its wire transfer and allow sufficient time for the transfer to be initiated and completed prior to the deadline. The Commission repeatedly has cautioned auction participants about the importance of planning ahead to prepare for unforeseen last-minute difficulties in making payments by wire transfer. Each applicant also is responsible for obtaining confirmation from its financial institution that its wire transfer to U.S. Bank was successful and from Commission staff that its upfront payment was timely received and that it was deposited into the proper account.

87. All upfront payments must be made in U.S. dollars. All upfront payments must be made by wire transfer. Upfront payments for Auction 93 go to a lockbox number different from the lockboxes used in previous FCC auctions. Failure to deliver a sufficient upfront payment as instructed in the Auction 93 Procedures Public Notice by the deadline on February 22, 2012, will result in dismissal of the short-form application and disqualification from participation in the auction. Any applicant that submits a short-form application but fails to timely submit a sufficient upfront payment will retain its status as an applicant in this auction and will remain subject to 47 CFR 1.2105(c) and 73.7002(d), but, having purchased no bidding eligibility, will not be eligible to bid.

ii. FCC Form 159

88. An accurate and complete FCC Remittance Advice Form (FCC Form 159, Revised 2/03) must be faxed to U.S. Bank to accompany each upfront payment. Proper completion of this form is critical to ensuring correct crediting of upfront payments. Detailed instructions for completion of FCC Form 159 are included in Attachment C of the *Auction 93 Procedures Public Notice.* An electronic pre-filled version of the FCC Form 159 is available after submitting the FCC Form 175. Payers using the pre-filled FCC Form 159 are responsible for ensuring that all of the information on the form, including payment amounts, is accurate. The FCC Form 159 can be completed electronically, but must be filed with U.S. Bank by fax.

iii. Upfront Payments and Bidding Eligibility

89. Applicants must make upfront payments sufficient to obtain bidding eligibility on the construction permits on which they will bid. The amount of the upfront payment determines a bidder's initial bidding eligibility, the maximum number of bidding units on which a bidder may place bids. In order to bid on a particular construction permit, a qualified bidder must have selected the construction permit on its FCC Form 175 and must have a current eligibility level that meets or exceeds the number of bidding units assigned to that construction permit. At a minimum, therefore, an applicant's total upfront payment must be enough to establish eligibility to bid on at least one of the construction permits selected on its FCC Form 175, or else the applicant will not be eligible to participate in the auction. An applicant does not have to make an upfront payment to cover all construction permits the applicant selected on its FCC Form 175, but only enough to cover the maximum number of bidding units that are associated with construction permits on which they wish to place bids and hold provisionally winning bids in any given round. (Provisionally winning bids are bids that would become final winning bids if the auction were to close after the given round.) The total upfront payment does not affect the total dollar amount the bidder may bid on any given construction permit.

90. The Bureaus adopted an upfront payment and number of bidding units for each construction permit in Auction 93. Upfront payment amounts and bidding units are set forth in Attachment A of the *Auction 93 Procedures Public Notice.*

91. In calculating its upfront payment amount, an applicant should determine the maximum number of bidding units on which it may wish to be active (bid on or hold provisionally winning bids on) in any single round, and submit an upfront payment amount covering that number of bidding units. In order to make this calculation, an applicant should add together the bidding units for all construction permits on which it seeks to be active in any given round. Applicants should check their calculations carefully, as there is no provision for increasing a bidder's eligibility after the upfront payment deadline.

92. 47 CFR 1.2106(a) requires that applicants that are former defaulters or delinquents must pay upfront payments 50 percent greater than non-former defaulters or non-former delinquents. For purposes of this calculation, the applicant includes the applicant itself, its affiliates, its controlling interests, and affiliates of its controlling interests, as defined by 47 CFR 1.2110. If an applicant is a former defaulter or delinquent, it must calculate its upfront payment for all of its identified construction permits by multiplying the number of bidding units on which it wishes to be active by 1.5.

93. In order to calculate the number of bidding units to assign to former defaulters, the Commission will divide the upfront payment received by 1.5 and round the result up to the nearest bidding unit. If an applicant fails to submit a sufficient upfront payment to establish eligibility to bid on at least one of the construction permits selected on its FCC Form 175, the applicant will not

be eligible to participate in the auction. This ineligible applicant will retain its status as an applicant in Auction 93 and will remain subject to 47 CFR 1.2105(c) and 73.5002(d).

E. Applicant's Wire Transfer Information for Purposes of Refunds of Upfront Payments

94. After the auction, applicants that are not winning bidders or are winning bidders whose upfront payment exceeded the total net amount of their winning bids may be entitled to a refund of some or all of their upfront payment. All refunds will be returned to the payer of record, as identified on the FCC Form 159, unless the payer submits written authorization instructing otherwise. Bidders that drop out of the auction completely (have exhausted all of their activity rule waivers and have no remaining bidding eligibility) may request a refund of their upfront payments before the close of the auction.

95. To ensure that refunds of upfront payments are processed in an expeditious manner, the Commission is requesting that all pertinent information be supplied. Applicants can provide the information electronically during the initial short-form application filing window after the form has been submitted. (Applicants are reminded that information submitted as part of an FCC Form 175 will be available to the public; for that reason, wire transfer information should not be included in an FCC Form 175.) Specific instructions were provided in the *Auction 93 Procedures Public Notice* for the submission of wire transfer instructions by fax.

F. Auction Registration

96. Approximately ten days before the auction, the Bureaus will issue a public notice announcing all qualified bidders for the auction. Qualified bidders are those applicants with submitted FCC Form 175 applications that are deemed timely-filed, accurate, and complete, provided that such applicants have timely submitted an upfront payment that is sufficient to qualify them to bid.

97. All qualified bidders are automatically registered for the auction. Registration materials will be distributed prior to the auction by overnight mail. The mailing will be sent only to the contact person at the contact address listed in the FCC Form 175 and will include the SecurID® tokens that will be required to place bids, the Integrated Spectrum Auction System (ISAS) Bidder's Guide, and the Auction Bidder Line telephone number.

98. Qualified bidders that do not receive this registration mailing will not be able to submit bids. Therefore, if this mailing is not received by noon on Tuesday, March 20, 2012, such a qualified bidder must call the Auctions Hotline at (717) 338–2868. Receipt of this registration mailing is critical to participating in the auction, and each applicant is responsible for ensuring it has received all of the registration material.

99. In the event that SecurID® tokens are lost or damaged, only a person who has been designated as an authorized bidder, the contact person, or the certifying official on the applicant's short-form application may request replacements. To request replacement of these items, call Technical Support at (877) 480–3201, option nine; (202) 414–1250; or (202) 414–1255 (TTY).

G. Remote Electronic Bidding

100. The Commission will conduct this auction over the Internet, and telephonic bidding will be available as well. Only qualified bidders are permitted to bid. Each applicant should indicate its bidding preference—electronic or telephonic—on its FCC Form 175. In either case, each authorized bidder must have its own SecurID® token, which the Commission will provide at no charge. Each applicant with one authorized bidder will be issued two SecurID® tokens, while applicants with two or three authorized bidders will be issued three tokens. For security purposes, the SecurID® tokens, the telephonic bidding telephone number, and the ISAS Bidder's Guide are only mailed to the contact person at the contact address listed on the FCC Form 175. Each SecurID® token is tailored to a specific auction. SecurID® tokens issued for other auctions or obtained from a source other than the FCC will not work for Auction 93.

H. Mock Auction—March 23, 2012

101. All qualified bidders will be eligible to participate in a mock auction on Friday, March 23, 2012. The mock auction will enable bidders to become familiar with the FCC Auction System prior to the auction. The Bureaus strongly recommend that all bidders participate in this mock auction. Details will be announced by public notice.

IV. Auction

102. The first round of bidding for Auction 93 will begin on Tuesday, March 27, 2012. The initial bidding schedule will be announced in a public notice listing the qualified bidders, which will be released approximately 10 days before the start of the auction.

A. Auction Structure

i. Simultaneous Multiple Round Auction

103. In Auction 93, all construction permits will be auctioned in a single auction using the Commission's standard simultaneous multiple-round auction format. This type of auction offers every construction permit for bid at the same time and consists of successive bidding rounds in which eligible bidders may place bids on individual construction permits. A bidder may bid on, and potentially win, any number of construction permits. Unless otherwise announced, bids will be accepted on all construction permits in each round of the auction until bidding stops on every construction permit.

ii. Eligibility and Activity Rules

104. The Bureaus will use upfront payments to determine initial (maximum) eligibility (as measured in bidding units) for Auction 93. The amount of the upfront payment submitted by a bidder determines its initial bidding eligibility, the maximum number of bidding units on which a bidder may be active. Each construction permit is assigned a specific number of bidding units as listed in Attachment A of the *Auction 93 Procedures Public Notice.* Bidding units assigned to each construction permit do not change as prices rise during the auction. Upfront payments are not attributed to specific construction permits. Rather, a bidder may place bids on any of the construction permits selected on its FCC Form 175 as long as the total number of bidding units associated with those construction permits does not exceed its current eligibility.

105. In order to ensure that an auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. Bidders are required to be active on a specific percentage of their current bidding eligibility during each round of the auction. Auction 93 will be a single-stage auction and 100 percent activity is required. In each round of the auction, a bidder desiring to maintain its current bidding eligibility is required to be active on 100 percent of its bidding eligibility. That is, a bidder must place a bid (or bids) and/or have a provisionally winning bid (or bids) during each round of the auction.

106. A bidder's activity level in a round is the sum of the bidding units associated with any construction permits covered by new and provisionally winning bids. A bidder is considered active on a construction permit in the current round if it is either the provisionally winning bidder at the end of the previous bidding round or if it submits a bid in the current round.

107. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any remain, or a reduction in the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction.

iii. Activity Rule Waivers

108. The Bureaus decided to provide bidders in Auction 93 with three activity rule waivers. Bidders may use an activity rule waiver in any round during the course of the auction. Use of an activity rule waiver preserves the bidder's eligibility despite its activity in the current round being below the required minimum activity level. An activity rule waiver applies to an entire round of bidding and not to a particular construction permit. Waivers can be either proactive or automatic and are principally a mechanism for auction participants to avoid the loss of bidding eligibility in the event that exigent circumstances prevent them from placing a bid in a particular round.

109. The FCC Auction System assumes that a bidder with insufficient activity would prefer to apply an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver at the end of any bidding round in which a bidder's activity level is below the minimum required unless (1) the bidder has no activity rule waivers remaining or (2) the bidder overrides the automatic application of a waiver by reducing eligibility. If no waivers remain and the activity requirement is not satisfied, the FCC Auction System will permanently reduce the bidder's eligibility, possibly curtailing or eliminating the ability to place additional bids in the auction.

110. A bidder with insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding round by using the reduce eligibility function in the FCC Auction System. In this case, the bidder's eligibility is permanently reduced to bring it into compliance with the activity rule described above. Reducing eligibility is an irreversible action; once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility, even if the round has not yet closed.

111. Finally, a bidder may apply an activity rule waiver proactively as a means to keep the auction open without placing a bid. If a proactive waiver is applied (using the ''apply waiver'' function in the FCC Auction System) during a bidding round in which no bids are placed the auction will remain open and the bidder's eligibility will be preserved. However, an automatic waiver applied by the FCC Auction System in a round in which there are no new bids or proactive waivers will not keep the auction open. A bidder cannot submit a proactive waiver after bidding in a round, and applying a proactive waiver will preclude it from placing any bids in that round. Applying a waiver is irreversible; once a bidder submits a proactive waiver, the bidder cannot unsubmit the waiver even if the round has not yet ended.

iv. Auction Stopping Rules

112. For Auction 93, the Bureaus will employ a simultaneous stopping rule approach, which means all construction permits remain available for bidding until bidding stops simultaneously on every construction permit. More specifically, bidding will close on all construction permits after the first round in which no bidder submits any new bids or applies a proactive waiver.

113. The Bureaus also adopted for Auction 93 alternative versions of the simultaneous stopping rule. Under Option 1, the auction would close for all construction permits after the first round in which no bidder applies an activity rule waiver or places any new bids on any construction permit on which it is not the provisionally winning bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a construction permit for which it is the provisionally winning bidder would not keep the auction open under this modified stopping rule.

114. Under Option 2, the auction would close for all construction permits after the first round in which no bidder applies a waiver or places any new bids on any construction permit that is not FCC held. Thus, absent any other bidding activity, a bidder placing a new bid on a construction permit that does not already have a provisionally winning bid (an FCC-held construction permit) would not keep the auction open under this modified stopping rule.

115. Under Option 3, the auction would close using a modified version of the simultaneous stopping rule that combines Options 1 and 2 above.

116. Under Option 4, the auction would end after a specified number of additional rounds. If the Bureaus invoke this special stopping rule, it will accept bids in the specified final round(s), after which the auction will close.

117. Under Option 5, the auction would remain open even if no bidder places any new bids or applies a waiver. In this event, the effect will be the same as if a bidder had applied a waiver. Thus, the activity rule will apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use a waiver.

118. The Bureaus proposed to exercise these options only in certain circumstances, for example, where the auction is proceeding unusually slowly or quickly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time or will close prematurely. Before exercising these options, the Bureaus are likely to attempt to change the pace of the auction. For example, the Bureaus may adjust the pace of bidding by changing the number of bidding rounds per day and/or the minimum acceptable bids. The Bureaus retain the discretion to exercise any of these options with or without prior announcement during the auction.

v. Auction Delay, Suspension, or Cancellation

119. By public notice or by announcement during the auction, the Bureaus may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding. Network interruption may cause the Bureaus to delay or suspend the auction. In such cases, the Bureaus, in their sole discretion, may elect to resume the auction starting from the beginning of the current round or from some previous round, or cancel the auction in its entirety. The Bureaus will exercise this authority solely at the discretion of the Bureaus, and not as a substitute for situations in which bidders may wish to apply their activity rule waivers.

B. Bidding Procedures

i. Round Structure

120. The initial schedule of bidding rounds will be announced in the public notice listing the qualified bidders, which is released approximately 10 days before the start of the auction. Each

bidding round is followed by the release of round results. Multiple bidding rounds may be conducted each day.

121. The Bureaus have the discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. The Bureaus may change the amount of time for the bidding rounds, the amount of time between rounds, or the number of rounds per day, depending upon bidding activity and other factors.

ii. Reserve Price and Minimum Opening Bids

122. The Bureaus did not establish a reserve price for the construction permits to be offered in Auction 93. The Bureaus did establish minimum opening bids for each construction permit in this auction. The specific minimum opening bid amounts for the construction permits available in Auction 93 were specified in Attachment A of the *Auction 93 Procedures Public Notice.*

123. In response to the *Auction 93 Comment Public Notice,* a commenter requested that the minimum opening bid for a construction permit at Grants Pass, Oregon, Channel 257A (MM–FM936–A) be reduced from $35,000 to $750. The Bureaus agreed that some reduction of the proposed minimum opening bid amount was warranted in this case, though the Bureaus did not believe that the reduction proposed by the commenter was justified. The Bureaus adopted a minimum opening bid (and corresponding upfront payment amount) for MM–FM936–A, at Grants Pass, Oregon, of $15,000.

iii. Bid Amounts

124. In each round, an eligible bidder will be able to place a bid on a given construction permit in any of up to nine different amounts, if the bidder has sufficient eligibility to place a bid on the particular construction permit. The FCC Auction System interface will list the nine acceptable bid amounts for each construction permit. In the event of duplicate bid amounts due to rounding, the FCC Auction System will omit the duplicates and will list fewer acceptable bid amounts for the permit.

125. The first of the acceptable bid amounts is called the minimum acceptable bid amount. The minimum acceptable bid amount for a construction permit will be equal to its minimum opening bid amount until there is a provisionally winning bid for the construction permit. After there is a provisionally winning bid for a permit, the minimum acceptable bid amount will be a certain percentage higher. That is, the minimum acceptable bid amount will be calculated by multiplying the provisionally winning bid amount times one plus the minimum acceptable bid percentage. The Bureaus will begin the auction with a minimum acceptable bid percentage of 10 percent. Thus, the minimum acceptable bid amount will equal (provisionally winning bid amount) * (1.10), rounded.

126. The eight additional bid amounts are calculated using the minimum acceptable bid amount and a bid increment percentage, which will be 5 percent for the beginning of Auction 93. The first additional acceptable bid amount equals the minimum acceptable bid amount times one plus the bid increment percentage, rounded. For Auction 93, the calculation is (minimum acceptable bid amount) * (1 + 0.05), rounded, or (minimum acceptable bid amount) * 1.05, rounded; the second additional acceptable bid amount equals the minimum acceptable bid amount times one plus two times the bid increment percentage, rounded, or (minimum acceptable bid amount) * 1.10, rounded; the third additional acceptable bid amount equals the minimum acceptable bid amount times one plus three times the bid increment percentage, rounded, or (minimum acceptable bid amount) * 1.15, rounded; etc. The Bureaus will round the results of these calculations using the standard rounding procedures for auctions.

127. The Bureaus retain the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid percentage, the bid increment percentage, and the number of acceptable bid amounts if the Bureaus determine that circumstances so dictate. The Bureaus retain the discretion to do so on a construction permit-by-construction permit basis. The Bureaus retain the discretion to limit (a) the amount by which a minimum acceptable bid for a construction permit may increase compared with the corresponding provisionally winning bid, and (b) the amount by which an additional bid amount may increase compared with the immediately preceding acceptable bid amount. For example, the Bureaus could set a $10,000 limit on increases in minimum acceptable bid amounts over provisionally winning bids. Thus, if calculating a minimum acceptable bid using the minimum acceptable bid percentage results in a minimum acceptable bid amount that is $12,000 higher than the provisionally winning bid on a construction permit, the minimum acceptable bid amount would instead be capped at $10,000 above the provisionally winning bid. If the Bureaus exercise this discretion, the Bureaus will alert bidders by an announcement in the FCC Auction System during the auction.

iv. Provisionally Winning Bids

128. At the end of each bidding round, a provisionally winning bid will be determined based on the highest bid amount received for each construction permit. A provisionally winning bid will remain the provisionally winning bid until there is a higher bid on the same construction permit at the close of a subsequent round. Provisionally winning bids at the end of the auction become the winning bids. Provisionally winning bids count toward activity for purposes of the activity rule.

129. The Bureaus will use a random number generator to select a single provisionally winning bid in the event of identical high bid amounts being submitted on a construction permit in a given round (*i.e.,* tied bids). Specifically, the FCC Auction System will assign a random number to each bid upon submission. The tied bid with the highest random number wins the tiebreaker, and becomes the provisionally winning bid. Bidders, regardless of whether they hold a provisionally winning bid, can submit higher bids in subsequent rounds. However, if the auction were to end with no other bids being placed, the winning bidder would be the one that placed the provisionally winning bid.

v. Bidding

130. All bidding will take place remotely either through the FCC Auction System or by telephonic bidding. There will be no on-site bidding during Auction 93. Telephonic bid assistants are required to use a script when entering bids placed by telephone. Telephonic bidders must allow sufficient time to bid by placing their calls well in advance of the close of a round. The length of a call to place a telephonic bid may vary; please allow a minimum of ten minutes.

131. A bidder's ability to bid on specific construction permits is determined by two factors: (1) the construction permits selected on the bidder's FCC Form 175 and (2) the bidder's eligibility. The bid submission screens will allow bidders to submit bids on only those construction permits the bidder selected on its FCC Form 175.

132. In order to access the bidding function of the FCC Auction System, bidders must be logged in during the bidding round using the passcode generated by the SecurID® token and a

personal identification number PIN created by the bidder. The Bureaus strongly encouraged bidders to print a round summary for each round after they have completed all of their activity for that round.

133. In each round, an eligible bidder will be able to place bids on a given construction permit in as many as nine pre-defined bid amounts, if the bidder has sufficient eligibility to place a bid on the particular construction permit. For each construction permit, the FCC Auction System will list the acceptable bid amounts in a drop-down box. Bidders use the drop-down box to select from among the acceptable bid amounts. The FCC Auction System also includes an upload function that allows text files containing bid information to be uploaded.

134. Until a bid has been placed on a construction permit, the minimum acceptable bid amount for that permit will be equal to its minimum opening bid amount. Once there are bids on a permit, minimum acceptable bids for the following round will be determined.

135. During a round, an eligible bidder may submit bids for as many construction permits as it wishes (providing that it is eligible to bid on the specific permits), remove bids placed in the current bidding round, or permanently reduce eligibility. If multiple bids are submitted for the same construction permit in the same round, the system takes the last bid entered as that bidder's bid for the round. Bidding units associated with construction permits for which the bidder has removed bids do not count towards current activity.

vi. Bid Removal and Bid Withdrawal

136. In Auction 93, each bidder will have the option of removing any bids placed in a round provided that such bids are removed before the close of that bidding round. By using the remove bids function in the FCC Auction System, a bidder may effectively unsubmit any bid placed within that round. A bidder removing a bid placed in the same round is not subject to withdrawal payments. Removing a bid will affect a bidder's activity for the round in which it is removed, *i.e.,* a bid that is removed does not count toward bidding activity. Once a round closes, a bidder may no longer remove a bid.

137. The Bureaus will prohibit bidders in Auction 93 from withdrawing any bids after the round in which the bids were placed has ended. Bidders are cautioned to select bid amounts carefully because no bid withdrawals will be allowed, even if a bid was mistakenly or erroneously made.

vii. Round Results

138. Reports reflecting bidders' identities for Auction 93 will be available before and during the auction. Thus, bidders will know in advance of this auction the identities of the bidders against which they are bidding.

139. Bids placed during a round will not be made public until the conclusion of that round. After a round closes, the Bureaus will compile reports of all bids placed, current provisionally winning bids, new minimum acceptable bid amounts for the following round, whether the construction permit is FCC held, and bidder eligibility status (bidding eligibility and activity rule waivers), and post the reports for public access.

viii. Auction Announcements

140. The Commission will use auction announcements to report necessary information such as schedule changes. All auction announcements will be available by clicking a link in the FCC Auction System.

V. Post-Auction Procedures

141. Shortly after bidding has ended, the Commission will issue a public notice declaring the auction closed, identifying the winning bidders, and establishing the deadlines for submitting down payments, final payments, and the long-form applications (FCC Forms 301).

A. Down Payments

142. Within ten business days after release of the auction closing public notice, each winning bidder must submit sufficient funds (in addition to its upfront payment) to bring its total amount of money on deposit with the Commission for Auction 93 to twenty percent of the net amount of its winning bids (gross bids less any applicable new entrant bidding credits).

B. Final Payments

143. Each winning bidder will be required to submit the balance of the net amount of its winning bids within ten business days after the applicable deadline for submitting down payments.

C. Long-Form Application (FCC Form 301)

144. The Commission's rules currently provide that within thirty days following the close of bidding and notification to the winning bidders, unless a longer period is specified by public notice, winning bidders must electronically submit a properly completed long-form application (FCC Form 301, Application for Construction Permit for Commercial Broadcast Station), and required exhibits for each construction permit won through Auction 93. Winning bidders claiming new entrant status must include an exhibit demonstrating their eligibility for the bidding credit. Further instructions on these and other filing requirements will be provided to winning bidders in the auction closing public notice.

D. Default and Disqualification

145. Any winning bidder that defaults or is disqualified after the close of the auction (*i.e.,* fails to remit the required down payment within the prescribed period of time, fails to submit a timely long-form application, fails to make full payment, or is otherwise disqualified) will be subject to the payments described in 47 CFR 1.2104(g)(2). This payment consists of a deficiency payment, equal to the difference between the amount of the Auction 93 bidder's winning bid and the amount of the winning bid the next time a construction permit covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less. The percentage of the applicable bid to be assessed as an additional payment for defaults in Auction 93 was established at twenty percent of the applicable bid.

146. If a default or disqualification involves gross misconduct, misrepresentation, or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing authorizations held by the applicant.

Federal Communications Commission.

Gary Michaels,

Deputy Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. 2011–32430 Filed 12–16–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 3, 2012.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. The Garst Family consisting of Elizabeth Garst, Edward Garst and Rachel Garst, all of Coon Rapids, Iowa; Jennifer Garst, Ames, Iowa; Kate Garst Revocable Trust, Des Moines, Iowa; Sarah Garst, West Des Moines, Iowa; as a group acting in concert and individually by Elizabeth Garst, Sarah Garst, and Sally Garst Haerr, all of Fairfield, Iowa, to acquire additional voting shares of Perry Investment Company, and thereby indirectly acquire additional voting shares of Racoon Valley Bank, both in Perry, Iowa.

Board of Governors of the Federal Reserve System, December 13, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–32291 Filed 12–16–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 12, 2012.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Valley Bancshares Incorporated,* Pauls Valley, Oklahoma, to acquire up to 23 percent of the voting shares of First Lindsay Corporation, and thereby indirectly acquire voting shares of The First National Bank of Lindsay, both in Lindsay, Oklahoma.

Board of Governors of the Federal Reserve System, December 13, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–32293 Filed 12–16–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in or to Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 3, 2012.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414: *1. Talen, Inc.,* Traer, Iowa; to continue to engage in the extensions of credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, December 13, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–32292 Filed 12–16–11; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Webinar Overview of the National Vaccine Advisory Committee Healthcare Personnel Influenza Vaccination Subgroup's Draft Report and Draft Recommendations for Achieving the Healthy People 2020 Annual Coverage Goals for Influenza Vaccination in Healthcare Personnel

AGENCY: National Vaccine Program Office, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The National Vaccine Program Office (NVPO), on behalf of the National Vaccine Advisory Committee (NVAC), Healthcare Personnel Influenza Vaccination Subgroup (HCPIVS), will host an informational webinar to introduce the committee's draft report and draft recommendations for annually achieving 90% influenza vaccination coverage among healthcare personnel, as stated in the Healthy People 2020 goals. The informational webinar provides an opportunity for the public to listen to an overview of the findings and processes used by the HCPIVS members to derive their recommendations. Pre-registration for the webinar is required. The co-chairs of the HCPIVS working group will also provide information to the public on how to submit written comments on the draft report and draft recommendations through the **Federal Register** process. Registrants for the webinar will be provided an opportunity to submit questions about the report at the time of registration. Public and Stakeholder comments on the draft report and the draft recommendations should be directed to *http://www.hhs.gov/nvpo/nvac/subgroups/healthcare_personnel_influenza_vacc_subgroup.html.*

DATES: This webinar will be held on Monday, January 9, 2012 from 11 a.m.–12 p.m. EST. Registration will close January 4, 2012 at 5 p.m. EST.

ADDRESSES: Information about this webinar and registration can be found at: *http://www.hhs.gov/nvpo/nvac/meetings/index.html*.

Submitting Questions: Questions regarding the report may be submitted at the time of registration. Registration closes January 4, 2012 at 5 p.m. EST. The chairs of the working group reserve the right to determine which, if any, questions they will answer in the available time.

All stakeholders and members of the public may register to attend this webinar; the number of call-in lines is limited and available on a first-come, first-serve basis.

FOR FURTHER INFORMATION CONTACT: Jennifer Gordon, Ph.D., National Vaccine Program Office, Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Ave. SW., Room 733G.3, Washington, DC 20201, Attn: Healthcare Personnel Influenza Vaccination, telephone (202) 205–5673; fax (202) 260–1165; email: *nvpo@hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The National Vaccine Advisory Committee (NVAC) was established in 1987 to comply with Title XXI of the Public Health Service Act (Pub. L. 99–660) (§ 2105) (42 U.S. Code 300aa–5 (PDF–78 KB)). Its purpose is to advise and make recommendations to the Director of the National Vaccine Program on matters related to program responsibilities. The Assistant Secretary for Health (ASH) has been designated by the Secretary of Health and Human Services as the Director of the National Vaccine Program. The ASH has charged the NVAC with developing recommended strategies for annually achieving 90% influenza vaccination coverage among healthcare personnel, as stated in the Healthy People 2020 goals. The Healthcare Personnel Influenza Vaccination Subgroup (HCPIVS), a subgroup of the NVAC Adult Immunization Working Group (AWIG), was established to address this charge on behalf of the NVAC. The HCPIVS consists of a broad range of stakeholders including representatives from a variety of important medical and public health agencies and professional organizations. The HCPIVS members have deliberated on a number of scientific findings, position statements, and presentations that examine issues pertaining to influenza vaccination in healthcare personnel. Through discussion and careful review, the HCPIVS have developed draft recommendations for consideration by the NVAC to achieve this charge. The HCPIVS draft report and draft recommendations will be made available for public review and written comment from December 16, 2011 to January 16, 2012 through the **Federal Register** process.

The informational webinar provides an opportunity for the public to hear an overview of the findings and processes used by the HCPIVS members to derive their recommendations. The HCPIVS members will also provide information to the public on how to submit written comments on the draft report and draft recommendations through the **Federal Register** process. Written comments from the **Federal Register** will be given consideration by the NVAC when deliberating their final recommendations to the ASH.

Dated: December 8, 2011.

Mark Grabowsky,

Deputy Director, National Vaccine Program Office.

[FR Doc. 2011–32319 Filed 12–16–11; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Solicitation of Written Comments on the Draft Report and Draft Recommendations of the Healthcare Personnel Influenza Vaccination Subgroup for Consideration by the National Vaccine Advisory Committee on Achieving the Healthy People 2020 Annual Coverage Goals for Influenza Vaccination in Healthcare Personnel

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health, National Vaccine Program Office.

ACTION: Notice.

SUMMARY: The National Vaccine Advisory Committee (NVAC) was established in 1987 to comply with Title XXI of the Public Health Service Act (Pub. L. 99–660) (§ 2105) (42 U.S. Code 300aa–5 (PDF—78 KB)). Its purpose is to advise and make recommendations to the Director of the National Vaccine Program on matters related to program responsibilities. The Assistant Secretary for Health (ASH) has been designated by the Secretary of Health and Human Services as the Director of the National Vaccine Program. The ASH has charged the NVAC with developing recommended strategies for annually achieving 90% influenza vaccination coverage among healthcare personnel, as stated in the Healthy People 2020 goals. The Healthcare Personnel Influenza Vaccination Subgroup (HCPIVS), a subgroup of the NVAC Adult Immunization Working Group (AWIG), was established to address this charge on behalf of the NVAC. A draft report and draft recommendations have been developed by the HCPIVS for consideration by the NVAC and will be deliberated on by the NVAC when developing NVAC's final recommendations to the ASH. The National Vaccine Program Office (NVPO) is soliciting public comment on the Healthcare Personnel Influenza Vaccination Subgroup draft report and draft recommendations for increasing vaccination of healthcare personnel to meet the Healthy People 2020 goals. Individuals and organizations are encouraged to submit their comments on the draft report and draft recommendations. It is anticipated that the draft report and draft recommendations, as revised with consideration given to public comment and stakeholder input, will be presented in February 2012 to the NVAC for deliberation and decision on their final recommendations.

DATES: Comments for consideration by the NVAC should be received no later than 5:00 p.m. EST on Monday, January 16, 2012.

ADDRESSES:

(1) The draft report and draft recommendations are available on the web at *http://www.hhs.gov/nvpo/nvac/subgroups/healthcare_personnel_influenza_vacc_subgroup.html.*

(2) Electronic responses are preferred and may be addressed to: *nvpo@hhs.gov.*

(3) Written responses should be addressed to: National Vaccine Program Office, U.S. Department of Health and Human Services, 200 Independence Avenue SW., Room 733G.3, Washington, DC 20201, Attn: Healthcare Personnel Influenza Vaccination c/o Jennifer Gordon.

FOR FURTHER INFORMATION CONTACT: Jennifer Gordon, Ph.D., National Vaccine Program Office, U.S. Department of Health and Human Services, 200 Independence Ave. SW., Room 733G.3, Washington, DC 20201, Attn: Healthcare Personnel Influenza Vaccination, telephone (202) 205–5673; fax (202) 260–1165; email: *nvpo@hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The National Vaccine Program Office (NVPO) is located within the Office of the Assistant Secretary for Health (OASH), Office of the Secretary, U.S. Department of Health and Human Services. NVPO provides leadership and fosters collaboration among the various Federal agencies involved in vaccine and immunization activities. These coordinated efforts are aimed to achieve the strategic goals outlined in the National Vaccine Plan. The National Vaccine Plan provides a framework, including goals, objectives, and strategies, for pursuing the prevention of infectious diseases through immunizations. The NVPO also supports the National Vaccine Advisory Committee (NVAC). The NVAC advises and makes recommendations to the Assistant Secretary for Health (ASH) in his capacity as the Director of National Vaccine Program on matters related to vaccine program responsibilities.

In response to historically low influenza vaccination rates in healthcare personnel, the ASH charged NVAC with developing recommended strategies for annually achieving 90% influenza vaccination coverage among healthcare personnel, as stated in the Healthy People 2020 goals. The Healthcare Personnel Influenza Vaccination Subgroup (HCPIVS), a subgroup of the NVAC Adult Immunization Working Group (AWIG), was established to address this charge on behalf of the NVAC. The HCPIVS consists of a broad range of stakeholders including representatives from a variety of medical and public health agencies and professional organizations. The HCPIVS members have deliberated on a number of scientific findings, position statements, and presentations that examine issues pertaining to influenza vaccination in healthcare personnel. Through discussion and careful review, the HCPIVS has developed draft recommendations for consideration by the NVAC to achieve the charge, as noted above.

The draft report describes the importance of influenza as a public health issue, the importance of protecting vulnerable patients from influenza infection, and the importance of influenza immunization as part of a comprehensive influenza infection control program for protecting both healthcare personnel and patients against influenza infections. From these findings and conclusions, HCPIVS has developed draft recommendations that support strategies which have shown success in improving influenza vaccination coverage among healthcare personnel.

NVPO is seeking comments on these draft recommendations from a variety of stakeholders, including the general public, for consideration by the NVAC as they develop their final recommendations to the ASH. Comments received will be available for public viewing on the NVAC Healthcare Personnel Influenza Vaccination Subgroup site located on the NVPO Web site *http://www.hhs.gov/nvpo/nvac/subgroups/healthcare_personnel_influenza_vacc_subgroup.html.*

II. Request for Comment

NVPO, on behalf of the NVAC Healthcare Personnel Influenza Vaccination Subgroup, requests input on the draft report and draft recommendations *http://www.hhs.gov/nvpo/nvac/subgroups/healthcare_personnel_influenza_vacc_subgroup.html.*

In addition to general comments, NVPO is seeking input on additional proven strategies and/or potential barriers to achieving the Healthy People 2020 annual goal of 90% influenza vaccine coverage among healthcare personnel that are not addressed in the NVAC Healthcare Personnel Influenza Vaccination Subgroup draft report and draft recommendations. Please limit comments to 6 pages.

III. Potential Responders

NVPO invites input from a broad range of individuals and organizations that have interests in influenza vaccination coverage in Healthcare Personnel as an important patient safety measure. Examples of potential responders include, but are not limited to, the following:

—General public;
—Advocacy groups and public interest organizations;
—State and local governments;
—State and local public health departments;
—Healthcare professional societies and organizations;
—Healthcare organizations.

When responding, please self-identify with any of the above or other categories (include all that apply) and your name. All comments submitted will be made publicly available. Anonymous submissions will not be considered and will not have their comments posted.

Written submissions should not exceed 6 pages. Any information you submit will be made public. Consequently, do not send proprietary, commercial, financial, business, confidential, trade secret, or personal information that you do not wish to be made public.

IV. Public Access

Comments on the draft report and draft recommendations will be available to the public on the NVPO Web site at: *http://www.hhs.gov/nvpo/nvac/subgroups/healthcare_personnel_influenza_vacc_subgroup.html.*

You may access public comments received by going to the above Web site.

Dated: November 07, 2011.

Bruce Gellin,

Deputy Assistant Secretary for Health, Director, National Vaccine Program Office.

[FR Doc. 2011–32308 Filed 12–16–11; 8:45 am]

BILLING CODE 4150–28–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Solicitation of Nominations for Membership on the Secretary's Advisory Committee on Human Research Protections

AGENCY: Office for Human Research Protections, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

Authority: 42 U.S.C. 217a, Section 222 of the Public Health Service 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 Office for Human Research Protections (OHRP), a program office in the Office of the Assistant Secretary for Health, Department of Health and Human Services (HHS), is seeking nominations of qualified candidates to be considered for appointment as members of the Secretary's Advisory Committee on Human Research Protections (SACHRP). SACHRP provides advice and recommendations to the Secretary, HHS, and the Assistant Secretary for Health on matters pertaining to the continuance and improvement of functions within the authority of HHS directed toward protections for human subjects in research. SACHRP was established by the Secretary, HHS, on October 1, 2002. OHRP is seeking nominations of qualified candidates to fill four positions on the Committee membership that will be vacated during the 2012 calendar year.

DATES: Nominations for membership on the Committee must be received no later than February 17, 2012.

ADDRESSES: Nominations should be mailed or delivered to Dr. Jerry Menikoff, Director, Office for Human Research Protections, Department of Health and Human Services, 1101 Wootton Parkway, Suite 200; Rockville, MD 20852. Nominations will not be accepted by email or by facsimile.

FOR FURTHER INFORMATION CONTACT: Julia Gorey, Executive Director, SACHRP, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852, telephone: (240) 453–8141. A copy of the Committee charter and list of the current members can be obtained by contacting Ms. Gorey, accessing the SACHRP Web site at *http://www.hhs.gov/ohrp/sachrp,* or requesting via email at *sachrp@osophs.dhhs.gov.*

SUPPLEMENTARY INFORMATION: The Committee provides advice on matters pertaining to the continuance and improvement of functions within the authority of HHS directed toward protections for human subjects in research. Specifically, the Committee provides advice relating to the responsible conduct of research involving human subjects with particular emphasis on special populations such as neonates and children, prisoners, the decisionally impaired, pregnant women, embryos and fetuses, individuals and populations in international studies, investigator conflicts of interest and populations in which there are individually identifiable samples, data or information.

In addition, the Committee is responsible for reviewing selected ongoing work and planned activities of the OHRP and other offices/agencies within HHS responsible for human subjects protection. These evaluations may include, but are not limited to, a review of assurance systems, the application of minimal research risk standards, the granting of waivers, education programs sponsored by OHRP, and the ongoing monitoring and oversight of institutional review boards and the institutions that sponsor research.

Nominations: The OHRP is requesting nominations to fill four positions for voting members of SACHRP. Two positions will become vacant in July and two in October, 2012. Nominations of potential candidates for consideration are being sought from a wide array of fields, including, but not limited to: Public health and medicine, behavioral and social sciences, health administration, and biomedical ethics. To qualify for consideration of appointment to the Committee, an individual must possess demonstrated experience and expertise in any of the several disciplines and fields pertinent to human subjects protection and/or clinical research.

The individuals selected for appointment to the Committee can be invited to serve a term of up to four years. Committee members receive a stipend and reimbursement for per diem and any travel expenses incurred for attending Committee meetings and/or conducting other business in the interest of the Committee. Interested applicants may self-nominate.

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, daytime telephone number, and the home and/or work address, telephone number, and email address of the individual being nominated; and (3) a current copy of the nominee's curriculum vitae. 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 to ensure that individuals from a broad representation of geographic areas, women and men, 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.

Individuals who are selected to be considered for appointment will be required to provide detailed information regarding their financial holdings, consultancies, and research grants or contracts. Disclosure of this information is necessary in order to determine if the selected candidate is involved in any activity that may pose a potential conflict with the official duties to be performed as a member of SACHRP.

Dated: December 12, 2011.

Jerry Menikoff,

Director, Office for Human Research Protections, Executive Secretary, Secretary's Advisory Committee on Human Research Protections.

[FR Doc. 2011–32326 Filed 12–16–11; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[CDC–2011–0014]

Correction for Draft Vieques Report: An Evaluation of Environmental, Biological, and Health Data From the Island of Vieques, PR

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (DHHS).

ACTION: General notice: correction.

SUMMARY: On December 12, 2011 the Agency for Toxic Substance and Disease Register published a 30-day public comment period notice in the **Federal Register** (76 FR 77234) for the Draft Vieques Report: *An Evaluation of Environmental, Biological, and Health Data From the Island of Vieques, Puerto Rico.''* This comment period was published as closing on January 11, 2012 in error. The comment period will be open for 90 days and will close March 11, 2012.

DATES: Written comments must be received on or before March 12, 2012.

Electronic comments may be sent via *http://www.regulations.gov*, docket control number CDC–2011–0014. Please follow the directions on the site to submit comments. Comments may also be sent to the attention of Rolanda Morrison, ATSDR Records Center, Mailstop F–09, 4770 Buford Highway NE., Atlanta, GA 30341. Send one copy of all comments and three copies of all supporting documents. Comments may also be submitted by email to *ATSDRecordsCenter@cdc.gov*. Please ensure docket control number CDC–2011–0014 is included in the subject line of all written correspondence. Because all public comments regarding this draft report are available for public inspection, no confidential business information or other confidential information should be submitted in response to this notice.

FOR FURTHER INFORMATION CONTACT: The Division of Health Assessment and Consultation, Agency for Toxic Substances and Disease Registry,

Mailstop F–59, 1600 Clifton Road NE., Atlanta, Georgia 30333, email: *viequesreport@cdc.gov*.

SUPPLEMENTARY INFORMATION: This report's principal focus is to review updated environmental data on Vieques air, water, soil, seafood, and locally grown foods. In addition, this report evaluates human biomonitoring and health outcome data. ATSDR is providing a public comment period for this draft report as a means to best serve public health and the residents of Vieques, Puerto Rico. The Draft Vieques Report is available in English and Spanish at *www.regulations.gov* in the docket identified by Docket ID No. CDC–2011–0014 and *www.atsdr.cdc.gov/sites/vieques/*.

Dated: December 13, 2011.

Thomas Sinks,

Deputy Director, National Center for Environmental Health/Agency for Toxic Substances and Disease Registry.

[FR Doc. 2011–32371 Filed 12–16–11; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects:

Title: Plan for Foster Care and Adoption Assistance—Title IV–E.

OMB No.: 0980–0141.

Description: A title IV–E plan is required by section 471, part IV–E of the Social Security Act (the Act) for each public child welfare agency requesting Federal funding for foster care, adoption assistance and guardianship assistance under the Act. Section 479B of the Act provides for an Indian tribe, tribal organization or tribal consortium (Tribe) to operate a title IV–E program in the same manner as a State with minimal exceptions. The Tribe must have an approved title IV–E Plan. The title IV–E plan provides assurances the programs will be administered in conformity with the specific requirements stipulated in title IV–E. The plan must include all applicable State or Tribal statutory, regulatory, or policy references and citations for each requirement as well as supporting documentation. A title IV–E agency may use the pre-print format prepared by the Children's Bureau of the Administration for Children and Families or a different format, on the condition that the format used includes all of the title IV–E plan requirements of the law.

Respondents: Title IV–E agencies administering or supervising the administration of the title IV–E programs.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Title IV–E Plan	17	1	16	272

Estimated Total Annual Burden Hours: 272.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–32410 Filed 12–16–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Agency Recordkeeping/Reporting Requirements Under Emergency Review by the Office of Management and Budget (OMB)

Title: State Court Improvement Program.

OMB No.: New Collection.

Description: The Court Improvement Program (CIP) is composed of three grants, the basic, data, and training grants, governed by two separate Program Instructions (PIs). The training and data grants are governed by the ''new grant'' PI and the basic grant is governed by the ''basic grant'' PI. Current PIs require separate applications and program assessment reports for each grant. Every State applies for at least two of the grants annually and most States apply for all three. As many of the application requirements are the same for all three grants, this results in duplicative work and high degrees of repetition for State courts applying for more than one CIP grant.

The purpose of this Program Instruction is to streamline and simplify the application and reporting processes by consolidating the PIs into one single PI and requiring one single, consolidated application (App) package and program assessment report (PAR) per State court annually. These revisions will satisfy statutory programmatic requirements and reduce both the number of required responses and associated total burden hours for State courts.

This new PI also describes programmatic and fiscal provisions and

reporting requirements for the grants, specifies the application submittal and approval procedures for the grants for fiscal years 2012 through 2015, and identifies technical resources for use by State courts during the course of the grants. The agency uses the information received to ensure compliance with the statute and provide training and technical assistance to the grantees.

Respondents: Highest State Courts of Appeal.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Application	52	1	92	4784
Program Assessment Report	52	1	86	4472

Estimated Total Annual Burden Hours: 9256.

Additional Information: ACF is requesting that OMB grant a 180 day approval for this information collection under procedures for emergency processing by December 20, 2011. A copy of this information collection, with applicable supporting documentation, may be obtained by calling the Administration for Children and Families, Reports Clearance Officer, Robert Sargis at (202) 690–7275.

Comments and questions about the information collection described above should be directed to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for ACF, Office of Management and Budget, Paperwork Reduction Project, 725 17th Street NW., Washington, DC 20503; FAX: (202) 395–7285; email: *oira_submission@omb.eop.gov*.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–32349 Filed 12–16–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0230]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Examination of Online Direct-to-Consumer Prescription Drug Promotion

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 18, 2012.

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–New and title, Examination of Online Direct-to-Consumer Prescription Drug Promotion. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Juanmanuel Vilela, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, (301) 796–7651, *juanmanuel.vilela@fda.hhs.gov..*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Examination of Online Direct-to-Consumer Prescription Drug Promotion—(OMB Control Number 0910—New)

I. Background

Pharmaceutical products are launched and marketed in a number of new modalities and venues that did not exist a short time ago. Increasingly, prescription products are promoted to consumers online in such formats as banners, Web sites, and videos. The interactive nature of the Internet allows for features not possible with traditional media (i.e., print, radio, and television), such as scrolling information, popup windows, linking to additional information, and embedded videos. FDA regulations require that prescription drug advertisements include a ''fair balance'' of information about the benefits and risks of advertised products, both in terms of the content and presentation of the information (21 CFR 202.1(e)(5)(ii)). All prescription drug promotion that makes claims about a product must, therefore, also include risk information in a ''balanced'' manner. Currently, there are a number of questions surrounding how to achieve ''fair balance'' in online direct-to-consumer (DTC) promotion.

A few studies have examined how well online DTC Web sites communicate benefit and risk information. Although content analyses demonstrate that most Web sites include information on side effects and contraindications (Ref. 1), risk information is often presented less prominently and in fewer locations on the Web site (Refs. 2, 3, and 4). Content analyses also suggest that risk information on DTC prescription drug Web sites is often incomplete (Ref. 5) and written at very high literacy levels (Ref. 6).

One study examined how users interact with prescription drug Web sites (Ref. 7). This study found that the placement of risk and benefit information on a Web site is an important factor in whether it achieves ''fair balance.'' Specifically, participants' ability to find and accurately recall risk information was enhanced when risk and benefit information were presented separately and when risk information was presented on a higher order page (i.e., on a second-level page clearly linked from the homepage, or on the homepage).

This project is designed to test different ways of presenting prescription drug risk and benefit information on branded drug Web sites. This research is relevant to current policy questions and debate and will complement qualitative research we plan to conduct on issues surrounding social media. The series of studies described in this document will provide data that, along with other input and considerations, will inform the development of future guidance.

II. Comments

In the **Federal Register** of April 28, 2011 (76 FR 23821), FDA published a 60-day notice requesting public comment on the proposed collection of information. Seven statements were received, some of which included several comments.

(Comment 1) One comment expressed the opinion that DTC advertising will never present risk and benefit information in a balanced manner and therefore the government should take a stronger stand against DTC advertising.

(Response) This is outside the scope of this project, but we note that the overall purpose of the research is to improve consumer understanding of prescription drug advertising.

(Comment 2) The comment describes Web archiving technology and how it can be used to capture information from Web sites. They recommended we use their company's Web archiving services for regulatory activities and to conduct the study.

(Response) The sections of this comment that relate to how the company's services can be used for regulatory activities are beyond the scope of this project. The sections that relate to the research suggest that we could use Web archiving technology to create Web sites for the study; however, we plan to create new, unique, fictitious Web sites for the study to ensure familiarity with a particular Web site or brand does not have any influence on our findings.

(Comment 3) Two statements suggested additional information should be collected from participants. One statement suggested we use some of this additional information (prescription drug use) as a covariate.

(Response) Some of the additional information suggested is already included in the questionnaire (*e.g.,* age, ethnicity, education level, and prescription drug use for the medical condition of interest). Although native language and whether participants are hearing or vision impaired are not directly assessed, participants must be capable of completing an intake questionnaire and core adult profile survey, both of which are written at an eighth grade reading level. Other additional information suggested will be included. Specifically, we will include level of Internet use and length of time from diagnosis with the medical condition of interest. In addition, we will use prescription drug use for the medical condition of interest as a covariate in our analyses.

(Comment 4) One comment addressed the recruitment process, requesting that we disclose how participants will be recruited and recommending online recruitment.

(Response) We plan to recruit and conduct the study online.

(Comment 5) One comment recommended that caregivers also be included as participants.

(Response) To ensure that our participants are motivated to consider the information presented in the study and to conserve resources, we will limit our sample to people who have the medical condition of interest.

(Comment 6) One comment requested that we not apply the results of these studies to social media and mobile technology, as Web sites differ in a number of ways from other online contexts.

(Response) These studies are designed to address questions surrounding branded prescription drug Web sites and therefore the results will not be applied to social media and mobile technology.

(Comment 7) One comment requested that FDA publish the study design for the qualitative study mentioned in the **Federal Register** notice.

(Response) FDA plans to conduct 10 focus groups to investigate how consumers, patients, and caregivers use online health communities and social media sites to make health decisions, especially regarding prescription drugs. These focus groups received OMB approval on April 28, 2011 (''Examination of Online Direct-to-Consumer Prescription Drug Promotion,'' OMB control number 0910–0677). FDA will share the results of these focus groups when they become available.

(Comment 8) One comment suggested that the proposed samples sizes may not result in adequate statistical power.

(Response) We have conducted power analyses and will have sufficient sample to detect small to medium size effects with an alpha level of 0.05 and power of 0.90.

(Comment 9) One statement suggested that the proposed $2 \times 2 + 1$ design in Study 2 may limit an objective assessment of the effect of the variables in the control group. Another questioned the presence of the control group in Study 2, suggesting that it may confound the interpretation of results regarding the ''prominence'' manipulation. This statement suggested evaluating prominence in a separate part of the study.

(Response) Study 2 is designed to test two research questions: (1) To what extent does the presence of special features (e.g., personal testimonials, animated visuals) on a branded drug Web site influence consumer perceptions of a prescription drug and (2) to what extent does the prominence of risk information in special features on a branded drug Web site influence consumer perceptions of a prescription drug? Both research questions can be addressed within the same design without having to evaluate prominence in a separate design. The first research question will be tested by comparing responses of participants exposed to a Web site with a special feature to those who were not (the control group). The second research question will be tested by comparing responses of participants exposed to more prominently displayed risk information to those exposed to less prominently displayed risk information (i.e., the control condition would not be included in these analyses).

(Comment 10) One comment stated that the study outcome measures were not clear and recommended using validated measures.

(Response) The key outcome measures are risk comprehension, benefit comprehension, risk perceptions, and benefit perceptions. Where validated measures exist we will use them. Because the comprehension measures by necessity will be based on the information particular to each fictitious drug, these will be new measures; however, they will take the form of similar comprehension measures used by FDA and others in past research.

(Comment 11) One comment noted that we planned to conduct the studies with participants diagnosed with medical conditions like high cholesterol, seasonal allergies, depression, acid reflux, and high blood pressure, but suggested we also include participants with other medical conditions such as HIV and cancer and replicate the studies across different therapeutic areas.

(Response) As noted in the comment, we plan to conduct the studies with patients diagnosed with a range of medical conditions that differ in diagnosis, symptomatology, patient population, and treatment options. Because it is difficult to recruit participants from low-incidence samples such as those recommended, we do not plan to include these other medical conditions in the study. However, we will consider this for future studies and encourage replication across medical conditions by other researchers.

(Comment 12) One comment recommended that FDA not delay issuing draft Internet guidance until the results of the studies are known.

(Response) FDA does not intend to delay issuing draft guidance because of this research.

(Comment 13) One comment suggested that FDA policy should not categorically prohibit the use of hyperlinks to provide risk information.

(Response) Because this comment addresses issues of policy and not the current research, this comment is outside the scope of this project.

(Comment 14) One comment suggested that, rather than focus on a single branded drug Web site, the studies should take into account the multiple executional elements of Internet drug promotion and how online promotional executions are affected by the broader health information environment. The comment argues that this is necessary because risk and benefit comprehension is affected not only by the specifics of one branded drug Web site but also by other health information found online and elsewhere.

(Response) The regulations these studies address do not apply to the broader online health information environment; rather, each individual branded drug Web site needs to achieve fair balance. The fictitious branded drug Web sites used in the studies will include multiple executional elements; however, only one variable will be manipulated at a time in order to maintain experimental control.

(Comment 15) One comment recommended we take advantage of other researchers who can help revise the study design.

(Response) We obtained comments from peer reviewers and incorporated their suggestions in the new design.

(Comment 16) One comment noted that there are numerous issues that this research does not address, including online data mining by pharmaceutical companies, techniques of personalization for targeted digital pharmaceutical and health marketing, and pharmaceutical marketing's ''exploitative'' approach to social media. The comment criticized the focus on branded drug Web sites, as the online marketing environment encompasses newer technology.

(Response) Although there are several other issues surrounding prescription drug advertising online, such as privacy concerns, this is not the purview of the current research. This research is not designed to ''assess the full impact of digital drug marketing'' or document pharmaceutical marketing practices but rather to address specific issues regarding implementation of ''fair balance'' regulations for branded prescription drug Web sites. We note that no one study can address all relevant questions and encourage others to pursue research in this area to supplement the proposed research.

Although the online landscape is much broader than Web sites, Web sites continue to be a major source of information for consumers (*e.g.,* a recent survey found that 49 percent of respondents who went online for prescription drug information reported seeking this information on a specific brand's Web site (Ref. 8)) and, as noted previously in this document, there is not much relevant research on branded prescription drug Web sites.

(Comment 17) One comment suggested that the study use eye tracking and neuromarketing methods.

(Response) Because the comment does not specify why eye tracking and neuromarketing should be used in this research beyond noting that the pharmaceutical industry employs these methods, it is difficult to understand how the current research would benefit from these methods. Neuromarketing, for instance, may tell us that participants prefer one Web site over another. While this is relevant information from a marketing perspective, from a regulatory perspective it is comprehension, and not preference, that is the important outcome to assess.

(Comment 18) One comment requested additional information on the study. Issues not already addressed previously in this document include hypotheses, how the risk information will be portrayed, whether the Web site will be viewed under controlled conditions, how the participants' perceptions and understanding of the risks and benefits will be assessed, and the statistical analyses to be performed.

(Response) As noted in the 60-day **Federal Register** notice, the questionnaire is available upon request; this demonstrates how participants' perceptions and understanding will be assessed. We intend to manipulate how the risk information will be portrayed; please see the study design. Participant will complete the study online, not under controlled conditions. We will ask about the type of device they are using to view the Web site and can control for this if necessary. Hypotheses and statistical analyses are included in this document.

(Comment 19) One comment recommends testing the use of hyperlinks to risk information in the first study. The comment states that this would be useful in developing guidance for social media as well.

(Response) We have revised the design in Study 1 so that the risk visibility manipulation now tests the use of hyperlinks to risk information. We note that this study focuses on prescription drug Web sites aimed at consumers. As discussed in a previous comment, the results of these studies will be applied in this context only and not to social media.

(Comment 20) One comment asks for more detail regarding the checklist and animated spokesperson to be used in the first study.

(Response) The Study 1 risk formats were chosen based on the risk communication literature. Risk communication studies have found that making risk information less dense (e.g., bulleted lists), more visual (e.g., checklists), and audible (e.g., spokesperson) might increase comprehension. Thus, we want to test formats that are consistent with risk communication best practices. The checklist will be more visual and pronounced than a typical bulleted list. The animated spokesperson will include an audio component.

(Comment 21) One comment recommended that FDA follow FDA's 2009 Draft Guidance on Presenting Risk Information when deciding which risk information should be included in the special features in Study 2.

(Response) FDA will consider this guidance when designing the study stimuli.

(Comment 22) One comment questioned the usefulness of the Study 3 design.

(Response) We have redesigned the third study to ensure it addresses relevant questions in online prescription drug promotion. Please see the revised study design in this document.

III. Revised Study Design

This research will be conducted in three concurrent studies. The design and hypotheses for each study are outlined as follows. We will use ANOVAs, planned comparisons, and regressions to test hypotheses.

The purpose of Study 1 is to investigate whether the presentation of risk information on branded drug Web sites influences consumers' perceptions and understanding of the risks and benefits of the product. In Study 1, we will examine the format (e.g., whether the risk information is presented in a paragraph or as a bulleted list) and visibility of risk information on a prescription drug Web site. Risk visibility will be manipulated by having the risk information on the homepage; having the risk information on the homepage with a signal to scroll; or having a hyperlink, with a signal to

click on the link, on the homepage that leads to a secondary page with the risk information. The signal will direct participants to the important safety information. Participants will be randomly assigned to experimental conditions in a factorial design as follows:

TABLE 1—STUDY 1 PROPOSED DESIGN

[3 × 5]

	Format				
Risk visibility	Paragraph	Bullet list	Checklist	Highlighted box	Animated spokesperson
On Homepage On Homepage with Signal On Secondary Page with Signal					

A. Study 1 Hypotheses

1. Locating risk information on the homepage (with or without a signal) will lead consumers to have greater perceived risk and greater risk comprehension than locating this information on a secondary page with a hyperlink. Locating risk information on the homepage with a signal will lead consumers to have greater perceived risk and greater risk comprehension than locating this information on the homepage without a signal.

2. Presenting risk information in a bulleted list or checklist format will lead consumers to have greater perceived risk and greater risk comprehension than presenting this information in paragraph format.

3. Presenting risk information in a highlighted box format will lead consumers to have greater perceived risk and greater risk comprehension than presenting this information in bulleted list, checklist, or paragraph format.

4. We have competing hypotheses for the animated spokesperson. If the use of audio increases attention to the animated spokesperson, then presenting risk information via an animated spokesperson will lead consumers to have greater perceived risk and greater risk comprehension than presenting this information in any other format. If the animated spokesperson distracts consumers and/or the preset pace of the audio presentation is difficult for consumers to follow, then presenting risk information via an animated spokesperson will lead consumers to have lower perceived risk and lower risk comprehension than presenting this information in any other format.

The purpose of Study 2 is to investigate how special visual features on branded drug Web sites influence perceptions and understanding of the risks and benefits of the product. The special features we will examine are a personal testimonial video and an animated mechanism of action visual. Benefit information will be presented in either a personal testimonial video, an animated mechanism of action visual, or in text (the control). We will examine these special features in the context of the prominence of the presentation of risk information in two levels; more prominent and less prominent. An example of a more prominent display of risk information might involve including the risks as part of the spoken testimonial, whereas a less prominent display may involve a scrolling text of the risks after the animated video. We will include a control condition in which participants view a Web page with no special features. Participants will be randomly assigned to experimental conditions in a factorial design as follows:

TABLE 2—STUDY 2 PROPOSED DESIGN

[2 × 2 + 1]

	Special features		
Risk presentation	Personal testimonial	Animated visual	Control group
Prominent Less Prominent			

B. Study 2 Hypotheses

1. The presence of any special feature will lead consumers to have lower perceived risk, greater perceived efficacy, greater benefit comprehension, and greater intentions to ask their doctor about the drug than the absence of these features.

2. More prominently displayed risk information will lead consumers to have greater perceived risk and greater risk comprehension than less prominently displayed risk information.

The revised Study 3 design tests whether participants are misled by a link from a branded prescription drug Web site to a disease awareness Web site with off-label information, and whether the presence of context attenuates this potential effect. Participants will be randomly assigned to experimental conditions in a factorial design as follows:

TABLE 3—STUDY 3 REVISED DESIGN

[4 × 1]

Context			
No Link (control)	None	External only	External and not sponsored

The three context conditions will include a link. For example, ''For more information about Disease X, please visit [link].'' An example of the ''none'' context condition is, ''if the link is clicked, there is an interim page that says 'Loading.' '' An example of the ''external only'' context is, ''if the link is clicked, there is an interim page that says 'You are leaving the Drug X Web site and entering an external Web site.' '' An example of the ''external and not sponsored'' context is ''if the link is clicked, there is an interim page that says 'You are leaving the Drug X Web site and entering an external Web site not controlled or endorsed by Pharmaceutical Company Y.' ''

C. Study 3 Hypotheses

1. Participants who view the link to external information, compared to those who do not, will have greater perceived efficacy and lower correct benefit comprehension.

2. This effect may be attenuated by context, such that participants who view the link without context, compared to those who view the link with either type of context, will have greater perceived efficacy and lower correct benefit comprehension. We will explore whether the type of context (external only vs. external and not sponsored) affects perceived efficacy and benefit comprehension.

In these three studies, participants will be randomly assigned to view one version of a (fictitious) prescription drug Web site. After viewing the Web site, participants will answer a series of questions about the drug. We will test how the manipulations affect outcomes such as perceived efficacy, perceived risk, behavioral intention, and accurate understanding of the benefit and risk information. In each study, the fictitious prescription drug will be for the treatment of a high-prevalence medical condition and modeled on an actual drug used to treat that condition. Participants will be consumers who have been diagnosed with the medical condition of interest. For instance, the medical conditions may be high cholesterol and seasonal allergies for Study 1, high blood pressure and acid reflux disease for Study 2, and depression for Study 3. Interviews are expected to last no more than 25 minutes (the questionnaire is available upon request). This will be a one-time (rather than annual) collection of information.

FDA estimates the burden of this collection of information as follows:

TABLE 4—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Screener	16,000	1	16,000	0.03 (2 minutes)	533
Pretests	1,200	1	1,200	0.33 (20 minutes)	400
Study 1	6,000	1	6,000	0.42 (25 minutes)	2,500
Study 2	2,000	1	2,000	0.42 (25 minutes)	833
Study 3	1,000	1	1,000	0.42 (25 minutes)	417
Total					4,683

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

IV. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Macias, W. and L. Stavchansky Lewis, ''How Well Do Direct-to-Consumer (DTC) Prescription Drug Web Sites Meet FDA Guidelines and Public Policy Concerns?'' *Health Marketing Quarterly,* vol. 22, pp. 45–71, 2005.

2. Hicks, K.E., M.S. Wogalter, and W.J. Vigilante, Jr., ''Placement of Benefits and Risks in Prescription Drug Manufacturers' Web Sites and Information Source Expectations,'' *Drug Information Journal,* vol. 39, pp. 267–278, 2005.

3. Huh, J. and B.J. Cude, ''Is the Information 'Fair and Balanced' in Direct-to-Consumer Prescription Drug Web Sites?'' *Journal of Health Communication,* vol. 9, pp. 529–540, 2004.

4. Sheehan, K.B., ''Direct-to-Consumer (DTC) Branded Drug Web Sites Risk Presentation and Implications for Public Policy,'' *Journal of Advertising,* vol. 36, pp. 123–135, 2007.

5. Davis, J.J., E. Cross, and J. Crowley, ''Pharmaceutical Web Sites and the Communication of Risk Information,'' *Journal of Health Communication,* vol. 12, pp. 29–39, 2007.

6. Naik, S. and S.P. Desselle, ''An Evaluation of Cues, Inducements, and Readability of Information on Drug-Specific Web Sites,'' *Journal of Pharmaceutical Marketing and Management,* vol. 17, pp. 61–81, 2007.

7. Vigilante, Jr., W.J., and M.S. Wogalter, ''Assessing Risk and Benefit Communication in Direct-to-Consumer Medication Web Site Advertising,'' *Drug Information Journal,* vol. 39, pp. 3–12, 2005.

8. Prevention Magazine. 14th Annual Survey of Consumer Reactions to DTC Advertising of Prescription Medicines, Emmaus, PA: Rodale, Inc., 2011.

Dated: December 13, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–32275 Filed 12–16–11; 8:45 a.m.]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0883]

Agency Information Collection Activities; Proposed Collection; Comment Request; Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of FDA's requirements on content and format of labeling for human prescription drug and biological products.

DATES: Submit either electronic or written comments on the collection of information by February 17, 2012.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Juanmanuel Vilela, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, (301) 796–7651, *Juanmanuel.Vilela@FDA.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products (OMB Control Number 0910–0572)—Extension

FDA's final rule entitled ''Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products'' (the Final Rule), which published on January 24, 2006 (71 FR 3922), and was effective on June 30, 2006, amended FDA's regulations governing the format and content of labeling for human prescription drug and biological products to require that the labeling of new and recently approved products contain highlights of prescribing information, a table of contents for prescribing information, reordering of certain sections, minor content changes, and minimum graphical requirements. These revisions were intended to make it easier for health care practitioners to access, read, and use information in prescription drug labeling; to enhance the safe and effective use of prescription drug products; and to reduce the number of adverse reactions resulting from medication errors due to misunderstood or incorrectly applied drug information.

A. Summary of Prescription Drug Labeling Content and Format Requirements That Contain Collections of Information

Section 201.56 (21 CFR 201.56) requires that prescription drug labeling contain certain information in the format specified in either § 201.57 (21 CFR 201.57) or § 201.80 (21 CFR 201.80), depending on when the drug was approved for marketing. Section 201.56(a) sets forth general labeling requirements applicable to all prescription drugs. Section 201.56(b) specifies the categories of new and more recently approved prescription drugs subject to the revised content and format requirements in §§ 201.56(d) and 201.57. Section 201.56(c) sets forth the schedule for implementing these revised content and format requirements. Section 201.56(e) specifies the sections and paragraphs, required and optional, for the labeling of older prescription drugs not subject to the revised format and content requirements.

Section 201.57(a) requires that prescription drug labeling for new and more recently approved prescription drug products include ''Highlights of Prescribing Information.'' Highlights provides a concise extract of the most important information required under § 201.57(c) (the Full Prescribing Information (FPI)), as well as certain additional information important to prescribers. Section 201.57(b) requires a table of contents to prescribing information, entitled ''Full Prescribing Information: Contents,'' consisting of a list of each heading and subheading along with its identifying number to facilitate health care practitioners' use of labeling information. Section 201.57(c) specifies the contents of the FPI. Section 201.57(d) mandates the minimum specifications for the format of prescription drug labeling and establishes minimum requirements for key graphic elements such as bold type, bullet points, type size, and spacing.

Older drugs not subject to the revised labeling content and format requirements in § 201.57 remain subject to labeling requirements at § 201.80 (in the final rule, former § 201.57 was redesignated as § 201.80). Section 201.80(f)(2) requires that within 1 year, any FDA-approved patient labeling be referenced in the ''Precautions'' section of the labeling of older products and either accompany or be reprinted immediately following the labeling.

B. Estimates of Reporting Burden

The PRA information collection analysis in the final rule (71 FR 3964–3967) (currently approved under OMB

Control Number 0910–0572) estimated the reporting burden for a multi-year period. We are requesting that OMB extend approval for the information in this collection, as described below, which will continue to be submitted to FDA during this multi-year period.

Annual Burden for Prescription Drug Labeling Design, Testing, and Submitting to FDA for New Drug Applications (NDAs) and Biologics License Applications (BLAs) (§§ 201.56 and 201.57) (Table 1)

New drug product applicants must: (1) Design and create prescription drug labeling containing Highlights, Contents, and FPI; (2) test the designed labeling (e.g., to ensure that the designed labeling fits into carton-enclosed products); and (3) submit it to FDA for approval. Based on the projected data estimated in the final rule, FDA estimates that it takes applicants approximately 3,349 hours to design, test, and submit prescription drug labeling to FDA as part of an NDA or a BLA under the revised regulations. Approximately 84 applicants submit approximately 105 new applications (NDAs and BLAs) to FDA per year, totaling 351,645 hours.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED REPORTING BURDEN FOR NEW DRUG APPLICATIONS [1]

Category (21 CFR section)	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Annual Burden for Labeling Requirements in §§ 201.56 and 201.57	84	1.25	105	3,349	351,645

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: December 14, 2011.

David Dorsey,

Acting Associate Commissioner for Policy and Planning.

[FR Doc. 2011–32397 Filed 12–16–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–P–0578]

Determination that Bretylium Tosylate Injection, 50 Milligrams/Milliliter, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that Bretylium Tosylate injection, 50 milligrams (mg)/milliliter (mL), was not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for Bretylium Tosylate injection, 50 mg/mL, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Molly Flannery, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6246, Silver Spring, MD 20993–0002, (301) 796–3543.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the ''listed drug,'' which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is known generally as the ''Orange Book.'' Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

Bretylium Tosylate injection, 50 mg/mL, is the subject of NDA 19–030, held by Hospira, Inc., and initially approved on April 16, 1986. Bretylium Tosylate injection, 50 mg/mL, is indicated in the prophylaxis and therapy of ventricular fibrillation and in the treatment of life-threatening ventricular arrhythmias, such as ventricular tachycardia, that have failed to respond to adequate doses of a first-line antiarrhythmic agent, such as lidocaine.

In a letter dated June 17, 2010, Hospira, Inc. requested withdrawal of NDA 19–030 for Bretylium Tosylate injection, 50 mg/mL. In the **Federal Register** of June 8, 2011 (76 FR 33310), FDA announced that it was withdrawing approval of NDA 019030, effective July 8, 2011.

Academic Pharmaceuticals, Inc. submitted a citizen petition dated July 27, 2011 (Docket No. FDA–2011–P–0578), under 21 CFR 10.30, requesting that the Agency determine whether Bretylium Tosylate injection, 50 mg/mL, was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that Bretylium Tosylate injection, 50 mg/mL, was not withdrawn for reasons of safety or effectiveness. We have carefully reviewed the information provided by the petitioner and our files for records concerning the withdrawal of Bretylium

Tosylate injection, 50 mg/mL, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have found no information that would indicate that this product was withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list Bretylium Tosylate injection, 50 mg/mL, in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to Bretylium Tosylate injection, 50 mg/mL, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: December 12, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–32367 Filed 12–16–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0817]

Draft Guidance for Industry and Food and Drug Administration Staff; Evaluation of Sex Differences in Medical Device Clinical Studies; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled ''Evaluation of Sex Differences in Medical Device Clinical Studies.'' This document provides guidance on the study and evaluation of sex differences in medical device clinical trials, with a specific focus on addressing potential differences in study design, conduct, outcomes, and interpretation that should be considered to ensure sex-specific issues are adequately addressed in clinical trials. This draft guidance is not final nor is it in effect at this time.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment of this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by March 19, 2012.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled ''Evaluation of Sex Differences in Medical Device Clinical Studies'' to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4613, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to (301) 847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the draft 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. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Kathryn O'Callaghan, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1546, Silver Spring, MD 20993–0002, (301) 796–6349.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of this guidance is to outline the Center for Devices and Radiological Health's (CDRH's) expectations regarding sex-specific patient enrollment, data analysis, and reporting of study information. The intent is to improve the quality and consistency of available data regarding the performance of medical devices in women. This information can be of benefit to patients and their medical providers, as well as clinical researchers and others. The specific objectives of this guidance are to: (1) Better communicate the balance of risks and benefits of FDA-approved or cleared medical devices; (2) identify sex-specific questions for further study; and (3) encourage the consideration of sex and associated covariates (e.g., body size, plaque morphology, etc.) during the trial design stage.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on ''Evaluation of Sex Differences in Medical Device Clinical Studies.'' 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 statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov.* To receive ''Evaluation of Sex Differences in Medical Device Clinical Studies,'' you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to (301) 847–8149 to receive a hard copy. Please use the document number 1727 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to currently 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 812.25(c) have been approved under OMB control number 0910–0078; the collections of information in 21 CFR part 807 Subpart E have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 814 Subparts B and E have been approved under OMB control number 0910–0231; the collections of information in 21 CFR part 814 Subpart H have been approved under OMB control number 0910–0332; the collections of information in 21 CFR part 822 have been approved under OMB control number 0910–0449.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments.

Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 13, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–32368 Filed 12–16–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development; Special Emphasis Panel. Folic Acid Supplementation and Semen Quality Trial.

Date: January 10, 2012.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Sathasiva B. Kandasamy, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, (301) 435–6680, *skandasa@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: December 13, 2011.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–32459 Filed 12–16–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, NIMH K22 Review.

Date: January 5, 2012.

Time: 12 p.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard Rockville, MD 20852 (Telephone Conference Call).

Contact Person: David M. Armstrong, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center/Room 6138/MSC 9608, 6001 Executive Boulevard Bethesda, MD 20892–9608, (301) 443–3534, *armstrda@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: December 12, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–32425 Filed 12–16–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Drugged Driving: Future Research Directions (5569).

Date: January 11, 2012.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Gerald L. McLaughlin, Ph.D. Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Blvd. Room 4238, MSC 9550, Bethesda, MD 20892–9550, (301) 402–6626, *gm145a@nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Feasibility of Development of RNAi-based Therapeutics for Treatment of HIV and HVC Infections in Drug Abusing Populations (8907).

Date: January 13, 2012.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Minna Liang, Ph.D., Scientific Review Officer, Grants Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Blvd. Room 4226, MSC 9550, Bethesda, MD 20892–9550, (301) 435–1432, *liangm@nida.nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Development of a Solid Dosage Form for Fenobam (8906).

Date: January 18, 2012.

Time: 11 a.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive

Boulevard Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Gerald L. McLaughlin, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Blvd. Room 4238, MSC 9550, Bethesda, MD 20892–9550, (301) 402–6626, *gm145a@nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Smokescreen: Genetic Screening Tool for Tobacco Dependence and Treatment Approaches (7783).

Date: January 19, 2012.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard Rockville, MD 20852, (Virtual Meeting).

Contact Person: Minna Liang, Ph.D., Scientific Review Officer, Grants Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, 6001 Executive Blvd. Room 4226, MSC 9550, Bethesda, MD 20892–9550, (301) 435–1432, *liangm@nida.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–32424 Filed 12–16–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed 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 USC, as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel Grand Opportunity in Medications Development for Substance-Related Disorders (U01).

Date: January 6, 2012.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Jose F. Ruiz, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, Room 4228, MSC 9550, 6001 Executive Blvd., Bethesda, MD 20892–9550, (301) 451–3086, *ruizjf@nida.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–32422 Filed 12–16–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the Literature Selection Technical Review Committee.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended because the premature disclosure of journals as potential titles to be indexed by the National Library of Medicine and the discussions would likely to significantly frustrate implementation of recommendations.

Name of Committee: Literature Selection Technical Review Committee.

Date: February 23–24, 2012.

Open: February 23, 2012, 9 a.m. to 11 a.m.

Agenda: Administrative.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: February 23, 2012, 11 a.m. to 5 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: February 24, 2012, 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20894.

Contact Person: Sheldon Kotzin, MLS, Associate Director, Division of Library Operations, National Library of Medicine, 8600 Rockville Pike, Building 38, Room 2W06, Bethesda, MD 20892, (301) 496–6921, *kotzins@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS).

Dated: December 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–32426 Filed 12–16–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of meetings of the Board of Regents of the National Library of Medicine.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections

552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Regents of the National Library of Medicine Disaster Information Management Research Center Working Group.
Date: February 6, 2012.
Open: 9 a.m. to 4 p.m.
Agenda: Review and discuss the current activities of NLM's Disaster Information Management Research Center.
Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.
Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20892, (301) 496–6221, *lindberg@mail.nih.gov.*

Name of Committee: Board of Regents of the National Library of Medicine Extramural Programs Subcommittee.
Date: February 6, 2012.
Closed: 2:30 p.m. to 4 p.m.
Agenda: To review and discuss grants and new programs.
Place: National Library of Medicine, Building 38, 2nd Floor, Conference Room B, 8600 Rockville Pike, Bethesda, MD 20892.
Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20892, (301) 496–6221, *lindberg@mail.nih.gov.*

Name of Committee: Board of Regents of the National Library of Medicine Subcommittee on Outreach and Public Information.
Date: February 7, 2012.
Open: 7:45 a.m. to 8:45 a.m.
Agenda: To review and discuss outreach activities.
Place: National Library of Medicine, Building 38, 2nd Floor, Conference Room B, 8600 Rockville Pike, Bethesda, MD 20892.
Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20892, (301) 496–6221, *lindberg@mail.nih.gov.*

Name of Committee: Board of Regents of the National Library of Medicine.
Date: February 7–8, 2012.
Open: February 7, 2012, 9 a.m. to 4:10 p.m.
Agenda: Program Discussion.
Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.
Closed: February 7, 2012, 4:10 p.m. to 4:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.
Open: February 8, 2012, 9 a.m. to 12 p.m.
Agenda: Program Discussion.
Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.
Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20892, (301) 496–6221, *lindberg@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nlm.nih.gov/od/bor/bor.html*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS).

Dated: December 13, 2011.

Jennifer S. Spaeth,

Office of Federal Advisory Committee Policy.

[FR Doc. 2011–32429 Filed 12–16–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

New Agency Information Collection Activity Under OMB Review: Exercise Information System (EXIS)

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-day notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the new Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on January 6, 2011 (76 FR 792). The ICR describes the nature of the information collection and its expected burden for the TSA Exercise Information System (EXIS). EXIS is a web portal designed to serve stakeholders in the transportation industry by providing transportation stakeholders with an online tool to generate security exercises based on the unique needs of their specific transportation mode or method of operation. It provides stakeholders with exercise information tailored to the transportation industry, best practices, and lessons learned based on experience for use in future exercises. Utilizing and inputting information into EXIS is completely voluntary.

DATES: Send your comments by January 18, 2012. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson, TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011; telephone (571) 227–3651; email *TSAPRA@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments Received

Pursuant to 5 CFR 1320.8(d), TSA published a 60-day notice soliciting comments from persons outside of the agency regarding the data collection procedures of EXIS. This notice was published on January 6, 2011 (76 FR 792). TSA received two comments. The first comment was from a contractor in the Infrastructure Protection Disaster Management Division of the Science and Technology Directorate at DHS. This comment sought more information regarding the program manager of EXIS and program manager role/capabilities in exercise training. TSA responded by referring the commentator to the appropriate EXIS personnel for further detail on the EXIS program manager role. The second comment came from a transportation security inspector in South Carolina seeking more information on the capabilities of EXIS. TSA responded by electronically sending the commentator an EXIS information brochure and referring the commentator to the EXIS email address for any additional questions. To our knowledge, no additional comments have been received.

Information Collection Requirement

Title: Exercise Information System (EXIS).

Type of Request: New collection.

OMB Control Number: Not yet assigned.

Form(s): N/A.

Affected Public: Interested transportation owners and operators with security interests and responsibilities.

Abstract: The Exercise Information System (EXIS) is an Internet-accessible knowledge-management system developed by TSA serving stakeholders—industry, port authorities, Federal agencies, and State and local governments—and integrating other security-related training and exercise components. Because EXIS may contain Sensitive Security Information (SSI),[1] the system meets the requirements for an SSI-level system. EXIS gives stakeholders valuable exercise information tailored to the transportation industry, best practices, and lessons learned based on experience for use in future exercises. Transportation industry stakeholders can choose scenarios and objectives based on their particular needs, such as their transportation modes, or their regulated areas of operation. EXIS is a data management system that provides end-to-end security exercise support, from the initial planning meeting, through exercise design, implementation, evaluation, and reporting.

TSA will use this information to assess and improve the capabilities of all surface transportation modes to prevent, prepare for, mitigate against, respond to, and recover from transportation security incidents. A failure to collect this information will limit TSA's ability to effectively test security countermeasures, security plans, and the ability of a modal operator to respond to and quickly recover after a transportation security incident. Insufficient awareness, prevention, response, and recovery to a transportation security incident will result in increased vulnerability of the U.S. transportation network and a reduced ability of DHS to assess system readiness.

Since the system has not been released to the public yet, it is difficult to determine the amount of volume that will be generated from its release. Based on industry population estimates and industry growth rates transportation modes prior to EXIS release to the public, TSA estimates that there will be approximately 336,000 users within the first three years of the system's use. TSA estimates users will spend approximately 7 hours per EXIS user inputting the information described above.

Number of Respondents: 112,109.

Estimated Annual Burden Hours: An estimated 392,385 hours annually.

Issued in Arlington, Virginia, on December 13, 2011.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2011–32360 Filed 12–16–11; 8:45 am]

BILLING CODE 9110–05–P

[1] See 49 U.S.C. 114(s); 49 CFR part 1520.

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form N–470, Revision of a Currently Approved Information Collection; Comment Request

ACTION: 30–Day Notice of Information Collection Under Review: Form N–470, Application To Preserve Residence for Naturalization; OMB Control No. 1615–0056.

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. An information collection notice was previously published in the **Federal Register** on October 12, 2011, at 76 FR 63321, allowing for a 60-day public comment period. USCIS received comments from one commenter on the 60-day notice. A discussion of the comments and USCIS' responses are addressed in item 8 of the supporting statement that can be viewed at: *http://www.regulations.gov.*

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until January 18, 2012. 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 Management and Budget (OMB), USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, Clearance Office, 20 Massachusetts Avenue, Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to (202) 272–0997 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 Number 1615–0056 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 collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Revision of an existing information collection.

(2) *Title of the Form/Collection:* Application to Preserve Residence for Naturalization.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–470. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households.* The information collected on Form N–470 will be used to determine whether an alien who intends to be absent from the United States for a period of one year or more is eligible to preserve residence for naturalization purposes.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 525 responses at 36 minutes (.6 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 315 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: December 13, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–32358 Filed 12–16–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5529–N–03]

Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2011

AGENCY: Office of the General Counsel, HUD.

ACTION: Notice.

SUMMARY: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly **Federal Register** notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous **Federal Register** notice. The purpose of this notice is to comply with the requirements of section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on July 1, 2011, and ending on September 30, 2011.

FOR FURTHER INFORMATION CONTACT: For general information about this notice, contact Camille E. Acevedo, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development, 451 7th Street SW., Room 10282, Washington, DC 20410–0500, telephone (202) 708–1793 (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 Relay Service at (800) 877–8339.

For information concerning a particular waiver that was granted and for which public notice is provided in this document, contact the person whose name and address follow the description of the waiver granted in the accompanying list of waivers that have been granted in the third quarter of calendar year 2011.

SUPPLEMENTARY INFORMATION: Section 106 of the HUD Reform Act added a new section 7(q) to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)), which provides that:

1. Any waiver of a regulation must be in writing and must specify the grounds for approving the waiver;

2. Authority to approve a waiver of a regulation may be delegated by the Secretary only to an individual of Assistant Secretary or equivalent rank, and the person to whom authority to waive is delegated must also have authority to issue the particular regulation to be waived;

3. Not less than quarterly, the Secretary must notify the public of all waivers of regulations that HUD has approved, by publishing a notice in the **Federal Register**. These notices (each covering the period since the most recent previous notification) shall:

a. Identify the project, activity, or undertaking involved;

b. Describe the nature of the provision waived and the designation of the provision;

c. Indicate the name and title of the person who granted the waiver request;

d. Describe briefly the grounds for approval of the request; and

e. State how additional information about a particular waiver may be obtained.

Section 106 of the HUD Reform Act also contains requirements applicable to waivers of HUD handbook provisions that are not relevant to the purpose of this notice.

This notice follows procedures provided in HUD's Statement of Policy on Waiver of Regulations and Directives issued on April 22, 1991 (56 FR 16337). In accordance with those procedures and with the requirements of section 106 of the HUD Reform Act, waivers of regulations are granted by the Assistant Secretary with jurisdiction over the regulations for which a waiver was requested. In those cases in which a General Deputy Assistant Secretary granted the waiver, the General Deputy Assistant Secretary was serving in the absence of the Assistant Secretary in accordance with the office's Order of Succession.

This notice covers waivers of regulations granted by HUD from July 1, 2011 through September 30, 2011. For ease of reference, the waivers granted by HUD are listed by HUD program office (for example, the Office of Community Planning and Development, the Office of Fair Housing and Equal Opportunity, the Office of Housing, and the Office of Public and Indian Housing, etc.). Within each program office grouping, the waivers are listed sequentially by the regulatory section of title 24 of the Code of Federal Regulations (CFR) that is being waived. For example, a waiver of a provision in 24 CFR part 58 would be listed before a waiver of a provision in 24 CFR part 570.

Where more than one regulatory provision is involved in the grant of a particular waiver request, the action is listed under the section number of the first regulatory requirement that appears in 24 CFR and that is being waived. For example, a waiver of both § 58.73 and § 58.74 would appear sequentially in the listing under § 58.73.

Waiver of regulations that involve the same initial regulatory citation are set out in time sequence beginning with the earliest-dated regulatory waiver.

Should HUD receive additional information about waivers granted during the period covered by this report (the third quarter of calendar year 2011) before the next report is published (the fourth quarter of calendar year 2011), HUD will include any additional waivers granted for the third quarter in the next report.

Accordingly, information about approved waiver requests pertaining to HUD regulations is provided in the Appendix that follows this notice.

Dated: December 13, 2011.

Helen R. Kanovsky,

General Counsel.

Appendix—Listing of Waivers of Regulatory Requirements Granted by Offices of the Department of Housing and Urban Development July 1, 2011 Through September 30, 2011

Note to Reader: More information about the granting of these waivers, including a copy of the waiver request and approval, may be obtained by contacting the person whose name is listed as the contact person directly after each set of regulatory waivers granted.

The regulatory waivers granted appear in the following order:

I. Regulatory waivers granted by the Office of Community Planning and Development.
II. Regulatory waivers granted by the Office of Housing.
III. Regulatory waivers granted by the Office of Public and Indian Housing.

I. Regulatory Waivers Granted by the Office of Community Planning and Development

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 58.22(a).

Project/Activity: Railtech International, a global manufacturer of rail track repair and assembly equipment, sought to consolidate its operations by expanding the existing Railtech Boutet facility in Liberty Township, Ohio. The project included the construction of 31,777 sq. ft. in office and manufacturing space at that location.

Henry County used non-HUD funds to assist construction of the facility and to purchase equipment and machinery after applying for HUD CDBG funds, but prior to completing the environmental review process and receiving an approved Request for Release of Funds from HUD. The CDBG funds were to be used to purchase additional machinery and equipment.

Nature of Requirement: The regulation at 24 CFR 58.22(a) requires that an environmental review be performed and a Request for Release of Funds be completed and certified prior to the commitment of non-HUD funds to a project using HUD funds.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: August 3, 2011.

Reason Waived: The waiver was granted because the above project would further the HUD mission and advance HUD program goals to develop viable, quality communities. Henry County does not have experience in administering HUD grants and the county stated that it did not intend to violate HUD's environmental requirements. No HUD funds were committed to the project prior to the environmental review. Granting the waiver would not result in any unmitigated, adverse environmental impact.

Contact: Nelson Rivera, Office of Environment and Energy, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7248, Washington, DC 20410, telephone (202) 402–4455.

Nature of Requirement: According to 24 CFR 91.105(c)(1), changes in the use of CDBG funds from one activity to another constitutes a substantial amendment. HUD's regulation at 24 CFR 91.105(c)(2) requires that citizens be given no less than 30 days to comment on substantial amendments before they are implemented. The city asked to reduce its citizen comment period to 7 days so that it may quickly reallocate CDBG funds for activities to assist city residents and businesses affected by the storm/tornado.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: July 13, 2011.

Reason Waived: The city was allowed to reduce its comment period from 30 days to 7 days so that it may quickly reallocate CDBG funds for activities to provide assistance to residents and businesses and facilitate its recovery efforts from the April 27, 2011, storm/tornado.

Contact: Gloria Coates, Office of Block Grant Assistance, Entitlement Communities Division, Office of Community Planning and Development, 451 7th Street SW., Room 7282, Washington, DC 20410, telephone (202) 708–1577.

• *Regulation:* 24 CFR 91.105(c)(2).

Project/Activity: The city of Birmingham, AL, experienced severe storms and a tornado on April 27, 2011, resulting in substantial property damage. A federal disaster declaration was issued for most jurisdictions in Alabama on April 28, 2011. The city requested the waiver of a regulation to shorten the required citizen comment period in order to quickly reallocate CDBG funds to assist residents and facilitate its recovery efforts.

Nature of Requirement: According to 24 CFR 91.105(c)(1), changes in the use of CDBG funds from one activity to another constitutes a substantial amendment. HUD's regulation at 24 CFR 91.105(c)(2) requires that citizens be given no less than 30 days to comment on substantial amendments before they are implemented. The city asked to reduce its citizen comment period to 7 days so that it may reallocate CDBG funds for activities to assist city residents affected by the storm/tornado.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: August 31, 2011.

Reason Waived: The city was allowed to reduce the comment period from 30 days to 7 days to more quickly reallocate CDBG funds for activities that provide assistance to residents and businesses and facilitate recovery efforts from the April 27, 2011, storm/tornado.

Contact: Gloria Coates, Office of Block Grant Assistance, Entitlement Communities Division, Office of Community Planning and Development, 451 7th Street SW., Room 7282, Washington, DC 20410, telephone (202) 708–1577.

• *Regulation:* 24 CFR 91.105(c)(2).

Project/Activity: The city of Joplin, Missouri experienced a severe tornado on May 22, 2011, resulting in substantial property damage. A federal disaster declaration was issued for Jasper County, where Joplin is located, on May 9, 2011. This disaster declaration covers tornadoes, severe storms, and flooding that occurred from April 19, 2011, until June 6, 2011. The city requested the waiver of a regulation to shorten the required citizen comment period in order to quickly reallocate CDBG funds to assist city residents and facilitate recovery efforts.

Nature of Requirement: According to 24 CFR 91.105(c)(1), changes in the use of CDBG funds from one activity to another constitutes a substantial amendment. HUD's regulation at 24 CFR 91.105(c)(2) requires that citizens be given no less than 30 days to comment on substantial amendments before they are implemented. The city asked to reduce its citizen comment period to 7 days so that it may reallocate CDBG funds for activities to assist city residents affected by the storm/tornado.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: September 8, 2011.

Reason Waived: The city was allowed to reduce its comment period from 30 days to 7 days so that it could quickly reallocate CDBG funds for activities to provide assistance to residents and businesses and facilitate its recovery efforts from the May 22, 2011, tornado.

Contact: Gloria Coates, Office of Block Grant Assistance, Entitlement Communities Division, Office of Community Planning and Development, 451 7th Street SW., Room 7282, Washington, DC 20410, telephone (202) 708–1577.

• *Regulation:* 24 CFR 91.105(c)(2).

Project/Activity: After disapproval of the County's FY2011 action plan, Westchester County, New York faced the possibility of layoffs or other staffing consequences. The county determined that there were additional eligible program administrative expenses and activity delivery costs that could be charged to its CDBG program from its 2008–2010 program years. The county requested a waiver of 24 CFR 91.105(c)(2) to reduce its citizen comment period to 14 days so that it may reallocate CDBG funds for these costs.

Nature of Requirement: According to 24 CFR 91.105(c)(1), changes in the use of CDBG funds from one activity to another constitutes a substantial amendment. HUD's regulation at 24 CFR 91.105(c)(2) requires that citizens be given no less than 30 days to comment on substantial amendments before they are implemented. The county needed to reduce its citizen comment period for substantial amendments to prior year action plans, so that it might quickly reallocate CDBG funds for planning and administrative costs to avoid layoffs or other critical staffing reductions.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: September 8, 2011.

Reason Waived: The county was allowed to reduce its comment period from 30 days to 14 days so that it may quickly reallocate CDBG funds for planning and administrative activities and avoid a situation in which the

county must lay off or otherwise reduce staffing levels at a critical time in its implementation of a legal settlement agreement. The waiver allowed the county to maintain capacity to administer its CDBG program until December 31, 2011.

Contact: Steve Johnson, Office of Block Grant Assistance, Entitlement Communities Division, Office of Community and Planning Development, 451 7th Street SW., Room 7282, Washington, DC 20410, telephone (202) 708–1577.

• *Regulations:* 24 CFR 91.115(b)(3), 24 CFR 91.115(c)(2), and 24 CFR 91.115(i).

Project/Activity: The State of Missouri requested a waiver of regulations at 24 CFR 91.115(b)(3), 24 CFR 91.115(c)(2), and 24 CFR 91.115(i) in order to provide disaster assistance to local governments in a timely manner.

Nature of Requirement: HUD's regulation at 24 CFR 91.115(b)(3) requires at least one public hearing on housing and community development needs before the proposed consolidated plan is published for comment. HUD's regulation at 24 CFR 91.115(c)(2) requires the citizen participation plan to provide a period not less than 30 days, to receive comments on the substantial amendment of the consolidated plan. HUD's regulation at 24 CFR 91.115(i) requires the State to follow its citizen participation plan.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: July 27, 2011.

Reason Waived: A waiver of the need to hold additional public hearings and a reduced public comment period from 30 to 7 days was granted to allow the State of Missouri to implement the amendment to its 2011 Method of Distribution and annual action plan and enable the State to provide disaster assistance to affected local governments in a timely manner.

Contact: Steve Rhodeside, Acting Director, State and Small Cities Division, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7184, Washington, DC 20410, telephone (202) 402–7375.

• *Regulations:* 24 CFR 92.503(b)(3).

Project/Activity: The City of Inglewood, CA requested a waiver of 24 CFR 92.503(b)(3) to permit the City's repayment of $536,618.36 to be deposited into the City's HOME Investment Trust Fund local account and fund additional HOME-eligible activities.

Nature of Requirements: HUD's regulation at 24 CFR 92.503(b)(3) requires HOME funds to be repaid to the account from which they were drawn.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: September 1, 2011.

Reasons Waived: The City of Inglewood repaid $2,191,107.25 to its HOME Investment Trust Fund Treasury account for an ineligible project. A portion of the total repayment, $536,618.36, was credited to the City's Fiscal Year (FY) 2003 HOME account, which was closed in 2010 due to expiration of the period of availability of the funds. As a result, the repaid funds were no longer available for the City's use in eligible affordable housing activities. The Cranston-Gonzalez National Affordable Housing Act states that such repaid funds shall be immediately available to the grantee for investment in eligible affordable housing activities. In this case, the compliance with the regulation thwarted statutory intent. The waiver was granted to permit the repaid funds to be returned to the City so that the funds could be deposited in the City's local HOME Investment Trust Fund account and invested in additional HOME-eligible activities.

Contact: Virginia Sardone, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7164, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 570.200(g).

Project/Activity: After disapproval of its FY2011 action plan, Westchester County, NY faced the possibility of layoffs or other staffing consequences. The county determined that for program years 2008–2010 it could have expended additional amounts for administrative costs consistent with the statutory 20 percent cap, and could reprogram certain costs to administration and activity delivery costs. Amending its prior year action plans to include these costs would free up other funds to cover current administrative expenses, and would allow the county to retain capacity to administer CDBG-funded activities as well as implement activities required by a 2009 legal settlement.

Nature of Requirement: CDBG program annual appropriations acts contain a requirement that ''not to exceed 20 percent of any grant made with funds appropriated [under the CDBG program] shall be expended for planning and management development and administration.'' The methodology for determining compliance with this statutory requirement is established by regulation at 24 CFR 570.200(g). The county requested relief from the regulatory provisions of 24 CFR 570.200(g) to allow it to reprogram funds in program years 2008–2010 to address pending administrative costs, while maintaining compliance with the statutory provision.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: September 8, 2011.

Reason Waived: In order to avoid a situation in which the county must lay off or otherwise reduce staffing levels at a critical time in its implementation of a legal settlement agreement, HUD approved a waiver of 24 CFR 570.200(g) to the extent necessary to provide reasonable flexibility in reprogramming funds. The county has assured HUD that the reprogramming will not result in the county exceeding the statutory limitations on planning and administrative expenditures. The waiver allowed the county to maintain capacity to administer its CDBG program until December 31, 2011.

Contact: Steve Johnson, Office of Block Grant Assistance, Entitlement Communities Division, Office of Community Planning and Development, 451 7th Street SW., Room 7282, Washington, DC 20410, telephone (202) 708–1577.

• *Regulations:* 24 CFR 570.209(b)(3).

Project/Activity: The City of Cleveland, OH, requested waiver of the standards for evaluating public benefit for special economic development projects for its Green City Growers Cooperative project. The city submitted a request for Section 108 Guaranteed Loan funds in the amount of $8,000,000 to be used in conjunction with its Fiscal Year 2009 Brownfield Economic Development Initiative (BEDI) grant in the amount of $2,000,000 for the Green City Growers Project. The project involves acquisition of real property and construction of a 6-acre commercial greenhouse complex on a 10-acre site. The project would cause the creation of 42 permanent jobs. The project is an eligible economic development activity in accordance with 24 CFR 570.703(i), pursuant to 24 CFR 570.203(b) and will meet the CDBG national objectives criteria in accordance with 24 CFR 570.208(a)(1)(vii) and 24 CFR 570.208(d)(5)(i) through low and moderate income area benefit; however, it does not meet the guidelines for evaluating public benefit for special economic development activities in accordance with 24 CFR 570.209(b)(3) for an individual activity. The city requested a waiver of these standards and cited other benefits to the residents in the project's service area, which is the city's Central Neighborhood Revitalization Area.

Nature of Requirements: HUD's regulation at 24 CFR 570.209(b)(3) specifies the minimum level of public benefit that must be obtained from the expenditure of CDBG funds (which term includes the proceeds of a Section 108 loan and BEDI grant funds) for special economic development projects. Specifically, for an individual activity that either creates or retains jobs or provides goods and services, the use of CDBG funds cannot exceed $50,000 per full-time equivalent job or $1,000 per low- and moderate-income person to which goods or services are provided. The City's project did not meet these guidelines.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: July 29, 2011.

Reasons Waived: HUD granted the waiver because the City showed good cause by demonstrating that public benefits would be derived from the project, the public benefits provided by the project would be appropriate relative to the amount of CDBG assistance provided, and that an economic hardship would be suffered if the project was not carried out.

Contact: Paul D. Webster, Director, Financial Management Division, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–1871.

• *Requirements:* Sections IV.A.1, IV.A.1.e and IV.A.2 of the Notice of Allocations, Application Procedures, and Requirements for Homelessness Prevention and Rapid Re-Housing Program Grantees under the American Recovery and Reinvestment Act of 2009, issued March 19, 2009 (HPRP Notice); and 24 CFR 91.115(c), (i), 576.3, and 576.35.

Project/Activity: The State of Alabama requested a waiver of several Homelessness

Prevention and Rapid Re-Housing Program (HPRP) requirements, including sections IV.A.1, IV.A.1.e and IV.A.2 of the HPRP Notice, to allow more flexibility in providing homelessness prevention and rapid re-housing assistance to households affected by the April 2011 severe storms, tornadoes, straight-line winds, and flooding in the state.

Nature of Requirement: Sections IV.A.1 and IV.A.2 of the HPRP Notice limit the amount of time a program participant may receive HPRP financial assistance or housing relocation and stabilization services to 18 months. Section IV.A.1.e allows HPRP funds to be used for motel and hotel vouchers only up to 30 days for a program participant and only if no appropriate shelter beds are available and subsequent rental housing has been identified but is not immediately available. The citizen participation requirements at 24 CFR 91.115(c) and (i) require a minimum public comment period of 30 days for any substantial amendment to a grantee's consolidated plan. The ''emergency shelter'' definition in 24 CFR 576.3 limits the types of shelter fundable with Emergency Shelter Grants (ESG) to facilities focused on providing temporary or transitional shelter for homeless families and individuals. Under 24 CFR 576.35, states have 65 days after the award date to make ESG funds available to subgrantees, the subgrantees have another 180 days to obligate the funds, and all funds must be expended within 2 years of the award date.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: July 1, 2011.

Reason Waived: HUD waived the requirements listed above to give the State more flexibility in using ESG and HPRP funds to assist households affected by the disaster. The State was allowed to reduce its public comment period to 3 days so the State could quickly reprogram and reallocate its ESG and HPRP funds to adapt to new needs caused by the disaster. Where shelter facilities were overfilled or damaged by the disaster, ESG funds could be used to rent available rental housing to shelter disaster victims. Program participants affected by the disaster could continue receiving HPRP assistance beyond the 18-month limit. Where adequate shelters and housing were both scarce, HPRP hotel vouchers could be used for longer periods and without identification of a subsequent residence. Finally, the extension of the ESG obligation and expenditure deadlines would allow for time needed to rebuild service delivery systems impaired by the disaster.

Contact: Ann M. Oliva, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7262, Washington, DC 20410, telephone (202) 708–4300.

Requirement: Section IV.A.1 of the HPRP.

Project/Activity: The State of Maryland requested the waiver so that its subgrantee, Garrett County Community Action Committee, Inc. (Garrett County CAC), could provide HPRP assistance to individuals and families in housing units owned by Garrett County CAC.

Nature of Requirement: Section IV.A.1 of the HPRP Notice provides that HPRP financial assistance may not be used in connection with housing owned by the grantee, subgrantee, or the parent, subsidiary, or affiliated organization of the subgrantee.

Date Granted: July 22, 2011.

Reason Waived: The State of Maryland and Garrett County CAC sufficiently demonstrated that: (1) The use of the housing owned and/or managed by Garrett County CAC is necessary to provide an adequate supply of appropriate housing options for HPRP participants in Garrett County; (2) the State of Maryland and Garrett County CAC disclosed the conflict of interest; (3) HPRP participants would not be required or steered to live in housing owned and/or managed by Garrett County CAC in order to receive financial or other assistance under HPRP; and (4) other than a one-time payment of rent in arrears, Garrett County CAC would not provide HPRP rental assistance to any tenant who lives in a unit that receives ongoing assistance, or who receives tenant-based rental assistance, under any other program.

Contact: Ann M. Oliva, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7262, Washington, DC 20410, telephone (202) 708–4300.

• *Requirement:* Section IV.A.1 of the HPRP Notice.

Project/Activity: The State of California, County of Alameda, City of Oakland, City of Alameda, City of Berkeley, City of Fremont, and City of Hayward requested the waiver to help individuals and families in Alameda County retain or obtain units in housing owned by an HPRP subgrantee or its subsidiary. The grantees and their subgrantees had partnered to implement a single, comprehensive, coordinated HPRP program in Alameda County. According to the grantees, the housing owned by the following subgrantees and one subsidiary organization was necessary to meet the high demand for affordable housing by individuals and families eligible for HPRP: Abode Services (HPRP subgrantee), Allied Housing (a subsidiary of Abode Services), Berkeley Food and Housing Project (HPRP subgrantee), and Building Futures with Woman and Children (HPRP subgrantee).

Nature of Requirement: Section IV.A.1 of the HPRP Notice provides that HPRP financial assistance may not be used in connection with housing owned by the grantee, subgrantee, or the parent, subsidiary, or affiliated organization of the subgrantee.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: September 14, 2011.

Reason Waived: The grantees sufficiently demonstrated that: (1) The conflict of interest for each subgrantee had been publicly disclosed; (2) HPRP participants would not be required or steered to live in housing owned by the subgrantees or subsidiary in order to receive financial or other assistance under HPRP; (3) other than a one-time payment of rent in arrears, HPRP rental assistance would not be provided to any tenant who lives in a unit that receives ongoing assistance, or who receives tenant-based rental assistance, under any other program; (4) no subgrantee would conduct an eligibility assessment for any individual or family housed in units owned by that subgrantee or its subsidiary; and (5) no subgrantee would assess rent reasonableness of determine the amount or length of the rent subsidy for housing owned by that subgrantee or its subsidiary.

Contact: Ann M. Oliva, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7262, Washington, DC 20410, telephone (202) 708–4300.

• *Requirements:* Section IV.A.1 of the HPRP Notice.

Project/Activity: The U.S. Virgin Islands requested the waiver so that HPRP funds could be used to assist individuals and families in housing owned by the Virgin Islands Housing Finance Agency (VIHFA) and its subsidiary Virgin Islands Housing Management, Inc. (VIHM).

Nature of Requirement: Section IV.A.1 of the HPRP Notice provides that HPRP financial assistance may not be used in connection with housing owned by the grantee, subgrantee, or the parent, subsidiary, or affiliated organization of the subgrantee.

Granted by: Mercedes Márquez, Assistant Secretary for Community Planning and Development.

Date Granted: September 29, 2011.

Reason Waived: The U.S. Virgin Islands sufficiently demonstrated that: (1) The use of HPRP funds to pay rent or utilities in arrears in housing owned by VIHFA and VIHM is necessary to prevent eligible households from becoming homeless; (2) VIHFA and VIHM disclosed the conflict of interest; (3) HPRP participants would not be required or steered to live in VIHFA's or VIHM's housing in order to receive financial or other assistance under HPRP; (4) other than a one-time payment of the tenant's portion of rent in arrears, HPRP rental assistance would not be provided to any tenant who lives in a unit that receives ongoing assistance, or who receives tenant-based rental assistance, under any other program; and (5) initial assessment and review of each applicant's eligibility, assistance needs, and rent reasonableness would be conducted by organizations other than VIHFA and VIHM.

Contact: Ann M. Oliva, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7262, Washington, DC 20410, telephone (202) 708–4300.

II. Regulatory Waivers Granted by the Office of Housing—Federal Housing Administration (FHA)

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 203.4(b).

Project/Activity: FHA Single Family Mortgage Insurance Program, Washington, DC.

Nature of Requirement: HUD's regulation at 24 CFR 203.4(b) requires that mortgagees seeking Lender Insurance authority have an acceptable claim and default record for at least two years. This regulation makes new mortgagees created from mergers, acquisitions and reorganizations, including changes and transfers among corporate parents and subsidiaries, ineligible for Lender Insurance, even when the former mortgagee entity or entities had Lender Insurance authority.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 9, 2011.

Reason Waived: Lender Insurance provides benefits and cost savings to both mortgagees and HUD. By waiving this requirement an expanded number of mortgagees with a demonstrated successful record in the Lender Insurance program may participate in the program. HUD is currently amending the regulation at 24 CFR 203.4(b) to specifically allow mortgagees created through corporate acquisitions, mergers and reorganizations to qualify for the Lender Insurance program.

Contact: Philip Caulfield, Home Mortgage Insurance Division, 45, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Monarch Place Apartments, Marion, OH, Project Number: 043–HD057/OH16–Q091–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: July 27, 2011.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Charles Place Apartments, Rushville, IL, Project Number: 072–EE178/IL06–S091–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 10, 2011.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Commonwealth Apartments, Loves Park, IL, Project Number: 071–HD169/IL06–Q091–011.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 19, 2011.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Hudson House, Bronx, NY, Project Number: 012–EE376/NY36–S091–006.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 23, 2011.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Boehme Hinni Apartments, Cape Girardeau, MO, Project Number: 085–HD054/MO36–Q091–003.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 29, 2011.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Stella Linney House, Wilburton, OK, Project Number: 118–HD039/OK56–Q091–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 22, 2011.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Woodburne House, Louisville, KY, Project Number: 083–EE112/KY36–S081–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 1, 2011.

Reason Waived: Additional time was needed for the sponsor/owner to resubmit their application to secure funding for Low Income Housing Tax Credits through the Kentucky Housing Corporation and for the project to reach initial closing.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Hudson Disabled Housing, Hudson, WI, Project Number: 075–HD094/WI39–Q081–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 1, 2011.

Reason Waived: Additional time was needed for the project to reach initial closing.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: Markham Gardens, Staten Island, NY,
Project Number: 012–EE370/NY36–S081–006.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.
Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.
Date Granted: July 1, 2011.
Reason Waived: Additional time was needed for the firm commitment application to be processed and for the project to reach initial closing.
Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: TBD, Westerly, RI, And Project Number: 016–HD055/RI43–Q081–001.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.
Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: July 8, 2011.
Reason Waived: Additional time was needed for the firm commitment application to be submitted and processed and for the project to reach initial closing.
Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: Hale Mahaolu Ehiku, Phase II, Kihei, HI, Project Number: 140–EE035/HI10–S051–002.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.
Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.
Date Granted: July 8, 2011.
Reason Waived: Additional time was needed to finalize the Declaration of Covenants, Conditions and Restrictions and other closing documents for this mixed finance project.
Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: Incor Two, Muskogee, OK, Project Number: 118–HD038/OK56–Q081–002.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.
Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.
Date Granted: August 1, 2011.
Reason Waived: Additional time was needed for the firm commitment to be issued and for the project to reach initial closing.
Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: Rock Ridge Apartments, McAlester, OK, Project Number: 118–HD037/OK56–Q081–001.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.
Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.
Date Granted: August 3, 2011.
Reason Waived: Additional time was needed for the sponsor/owner to finalize the development plans and for the project to reach initial closing.
Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: Gautier VOA Senior Housing, Inc., Project Number: 065–EE051/MS26–S091–001.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.
Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.
Date Granted: August 15, 2011.
Reason Waived: Additional time was needed for the project to reach initial closing.
Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: Picayune VOA Senior Housing, Inc., Project Number: 065–EE052/MS26–S091–002.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.
Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.
Date Granted: August 17, 2011.
Reason Waived: Additional time was needed for the project to reach initial closing.
Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: AHEPA 63, Tallmadge, OH, Project Number: 042–EE218/OH12–S071–004.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.
Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: August 31, 2011.
Reason Waived: Additional time was needed to process the firm commitment application and for the project to reach initial closing.
Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: Mary Rose Estates Apartments, Willoughby, OH, Project Number: 042–EE208/OH12–S061–006.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.
Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.
Date Granted: September 2, 2011.
Reason Waived: Additional time was needed to resolve the zoning litigation, the site change and cost increases issues and for the project to reach initial closing.
Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 4517th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: Shiloh Senior Housing, New Rochelle, NY, Project Number: 012–EE361/NY36–S071–007.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18

months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 9, 2011.

Reason Waived: Additional time was needed for this mixed finance project to finalize the bond issues and for the project to reach initial closing.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Kelsey Village Apartments (aka Querencia Place, Sacramento, CA, Project Number: 136–HD022/CA30–Q071–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 29, 2011.

Reason Waived: Additional time was needed for the firm commitment application to be submitted and processed and for the project to reach initial closing.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Bakersfield Senior Apartments, Bakersfield, CA, Project Number: 122–EE208/CA16–S081–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 30, 2011.

Reason Waived: Additional time was needed for the firm commitment application to be processed and for the project to reach initial closing.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.830(c)(4).

Project/Activity: Allen by the Bay Senior Housing, Queens, NY, Project Number: 012–EE368/NY36–S081–004.

Nature of Requirement: Section 891.830(c)(4) requires that capital advance funds be drawn down only in an approved ratio to other funds, in accordance with a drawdown schedule approved by HUD.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: July 26, 2011.

Reason Waived: While HUD generally expects the capital advance funds to be drawn in one-to-one ratio for eligible costs actually incurred, HUD acknowledges that, at times, some variance from the drawdown requirements may be needed for the success of the project. For this project, the waiver was granted to permit the capital advance to be used to collateralize the tax exempt bonds issued to finance the construction of the project and to pay off a portion of the tax-exempt bonds that strictly related to capital advance eligible costs.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.830(c)(4).

Project/Activity: NCR Holy Trinity II (Mother Teresa Commons), Bedford Heights, OH, Project Number: 042–EE241/OH12–S091–004.

Nature of Requirement: Section 891.830(c)(4) prohibits the capital advance funds from paying off bridge or construction financing, or repaying or collateralizing bonds.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 5, 2011.

Reason Waived: While HUD generally expects the capital advance funds to be drawn in one-to-one ratio for eligible costs actually incurred, HUD acknowledges that, at times, some variance from the drawdown requirements may be needed for the success of the project. For this project, the waiver was granted to permit the capital advance to be used to collateralize the tax exempt bonds issued to finance the construction of the project and to pay off a portion of the tax-exempt bonds that strictly related to capital advance eligible costs.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.830(c)(4).

Project/Activity: Betmar Village, Atlanta, GA, Project Number: 061–EE176/GA06–S091–007.

Nature of Requirement: Section 891.830(c)(4) prohibits the capital advance funds from paying off bridge or construction financing, or repaying or collateralizing bonds.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 31, 2011.

Reason Waived: While HUD generally expects the capital advance funds to be drawn in one-to-one ratio for eligible costs actually incurred, HUD acknowledges that, at times, some variance from the drawdown requirements may be needed for the success of the project. For this project, the waiver was granted to permit the capital advance to be used to collateralize the tax exempt bonds issued to finance the construction of the project and to pay off a portion of the tax-exempt bonds that strictly related to capital advance eligible costs.

Contact: Aretha Williams, Acting Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6142, Washington, DC 20410–8000, telephone (202) 708–3000.

III. Regulatory Waivers Granted by the Office of Public and Indian Housing

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 5.801(d)(1).

Project/Activity: Oakland Housing Authority, (CA003), Oakland, CA.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the housing authority's (HA) fiscal year end (FYE), in accordance with the Single Audit Act and OMB Circular A–133.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing

Date Granted: August 12, 2011.

Reason Waived: The HA contends that as a result of a HUD Office of the Inspector General Investigation, additional time was needed to submit its fiscal year end (FYE) June 30, 2010, audited financial information. An initial waiver request dated March 17, 2011, was granted with a June 30, 2011, financial submission due date. Granting the waiver would provide additional time to allow the financial data schedule to be adequately completed and for inputting the June 30, 2010, audited financial information into the Financial Assessment Subsystem (FASS) on-line system. However, this FASS audited submission waiver (extension) does not apply to Circular A–133 submissions to the Federal Audit Clearinghouse. The HA is required to meet the A–133 due dates.

Contact: Johnson Abraham, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW., Suite 100, Washington, DC 20410, telephone (202) 475–8583.

• *Regulation:* 24 CFR 902.20.

Project/Activity: Bladenboro Housing Authority, (NC089), Bladenboro, NC.

Nature of Requirement: The objective of this regulation is to determine whether a housing authority (HA) is meeting the standard of decent, safe, sanitary, and in good repair. The Real Estate Assessment Center (REAC) provides for an independent physical inspection of a HA's property of properties that includes a statistically valid sample of the units.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing

Date Granted: September 8, 2011.

Reason Waived: The housing authority (HA) sustained extensive wind and hail damage due to a tornado. The HA contends that a physical inspection at this time would unduly penalize the HA and adversely affect its Public Housing Assessment Score. The reporting requirements were waived to give the HA the necessary time to tend to any damage caused by the storm.

Contact: Johnson Abraham, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW., Suite 100, Washington, DC 20410, telephone (202) 475–8583.

• *Regulation:* 24 CFR 982.312.

Project/Activity: Bellingham/Whatcom County Housing Authority (BWCHA), Bellingham, WA.

Nature of Requirement: 24 CFR 982.312 prohibits the family from being absent from the unit for more than 180 consecutive days.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 12, 2011.

Reason Waived: The family participated in the Homeownership Option under the voucher program. The head of household was called for active duty in the United States Navy. Granting a waiver prevented a default of the housing loan and unnecessary hardship on the family.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(d) and 982.505(c)(3).

Project/Activity: Placios Housing Authority (PHA), Placios, TX.

Nature of Requirement: HUD's regulation at 24 CFR 982.503(d) states that HUD may consider and approve a public housing agency's establishment of a payment standard lower than the basic range, but that HUD will not approve a lower payment standard if the family share for more than 40 percent of participants in the agency's voucher program exceeds 30 percent of adjusted monthly income. HUD's regulation 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 13, 2011.

Reason Waived: This waiver was granted because these cost-saving measures would enable the PHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Tennessee Housing Development Agency (THDA), Nashville, TN.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 13, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the THDA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Metropolitan Development and Housing Agency (MDHA), Nashville, TN.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 18, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the MDHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Danbury Housing Authority (DHA), Danbury, CT.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 16, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the DHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Bayamon Public Housing Authority (BPHA), Bayamon, PR.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 25, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the BPHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Housing Authority of Bladenboro (HAB), Bladenboro, NC.

Nature of Requirement: 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 25, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the HAB to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and

Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: East Tennessee Human Resource Agency (ETHRA), Maynardville, TN.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 7, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the ETHRA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Housing Authority of Hartsville (HAH), Hartsville, SC.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 20, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the HAH to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Housing Authority of Bartow (HAB), Bartow, FL.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 21, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the HAB to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Brunswick Housing Authority (BHA), Brunswick, GA.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 21, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the BHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Harnett County Housing Authority (HCHA), Harnett County, NC.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 21, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the HCHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Jefferson Metropolitan Housing Authority (JMHA), Jefferson, OH.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 22, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the JMHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Anasco Public Housing Authority (APHA), Anasco, PR.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 29, 2011.

Reason Waived: This waiver was granted because this cost-saving measure would enable the APHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Southern Nevada Regional Housing Authority (SNRHA), Las Vegas, NV.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(d) states that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 6, 2011.

Reason Waived: The participant, who is disabled, required an exception payment standard to remain in her manufactured home space which she owns. Her health care provider confirmed the need for this participant to remain in her unit. To provide this reasonable accommodation so the client could be assisted in her current unit and pay no more than 40 percent of her adjusted income toward the family share, the SNRHA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Willimantic Housing Authority (WHA), Willimantic CT, Las Vegas, NV.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(d) states that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 30, 2011.

Reason Waived: The participant, who is disabled, required an exception payment standard to move to a unit that is accessible. The health care provider confirmed the need for this participant to move to this unit. To provide this reasonable accommodation so the client could be assisted in a new accessible unit and pay no more than 40 percent of her adjusted income toward the family share, the WHA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.517(b)(1).

Project/Activity: Housing Authority of the City of Alameda (HACA), Alameda, CA.

Nature of Requirement: HUD's regulation at 24 CFR 982.517(b) (1) states that the utility allowance schedule must be determined based on the typical costs of utilities and services paid by energy conservative households.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 28, 2011.

Reason Waived: The waiver was granted because the California Tax Credit Allocation Committee approves utility allowances for low-income housing tax credit (LIHTC) units. These utility allowances more accurately reflect the typical cost and consumption of utilities in the project and encourage development of affordable energy efficient units.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.517(b)(1).

Project/Activity: New York State Homes and Community Renewal (NYSHCR), Albany, NY.

Nature of Requirement: HUD's regulation at 24 CFR 982.517(b)(1) states that the utility allowance schedule must be determined based on the typical costs of utilities and services paid by energy conservative households.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 25, 2011.

Reason Waived: The waiver was granted because implementing a project-specific utility allowances for any development that converts to sub-metering and is awarded enhanced vouchers would ensure that utility allowances accurately reflect the typical cost for consumption of utilities at specific projects.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 985.101(a).

Project/Activity: Pleasantville Housing Authority (PHA), Pleasantville, NJ.

Nature of Requirement: HUD's regulation at 24 CFR 985.101(a) states that a public housing agency must submit the HUD-required Section Eight Management Assessment Program (SEMAP) certification form within 60 calendar days after the end of its fiscal year.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 16, 2011.

Reason Waived: PHA is a small housing agency with less than 250 voucher units. Small housing agencies are required to submit their SEMAP certifications every other year depending on their fiscal year end date. The field office informed PHA that it was not required to submit a certification for its fiscal year ending March 31, 2011. However, small PHAs were not exempt from submitting certifications for that quarter.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 985.101(a).

Project/Activity: Brockton Area Multi-Service Incorporated (BAMSI), Brockton, MA.

Nature of Requirement: HUD's regulation at 24 CFR 985.101(a) states that a public housing agency must submit the HUD-required Section Eight Management Assessment Program (SEMAP) certification form within 60 calendar days after the end of its fiscal year.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 21, 2011.

Reason Waived: The waiver was granted because due to Tropical Storm Irene, BAMSI was unable to submit its SEMAP certification by the deadline of August 29, 2011, due to a power outage.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 990.185(a)(1)(ii).

Project/Activity: Tuscaloosa Housing Authority (THA), Tuscaloosa, Alabama

Nature of Requirement: This regulation requires that 75 percent of savings generated under the Operating Fund by an Energy Performance Contract using the Frozen Rolling Base incentive must be used for debt service. If less than 75 percent of savings are used for debt service, the difference between whatever percentages is used and 75 percent must be returned to HUD. The public housing authority can keep the remaining 25 percent.

Granted by: Sandra B. Henriquez, Assistant Secretary, Public and Indian Housing

Date Granted: August 31, 2011.

Reason Waived: Enforcement of the requirement would have resulted in the PHA having in excess of $845,000 recaptured by HUD, representing a significant portion of their allocation. The Tuscaloosa Housing Authority was struck by a tornado in April of 2011, resulting in a large amount of unforeseen costs. Recapture of the Energy Performance Contract-related savings would have resulted in additional financial hardship to the PHA.

Contact: Erin Schaefer, Housing Program Specialist, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4212, Washington, DC 20410, telephone (202) 402–6354.

[FR Doc. 2011–32446 Filed 12–16–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Grant Program To Assess, Evaluate and Promote Development of Tribal Energy and Mineral Resources

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Solicitation of proposals.

SUMMARY: The Energy and Mineral Development Program (EMDP) provides funding to Indian tribes with the mission goal of assessing, evaluating, and promoting energy and mineral resources on Indian trust lands for the economic benefit of Indian mineral owners. To achieve these goals, the Department of the Interior's Office of Indian Energy and Economic Development (IEED), through its Division of Energy and Mineral Development (DEMD) office, is soliciting proposals from tribes. The Department will use a competitive evaluation process to select several proposed projects to receive an award.

DATES: Submit grant proposals on or before March 16, 2012. We will not consider grant proposals received after this date.

ADDRESSES: Mail or hand-carry EMDP proposals to the Department of the Interior, Division of Energy and Mineral Development, Attention: Energy and Mineral Development Program, 12136 W. Bayaud Avenue, Suite 300, Lakewood, Colorado 80228. After November 30, 2011, the DEMD office will have a new address at 13922 Denver West Parkway, Suite 200, Lakewood, Colorado 80401. Applicants should also inform local Bureau of Indian Affairs (BIA) offices by forwarding a copy of their proposal to their own BIA Agency and Regional offices.

Emailing your proposal is highly recommended this year. You may email your proposal to Amanda John at *amanda.john@bia.gov* or Amber Beckham at *amber.beckham@bia.gov*. We will respond back to you via email that we received your proposal and that it was readable.

FOR FURTHER INFORMATION CONTACT: If you have questions about the EMDP program or submission process, please contact either Amanda John, Tel: (720) 407–0672, email *amanda.john@bia.gov* or Robert Anderson, Tel: (720) 407–0602 or email: *robert.anderson@bia.gov.*

For additional copies of the Proposal Writing Guidelines Manual, contact Tahnee KillsCrow at Tel: (720) 407–0655, or email: *tahnee.killscrow@bia.gov.*

If you have technical questions about the commodity you wish to assess or develop, please contact the appropriate DEMD persons listed below:

- *Mineral Projects (Precious Metals, Sand and Gravel):* Lynne Carpenter, Tel: (720) 407–0605, email: *lynne.carpenter@bia.gov,* or David Holmes, Tel: (720) 407–0609, email: *david.holmes@bia.gov;*
- *Conventional Energy Projects (Oil, Natural Gas, Coal):* Bob Just, Tel: (720) 407–0611, or email: *robert.just@bia.gov;*
- *Renewable Energy Projects (Biomass, Wind, Solar):* Winter Jojola-Talburt, Tel: (720) 407–0668 or email: *winter.jojola-talburt@bia.gov;* and
- *Geothermal Energy:* Bob Just, Tel: (720) 407–0611, email: *bob.just@bia.gov.*

You may also find additional information about the EMDP program from our Web site, such as sample proposals, sample tribal Resolutions, frequently asked questions, best practices for creating proposals, and general information about the technical assistance that the DEMD office can provide to tribes. To locate our Web page, navigate to the Indian Affairs Web site at *www.bia.gov.* Along the top tabs, click on the tab ''WHO WE ARE.'' On that page, you will find a heading ''OUR ORGANIZATION STRUCTURE.'' Locate the ''Indian Energy and Economic Development (IEED)'' link and click on that. Under the ''SPOTLIGHT'' section there will be a new announcement titled ''Energy and Mineral Tribal Grant Program (EMDP).'' Clicking on that link will take to you to the page containing the EMDP program information.

The full link to the same page is as follows: *http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEMD/TT/TF/index.htm.* Copy the above link address and paste it into the address box on your Internet browser program.

SUPPLEMENTARY INFORMATION:

A. Background
B. Items To Consider Before Preparing an Application for an Energy and Mineral Development Grant
C. How To Prepare an Application for Energy and Mineral Development Funding
D. Submission of Application in Digital Format
E. Application Evaluation and Administrative Information
F. When To Submit
G. Where To Submit
H. Transfer of Funds
I. Reporting Requirements for Award Recipients
J. Requests for Technical Information

A. Background

Section 103 of the Indian Self-Determination Act, Public Law 93–638, as amended by Public Law 100–472 contains the contracting mechanism for energy and mineral development-funded programs.

The IEED, through the DEMD office located in Lakewood, Colorado, administers and manages the EMDP program. The objectives of this solicitation are to receive proposals for energy and mineral development projects in the areas of exploration, assessment, development, feasibility and market studies.

Energy includes both conventional energy resources (such as oil, gas, coal, uranium, and coal bed gas) and renewable energy resources (such as wind, solar, biomass, hydro and geothermal). Mineral resources include industrial minerals (*e.g.,* sand, gravel), precious minerals (*e.g.,* gold, silver, platinum), base minerals (*e.g.,* lead, copper, zinc), and ferrous metal minerals (*e.g.,* iron, tungsten, chromium).

The DEMD's goal is to assist tribes to achieve economic benefits from their energy and mineral resources. The purpose of the program is to expand the knowledge-base through which tribes, either by themselves or with industry partners, can bring new energy and mineral resources into the marketplace through a comprehensive understanding of their undeveloped resource potential. A strong knowledge-base will also ensure that new resources are produced in an environmentally acceptable manner.

Each year, DEMD usually receives more energy and mineral development applications than can be funded in that year. The DEMD has discretion for awarding funds and requires that the tribes compete for such funds on an annual basis. The DEMD has established ranking and paneling procedures with defined criteria for rating the merits of proposals to make the award of limited funds as fair and equitable as possible.

The EMDP program is funded under the non-recurring appropriation of the BIA's budget. Congress appropriates funds for EMDP funding on a year-to-year basis. Thus, while some projects may extend over several years, funding for successive years depends on each fiscal year's appropriations.

The information collection requirements contained in this notice have been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3504(h). The OMB control number is 1076–0174. The authorization expires on April 30, 2013. An agency may not sponsor, and you are not required to respond to, any information collection that does not display a currently valid OMB Control Number.

B. Items To Consider Before Preparing an Application for an Energy and Mineral Development Grant

1. Trust Land Status

The EMDP funding can only be made available to tribes whose lands are held in trust or restricted fee by the federal

government. Congress has appropriated these funds for the development of energy and mineral resources only on Indian trust or restricted fee lands.

2. Tribes' Compliance History

The DEMD will monitor all EMDP grants for statutory and regulatory compliance to assure that awarded funds are correctly applied to approve projects. Tribes that expend funds on unapproved functions may forfeit remaining funds in that proposal year, and possibly for any future EMDP funding. The DEMD may also conduct a review of prior award expenditures before making a decision on funding current year proposals, and may request explanation from tribes who have outstanding project funds from previous years.

3. BIA Sanction List

Tribes who are currently under BIA sanction at Level 2 or higher resulting from non-compliance with the Single Audit Act may be ineligible from being considered for an award. Tribes at Sanction Level 1 will be considered for funding.

4. Completion of Previous Energy and Mineral Development Projects

Generally, the DEMD will not support nor recommend additional funding for a new project until a previous year's project has been completed, documented and reviewed by the DEMD.

However delays sometime occur that are beyond the control of the tribe or their consultant. These situations will be taken into consideration when making decisions on new EMDP awards. Examples of events which cause delays include late delivery of funding awards to the tribal project, difficulty in finding appropriate contractors to perform project functions, permitting issues, and weather delays.

5. Multiple Projects

The DEMD will accept separate applications for multiple projects, even if the project concerns the same commodity. For example, the tribe may have a viable renewable energy resource, but needs to better define the resource with further exploration work or analysis. Concurrently the tribe also needs to evaluate the market place for selling their resource. In this situation, two separate proposals can be submitted and DEMD will apply the same objective ranking criteria to each proposal, although EMDP budget levels may limit the full application of this guideline. Contact DEMD if you have questions concerning multiple projects.

6. Multi-Year Projects

The DEMD cannot award multi-year funding for a project. Funding available for the EMDP is subject to annual appropriations by Congress and, therefore, DEMD can only consider single-year funded projects.

The EMDP projects requiring funding beyond one-year intervals should be submitted as single-year proposals with an explanation that the tribe expects additional time will be required to complete the project and will, therefore, be submitting applications in following years. The DEMD will make every effort to fund a tribe's project in following years although there is no guarantee of EMDP awards being available for future years of a multi-year project due to the discretionary nature of EMDP award funding.

7. Use of Existing Data

The DEMD maintains a comprehensive set of tribal data and information and has spent considerable time and expense in collecting digital land grids, geographic information system (GIS) data and imagery data for many reservations. Well and production data, geophysical data (such as seismic data), geology and engineering data, are all stored at DEMD's offices. All of these data sets can be made available to tribes or their consultants to reduce the cost of their investigations.

Budget line items will not be allowed for data or products that reside at DEMD. The tribe or the tribe's consultant must first check with DEMD for availability of these data sets on the reservation they are investigating. If DEMD does not have a particular data set, then EMDP funds may be used to acquire such data.

When a proposal includes the acquisition of new data, the tribe should thoroughly search for preexisting data to ensure there is no duplication. If older data does exist, it may still have considerable value. Using today's data processing and interpretation techniques, older data may be updated or improved, either by the DEMD or by the tribe's consultant.

8. Using Technical Services at DEMD

The DEMD has many in-house technical capabilities and services that the tribes may wish to use. All services provided by DEMD are without charge to the tribes. Tribes can obtain maximum benefit from energy and mineral development studies by first using DEMD's services, or by using DEMD services in conjunction with outside consultants. Services available at DEMD include:

- Technical literature search of previous investigations and work performed in and around reservations using reference materials located nearby, such as the U.S. Geological Survey (USGS) library in Denver, Colorado, or the Colorado School of Mines library in Golden, Colorado;
- Well production history analysis, decline curve and economic analysis of data obtained through DEMD's in-house databases;
- Well log interpretation, including correlation of formation tops, identification of producing horizons, and generation of cross-sections;
- Technical mapping capabilities, using data from well log formation tops and seismic data;
- Contour mapping capabilities, including isobaths, calculated grids, color-fill plotting, and posting of surface features, wells, seismic lines and legal boundaries;
- Seismic data interpretation and data processing;
- Three dimensional modeling of mine plans;
- Economic analysis and modeling for energy and solid mineral projects; and
- Marketing studies.

9. What the Energy and Mineral Development Program Cannot Fund

As stated above, these funds are specifically for energy and mineral development project work only. Examples of elements that cannot be funded include:

- Establishing or operating a tribal office, and/or purchase of office equipment;
- Salaries or fringe benefits for tribal employees; except for clearly defined technical project related tasks. Salary requests must comply with the detailed budget component as described under Mandatory Component 3;
- Indirect costs as defined by the Federal Acquisition Regulation, and overhead;
- Purchase of equipment such as computers, vehicles, field gear, anemometer (Met) towers, etc. that are used to perform pre-development activities. However, the leasing of this type of equipment for the pre-development activities is allowed;
- Purchasing or leasing of equipment for the development of energy and mineral resources;

This would include such items as well drilling rigs, backhoes, bulldozers; cranes, trucks, etc;

- Drilling of wells for the sale of hydrocarbons, geothermal resources, other fluid and solid minerals (however, funds may be used for the drilling of

exploration holes for testing, sampling, coring, or temperature surveys);

- Legal fees;
- Application fees associated with permitting;
- Academic research projects;
- Development of unproven technologies;
- Training (for assistance on training and workforce development, contact IEED's Division of Workforce Development, Mr. Francis Dunne, at (202) 495–9843);
- Contracted negotiation fees;
- Purchase of data that is available through DEMD;
- Any other activities not authorized by the tribal resolution or by the award letter; and,
- Environmental Impact Studies (EIS).

10. Who Performs Energy and Mineral Development Studies?

The tribe determines who they wish to perform the energy and mineral development work, such as a consultant, a private company, or other sources described in the list below:

- A private company (although that company must not be competing for exploration or development rights on the tribe's lands);
- An experienced and qualified scientific consultant;
- A federal government agency (such as U.S. Geological Survey or the U.S. Department of Energy or a state government agency (such as a state geological survey);
- The DEMD office, although in this case, funds would not be transferred to the tribe but would be obligated by DEMD.

There are no requirements or restrictions on how the tribe performs their contracting function for the consultant or company. The tribe is free to issue the contract through a sole source selection or through competitive bidding, depending on the tribe's own contracting policies and procedures.

C. How to Prepare an Application for Energy and Mineral Development Funding

Each tribe's application must meet the criteria in this notice. A complete energy and mineral development request must contain the following three mandatory components:

1. A current tribal resolution authorizing the proposed project;
2. A proposal describing the planned activities and deliverable products; and,
3. A detailed budget estimate.

Any funding request that does not contain all of the mandatory components will be considered incomplete and will be returned to the tribe with an explanation. The tribe will then be allowed to correct all deficiencies and resubmit the proposal for consideration on or before the deadline.

This year there will be a page limit restrictions on proposal components. However the applicant will be allowed (and encouraged) to make use of appendices. Brevity of the proposal's proposal and statement of work will assist reviewers and DEMD staff in dealing effectively with proposals. Therefore the project proposal, statement of work and description of deliverable products may not exceed 20 pages. Visual materials, including charts, graphs, maps, photographs and other pictorial presentations are included in the 20-page limitation.

However an application may use appendices for the following types of discussions:

- Use an appendix for the overview of a tribe's history; location, government structure, population makeup, etc.
- Use an appendix to document previous work that has been performed concerning this proposal, including any work that was done under a previous EMDP grant.
- Use an appendix to expand on particular technical technologies or methodologies that will assist DEMD reviewers to gain a better understanding of these methods.

A detailed description of each of the required components follows.

1. Mandatory Component 1: Tribal Resolution

The tribal resolution must be current, signed, and on tribal letterhead. It must authorize tribal approval for an EMDP proposed project in the same fiscal year as that of the energy and mineral development proposal and must explicitly refer to the assessment proposal being submitted. However the resolution should not specify a starting date for the project. The tribal resolution must include:

(a) A description of the commodity or commodities to be studied;

(b) A statement that the tribe is willing to consider development of any potential energy or mineral resource discovered;

(c) A statement describing how the tribe prefers to have the energy or mineral program conducted (*i.e.,* by DEMD in-house professional staff only, by DEMD staff in conjunction with tribal professional staff, by private contractors or consultants, or through other acceptable means).

It is highly recommended that the following paragraphs also be included:

(d) A statement that the tribe will consider public release of information obtained from the energy and mineral development study. (Public release is meant to include publications, a poster session, attending a property fair, or giving an oral presentation at industry or federal meetings and conferences. It does *not* mean providing copies of the data or reports to any individual, private company or other government agency without express written permission from the tribal government.)

(e) We recommend that language also be inserted stating that the tribe requests and authorizes any resultant P.L. 93–638 contract (unless the tribe is a self-governance tribe), as this will expedite the process of the tribe entering into a 93–638 contract and receiving their funds more promptly. This is only a suggestion and up to the tribe to insert such language.

Note: Any information in the possession of DEMD or submitted to DEMD throughout the EMDP process, including the final energy and mineral development study, constitutes government records and may be subject to disclosure to third parties under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Department of the Interior's FOIA regulations at 43 CFR part 2, unless a FOIA exemption or exception applies or other provisions of law protect the information. A tribe may, but is not required to, designate information it submits as confidential commercially or financially sensitive information, as applicable, in any submissions it makes throughout the EMDP process. If DEMD receives a FOIA request for this information, it will follow the procedures in 43 CFR Part 2.

2. Mandatory Component 2: Energy and Mineral Development Proposal

The proposal should be well organized, contain as much detail as possible, yet be presented succinctly to allow a quick and thorough understanding of the proposal by the DEMD ranking team.

Many tribes utilize the services of a staff geoscientist or private consultant to prepare the technical part of the proposal. However, some tribes may not have these resources and therefore, are urged to seek DEMD's technical assistance in preparing their EMDP proposal. Tribes who want technical assistance from DEMD should make this request in writing to the address provided in the **ADDRESSES** section of this notice. The request should be made as early as possible to give DEMD time to provide the assistance.

The proposal should include the following sections:

(a) Overview and Technical Summary of the Project: Prepare a short summary overview of the proposal that is no

longer than one page. The summary should include the following:

- Elements of the proposed study;
- Reasons why the proposed study is needed;
- Total requested funding; and,
- Tribal project lead and tribal contact.

(b) Project Objective and Technical Description, Scope of Work: Provide a technical description of the project area, if sufficient information exists. Give examples of a typical resource occurrence to be examined under the proposal, such as the oil or gas deposit, etc. If possible, include criteria applicable to these types of resource occurrences.

- *Multi-Phased Studies:* Explain whether this assessment request will begin a new study or continue a study that has already been partially completed. Also explain how long the study will last. [**Note:** DEMD cannot guarantee funding for a project from one fiscal year to the next.]
- *Known Energy/Mineral Resource:* If a known energy or mineral deposit exists or produces near the reservation, discuss the possible extension or trend of the deposit onto the reservation.
- *Existing Information:* Acknowledge any existing mineral exploration information and provide references. The proposed new study should not duplicate previous work.
- *Environmental or Culturally Sensitive Areas:* Describe and verify if the resources are located in an archeological, environmentally or culturally sensitive area of the reservation. The tribe must also assist DEMD with the Environmental Assessment phase of the proposed project.
- Describe why the tribe needs the proposed energy and mineral development. Discuss the short and long term benefits to the tribe.
- Describe the work being proposed, project goals and objectives expected to be achieved by the proposed project.
- Describe the location on the reservation where the work will be done. Include relevant page size maps and graphs.
- Provide a detailed description of the scope of work and justification of a particular method. For example, if a geochemical sampling survey is planned, an explanation might include the quantity samples to be obtained, what type of sampling will be targeted, the soil horizons to be tested, general location of the projected sampling, how the samples are to be analyzed and why geochemistry was chosen as an exploration technique. Furnish similar types of explanations and details for geophysics, geologic mapping, core drilling, or any other type of assessment planned.

(c) Deliverable Products: Describe all deliverable products that the proposed assessment project will generate, including all technical data to be obtained during the study. Describe the types of maps to be generated and how these maps and cross-sections will help define the energy and mineral potential on the reservation. Discuss any planned status reports as well as the parameters of the final report.

(d) Resumes of Key Personnel: If the tribe is using a consultant's services, provide the resumes of key personnel who will be performing the project work. The resumes should provide information on each individual's expertise. If subcontractors are used, these should also be disclosed.

3. Mandatory Component 3: Detailed Budget Estimate

A detailed budget estimate is required for the funding level requested. The detail not only provides the tribe with an estimate of costs, but it also provides DEMD with the means of evaluating the cost-benefit of each project. This line-by-line budget must fully detail all projected and anticipated expenditures under the EMDP proposal. The ranking committee reviews each budget estimate to determine whether the budget is reasonable and can produce the results outlined under the proposal.

Each proposed project function should have a separate budget. The budget should break out contract and consulting fees, fieldwork, lab and testing fees, travel and all other relevant project expenses. Preparation of the budget portion of an EMDP proposal should be considered a top priority. The EMDP proposals that include sound budget projections will receive a more favorable ranking over those proposals that fail to provide appropriate budget projections.

The budget page(s) should provide a comprehensive breakdown for those project line items that involve several components, or contain numerous sub-functions.

(a) Contracted Personnel Costs: This includes all contracted personnel and consultants, their respective positions and time (staff-hour) allocations for the proposed functions of a project.

- Personnel funded under the P.L 93–638 Energy and Mineral Development Program must have documented professional qualifications necessary to perform the work. Position descriptions or resumes should be attached to the budget estimate.
- If a consultant is to be hired for a fixed fee, the consultant's expenses should be itemized as part of the project budget.
- Consultant fees must be accompanied by documentation that clearly identifies the qualifications of the proposed consultants, how the consultant(s) are to be used, and a line item breakdown of costs associated with each consultant activity.

(b) Travel Estimates: Estimates should be itemized by airfare, vehicle rental, lodging, and per diem, based on the current federal government per diem schedule.

(c) Data Collection and Analysis Costs: These costs should be itemized in sufficient detail for the reviewer to evaluate the charges. For example, break down drilling and sampling costs in relation to mobilization costs, footage rates, testing and lab analysis costs per core sample.

(d) Other Expenses: Include computer rental, report generation, drafting, and advertising costs for a proposed project.

D. Submission of Application in Digital Format

Submit the application, including the budget pages, in digital form. The DEMD will return proposals that are submitted without the digital components.

Acceptable formats are Microsoft Word and Adobe Acrobat PDF. Each file must be saved with a filename that clearly identifies the file being submitted. File name extensions must clearly indicate the software application used in preparing the documents (*e.g.,* doc, docx, .pdf). Documents that require an original signature, such as cover letters, tribal resolutions and other letters of tribal authorization can be scanned and submitted electronically.

The files can be copied to compact disk (CD or DVD) and mailed, although a more preferable method is to email the complete application. The DEMD will immediately respond back that the application was received and was readable. The budget should be in table format which is recommended to be in Microsoft Excel.

Emails of projects proposals, budget and tribal resolution should be sent to both Amanda John (*amanda.john@bia.gov*) and Amber Beckham (*Amber.Beckham@bia.gov*).

If you have any additional questions concerning the Energy and Mineral Development Program proposal submission process, please contact Amanda John at (720) 407–0672 or Amber Beckham at (720) 407–0692.

E. Application Evaluation and Administrative Information

1. Administrative Review

Upon receiving an application, DEMD will perform a preliminary review of the proposal to determine whether it contains the prescribed information, includes a tribal resolution, and contains sufficient technical and scientific information to permit an evaluation, and does not duplicate or overlap previous or current funded EMDP projects.

The DEMD staff may return an application that does not include all information and documentation required within this notice. During the review of a proposal, DEMD may request the submission of additional information.

2. Ranking Criteria

Proposals will be formally evaluated by a DEMD Review and Ranking Panel using the six criteria described below. Each criterion has a weight percent which is used to determine a final score.

(a) Resource Potential; Weight = 10%. If the resource is determined not to exist on the reservation, then the proposal will be rejected. The panel will base their scoring on both the information provided by the tribe and databases maintained by DEMD. It is critical that the tribe attempt to provide all pertinent information in their proposal in order to ensure that an accurate review of the proposal is accomplished. The reviewers are aware that many tribes have little energy or mineral resource data on reservation lands, and in some cases, resource data does not exist. However, geologic and historical mineral development data exist throughout most of the continental U.S. on lands surrounding Indian reservations.

Many times a producing energy or mineral deposit exists outside but near the reservation boundary. The geologic setting containing the resource may extend onto the reservation, regardless of the size of the reservation. This would suggest potential of finding similar resources on the reservation. In some cases, available data on non-reservation lands may allow for a scientifically acceptable projection of favorable trends for energy or mineral occurrences on adjacent Indian lands.

For renewable energy proposals, this factor applies to conditions favorable for the economic development of the renewable energy source being studied.

Examples of types of questions that the DEMD ranking panel will be analyzing in their review include: Based on your own knowledge or investigations, does the resource exist on or adjacent to the reservation? Does the application adequately describe the existence of the resource being present on or near the reservation, providing ample supporting technical evidence to support this?

(b) Marketability of the Resource; Weight = 15%. Reviewers will base their scoring on both the short- and long-term market conditions of the resources. Reviewers are aware that marketability of an energy or mineral commodity depends upon existing and emerging market conditions. Industrial minerals such as aggregates, sand/gravel and gypsum are dependent on local and regional economic conditions.

Precious and base metal minerals such as gold, silver, lead; copper and zinc are usually more dependent upon international market conditions. Natural gas and coal bed methane production depends upon having relatively close access to a transmission pipeline, as does renewable energy to an electric transmission grid.

Coal and crude oil production, on the other hand, carry built-in transportation costs, making those resources more dependent on current and projected energy commodity rates. At any time, some commodities may have a strong sustained market while others experience a weak market environment, or even a market surge that may be only temporary.

Reviewers are aware of pitfalls surrounding long-term market forecasts of energy and mineral resources, so the proposal should address this element fully. Also, short-term forecasts may indicate an oversupply from both national and internationally developed properties, and therefore additional production may not be accommodated. Certain commodities such as electricity may be in high demand in some regional sectors, but the current state of the transmission infrastructure does not allow for additional kilowatts to be handled, thereby hindering a market opportunity.

On the other hand, the potential for improving markets may be suggested by market indicators. Examples of market indicators include price history, prices from the futures markets, rig count for oil and gas and fundamental factors like supply shortages, political unrest in foreign markets, and changes in technology.

Examples of the types of questions that the DEMD ranking panel will be analyzing in their review include: Does the application describe an existing or potential market for the commodity in the area? Is the product suitable for the area or region? Does the tribe have a realistic plan to market this resource? Is the end product that the tribe wants to market commercially viable?

(c) Economic Benefits Produced by the Project; Weight = 25%. This year there will be greater emphasis on funding projects that would have an impact on tribal jobs and income. To receive a high score for this ranking criterion, the proposal should clearly state how the project would achieve this result. If the project indirectly creates economic benefits, for example applying royalty income from oil and gas productions to create other tribal businesses, that would satisfy this criterion. Whatever the commodity being studied, the ultimate goal is to collect useful data and information that allows the tribe to stimulate development on their lands. This might occur with industry partners or the tribe may develop the resource themselves.

Examples of the types of questions that the DEMD ranking panel will be analyzing in their review include: Are the economic goals and objectives of the project explained in the proposal? Does the proposal quantify the economic benefits (e.g., revenue, royalty income, number of jobs) that would result from completion of the project?

(d) Tribes' Willingness to Develop and Commitment to the Project; Weight = 20%: The tribe's willingness to consider developing any potential resource must be clearly stated in the proposal and the tribal resolution. Note that this is not a statement for mandatory development of any potential resource, but just that the tribe is willing to develop. The decision on whether to develop will always lie with the tribe. The willingness-to-develop statement should sufficiently explain how the tribe intends to accomplish this task. DEMD will also evaluate willingness to develop based upon the tribe's willingness to release energy or mineral data to potential developers.

Concerning the tribe's commitment to the project, the tribe should explain how it will participate in the study, such as by appointing a designated lead and contact person (especially a person with some knowledge of the technical aspects of the projects, and direct contact with the tribe's natural resource department and tribal council), to be committed to the successful completion of the project.

If the tribe has a strategic plan for development, this should be discussed in the proposal. A strategic plan outlines objectives, goals, and methodology for creating sustainable tribal economic development. The proposal should also explain how the

tribe's EMDP proposal fits within that strategic plan.

Examples of the types of questions that the DEMD ranking panel will be analyzing in their review include: Does the proposal explain how the tribe is committed to the project? Has the tribe appointed a designated lead or contact person within the tribe to serve as the project administrator (project champion)? Does the tribe have an existing strategic development plan and/or plan of action that includes the economic development of energy or mineral resources (plan of action could include: establishment of an energy task force/committees, resolutions, energy office, etc.)? Is the willingness to develop the resource clearly stated in the tribal resolution (is the full council on board with development)? Has the proposal clearly described the tribe's willingness to develop? Is the tribe willing to release non-proprietary data to potential developers or partners? Is the tribe's current business environment conductive to development?

(e) Budget Completeness, Cost Reasonableness, Cost Realism and Detail; Weight = 15%: The submitted budget should be evaluated as to the reasonableness and appropriateness of the costs for each line item, and the relationship to achieving the project's stated goals and objectives.

Examples of the types of questions that the DEMD ranking panel will be analyzing in their review include: Does the budget comply with Mandatory Component 3 (Detail Budget Estimate) from the guidelines? Is the budget detailed enough to explain how funds are to be allocated? Are line item budget numbers appropriate and reasonable to complete the proposed tasks?

(f) Appropriateness of the Technical Proposal and Statement of Work; Weight = 15%: The submitted application should address all the elements listed as Mandatory Component 2 in the guidelines from this **Federal Register** solicitation, and be technically clear to understand.

Examples of the types of questions that the DEMD ranking panel will be analyzing in their review include: Does the proposal address all of elements listed as Mandatory Component 2 in the guidelines from the **Federal Register** solicitation? Is the technical proposal clear to understand and adequately written? Are the techniques and methodologies being applied technically reasonable and follow best practices? Does the technical proposal adequately explain how the techniques and methods to be used in the project would meet the goals and objectives of the proposal?

3. Ranking of Proposals and Award Letters

The EMDP review committee will rank the energy and mineral development proposals using the selection criteria outlined in this section. The DEMD will then forward the rated requests to the Director of IEED for approval. Once approved, the Director will submit all proposals to the Assistant Secretary—Indian Affairs for concurrence and announcement of awards to those selected tribes, via written notice to the tribal leader. Those tribes not receiving an award will also be notified immediately in writing to the tribal leader.

F. When To Submit

The DEMD will accept applications at any time before the deadline stated in the **DATES** section of this notice, and will send a notification of receipt to the return address on the application package, along with a determination of whether or not the application is complete.

G. Where To Submit

Submit the energy and mineral development proposals to DEMD at the address listed in the **ADDRESSES** section of this notice. Applicants should also forward a copy of their proposal to their own BIA Agency and Regional offices.

However, DEMD asks that tribes or consultants do not send the entire proposal via fax, as this severely overloads DEMD's fax system.

The BIA Regional or Agency level offices receiving a tribe's submitted EMDP proposal do not have to forward it on to DEMD. It is meant to inform them of a tribe's intent to perform energy or mineral studies using EMDP funding. The BIA Regional or Agency offices are free to comment on the tribe's proposal, or to ask DEMD for other information.

H. Transfer of Funds

The IEED will transfer a tribe's EMDP award funds to the BIA Regional Office that serves that tribe, via a sub-allotment funding document coded for the tribe's EMDP project. The tribe should anticipate the transfer and be in contact with budget and self determination personnel at the Regional and Agency office levels. Tribes receiving EMDP awards must establish a new 638 contract to complete the transfer process, or use an existing 638 contract if necessary (unless the tribe is a self-governance tribe).

I. Reporting Requirements for Award Recipients

1. Quarterly Reporting Requirements

During the life of the EMDP project, quarterly written progress and financial status reports are to be submitted to the DEMD project monitor for the project. The beginning and ending quarter periods are to be based on the actual start date of the EMDP project. This date can be determined between DEMD's project monitor and the tribe.

The quarterly status report can be a one- to two-page summary of events, accomplishments, problems and results that took place during the quarter. Quarterly reports are due 2 weeks after the end of a project's fiscal quarter. The financial status information is reported via a SF169A or SF425.

Applicants should also forward a copy of their reports to their own BIA Agency and Regional offices for which the 638 contract exists. Additionally, the BIA Agency and Regional office may have reporting requirements in the 638 contract which may or may not correspond with DEMD's EMDP reports which must still be in compliance.

2. Final Reporting Requirements

- *Delivery Schedules.* The tribe must deliver all products and data generated by the proposed assessment project to DEMD's office within 2 weeks after completion of the project.
- *Mandatory Requirement to Provide Reports and Data in Digital Form.* The DEMD maintains a repository for all energy and mineral data on Indian lands, much of it derived from these energy and mineral development reports. As EMDP projects produce reports with large amounts of raw and processed data, analyses and assays, DEMD requires that deliverable products be provided in digital format, along with printed hard copies.

Reports can be provided in either Microsoft Word or Adobe Acrobat PDF format. Spreadsheet data can be provided in Microsoft Excel, Microsoft Access, or Adobe PDF formats. All vector figures should be converted to PDF format. Raster images can be provided in PDF, JPEG, TIFF, or any of the Windows metafile formats.

- *Number of Copies.* When a tribe prepares a contract for energy and mineral development, it must describe the deliverable products and include a requirement that the products be prepared in standard format (see format description above). Each energy and mineral development contract will provide funding for a total of six printed and six digital copies to be distributed as follows:

(a) The tribe will retain two printed and two digital copies of the EMDP report.

(b) The DEMD requires four printed copies and four digital copies of the EMDP report. The DEMD will transmit one of these copies to the tribe's BIA Regional Office, and one copy to the tribe's BIA Agency Office. Two printed and two digital copies will then reside with DEMD. These copies should be forwarded to the DEMD offices in Lakewood, Colorado, to the attention of the ''Energy and Mineral Development Program.''

All products generated by EMDP studies belong to the tribe and cannot be released to the public without the tribe's written approval. Products include all reports and technical data obtained during the study such as geophysical data, geochemical analyses, core data, lithologic logs, assay data of samples tested, results of special tests, maps and cross sections, status reports, and the final report.

J. Requests for Technical Assistance

The DEMD staff may provide technical consultation (*i.e.,* work directly with tribal staff on a proposed project), provide support documentation and data, provide written language on specialized sections of the proposal, and suggest ways a tribe may obtain other assistance, such as from a company or consultant specializing in a particular area of expertise. However, the tribe is responsible for preparing the executive summary, justification (including tribal commitment), and scope of work for their proposal.

The tribe must notify DEMD in writing that they require assistance, and DEMD will then appoint staff to provide the requested assistance. The tribe's request must clearly specify the type of technical assistance desired.

Requests for technical assistance should be submitted to DEMD's Division Chief well in advance of the proposal deadline established in the **DATES** section of this solicitation to allow DEMD staff time to provide the appropriate assistance. Tribes not seeking technical assistance should also attempt to submit their EMDP proposals well in advance of the deadline to allow DEMD staff time to review the proposals for possible deficiencies and allow time to contact the tribe with requests for revisions to the initial submission.

Dated: December 5, 2011.

Larry Echo Hawk,

Assistant Secretary—Indian Affairs.

[FR Doc. 2011–32363 Filed 12–16–11; 8:45 am]

BILLING CODE 4310–4M–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY910000 L16100000 XX0000]

Notice of Public Meeting; Wyoming Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Wyoming Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meetings will be held January 19 (8 a.m.–5 p.m.) and January 20 (8 a.m.–12 p.m.), 2012.

ADDRESSES: The meeting will be at the Bureau of Land Management National Historic Trails Interpretive Center, 1501 North Poplar Street, Casper, WY 82601.

SUPPLEMENTARY INFORMATION: This 10-member RAC advises the Secretary of the Interior on a variety of management issues associated with public land management in Wyoming. Planned agenda topics include an overview of the BLM's planning process, the Casper Resource Management Plan, a panel on Environmental Impact Statement projects and a discussion on cooperating agency involvement. All RAC meetings are open to the public with time allocated for hearing public comments. On January 20, there will be a 30-minute public comment period at 8:30 a.m. The public may also submit written comments to the RAC. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

FOR FURTHER INFORMATION CONTACT: Cindy Wertz, Wyoming Resource Advisory Council Coordinator, Wyoming State Office, 5353 Yellowstone, Cheyenne, WY 82009; telephone (307) 775–6014; email *cwertz@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1 (800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

Donald A. Simpson,

State Director.

[FR Doc. 2011–32392 Filed 12–16–11; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORV00000.L10200000.DD0000; HAG 12–0056]

Notice of Public Meeting, John Day-Snake Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: Pursuant to the Federal Land Policy and Management Act and the Federal Advisory Committee Act, the U.S. Department of the Interior, Bureau of Land Management (BLM) John Day-Snake Resource Advisory Council (RAC) will meet as indicated below:

DATES: The meeting will be held on February 16, 2012.

ADDRESS: The meeting will be held at Umatilla National Forest Supervisor Office located at 2517 SW. Hailey, Pendleton, Oregon, on February 16, 2012.

FOR FURTHER INFORMATION CONTACT: Mark Wilkening, Public Affairs Specialist, 100 Oregon Street, Vale, Oregon 97918, (541) 473–6218 or email *mwilkeni@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The February 16, 2012, meeting will be held from 8 a.m. to 4:30 p.m. Pacific Standard Time (PST) at the Umatilla National Forest Supervisor Office in Pendleton Oregon. Topics may include: Updates on the BLM Baker Draft Resource Management Plan, update on the BLM John Day Final Resource Management Plan, updates by Federal managers on litigation, energy projects, and other issues affecting their districts/units and other matters as may reasonably come before the RACs. All RAC meetings are open to the public; time is set aside for oral comments at 1 p.m. on February 16, 2012. Those who

verbally address the RAC are asked to provide a written statement of their presentation. Unless otherwise approved by the RAC Chair, the public comment period will last no longer than 15 minutes; each speaker may address the RAC for a maximum of five minutes. If reasonable accommodation is required, please contact the BLM Vale District Office at (541) 473–6218 as soon as possible. Before including your address, phone number, email address, or other personal identifying information in your comment, please be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Donald N. Gonzalez,

BLM Vale District Manager.

[FR Doc. 2011–32395 Filed 12–16–11; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAN00000.L18200000.XZ0000]

Notice of Public Meeting: Northeast California Resource Advisory Council Wild Horse and Burro Management Subcommittee

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U. S. Department of the Interior, Bureau of Land Management (BLM) Northeast California Resource Advisory Council's wild horse and burro management subcommittee will meet as indicated below.

DATES: The committee will meet Wednesday, Jan. 11, at 9 a.m., at the BLM Alturas Field Office, 708 West 12th St., Alturas, California. The meeting is open to the public.

FOR FURTHER INFORMATION CONTACT: Nancy Haug, BLM Northern California District manager, (530) 224–2160; or Joseph J. Fontana, BLM public affairs officer, (530) 252–5332.

SUPPLEMENTARY INFORMATION: The subcommittee was formed by the 15-member Northeast California Resource Advisory Council to work on issues associated with management of wild horses and burros on public lands managed by the BLM Eagle Lake, Alturas and Surprise field offices. The subcommittee reports to the full advisory council. The northeast California Resource Advisory Council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in northeast California and the northwest corner of Nevada. The topic for the subcommittee meeting is developing recommendations on wild horse and burro program management. Members of the public who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM as provided above.

Dated: Dec. 2, 2011.

Joseph J. Fontana,

Public Affairs Officer.

[FR Doc. 2011–32386 Filed 12–16–11; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

National Park Service

[2253–665]

Notice of Inventory Completion: Minnesota Indian Affairs Council, Bemidji, MN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Minnesota Indian Affairs Council has completed an inventory of human remains in consultation with the appropriate Indian tribes, and has determined that there is no cultural affiliation between the remains and any present-day Indian tribe. Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains may contact the Minnesota Indian Affairs Council. Disposition of the human remains to the Indian tribes stated below may occur if no additional requestors come forward.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the human remains should contact the Minnesota Indian Affairs Council at the address below by January 18, 2012.

ADDRESSES: James L. (Jim) Jones, Cultural Resource Director, Minnesota Indian Affairs Council, 3801 Bemidji Avenue NW., Suite 5, Bemidji, MN 56601, telephone (218) 755–3223.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the Minnesota Indian Affairs Council. The human remains were removed from Douglas County, MN.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Minnesota Indian Affairs Council (MIAC) professional staff in consultation with representatives of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bois Forte Band (Nett Lake) of the Minnesota Chippewa Tribe, Minnesota; Flandreau Santee Sioux Tribe of South Dakota; Fond du Lac Band of the Minnesota Chippewa Tribe, Minnesota; Grand Portage Band of the Minnesota Chippewa Tribe, Minnesota; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians, Michigan; Leech Lake Band of the Minnesota Chippewa Tribe, Minnesota; Lower Sioux Indian Community in the State of Minnesota; Mille Lacs Band of the Minnesota Chippewa Tribe, Minnesota; Minnesota Chippewa Tribe, Minnesota; Prairie Island Indian Community in the State of Minnesota; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Sokaogon Chippewa Community, Wisconsin; Spirit Lake Tribe, North Dakota; St. Croix Chippewa Indians of Wisconsin; Upper Sioux Community, Minnesota; and the White Earth Band of Minnesota Chippewa Tribe, Minnesota (hereinafter referred to as ''The Tribes'').

History and Description of the Remains

In 1985, human remains representing, at minimum, one individual were removed from a private residence located between Lake Cowdry and Lake Darling, near Alexandria, in Douglas County, MN, during excavation of a cellar. The human remains were

transferred to the MIAC (H107). No known individuals were identified. No associated funerary objects are present.

The condition of the human remains suggests an ancient context. Two additional locations in the immediate area have yielded pre-contact artifacts, including ceramics and lithic tools. These human remains have no archeological classification and cannot be associated with any present-day Indian tribe.

Determinations Made by the Minnesota Indian Affairs Council

Officials of the MIAC have determined that:

- Based on non-destructive physical analysis and catalogue records, the human remains are Native American.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian tribe.
- According to final judgments of the Indian Claims Commission, the land from which the Native American human remains were removed is the aboriginal land of The Tribes.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains is to The Tribes.

Additional Requestors and Disposition

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains or any other Indian tribe that believes it satisfies the criteria in 43 CFR 10.11(c)(1) should contact James L. (Jim) Jones, Cultural Resource Director, Minnesota Indian Affairs Council, 3801 Bemidji Avenue NW., Suite 5, Bemidji, MN 56601, telephone (218) 755–3223, before January 18, 2012. Disposition of the human remains to The Tribes may proceed after that date if no additional requestors come forward.

The Minnesota Indian Affairs Council is responsible for notifying The Tribes that this notice has been published.

Dated: December 14, 2011.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 2011–32456 Filed 12–16–11; 8:45 am]

BILLING CODE 4312–50–P

INTERNATIONAL TRADE COMMISSION

[DN 2865]

Certain Electric Fireplaces, Components Thereof, and Manuals for Same, Processes for Manufacturing or Relating to Same, and Products Containing Same; Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Electric Fireplaces, Components Thereof, and Manuals for Same, Processes for Manufacturing or Relating to Same, And Products Containing Same,* DN 2865; the Commission is soliciting comments on any public interest issues raised by the complaint.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint filed on behalf of Twin-Star International, Inc., and TS Investment Holding Corp. on December 13, 2011. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electric fireplaces, components thereof, and manuals for same, processes for manufacturing or relating to same, and products containing same. The complaint names Shenzhen Reliap Industrial Co. of China; Yue Qiu Sheng (a/k/a Jason Yue) of China; and Whalen Furniture Manufacturing Inc. of San Diego, CA, as respondents.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number (''Docket No. 2865'') in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf.*

Persons with questions regarding electronic filing should contact the Secretary (202) 205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

Issued: December 14, 2011.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–32400 Filed 12–16–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–683 (Third Review)]

Fresh Garlic From China; Scheduling of an expedited five-year review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of an expedited review pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)) (the Act) to determine whether revocation of the antidumping duty order on fresh garlic from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* December 5, 2011.

FOR FURTHER INFORMATION CONTACT: Keysha Martinez (202) 205–2136), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On December 5, 2011, the Commission determined that the domestic interested party group response to its notice of institution (76 FR 54487, September 1, 2011) of the subject five-year review was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting a full review.[1] Accordingly, the Commission determined that it would conduct an expedited review pursuant to section 751(c)(3) of the Act.

Staff report.—A staff report containing information concerning the subject matter of the review will be placed in the nonpublic record on March 21, 2012, and made available to persons on the Administrative Protective Order service list for this review. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

Written submissions.—As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the review and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the review may file written comments with the Secretary on what determination the Commission should reach in the review. Comments are due on or before March 26, 2012 and may not contain new factual information. Any person that is neither a party to the five-year review nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the review by March 26, 2012. However, should the Department of Commerce extend the time limit for its completion of the final results of its review, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. Please consult the Commission's rules, as amended, 76 FR 61937 (Oct. 6, 2011) and the Commission's Handbook on Filing Procedures, 76 FR 62092 (Oct. 6, 2011), available on the Commission's web site at *http://edis.usitc.gov.*

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determination.—The Commission has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: December 14, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–32399 Filed 12–16–11; 8:45 am]

BILLING CODE 7020–02–P

[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's web site.

[2] The Commission has found the response submitted by the Fresh Garlic Producers Association and its individual members Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, Inc., and Vessey and Company, Inc. to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearing of the Judicial Conference Committee on Evidence

AGENCY: Judicial Conference of the United States, Advisory Committee on Evidence.

ACTION: Notice of Cancellation of Open Hearing.

SUMMARY: The following public hearing on proposed amendments to the Federal Rules of Evidence has been canceled: Evidence Rules Hearing, January 7, 2012, Phoenix, Arizona.

FOR FURTHER INFORMATION CONTACT: Benjamin J. Robinson, Deputy Rules Officer and Counsel, Administrative Office of the United States Courts,

Washington, DC 20544, telephone (202) 502–1820.

Dated: December 8, 2011.

Benjamin J. Robinson,

Rules Committee Deputy and Counsel.

[FR Doc. 2011–32401 Filed 12–16–11; 8:45 am]

BILLING CODE 2210–55–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearing of the Judicial Conference Committee on Criminal Rules

AGENCY: Judicial Conference of the United States, Advisory Committee on Criminal Rules.

ACTION: Notice of Cancellation of Open Hearing.

SUMMARY: The following public hearing on proposed amendments to the Federal Rules of Criminal Procedure has been canceled: Criminal Rules Hearing, January 6, 2012, Phoenix, Arizona.

FOR FURTHER INFORMATION CONTACT: Benjamin J. Robinson, Deputy Rules Officer and Counsel Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: December 7, 2011.

Benjamin J. Robinson,

Rules Committee Deputy and Counsel.

[FR Doc. 2011–31930 Filed 12–16–11; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11–49]

Barry M. Schultz, M.D.; Decision and Order

On June 17, 2011, Administrative Law Judge (ALJ) Gail A. Randall issued the attached recommended decision. Neither party filed exceptions to the ALJ's decision.

Having reviewed the record in its entirety, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended order.

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), I order that DEA Certificate of Registration BS1314210, issued to Barry M. Schultz, M.D., be, and it hereby is, revoked. I further order that any pending application of Barry M. Shultz, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.[1]

Dated: December 8, 2011.

Michele M. Leonhart,

Administrator.

Dedra S. Curteman, Esq., for the Government.

Michael R. Lowe, Esq., for the Respondent.

Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge

I. Facts

Gail A. Randall, Administrative Law Judge. On April 19, 2011, the Administrator, Drug Enforcement Administration (''DEA'' or ''Government''), issued an Order to Show Cause and an Immediate Suspension of Registration (''Order to Show Cause'' or ''Order''), immediately suspending the DEA Certificate of Registration, Number BS1314210, of Barry M. Schultz, M.D. (''Respondent''), as a practitioner, pursuant to 21 U.S.C. 824(d) (2006), because the Respondent's continued registration constitutes an imminent danger to the public health and safety. The Order also proposed to revoke the Respondent's registration, pursuant to 21 U.S.C. 824(a)(4), and deny any pending applications for renewal or modification of such registration, pursuant to 21 U.S.C. 823(f), because the Respondent's continued registration is inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f). Specifically, the Order alleged that between May of 2009 and August of 2010, the Respondent issued prescriptions for an inordinate amount of controlled substances to ten patients for illegitimate medical purposes. [Order at 1]. The Government set out the various circumstances of those prescriptions including that during one month, the Respondent prescribed ''over 5,000 thirty milligram oxycodone tablets to R.L.,'' and ''on one occasion [the Respondent] prescribed 1,980 thirty milligram oxycodone tablets per day that equates to an individual ingesting 66 thirty milligram oxycodone per day.'' [*Id.* at 2].

The Order also alleged that from March 2009 through December 2009, the Respondent ordered approximately 281,000 dosage units of oxycodone to be delivered to his pain management clinic in Del Ray Beach, Florida. [*Id.* at 3]. The Order similarly alleged that from January 2010 through August 2010, the Respondent ordered approximately 378,000 dosage units of oxycodone. [*Id.* at 3].

Further, the Government alleged that on March 24, 2011, the Respondent was arrested and charged with trafficking in oxycodone and writing illegal prescriptions. [*Id.* at 3].

Last, the Order alleged that on April 14, 2011, the Florida Department of Health suspended the Respondent's authority to practice medicine in Florida. [*Id.* at 3].

On May 19, 2011, the Respondent, through counsel, timely filed a request for a hearing in the above-captioned matter.

On May 20, 2011, the Government filed its Motion for Summary Disposition and Motion to Stay Proceedings (''Government's Motion''). Therein, the Government requested that I grant its Motion for Summary Disposition, terminate the hearing in this matter, and forward the matter to the Deputy Administrator for a Final Order with a recommendation that the Respondent's registration be revoked and pending applications be denied. [Government's Motion (''Govt'') at 2].

The Government argues that summary disposition is appropriate where the Respondent lacks state authority to handle controlled substances as the DEA is barred by statute from continuing the Respondent's registration. [*Id.* at 1 (citing 21 U.S.C. 801(21), 823(f), 824(a)(3); *Layfe Robert Anthony, M.D.,* 67 FR 20,346 (2009)]. Hence, the Government argues, the DEA has consistently revoked such registrations. [Govt. at 1 (citing *Roy Chi Lung, M.D.,* 74 FR 20,346 (2009); *Michael Chait, M.D.,* 73 FR 40,382 (2008); *Shahid Musud Siddiqui,* 61 FR 14,818 (1996); *Michael D. Lawton,* 59 FR 17,792 (1994); *Abraham A. Chaplan, M.D.,* 57 FR 55,280 (1992)].

In addition, the Government argues that summary revocation is appropriate even where the suspension of the state license is temporary and, thus, may be reinstated. [Govt. at 2 (citing *Stuart A. Bergman, M.D.,* 70 FR 33,193 (2005); *Roger A. Rodriguez, M.D.,* 70 FR 33,206 (2005)].

Consequently, the Government argues that summary revocation of the Respondent's registration in this case is appropriate as he currently lacks state authority to handle controlled substances. [Govt. at 1–2]. The Government attached to its motion an order for the emergency suspension of the Respondent's medical license (''ESO''), issued by the State of Florida Department of Health on April 13, 2011. [Govt. Exhibit (''Exh.'') A].

[1] For the same reasons that led me to order the Immediate Suspension of Respondent's registration, I conclude that the public interest requires that this order be effective immediately. *See* 21 CFR 1316.67.

On May 24, 2011, I ordered the Respondent to respond to the Government's Motion, if at all, on or before June 1, 2011. On June 6, 2011, the Respondent, through counsel, filed Respondent's Motion For Extension Of Time For Respondent To File His Response To The DEA's Motions For Summary Disposition And To Stay Proceedings (''Respondent's Motion''). On June 3, 2011, I granted the Respondent's Motion and ordered him to file his response on or before June 13, 2011.

On June 13, 2011, the Respondent filed Respondent's Response To DEA's Motion For Summary Disposition And To Stay Proceedings (''Respondent's Response''). Therein, the Respondent did not dispute that his Florida medical license is currently suspended. [Respondent's Response (''Response'') at 1]. However, the Respondent requests that the proceedings be held in abeyance pending the outcome of his appeal of the ESO before the 1st District Tribunal of Appeals, State of Florida. [*Id.* at 1]. In the alternative, the Respondent requests to be heard as to why the Attorney General should order a ''narrowly tailored suspension, allowing Respondent to continue practicing in the areas of geriatric, internal and primary care.'' [*Id.* at 5].

In support of his request, the Respondent first argues that summary disposition is inappropriate because the state's ESO, ''which forms the basis of the Government's integrity behind requesting Summary Disposition, is currently under review and challenge'' due to its non-compliance with statutory standards. [*Id.* at 2–3]. Specifically, the Respondent avers that that order is invalid because of its lack of particularized allegations and failure to be narrowly tailored. [*Id.* at 2].

Next, the Respondent contends that several questions of material fact as well as procedural issues remain, and that summary disposition is inappropriate absent their resolution. [*Id.* at 3]. Some of those factual and procedural issues include: whether the immediate suspension of the Respondent's registration was based on a valid inspection and investigation; whether the continued registration of the Respondent constitutes an imminent danger to the public health and safety; and whether other grounds exist for the United States Attorney General to limit the suspension of the Respondent's registration. [*Id.* at 3–4]. In furtherance of this argument, the Respondent states that he ''calls into question the validity of the DEA's inspection and the manner in which the investigation was carried out.'' [*Id.* at 4].

Further, the Respondent argues that the DEA's reliance on *Layfe Robert Anthony, M.D.,* 67 FR 35,582 (DEA 2002), is inappropriate on the basis that that case ''involved a suspension resulting from a closed door hearing at which Dr. Anthony argued he was unable to question witnesses or present evidence.'' [*Id.*]. Here, the Respondent distinguishes, his appeal of the ESO is pending in state court on grounds that it fails to comply with state law. [*Id.*]

Last, the Respondent highlights the Attorney General's authority to issue a limited suspension or revocation of the Respondent's registration, and asks that he be afforded the opportunity to plead certain facts that would merit such a finding. Specifically, the Respondent seeks to inform this tribunal that the ESO is based on roughly 1% of the Respondent's medical practice, 6–8 patients total, and that a full suspension of his license ''is not so narrowly tailored as to adhere to Florida Law and to protect his due process rights.'' [*Id.* at 4–5]. The Respondent concludes that granting him a hearing before this Court will afford him due process ''by allowing him to petition this Tribunal for either an abeyance of the Administration's proceedings or the recommendation to the Attorney General that a narrowly tailored suspension be entered allowing Respondent to practice medicine in the areas of geriatric, internal and primary care.'' [*Id.* at 5].

For the reasons set forth below, I will grant the Government's Motion and recommend that the Deputy Administrator revoke the Respondent's DEA Certificate of Registration and deny any currently pending applications to renew this registration.

II. Discussion

The DEA will not maintain a controlled substances registration if the registrant is without state authority to handle controlled substances in the state in which the registrant practices. The Controlled Substances Act (''CSA'') provides that obtaining a DEA registration is conditional on holding a state license to handle controlled substances. [*See* 21 U.S.C. 802(21) (2006) (defining ''practitioner'' as ''a physician * * * 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''); 21 U.S.C. 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''). *See also* § 824(a)(3) (stating ''a registration may be suspended or revoked by the Attorney General upon a finding that the registrant has had his State license or registration suspended, revoked or denied by competent State authority'')]. The DEA, therefore, has consistently held that the CSA requires the DEA to revoke the registration of a practitioner who no longer possesses a state license to handle controlled substances. [*See e.g. Joseph Baumstarck,* 74 FR 17, 525, 17, 527 (DEA 2009) (stating the ''ALJ applied the Agency's long-settled ruled [sic] that a practitioner may not maintain his DEA registration if he lacks authority to handle controlled substances under the laws of the state in which he practices''); *Roy Chi Lung, M.D.,* 74 FR 20,346 (DEA 2009); *Gabriel Sagun Orzame, M.D.,* 69 FR 58,959 (DEA 2004); *Alton E. Ingram, Jr., M.D.,* 69 FR 22,562 (DEA 2004); *Graham Travers Schuler, M.D.,* 65 FR 50,570 (DEA 2000); *Dominick A. Ricci, M.D.,* 58 FR 51,104 (DEA 1993)].

Here, the Respondent does not dispute that he currently lacks state authority to handle controlled substances. Regardless, the Respondent requests that this tribunal grant him a hearing before the DEA to afford him his due process rights. However, I find that the Respondent will be afforded due process in the state proceedings. Furthermore, I find the Respondent's other arguments unpersuasive for granting his request.

A. Right to a Hearing and Due Process

First, while the Respondent correctly asserts that the due process clause applies, I find that the Respondent's hearing in state court satisfies that right.

The Respondent has a constitutionally protected property interest in his DEA registration. [*See Lujan* v. *G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 196 (2001) (finding that a claimant has a right to due process where ''the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation''). *See also Wedgewood Village Pharmacy* v. *Ashcroft,* 293 F. Supp. 2d 462, 469–70 (D. N.J. 2003) (finding that ''[d]epriving [a company] of its rights to dispense and receive controlled drugs without notice and a hearing would violate * * * due process'')].

In the event of an immediate suspension of his DEA registration, the Respondent must, therefore, be provided with notice and a meaningful post-deprivation hearing. [*See Edwards* v. *Dunn,* No. 3:10–CV–0145–O–BH,

2010 WL 1644134, at *3 (N.D. Tex. March 31, 2010) (stating ''[w]hen a temporary license suspension 'falls within the public health and safety class of due process cases * * * the Due Process Clause requires no more than adequate post deprivation process' and finding that post-deprivation due process applies to the immediate suspension of respondent's DEA license'') (quoting *Camuglia* v. *City of Albuquerque,* 375 F. Supp. 2d 1299, 1306 (D. N.M. 2005))].

Further, where the state has revoked or suspended a registrant's license to handle controlled substances, summary revocation of the registrant's DEA registration is only appropriate if the registrant will be afforded a state hearing on the merits of the state revocation or suspension. [*See Roger A. Rodriguez, M.D.,* 70 FR 33,206, 33,207 (DEA 2005) (finding summary disposition appropriate where a hearing was scheduled before the state board regarding the temporary suspension of the Respondent's state license); *Hichman K. Riba, D.D.S.,* 73 FR 75,773, 75,774 (DEA 2008) (finding summary disposition appropriate where the respondent was seeking judicial review of state proceedings); *Bourne Pharmacy, Inc.,* 72 FR 18,273, 18,274 (DEA 2007) (summary disposition appropriate where the state revocation was ''pending a final decision on the merits''); *Odette Louise Campbell, M.D.,* Docket No. 09–62 (April 16, 2010) (unpublished) (finding summary disposition inappropriate where ''granting the Government's request will deny her any opportunity to litigate the allegations upon which both the Federal and State suspension orders are based'')].

Here, the Respondent will be afforded such a hearing. Pursuant to Florida law, the Respondent is entitled to judicial review of the ESO, and the Respondent has pursued such review. [Fla. Stat. §§ 120.6, 120.68 (2007); Response at 1]. Therefore, I find that the Respondent will be afforded due process via the state hearing, and accordingly, under the facts of this case, has no constitutional right to a hearing before this agency.

B. Respondent's Other Arguments

I similarly find the Respondent's other arguments unpersuasive as to why this Court should not grant the Government's Motion in this proceeding.

First, while the Respondent may have raised genuine disputes of fact, those disputes are immaterial in light of the Respondent's lack of state registration. Indeed, the Controlled Substances Act and DEA case law make clear that as a pre-requisite to registration the Respondent must have state authority and that without such authority all other issues before this Court are moot. [21 U.S.C. 802(21) (defining ''practitioner'' as ''a physician * * * 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'') § 823(f) (requiring the agency to register ''practitioners''); *Baumstarck,* 74 FR at 17, 527 (interpreting that language to require state licensure)]. Thus, where there is no dispute of material fact, the Respondent's lack of state authority to handle controlled substances, there is no need for a plenary, administrative hearing. [*See Michael G. Dolin, M.D.,* 65 FR 5,661 (DEA 2000); *Jesus R. Juarez, M.D.,* 62 FR 14,945 (DEA 1997); *see also Philip E. Kirk, M.D.,* 48 FR 32,887 (DEA 1983), *aff'd sub nom Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984)].

Furthermore, to the extent that the Respondent believes that the agency's immediate suspension of the Respondent's registration was inappropriate, either substantively or procedurally, that matter is not reviewable by this tribunal, and must be pursued in federal District Court or directly to the Administrator. [*See* § 824(d) (stating that an immediate suspension order remains in effect ''until either withdrawn by the Administrator or dissolved by a court of competent jurisdiction''); 21 CFR 1301.36 (2010) (identical language)].

In addition, to the extent that the state's ESO is invalid due to its non-compliance with Florida law, that issue is certainly not before this agency, and should be litigated in the Respondent's state hearing.

Next, while the Respondent may have factually distinguished between the present case and *Layfe Robert Anthony,* that distinction is without a difference, as that case is relied on by the Government not for its factual similarities to the present one but for the principle that without state authority the Respondent may not maintain a federal controlled substances registration. [Govt. Brief at 1–2]. As the agency has reiterated that principle in several of its other decisions, I am not persuaded that any distinction between this case and *Anthony* is a meaningful one. [*See e.g. Riba,* 73 FR at 75,774; *Bourne Pharmacy, Inc.,* 72 FR at 18,274].

Last, the Respondent's argument that due process affords him the right to ''petition this Tribunal for * * * the recommendation to the Attorney General that a narrowly tailored suspension be entered allowing Respondent to continue practicing in the areas of geriatric, internal and primary care'' mischaracterizes the scope of this agency's regulatory authority.[1] The DEA is charged with regulating the handling of controlled substances and list I chemicals, and not the practice of medicine generally. [*See* Dispensing Controlled Substances for the Treatment of Pain, 76 FR 52,715, 52717 (2006) (stating ''although DEA is the agency responsible for administering the CSA, DEA does not act as the Federal equivalent of a State medical board overseeing the general practice of medicine. State laws and State licensing bodies (such as medical licensing boards) collectively regulate the practice of medicine'')]. Therefore, nothing in the DEA's Order generally precludes the Respondent from continuing to practice in those areas. Rather, the DEA's Order affects the Respondent's ability to handle controlled substances.

III. Conclusion, Order, and Recommendation

Consequently, there is no genuine dispute of material fact as there is no dispute that the Respondent currently lacks state authority to handle controlled substances and that he is entitled to a hearing on the merits of the state's ESO in state court. Therefore, summary disposition for the Government is appropriate.[2]

Accordingly, I hereby grant the Government's Motion for Summary Disposition.

I also forward this case to the Deputy Administrator for final disposition. I recommend that the Respondent's DEA Certificate of Registration, Number BS1314210, be revoked and any pending renewal applications for this registration be denied.

Date: June 17, 2011.

Gail A. Randall,

Administrative Law Judge.

[FR Doc. 2011–32393 Filed 12–16–11; 8:45 am]

BILLING CODE 4410–09–P

[1] In addition, the Respondent overlooks that the Attorney General's authority under the Controlled Substances Act has been delegated to the Deputy Administrator of the DEA. [*See* 21 U.S.C. 871(a); 28 CFR 0.100].

[2] This opinion does not reach the other factual issues made in the Order to Show Cause. Rather, this opinion solely addresses the Respondent's loss of his ability to practice medicine in the State of Florida, and, thus, his ability to handle controlled substances.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0054]

Proposed Revocation of Permanent Variances

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

ACTION: Notice.

SUMMARY: Between 1975 and 1977, the Occupational Safety and Health Administration (''OSHA'' or ''the Agency'') granted permanent variances to 24 companies engaged in the construction of cylindrical steel tanks. The variances specified several conditions that served as an alternative means of compliance to the falling-object-protection and fall-protection requirements of the standard on general requirements for scaffolds in effect during this period. In 1996, OSHA revised § 1926.451 to include provisions that duplicated the conditions specified by these variances. Therefore, OSHA believes the alternative means of compliance granted by the variances is no longer necessary, and is proposing to revoke the variances.

DATES: Submit comments and requests for a hearing (postmarked, sent, or received) by February 2, 2012. Hearing requests must provide a short and plain statement detailing (1) how the proposed revocation would affect the requesting party, and (2) what the requesting party would seek to show on the subjects or issues involved.

ADDRESSES: *Electronic.* Submit comments and requests for a hearing electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile. OSHA allows facsimile transmission of comments that are 10 pages or fewer in length (including attachments), as well as hearing requests. Send these comments and requests to the OSHA Docket Office at (202) 693–1648; hard copies of these comments are not required. Instead of transmitting facsimile copies of attachments that supplement their comments (e.g., studies and journal articles), commenters may submit these attachments, in triplicate hard copy, to the OSHA Docket Office, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210. These attachments must clearly identify the sender's name, date, subject, and docket number (i.e., OSHA–2011–0054) so that the Agency can attach them to the appropriate comments.

Regular mail, express delivery, hand (courier) delivery, and messenger service. Submit three copies of comments and any additional material (e.g., studies and journal articles), as well as hearing requests, to the OSHA Docket Office, Docket No. OSHA–2011–0054, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210; telephone: (202) 693–2350. Please contact the OSHA Docket Office at (202) 693–2350 for information about security procedures concerning the delivery of materials by express delivery, hand delivery, and messenger service. The hours of operation for the OSHA Docket Office and Department of Labor are 8:15 a.m. to 4:45 p.m., E.S.T.

Instructions. All submissions must include the organization's name and the OSHA docket number (i.e., OSHA Docket No. OSHA–2011–0054). OSHA places comments and other materials, including any personal information, in the public docket without revision, and these materials may be available online at *http://www.regulations.gov.* Therefore, the Agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

Docket. To read or download submissions or other material in the docket, go to *http://www.regulations.gov* or to the OSHA Docket Office at the address above. All documents in the docket are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

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

Technical information. Contact Stefan Weisz, Office of Technical Programs and Coordination Activities, Room N–3655, OSHA, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–2110; fax: (202) 693–1644.

Copies of this **Federal Register** *notice.* Electronic copies of this notice are available at *http://www.regulations.gov.* Electronic copies of this notice, as well as news releases and other relevant information, are available on OSHA's Web site at *http://www.osha.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

OSHA's general requirements for scaffolds used in the construction industry are set forth at 29 CFR 1926.451. OSHA adopted this standard from Section 107 of the Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 3704) under Section 6(a) of the Occupational Safety and Health Act of 1970 (OSH Act; 29 U.S.C. 651, 655) in 1971 (see 36 FR 7340). Paragraphs (a)(4) and (a)(5) of § 1926.451 required employers to erect, on scaffolds more than 10 feet above the ground or floor, toeboards having a minimum height of four inches on all open sides and open ends of the platforms. These requirements prevented tools and other equipment from falling from the scaffold and striking employees below. To ensure the structural integrity of scaffolds, § 1926.451(a)(5) required employers to erect guardrail supports at intervals not to exceed eight feet, while Table L–3 in § 1926.451(a)(10) set maximum permissible spans for 2- x 10-inch (or wider) planks.

Between 1975 and 1977, OSHA granted 24 permanent variances from the falling-object-protection and fall-protection requirements in § 1926.451(a)(4), (a)(5), and (a)(10) to employers using scaffolds in the construction of cylindrical steel tanks. Construction of these tanks involves attaching curved steel plates together to form the outer surface of a tank. After attaching a horizontal layer (ring) of steel plates around the circumference of the existing shell, employees raise the scaffolds to attach the next ring of steel plates onto the existing shell. Steel mills typically fabricate the steel plates to a standard length. After delivery of the steel plates to a worksite, and prior to attaching the plates to form the outer surface of a tank, employers attach scaffolding and guardrail supports to brackets welded onto the steel plates. The standard length and radius of the steel plates makes it difficult for employers to properly space scaffolding and guardrail supports as specified by § 1926.451. To address this problem, employers developed special procedures and methods, including special scaffolding that is more mobile,

flexible, and holds fewer workers than conventional scaffolding.

A. Alternative Means of Compliance Specified in the 24 Variances

The variances OSHA granted to the 24 employers did not require scaffolds used in the construction of cylindrical steel tanks to have the toeboards required by § 1926.451(a)(4) and (a)(5). Instead, the variances specified that the employers must implement the following conditions as an alternative means of compliance: (1) Ensure that employees keep loose tools and equipment in secure, well designed, containers; and (2) use ropes to demarcate the area below the scaffold and post clearly visible signs indicating ''overhead work above.'' The variances also stated that no more than three employees could work on a 10½-foot plank at any time.

Since the contour of the steel plates on a tank's outer surface is curved, and the adjacent edge of the scaffold is straight, there is an open space between them. As a result, the variances provided for the installation of a taut wire rope between the innermost edge of the scaffold and the curved plate of a tank's outer surface to serve as a safety line in place of a guardrail assembly. In the event the open space on either side of the rope exceeded 12 inches, the employer had to install a second wire rope or guardrail. Also, the variances set 10½ feet as the maximum distance between brackets used to attach scaffolding and guardrail supports, and stated that employers had to weld such brackets to the steel plates.

Additionally, the variances required employers to use scaffold planks of rough full-dimensioned 2-inch x 12-inch x 12-foot Douglas Fir or Southern Yellow Pine of Select Structural Grade. The Douglas Fir planking had to have at least a 1,900 fiber stress and 1,900,000 modulus of elasticity, while the Yellow Pine planking had to have at least 2,500 fiber stress and 2,000,000 modulus of elasticity. Employers had to secure all planking from movement or overlapped in accordance with § 1926.451(a)(12). The variances also required that employers construct guardrails of taut wire rope, and support the guardrails using angle irons attached to brackets welded to the steel plates. These guardrails had to be at least equivalent in strength, stability, and height to the 2-inch x 4-inch x 8-foot wooden rails addressed in § 1926.451(a)(5). Finally, the variances provided that employers space guardrail supports at intervals no greater than 10½ feet apart.

B. OSHA's Current Standard

On August 30, 1996, OSHA issued a final rule revising its construction safety standards regulating the design, construction, and use of scaffolds (61 FR 46026). In the preamble to the final rule, OSHA stated that it was updating its scaffold standards and, when possible, establishing performance-oriented criteria to protect employees from scaffold-related hazards such as falls, falling objects, structural instability, electrocution, and overloading. OSHA also explained that it was not issuing specific requirements for the tank-building industry because the Agency believed it addressed adequately the requirements for tank scaffolds under the general provisions of this final rule (see 61 FR 46033). In this regard, the final rule revised the requirements in § 1926.451(a)(4), (a)(5), and (a)(10). These revisions are set forth in § 1926.451, as well as non-mandatory Appendix A of 29 CFR part 1926, subpart L.

OSHA's current standard at § 1926.451(h) addresses the protection of employees from scaffold-related falling-object hazards. Section 1926.451(h)(1) requires employers to ensure that employees working on scaffolds wear hardhats, and to protect these employees from falling hand tools, debris, and other small objects. Section 1926.451(h)(2) sets forth several options for employers to use to prevent tools, materials, or equipment from falling from a scaffold and striking employees below. Paragraphs (h)(2)(i), (ii), (iii), (iv), and (v) of § 1926.451 specify these options, respectively, as follows: (1) Using barricades on lower levels to exclude employees from areas where falling objects might land; (2) erecting toeboards along the edge of platforms for a distance sufficient to protect workers below, when the platforms are more than 10 feet above lower levels; (3) erecting paneling or screening when tools or other materials piled on the platform reach a height higher than the top edge of a toeboard; (4) installing a guardrail system designed so that the openings will prevent the passage of falling objects; and (5) installing debris nets, catch platforms, or canopies to protect workers below scaffolds from falling objects.

Appendix A to subpart L addresses scaffold specifications, and provides non-mandatory guidance to assist employers in complying with the requirements in subpart L. Paragraph (z) of this appendix provides guidance regarding the use of tank builder's scaffolds. In the preamble to the 1996 final rule, OSHA noted that the introductory text of the appendix clearly indicates that employers following the appendix will be in compliance with the requirements of the standard that pertain to scaffolds used in the construction of cylindrical tanks. However, OSHA stated further that employers choosing not to follow the appendix still must comply with applicable requirements in § 1926.451, particularly paragraphs (a) and (f) (see 61 FR 46033).

Paragraph (z)(1) of the appendix states that the maximum distance between the brackets used to attach the scaffolding and guardrail supports shall be no more than 10½ feet, while paragraph (z)(2) provides that no more than three employees shall occupy a 10½-foot scaffolding plank at any time. Paragraph (z)(3) requires that employers install a taut wire or synthetic rope supported on the scaffold brackets at the scaffold-plank level between the innermost edge of the scaffold platform and the curved plates of the tank's outer surface to serve as a safety line in place of an inner guardrail assembly when the space between the scaffold platform and the tank exceeds 12 inches. If the space on either side of the rope exceeds 12 inches, employers must install a second wire or synthetic rope in an appropriate location, or install guardrails in accordance with § 1926.451(e)(4), to reduce the open space to less than 12 inches.

Additionally, paragraph (z)(4) provides that employers must use scaffold planks of rough full-dimensioned 2- x 12-inch Douglas Fir or Southern Yellow Pine of Select Structural Grade. Douglas Fir planks must have a fiber stress of at least 1,900 lb/m² and a modulus of elasticity of at least 1,900,000 lb/m², while Yellow Pine planks must have a fiber stress of at least 2,500 lb/m² and a modulus of elasticity of at least 2,000,000 lb/m². Finally, paragraph (z)(5) states that employers must construct guardrails of a taut wire or synthetic rope, and support these guardrails using angle irons attached to brackets welded to the steel plates. These guardrails shall comply with § 1926.451(e)(4), and employers must space the guardrail supports at intervals no greater than 10½ feet apart.

The following table compares the conditions specified in the 24 variances with the analogous paragraphs of the current § 1926.451.

Variance condition	Provision in current § 1926.451 and Appendix A of 29 CFR 1926, Subpart L
Condition (1) or (a): The applicants' loose tools and equipment shall be kept in well-designed tool containers. This does not include fitup bars, key plates, key channels, or long handled mauls which may be placed on the scaffold plank during the time they are required for work. The loose tool containers shall be secured to prevent their upset or dislodgment from the scaffold area.	*1926.451(h)(1):* In addition to wearing hardhats each employee on a scaffold shall be provided with additional protection from falling hand tools, debris, and other small objects through the installation of toeboards, screens, or guardrail systems, or through the erection of debris nets, catch platforms, or canopy structures that contain or deflect the falling objects. When the falling objects are too large, heavy or massive to be contained or deflected by any of the above-listed measures, the employer shall place such potential falling objects away from the edge of the surface from which they could fall and shall secure those materials as necessary to prevent their falling.
Condition (2) or (b): Areas beneath and far enough away from the base of the scaffold to contain anything that falls from above shall be roped off and posted with clearly visible signs stating: ''Danger Overhead Work.''.	*1926.451(h)(2)(i):* The area below the scaffold to which objects can fall shall be barricaded, and employees shall not be permitted to enter the hazard area.
Condition (3) or (c): The space between the innermost edge of the scaffold platform and the curved plate structure of the tank shell shall not exceed 12″ without protective measures. A taut wire rope supported on scaffold brackets at plank level may be used to divide any space exceeding 12″ in lieu of using a guardrail or tie-off system.	*1926.451 Appendix A (z)(3):* A taut wire or synthetic rope supported on the scaffold brackets shall be installed at the scaffold plank level between the innermost edge of the scaffold platform and the curved plate structure of the tank shell to serve as a safety line in lieu of an inner guardrail assembly where the space between the scaffold platform and the tank exceeds 12 inches (30.48 cm). In the event the open space on either side of the rope exceeds 12 inches (30.48 cm), a second wire or synthetic rope appropriately placed, or guardrails in accordance with 1926.451(e)(4), shall be installed in order to reduce that open space to less than 12 inches (30.48 cm).
Condition (4) or (d): Not more than three employees shall be working on a 10′ 6″ span of scaffold planking at any time.	*1926.451 Appendix A (z)(2):* Not more than three employees shall occupy a 10 feet 6 inch span of scaffold planking at any time.
Condition (5) or (e): The maximum distance between brackets to which scaffolding and guardrail supports are attached shall be 10′ 6″. These brackets shall be welded to the steel plates.	*1926.451 Appendix A (z)(1):* The maximum distance between brackets to which scaffolding and guardrail supports are attached shall be no more than 10 feet 6 inches.
Condition (6) or (f): Scaffold planks or rough full-dimensioned 2″ x 12″ x 12′ Douglas Fir or equivalent planking, shall be used. The Douglas Fir shall have at least a 1,900 fiber stress and 1,900,000 modulus of elasticity. Three planks with full thickness 2″ x 10″ x 12′ dimensions may be used in lieu of two 2″ x 12″ x 12′ planks provided that they are clamped or bonded together at the midpoint of the span in order to spread the weight of the employees.	*1926.451 Appendix A (z)(4):* Scaffold planks of rough full-dimensioned 2-inch (5.1 cm) x 12-inch (30.5 cm) Douglas Fir or Southern Yellow Pine of Select Structural Grade shall be used. Douglas Fir planks shall have a fiber stress of at least 1900 lb/in^2 (130,929 n/cm^2) and a modulus of elasticity of at least 1,900,000 lb/in^2 (130,929,000 n/cm^2), while Yellow Pine planks shall have a fiber stress of at least 2500 lb/in^2 (172,275 n/cm^2 and a modulus of elasticity of at least 2,000,000 lb/in^2) (137,820,000 n/cm^2).
Condition (7) or (g): All planking shall be secured from movement or overlapped in accordance with 1926.451(a)(12).	*1926.451(f)(15)(ii):* The platform units shall be secured to the scaffold to prevent their movement;
Condition (8) or (h): Guardrails shall be constructed of taut wire rope, and shall be supported by angle irons attached to brackets welded to the steel plates. These guardrails shall be at least of equivalent strength, stability and height as those required for the 8 foot span of 2″ x 4″ wood rails by 29 CFR 1926.451(a)(15). Guardrail supports shall be located at no greater than 10′ 6″ intervals.	*1926.451 Appendix A (z)(5):* Guardrails shall be constructed of a taut wire or synthetic rope, and shall be supported by angle irons attached to brackets welded to the steel plates. These guardrails shall comply with § 1926.451(e)(4). Guardrail supports shall be located at no greater than 10 feet 6 inch intervals.

Based on the comparisons in this table, OSHA finds that current § 1926.451 and Appendix A to 29 CFR part 1926, subpart L, which replaced the standards from which the employers received the variances, substantially duplicate the conditions specified by these variances, and that the current standards and the variances impose equivalent compliance burdens on employers. Accordingly, the current § 1926.451 and its associated appendix provide employees with protection that is at least equal to the protection afforded to them by the conditions specified by the variances. Therefore, OSHA is proposing to revoke the variances and require that the employers comply instead with the appropriate provisions of § 1926.451 and Appendix A to 29 CFR part 1926, subpart L.

The following table provides information about the variances proposed for revocation by this notice; interested parties may refer to the **Federal Register** cite in the table to obtain detailed information about the variances.

Name of employer (company) *	Variance No.	Date granted	**Federal Register** cite	OSHA Standards affected **
American Bridge Division, United States Steel Corp.	V–74–44, V–74–57	05/06/75	40 FR 19715	1926.451(a)(4), (5), and (10).
Baker Tank Company	V–77–7, V–77–1	08/09/77	42 FR 40269	1926.451(a)(4), (5), and (10).
Bethlehem Steel Corporation, Fabricated Steel Construction Division.	V–74–44, V–74–57	05/06/75	40 FR 19715	1926.451(a)(4), (5), and (10).
Brown Minneapolis Tank and Fabricating Co.	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Caldwell Tanks, Inc	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Chattanooga Boiler & Tank Co	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Chicago Bridge & Iron Co	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Edwards Tank Erection, Inc	V–76–4, V–76–5	09/24/76	41 FR 41976	1926.451(a)(4), (5), and (10).

Name of employer (company) *	Variance No.	Date granted	Federal Register cite	OSHA Standards affected **
Fisher Tank and Welding Co	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
General American Transportation Corporation.	V–75–35	04/27/76	41 FR 17642	1926.451(a)(4), (5), and (10).
Gorbett Brothers, Inc	V–75–35	04/27/76	41 FR 17642	1926.451(a)(4), (5), and (10).
Graver Tank & Manufacturing Co	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Marathon Steel Co. (formerly Allison Steel Manufacturing Co.).	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Newport News Industrial Corporation of Ohio.	V–76–4, V–76–5	09/24/76	41 FR 41976	1926.451(a)(4), (5), and (10).
Nooter Corp	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Pittsburgh-Des Moines Steel Co	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Prairie Tank and Construction Company.	V–75–35	04/27/76	41 FR 17642	1926.451(a)(4), (5), and (10).
PSF Industries, Inc	V–74–44, V–74–57	05/06/75	40 FR 19715	1926.451(a)(4), (5), and (10).
Richmond Engineering Company, Inc	V–77–7, V–77–1	08/09/77	42 FR 40269	1926.451(a)(4), (5), and (10).
Tank Services, Inc	V–75–35	04/27/76	41 FR 17642	1926.451(a)(4), (5), and (10).
The Bishopric Products, Co	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Universal Tank & Iron Works	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Western Petro-Chem. Services, Inc	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).
Wyatt, Division U.S. Industries	V–73–31, V–74–30	04/04/75	40 FR 15139	1926.451(a)(4), (5), and (10).

* As listed on the original variance.
** From OSHA's original scaffold standard issued in 1971.

II. State Plan States

Twenty-two states administer OSHA-approved occupational safety and health programs, or State Plans, that have jurisdiction over private-sector employers within the state. These states are Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. OSHA granted the 24 variances at issue under Federal authority with nationwide applicability, without reference to the State Plans. Subsequently, each State Plan state assumed responsibility for most occupational safety and health activities in the state, including enforcement, standards development, and granting variances. Accordingly, each State Plan state adopted state scaffolding standards that are identical to, or at least as effective as, the current Federal standard at 29 CFR 1926.451. If OSHA revokes the variances described herein, affected employers operating in one or more of these State Plan states must determine if the applicable state standards are identical to, or different from, OSHA's. These companies must meet any state-specific requirements in these standards, or apply directly to the State Plan Office for a variance from the state standard. Information on State Plans is available on OSHA's Web site at *http://www.osha.gov/dcsp/osp/index.html,* and includes links to each state's Web site, as well as information on state-specific standards.

III. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC, directed the preparation of this notice. OSHA is issuing this notice under the authority specified by Section 6(d) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655), Secretary of Labor's Order No. 4–2010 (75 FR 55355), and 29 CFR part 1905.

Signed at Washington, DC, on December 13, 2011.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2011–32369 Filed 12–16–11; 8:45 am]

BILLING CODE 4510–26–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting Notice

DATES: *Date and Time:* The Legal Services Corporation's Board of Directors will meet December 21, 2011. The meeting will commence at 5 p.m., Eastern Standard Time, and will continue until the conclusion of the Board's agenda.

LOCATION: F. William McCalpin Conference Center, Legal Services Corporation Headquarters Building, 3333 K Street NW., Washington, DC 20007.

PUBLIC OBSERVATION: Members of the public who are unable to attend but wish to listen to the public proceeding may do so by following the telephone call-in directions provided below but are asked to keep their telephones muted to eliminate background noises. From time to time the presiding Chair may solicit comments from the public.

CALL-IN DIRECTIONS FOR OPEN SESSIONS:

- Call toll-free number: 1–(866) 451–4981;
- When prompted, enter the following numeric pass code: 5907707348
- When connected to the call, please immediately ''mute'' your telephone.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Agenda.
2. Consider and act on recommendations of the Board's Operations & Regulations Committee on changes to LSC Bylaws.
3. Consider and act on ratification of LSC's solicitation of contribution from Friends of the Legal Services Corporation and a planning grant from the Public Welfare Foundation in 2011.
4. Consider and act on approval of a 2012 Public Welfare Foundation grant application.
5. Public comment.
6. Consider and act on other business.
7. Consider and act on adjournment of meeting.

CONTACT PERSON FOR INFORMATION: Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

ACCESSIBILITY: LSC complies with the Americans with Disabilities Act and Section 504 of the 1973 Rehabilitation Act. Upon request, meeting notices and materials will be made available in alternative formats to accommodate individuals with disabilities.

Individuals who need other accommodations due to disability in order to attend the meeting in person or telephonically should contact Katherine Ward, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov,* at least 2 business days in advance of the meeting. If a request is made without advance notice, LSC will make every effort to accommodate the request but cannot guarantee that all requests can be fulfilled.

Dated: December 14, 2011.

Victor M. Fortuno,

Vice President & General Counsel.

[FR Doc. 2011–32482 Filed 12–15–11; 11:15 am]

BILLING CODE 7050–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–029–COL, 52–030–COL; ASLBP No. 09–879–04–COL–BD01]

Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2)

Notice of Atomic Safety and Licensing Board Reconstitution

Pursuant to 10 CFR 2.313(c) and 2.321(b), the Atomic Safety and Licensing Board (Board) in the above-captioned *Progress Energy Florida, Inc.* proceeding is hereby reconstituted by appointing Administrative Judge (Technical) Randall J. Charbeneau to serve on the Board in place of Administrative Judge (Technical) William M. Murphy.

All correspondence, documents, and other materials shall continue to be filed in accordance with the NRC E-Filing rule. *See* 10 CFR 2.302 *et seq.*

Issued at Rockville, Maryland, this 13th day of December 2011.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2011–32391 Filed 12–16–11; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. A2012–83; Order No. 1032]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Sherwood, Michigan post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES: Deadline for notices to intervene: January 3, 2011, 4:30 p.m., Eastern Time. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

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: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on November 28, 2011, the Commission received a petition for review of the Postal Service's determination to close the Sherwood post office in Sherwood, Michigan. The petition for review was filed by Kathryn Barnes (Petitioner) and is postmarked November 12, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012–83 to consider Petitioner's appeal. If Petitioner would like to further explain her position with supplemental information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than January 3, 2012.

Categories of issues apparently raised. Petitioner contends that (1) the Postal Service failed to consider the effect of the closing on the community (*see* 39 U.S.C. 404 (d)(2)(A)(i)); (2) the Postal Service failed to consider whether or not it will continue to provide a maximum degree of effective and regular postal services to the community (*see* 39 U.S.C. 404(d)(2)(A)(iii)); and (3) the Postal Service failed to adequately consider the economic savings resulting from the closure (*see* 39 U.S.C. 404(d)(2)(A)(iv)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record with the Commission is December 13, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this Notice is December 13, 2011.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participant's submissions also will be posted on the Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at (202) 789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Eastern Time, Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site, *http://www.prc.gov,* or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioners and respondents, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before January 3, 2012. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has

been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

It is ordered:

1. The Postal Service shall file the applicable administrative record regarding this appeal no later than December 13, 2011.

2. Any responsive pleading by the Postal Service to this notice is due no later than December 13, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Manon Boudreault is designated officer of the Commission (Public Representative) to represent the interests of the general public.

5. The Secretary shall arrange for publication of this notice and order and Procedural Schedule in the **Federal Register**.

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

PROCEDURAL SCHEDULE

November 28, 2011	Filing of Appeal.
December 13, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
December 13, 2011	Deadline for the Postal Service to file any responsive pleading.
January 3, 2012	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
January 3, 2012	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
January 23, 2012	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
February 7, 2012	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
February 14, 2012	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116).
March 27, 2012	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

[FR Doc. 2011–32250 Filed 12–16–11; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29883; File No. 812–13930]

American Century Strategic Asset Allocations, Inc., et al.; Notice of Application

December 13, 2011.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from rule 12d1–2(a) under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit open-end management investment companies relying on rule 12d1–2 under the Act to invest in certain financial instruments.

APPLICANTS: American Century Strategic Asset Allocations, Inc. (''ACSAA''), American Century Investment Management, Inc. (''ACIM'') and American Century Investment Services, Inc. (''ACIS'').

DATES: *Filing Dates:* The application was filed on July 29, 2011, and amended on November 10, 2011.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 9, 2012, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants: ACSAA, 4500 Main Street Kansas City, Missouri 64111.

FOR FURTHER INFORMATION CONTACT: Emerson S. Davis, Senior Counsel, at (202) 551–6868, or Daniele Marchesani, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. ASCAA is organized as a Maryland corporation and is registered under the Act as an open-end management investment company. ACIM, a Delaware corporation, is an investment adviser registered under the Investment Advisers Act of 1940, as amended (the ''Advisers Act''). ACIM or another Adviser (as defined below) will serve as investment adviser to each Applicant Fund (as defined below). ACIS is a Missouri corporation, registered as a broker-dealer under the Securities Exchange Act of 1934, as amended, and will serve as the distributor for the initial Applicant Fund (as defined below).

2. Applicants request the exemption to the extent necessary to permit any existing or future series of ACSAA and any other existing or future registered open-end investment company or series thereof that (i) is advised by ACIM or any person controlling, controlled by or under common control with ACIM (any such adviser or ACIM, an ''Adviser''); [1] (ii) invests in other registered open-end investment companies (''Underlying Funds'') in reliance on section 12(d)(1)(G) of the Act; and (iii) is also eligible to invest in securities (as defined in section 2(a)(36) of the Act) in reliance on rule 12d1–2 under the Act (each an ''Applicant Fund''), to also invest, to the extent consistent with its investment objectives, policies, strategies and limitations, in financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act (''Other Investments'').[2]

[1] Any other Adviser will also be registered under the Advisers Act.

[2] Every existing entity that currently intends to rely on the requested order is named as an applicant. Any existing or future entity that relies on the requested order will do so only in

Continued

Applicants also request that the order exempt ACIS and any entity that now or in the future acts as principal underwriter, or broker or dealer if registered under the Securities Exchange Act of 1934, as amended (''Exchange Act''), with respect to the transactions described in the application.

3. Consistent with its fiduciary obligations under the Act, each Applicant Fund's board of directors will review the advisory fees charged by the Applicant Fund's Adviser to ensure that they are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to the advisory agreement of any investment company in which the Applicant Fund may invest.

Applicants' Legal Analysis

1. Section 12(d)(1)(A) of the Act provides that no registered investment company (''acquiring company'') may acquire securities of another investment company (''acquired company'') if such securities represent more than 3% of the acquired company's outstanding voting stock or more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or cause more than 10% of the acquired company's voting stock to be owned by investment companies and companies controlled by them.

2. Section 12(d)(1)(G) of the Act provides, in part, that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquired company and acquiring company are part of the same group of investment companies; (ii) the acquiring company holds only securities of acquired companies that are part of the same group of investment companies, government securities, and short-term paper; (iii) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the Exchange Act or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end investment companies or registered unit investment trusts in reliance on section 12(d)(1)(F) or (G) of the Act.

3. Rule 12d1–2 under the Act permits a registered open-end investment company or a registered unit investment trust that relies on section 12(d)(1)(G) of the Act to acquire, in addition to securities issued by another registered investment company in the same group of investment companies, government securities, and short-term paper: (i) Securities issued by an investment company that is not in the same group of investment companies, when the acquisition is in reliance on section 12(d)(1)(A) or 12(d)(1)(F) of the Act; (ii) securities (other than securities issued by an investment company); and (iii) securities issued by a money market fund, when the investment is in reliance on rule 12d1–1 under the Act. For the purposes of rule 12d1–2, ''securities'' means any security as defined in section 2(a)(36) of the Act.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction from any provision of the Act, or from any rule under the Act, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act.

5. Applicants state that the Applicant Funds will comply with rule 12d1–2 under the Act, but for the fact that the Applicant Funds may invest a portion of their assets in Other Investments. Applicants request an order under section 6(c) of the Act for an exemption from rule 12d1–2(a) to allow the Applicant Funds to invest in Other Investments while investing in Underlying Funds. Applicants assert that permitting the Applicant Funds to invest in Other Investments as described in the application would not raise any of the concerns that the requirements of section 12(d)(1) were designed to address.

Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the following condition:

Applicants will comply with all provisions of rule 12d1–2 under the Act, except for paragraph (a)(2) to the extent that it restricts any Applicant Fund from investing in Other Investments as described in the application.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32370 Filed 12–16–11; 8:45 am]

BILLING CODE 8011–01–P

accordance with the terms and condition in the application.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65943; File No. SR–NYSEAmex–2011–95]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Amex Options Fee Schedule

December 13, 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 30, 2011, NYSE Amex LLC (the ''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Amex Options Fee Schedule (''Fee Schedule'') for Qualified Contingent Cross (''QCC'') trades. The proposed change will be operative on December 1, 2011. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule for QCC trades.[3] Specifically, the Exchange proposes to exclude Customer-to-Customer QCC trades from the existing Floor Broker Rebate of $.03 per contract, which the Exchange inadvertently did not do when QCC fees were implemented in September 2011.[4] The Exchange notes that there is no execution charge for a Customer-to-Customer QCC trade and as such, including such non-revenue generating trades among those that generate a rebate for Floor Brokers is not economic for the Exchange and does not provide an offsetting benefit to other market participants, for example, by bringing additional order flow to the Exchange. The Exchange notes that at least one other exchange similarly excludes free customer-to-customer trades from floor broker rebates, and thus such a practice is not novel.[5]

The proposed changes will be operative on December 1, 2011.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)[6] of the Securities Exchange Act of 1934 (the ''Act''), in general, and Section 6(b)(4)[7] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that the proposed change is reasonable, equitable, and not unfairly discriminatory because it will apply uniformly to all Floor Brokers and it is not economic for the Exchange to pay a Floor Broker Rebate for a trade that does not generate trade execution revenues for the Exchange or provide any offsetting benefits to market participants generally, for example, by bringing additional order flow to the Exchange. Under such circumstances, the Exchange believes that it would be unfair to market participants that are not Floor Brokers to continue to pay Floor Brokers the Floor Broker Rebate from the general revenues of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[8] of the Act and subparagraph (f)(2) of Rule 19b–4[9] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAmex–2011–95 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2011–95. 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 NW., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2011–95 and should be submitted on or before January 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32355 Filed 12–16–11; 8:45 am]

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[3] The QCC permits an NYSE Amex ATP Holder to effect a qualified contingent trade (''QCT'') in a Regulation NMS stock and cross the options leg of the trade on the Exchange immediately upon entry and without order exposure if the order is for at least 1,000 contracts, is part of a QCT, and is executed at a price at least equal to the NBBO, as long as there are no Customer Orders in the Exchange's Consolidated Book at the same price. See Securities Exchange Act Release No. 65047 (August 5, 2011), 76 FR 49812 (August 11, 2011) (SR–NYSEAmex–2011–56).

[4] *See* Securities Exchange Act Release No. 65472 (October 3, 2011), 76 FR 62887 (October 11, 2011) (SR–NYSEAmex–2011–72).

[5] *See* Nasdaq PHLX LLC Fee Schedule, Section VII, at 18 (excluding various executions, including Customer-to-Customer trades, from the Options Floor Broker Subsidy), available at *http://www.nasdaqtrader.com/content/marketregulation/membership/phlx/feesched.pdf.*

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65944; File No. SR–FINRA–2011–062]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Repeal Incorporated NYSE Rule 2A (Jurisdiction)

December 13, 2011.

I. Introduction

On October 20, 2011, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to repeal incorporated NYSE Rule 2A. The proposed rule change was published for comment in the **Federal Register** on November 3, 2011.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal and Discussion

FINRA proposed to repeal incorporated NYSE Rule 2A (Jurisdiction) as part of the process of developing a consolidated rulebook (''Consolidated FINRA Rulebook''). NYSE Rule 2A generally addresses jurisdictional authority with respect to, among other things, rulemaking, examinations, disciplinary actions, and listing applications. NYSE Rule 2A was adopted in 2006 as part of the merger between the New York Stock Exchange LLC (''NYSE'') and Archipelago Holdings, Inc. since the NYSE Constitution, which contained provisions detailing the NYSE's jurisdiction, was eliminated in the merger.[4]

FINRA, in its filing with the Commission, stated that the FINRA By-Laws address the powers and authority of the FINRA Board of Governors and, together with the Act, set forth FINRA's authority and responsibilities as a registered securities association. FINRA further stated that its authority to regulate those matters that are addressed in NYSE Rule 2A and that are relevant to FINRA's role as a registered securities association, such as its jurisdictional authority with respect to: (i) Rulemaking; (ii) general supervisory powers over members, member organizations and their offices, partnership and corporate arrangements, their principal executives, employees and approved persons in connection with their conduct of the business of member organizations; (iii) ability to discipline members, member organizations, principal executives, employees and approved persons in connection with their conduct of the business of member organizations; and (iv) any and all other functions of members, member organizations, principal executives, employees and approved persons in connection with the conduct of the business of member organizations, are contained in the FINRA By-Laws.

FINRA further noted that other matters addressed by NYSE Rule 2A either are not applicable to the operations of a registered securities association that does not operate a listing market or are otherwise unique to the NYSE. FINRA stated that the transfer of NYSE Rule 2A to the Consolidated FINRA Rulebook was unnecessary and proposed that it be eliminated. FINRA advised that it would announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval of the proposed rule change and that the operative date of the proposal would be no later than 150 days following Commission approval.

III. Commission's Findings

After carefully considering the proposed rule change, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association. In particular, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,[5] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.[6]

The Commission believes that the proposal will streamline FINRA's rulebook by eliminating a rule that is duplicative of provisions of FINRA's By-Laws that already are in place for FINRA members and govern jurisdictional matters. The Commission notes that NYSE Rule 2A remains in NYSE's own rulebook and will continue to apply to NYSE-only members.

IV. Conclusion

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (SR–FINRA–2011–062), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32356 Filed 12–16–11; 8:45 am]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 65656 (November 3, 2011), 76 FR 68240 (''Notice'').

[4] *See* Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (Order Approving File No. SR–NYSE–2005–77).

[5] 15 U.S.C. 78o–3(b)(6).

[6] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65938; File No. SR–C2–2011–039]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to a Complex Order Auction Feature

December 12, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 6, 2011, the C2 Options Exchange, Incorporated (''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its electronic complex order rules. The text of the proposed rule change is available on the Exchange's Web site

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

(*http://www.c2exchange.com/Legal/RuleFilings.aspx*), 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, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On a class-by-class basis, the Exchange may determine to activate the electronic complex order RFR auction (''COA''), which is a process by which eligible complex orders [5] are given an opportunity for price improvement before being booked in the electronic complex order book (''COB''). Paragraph (c) of Rule 6.13 describes the COA process. Interpretation and Policy .02 of the Rule also provides that, with respect to the initiation of a COA, Participants routing complex orders directly to COB may request that the complex orders be processed by COA on a class-by-class basis.

The Exchange is proposing to amend the rule to describe a COA feature for complex orders resting in COB (referred to herein as the ''re-COA'' feature), which is currently in use but not expressly covered in the rules. In particular, the Exchange is proposing to provide that, for each class where COA is activated, the Exchange may also determine to activate the re-COA feature for complex orders resting in COB. For such classes, any order resting in COB (regardless of whether it was subject to COA before it was booked in COB) [6] will be automatically subject to the re-COA feature if the order is within a number of ticks away from the current market (calculated based on the derived net price of the individual series legs). The Exchange notes that this re-COA feature for resting orders is only applicable to resting non-marketable orders that move close to the current market price calculated based on the individual series legs. This feature is not applicable to resting orders that become marketable. The Exchange may also determine on a class-by-class and strategy basis to limit the frequency of re-COA auctions initiated for complex orders resting in COB. For example, the Exchange might determine to limit the frequency of re-COA auctions to once every ''X'' seconds (the ''interval timer'') for a total of ''Y'' intervals. Once this cycle is complete, the Exchange may determine to wait for a period of time ''Z'' (the ''sleep timer'') and then reactivate the re-COA feature.[7] All timers will be reset if a new complex order improves the top of the COB (*i.e.,* improves the best net price bid or offer of the complex orders resting in COB). These limitations on the frequency of COA auctions due to the re-COA feature are intended to address system efficiency and effectiveness considerations, such as limiting repeated initiations of COA auctions (and related messaging) when there are flickering quotes. Once the re-COA feature is initiated for a resting order, all other aspects of the COA process described in Rule 6.13 will apply unchanged. The Exchange believes this re-COA feature facilitates the orderly execution of complex orders by providing an automated opportunity for price improvement to (and execution of) resting orders priced near the current market, similar to what a broker-dealer might seek to do if the broker-dealer were representing a complex order in open outcry on an exchange floor (or just entering an order initially into COB).

The following example illustrates the operation of this re-COA feature: Assume the feature is activated for complex orders resting in COB that are within 2 ticks of the current market ($0.02 in a class where complex orders trade in $0.01 net price increments). Assume the frequency is limited to once every 15 seconds (the interval timer) for 1 interval. Under this setting, a total of 2 re-COA auctions could be triggered—the original re-COA auction and a second re-COA auction after the expiration of the 15-second interval timer. Assume the sleep timer is set at 60 minutes. Assume the current market calculated based on the derived net price of the individual series legs in the C2 electronic book for a given strategy is at a net price of $0.80–$1.01. If a complex order resting in the COB to buy the strategy is priced at a net debit price of $0.98, the complex order is not marketable (as the order is away from the current market by $0.03 (or 3 ticks)). If subsequently the individual series legs prices are updated such that the current market for the strategy moves to a net price of $0.80–$1.00, the resting complex order to buy at $0.98 would trigger the re-COA feature and initiate the re-COA auction process (as the order is within $0.02 (or 2 ticks) of the current market). If there are no responses, the order would be placed back in COB. The resting order would not initiate the re-COA feature again until the 15-second interval timer has expired. When the 15-second interval timer expires, the order would be eligible to initiate the re-COA feature again if the current market moves after the expiration of the timer and the order meets the tick distance parameter (the order would not automatically initiate the re-COA feature at the end of the interval timer; instead, there must be an update to the current market after the expiration of the interval timer and the order must meet the tick distance parameter for the system to re-COA again). For example, if after the end of the 15-second interval timer the current market moves to $0.80–$0.99 (or, for example, if the current market moves back to $0.80–$1.01 and then, after the end of the 15-second interval timer, moves back again to $0.80–$1.00), then the resting complex order would again initiate the re-COA feature. If there are no responses, the order would be placed back in COB. The cycle is complete. Now that the resting order has been subject to COA 2 times since it was booked in COB, the 60 minute sleep

[5] An eligible complex order, referred to in Rule 6.13 as a ''COA-eligible order,'' means a complex order that, as determined by the Exchange on a class-by-class basis, is eligible for a COA considering the order's marketability (defined as a number of ticks away from the current market), size, complex order type and complex order origin type (*i.e.,* non-broker-dealer public customer, broker-dealers that are not Market-Makers or specialists on an options exchange, and/or Market-Makers or specialists on an options exchange). All determinations by the Exchange on COA-eligible orders parameters are announced to via Regulatory Circular. *See* Rule 6.13(c)(1)(B) and Interpretation and Policy .01 to Rule 6.13.

[6] In this regard, the Exchange notes that, currently, all of its Trading Permit Holders have elected to have their COA-eligible orders processed by COA. In addition, the Exchange notes that other markets have programs in place that provide for the automatic auctioning of complex orders. *See, e.g.,* NASDAQ OMX PHLX LLC (''Phlx'') Rule 1080(e)(i)(A) which, among other things, provides that a complex order live auction (''COLA'') will initiate if the Phlx system receives a complex order that improves the Phlx complex order best debit or credit price respecting the specific complex order strategy that is the subject of the complex order. During a COLA, Phlx market participants may bid and offer against the COLA-eligible order pursuant to the Phlx Rule.

[7] Determinations by the Exchange regarding the classes where the re-COA feature is activated and related tick distance and frequency parameters will be announced to Trading Permit Holders via Regulatory Circular.

timer will begin and the resting order will not be eligible for the re-COA feature again until the sleep timer expires and there is a quote update after that timer expires that is within the tick distance parameter. All timers would be reset anytime there is a price change at the top of the COB. For example, if five minutes into the sleep interval a second complex order is entered to rest in COB at a price of $0.99 ($0.01 better than the original resting order priced at $0.98), the original resting order would no longer be at the top of the COB and subject to the re-COA feature. The timers would reset and the second complex order (which now represents the top of the COB) would be subject to the re-COA process. If, for example, the second order subsequently trades (constituting a price change at the top of the COB), the original order would be at the top of the COB again and could become subject to the re-COA feature again.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act [8] in general and furthers the objectives of Section 6(b)(5) of the Act [9] in particular in that it should promote just and equitable principles of trade, serve 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. The Exchange believes that the proposed rule change facilitates the orderly execution of complex orders by providing an automated opportunity for price improvement to (and execution of) resting orders priced near the current market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) thereunder.[11] At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2011–039 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–C2–2011–039. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–C2–2011–039 and should be submitted on or before January 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32343 Filed 12–16–11; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65939; File No. SR–CBOE–2011–119]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to a Complex Order Auction Feature

December 12, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on December 6, 2011, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its electronic complex order rules. 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, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On a class-by-class basis, the Exchange may determine to activate the electronic complex order RFR auction (''COA''), which is a process by which eligible complex orders [5] are given an opportunity for price improvement before being booked in the electronic complex order book (''COB'') or once on a PAR workstation. Paragraph (d) of Rule 6.53C describes the COA process. Interpretation and Policy .04 of the Rule also provides that, with respect to the initiation of a COA, Trading Permit Holders routing complex orders directly to COB may request that the complex orders be COA'd on a class-by-class basis and Trading Permit Holders with resting complex orders on PAR may request that complex orders be COA'd on an order-by-order basis.

The Exchange is proposing to amend the rule to describe a COA feature for complex orders resting in COB (referred to herein as the ''re-COA'' feature), which is currently in use but not expressly covered in the rules. In particular, the Exchange is proposing to provide that, for each class where COA is activated, the Exchange may also determine to activate the re-COA feature for complex orders resting in COB. For such classes, any non-marketable order resting at the top of the COB (regardless of whether it was subject to COA before it was booked in COB) [6] will be automatically subject to the re-COA feature if the order is within a number of ticks away from the current market (calculated based on the derived net price of the individual series legs). The Exchange notes that this re-COA feature for resting orders is only applicable to resting non-marketable orders that move close to the current market price calculated based on the individual series legs. This feature is not applicable to resting orders that become marketable. The Exchange may also determine on a class-by-class and strategy basis to limit the frequency of re-COA auctions initiated for complex orders resting in COB. For example, the Exchange might determine to limit the frequency of re-COA auctions to once every ''X'' seconds (the ''interval timer'') for a total of ''Y'' intervals. Once this cycle is complete, the Exchange may determine to wait for a period of time ''Z'' (the ''sleep timer'') and then reactivate the re-COA feature.[7] All timers will be reset if a new complex order improves the top of the COB (*i.e.,* improves the best net price bid or offer of the complex orders resting in COB). These limitations on the frequency of COA auctions due to the re-COA feature are intended to address system efficiency and effectiveness considerations, such as limiting repeated initiations of COA auctions (and related messaging) when there are flickering quotes. Once the re-COA feature is initiated for a resting order, all other aspects of the COA process described in Rule 6.53C will apply unchanged. The Exchange believes this re-COA feature facilitates the orderly execution of complex orders by providing an automated opportunity for price improvement to (and execution of) resting orders priced near the current market, similar to what a Trading Permit Holder might seek to do if the Trading Permit Holder were representing a complex order in open outcry (or just entering an order initially into COB).

The following example illustrates the operation of this re-COA feature: Assume the feature is activated for complex orders resting in COB that are within 2 ticks of the current market ($0.02 in a class where complex orders trade in $0.01 net price increments). Assume the frequency is limited to once every 15 seconds (the interval timer) for 1 interval. Under this setting, a total of 2 re-COA auctions could be triggered–the original re-COA auction and a second re-COA auction after the expiration of the 15-second interval timer. Assume the sleep timer is set at 60 minutes. Assume the current market calculated based on the derived net price of the individual series legs in the CBOE electronic book for a given strategy is at a net price of $0.80–$1.01. If a complex order resting in the COB to buy the strategy is priced at a net debit price of $0.98, the complex order is not marketable (as the order is away from the current market by $0.03 (or 3 ticks)). If subsequently the individual series legs prices are updated such that the current market for the strategy moves to a net price of $0.80–$1.00, the resting complex order to buy at $0.98 would trigger the re-COA feature and initiate the re-COA auction process (as the order is within $0.02 (or 2 ticks) of the current market). If there are no responses, the order would be placed back in COB. The resting order would not initiate the re-COA feature again until the 15-second interval timer has expired. When the 15-second interval timer expires, the order would be eligible to initiate the re-COA feature again if the current market moves after the expiration of the timer and the order meets the tick distance parameter (the order would not automatically initiate the re-COA feature after the expiration of the interval timer; instead there must be an update to the current market after the expiration of the interval timer and the order must meet the tick distance

[5] An eligible complex order, referred to in Rule 6.53C as a ''COA-eligible order,'' means a complex order that, as determined by the Exchange on a class-by-class basis, is eligible for a COA considering the order's marketability (defined as a number of ticks away from the current market), size, complex order type and complex order origin type (*i.e.,* non-broker-dealer public customer, broker-dealers that are not Market-Makers or specialists on an options exchange, and/or Market-Makers or specialists on an options exchange). All determinations by the Exchange on COA-eligible order parameters are announced to Trading Permit Holders by Regulatory Circular. *See* Rule 6.53C(d)(i)(2) and Interpretation and Policy .01 to Rule 6.53C.

[6] In this regard, the Exchange notes that, currently, all of its Trading Permit Holders have elected to have their COA-eligible orders COA'd. In addition, the Exchange notes that other markets have programs in place that provide for the automatic auctioning of complex orders. *See, e.g.,* NASDAQ OMX PHLX LLC (''Phlx'') Rule 1080(e)(i)(A) which, among other things, provides that a complex order live auction (''COLA'') will initiate if the Phlx system receives a complex order that improves the Phlx complex order best debit or credit price respecting the specific complex order strategy that is the subject of the complex order. During a COLA, Phlx market participants may bid and offer against the COLA-eligible order pursuant to the Phlx Rule.

[7] Determinations by the Exchange regarding the classes where the re-COA feature is activated and related tick distance and frequency parameters will be announced to Trading Permit Holders via Regulatory Circular.

parameter for the system to re-COA again). For example, if after the end of the 15-second interval timer the current market moves to $0.80–$0.99 (or, for example, if the current market moves back to $0.80–$1.01 and then, after the end of the 15-second interval timer moves back again to $0.80–$1.00), then the resting complex order would again initiate the re-COA feature. If there are no responses, the order would be placed back in COB. The cycle is complete. Now that the resting order has been subject to COA 2 times since it was booked in COB, the 60 minute sleep timer will begin and the resting order will not be eligible for the re-COA feature again until the sleep timer expires and there is a quote update after that timer expires that is within the tick distance parameter. All timers would be reset anytime there is a price change at the top of the COB. For example, if five minutes into the sleep interval a second complex order is entered to rest in COB at a price of $0.99 ($0.01 better than the original resting order priced at $0.98), the original resting order would no longer be at the top of the COB and subject to the re-COA feature. The timers would reset and the second complex order (which now represents the top of the COB) would be subject to the re-COA process. If, for example, the second order subsequently trades (constituting a price change at the top of the COB), the original order would be at the top of the COB again and could become subject to the re-COA feature again.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act [8] in general and furthers the objectives of Section 6(b)(5) of the Act [9] in particular in that it should promote just and equitable principles of trade, serve 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. The Exchange believes that the proposed rule change facilitates the orderly execution of complex orders by providing an automated opportunity for price improvement to (and execution of) resting orders priced near the current market.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) thereunder.[11] thnsp; At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–119 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–2011–119. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–CBOE–2011–119 and should be submitted on or before January 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32344 Filed 12–16–11; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65946; File No. SR–Phlx–2011–168]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Option Floor Broker Subsidy

December 13, 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

30, 2011, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to eliminate Section VII of its Fee Schedule entitled the ''Options Floor Broker Subsidy.''

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on December 1, 2011.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov*, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to eliminate the Options Floor Broker Subsidy (''Subsidy''). The Exchange is seeking to incentivize Floor Brokers in other ways, such as offering rebates for certain orders.[3] The Exchange believes that the Subsidy is no longer necessary as a means to incentivize Floor Brokers and proposes to eliminate the Subsidy.

The Exchange currently pays a Subsidy to member organizations with Exchange registered floor brokers that enter eligible contracts into the Exchange's Floor Broker Management System (''FBMS'').[4] The Subsidy is paid based on the contract volume on Customer-to-non-Customer as well as non-Customer-to-non-Customer transactions for that month. Only the volume from orders entered by floor brokers into FBMS and subsequently executed on the Exchange qualifies. The Exchange pays a Subsidy based on a monthly total of all eligible contracts as follows:

PER ELIGIBLE CONTRACT MONTHLY VOLUME SUBSIDY PAYMENT

Tier I	Tier II	Tier III	Tier IV
0 to 1,250,000	1,250,001 to 2,250,000	2,250,001 to 5,250,000	5,250,001 and greater.
$0.00 per contract	$0.03 per contract	$0.05 per contract	$0.09 per contract.

In computing the monthly eligible contracts, the Exchange currently excludes: (i) Customer-to-Customer executions; (ii) Firm-to-Customer executions where the Firm has reached the Firm Related Equity Option cap (''Cap'') (see Section II); (iii) Firm-to-Firm executions, where both sides have reached the Cap; (iv) dividend,[5] merger[6] and short stock interest[7] strategies; and (v) firm facilitation transactions.[8] The Subsidy applies to contracts that are executed as part of a Complex Order.[9] Where two or more member organizations with Exchange registered floor brokers each enter one side of a transaction into FBMS, the executed contracts are divided equally among qualifying member organizations that participate in that transaction.

The Exchange also proposes to eliminate other references to the Subsidy in the Fee Schedule at Section I entitled ''Rebates and Fees for Adding and Removing Liquidity in Select Symbols'' and in the Table of Contents.

The Exchange proposes to eliminate this Subsidy on December 1, 2011. The Exchange has provided notification to its Floor Brokers of its intent to eliminate the Subsidy.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[10] in general, and furthers the objectives of Section 6(b)(4) of the Act[11] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that the proposed elimination of the Subsidy is reasonable for various reasons. First, the Exchange believes that its purpose for offering Floor Brokers an incentive to transact certain eligible contracts through FBMS no longer exists. Second,

[3] *See* SR–Phlx–2011–169 [sic] (a proposed rule change to amend and adopt rebates applicable to both electronic QCC Orders and Floor QCC Orders with some exceptions and also amend and adopt a Service Fee).

[4] FBMS is designed to enable floor brokers and/or their employees to enter, route, and report transactions stemming from options orders received on the Exchange. FBMS also is designed to establish an electronic audit trail for options orders represented and executed by floor brokers on the Exchange. *See* Exchange Rule 1080, Commentary .06.

[5] A dividend strategy is defined as transactions done to achieve a dividend arbitrage involving the purchase, sale and exercise of in-the-money options of the same class, executed the first business day prior to the date on which the underlying stock goes ex-dividend. *See* Section II of the Fee Schedule.

[6] A merger strategy is defined as transactions done to achieve a merger arbitrage involving the purchase, sale and exercise of options of the same class and expiration date, executed the first business day prior to the date on which shareholders of record are required to elect their respective form of consideration, *i.e.,* cash or stock. *See* Section II of the Fee Schedule.

[7] A short stock interest strategy is defined as transactions done to achieve a short stock interest arbitrage involving the purchase, sale and exercise of in-the-money options of the same class. *See* Section II of the Fee Schedule.

[8] A facilitation occurs when a floor broker holds an options order for a public customer and a contra-side order for the same option series and, after providing an opportunity for all persons in the trading crowd to participate in the transaction, executes both orders as a facilitation cross. *See* Exchange Rule 1064.

[9] A Complex Order is any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced at a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy. Furthermore, a Complex Order can also be a stock-option order, which is an order to buy or sell a stated number of units of an underlying stock or ETF coupled with the purchase or sale of options contract(s). *See* Exchange Rule 1080, Commentary .08(a)(i).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

the Exchange is proposing to equalize the incentives provided to Floor Brokers and members entering electronic orders by offering a rebate on both electronic QCC Orders and Floor QCC Orders.[12] Finally, in light of offering Floor Brokers a rebate on Floor QCC Orders, the Exchange no longer desires to incentivize Floor Brokers with the Subsidy.

The Exchange believes that eliminating the Subsidy is equitable and not unfairly discriminatory for various reasons. First, the Exchange will not offer the Subsidy to any Floor Broker. Second, members executing orders electronically are not being offered the Subsidy today, so eliminating the Subsidy will further equalize Floor Brokers and members entering electronic orders. Finally, unlike the Subsidy which is based on monthly volume, there is no volume requirement to obtain a rebate on either an electronic QCC Order or a Floor QCC Order. The rebate is paid on each contract for electronic QCC Orders and Floor QCC Orders. Therefore, all Floor Brokers are in an equal position to qualify for the rebate.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[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–Phlx–2011–168 on the subject line.

Paper Comments

Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2011–168. 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 the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2011–168 and should be submitted on or before January 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

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BILLING CODE 8011–01–P

[12] The Exchange recently determined to offer a rebate to Floor Brokers for Floor QCC Orders as of December 1, 2011. *See* SR–Phlx–2011–169 [sic].

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65945; File No. SR–Phlx–2011–171]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Qualified Contingent Cross Orders

December 13, 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 December 1, 2011, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fee Schedule to increase a rebate and adopt a rebate related to Qualified Contingent Cross orders (''QCC Orders'').

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend and adopt rebates applicable to both electronic QCC Orders (''eQCC'') [3] and Floor QCC Orders.[4] The Exchange believes that paying rebates for QCC Orders will incentivize market participants to execute QCC Orders on the Exchange in Multiply Listed Securities.[5]

There are currently several categories of market participants: Customers, Directed Participants,[6] Specialists,[7] Registered Options Traders,[8] SQTs,[9] RSQTs,[10] Broker-Dealers, Firms and Professionals.[11] The Exchange proposes to amend the rebate applicable to eQCC Orders and adopt a rebate for Floor QCC Orders, for the above categories of market participants, applicable to both Sections I [12] and II [13] of the Fee Schedule. Currently, the Exchange pays a rebate of $0.05 per contract for all executed eQCC Orders. Today, the Exchange does not pay a rebate for Floor QCC Orders. The Exchange proposes to pay a rebate of $0.07 per contract for all executed eQCC Orders and Floor QCC Orders with some exceptions.[14] The Exchange will not offer a rebate on eQCC Orders or Floor QCC Orders where the transaction is either: (i) Customer-to-Customer; or (ii) a dividend,[15] merger [16] or short stock interest strategy [17] and execution subject to the Reversal and Conversion Cap.[18] The Exchange believes that offering a rebate of $0.07 per contract will encourage members to submit a greater numbers of QCC Orders in Multiply Listed Securities.

The Exchange is also concurrently eliminating the Options Floor Broker Subsidy (''Subsidy'') effective December 1, 2011.[19] Today, Floor Brokers are able to include Customer-to-Customer executions in the eligible contract computations of monthly volume. Floor Brokers are not able to include either the Firm-to-Customer or Firm-to-Firm executions where the Firm Related Equity Option Cap [20] has been reached for purposes of computing monthly volume. The dividend, merger, short stock interest strategies and executions subject to the Reversal and Conversion Cap are not eligible for the computations. Firm facilitation transactions are not included in the eligible computations for the Subsidy. By way of comparison, the Exchange will offer a QCC Rebate on Firm-to-Customer and Firm-to Firm transactions whereas today, with the Subsidy, Firm-to-Customer and Firm-to Firm transactions are not eligible for the monthly volume computations once the Firm Related Equity Option Cap is reached. Therefore, there is an opportunity to earn greater rebates on QCC Orders because these transaction types will get rebates. The Firm facilitation transactions are not included in the contract computations for the Subsidy. Firm facilitation is not applicable to a QCC Order.[21]

With respect to the rebate for Floor QCC Orders, the Exchange proposes to offer the rebate to floor brokers. Floor QCC Orders are orders that are electronically entered by a Floor

[3] A QCC Order is comprised of an order to buy or sell at least 1000 contracts that is identified as being part of a qualified contingent trade, as that term is defined in Rule 1080(o)(3), coupled with a contra-side order to buy or sell an equal number of contracts. The QCC Order must be executed at a price at or between the National Best Bid and Offer and be rejected if a Customer order is resting on the Exchange book at the same price. A QCC Order shall only be submitted electronically from off the floor to the PHLX XL II System. *See* Rule 1080(o). *See also* Securities Exchange Act Release No. 64249 (April 7, 2011), 76 FR 20773 (April 13, 2011) (SR–Phlx–2011–47) (a rule change to establish a QCC Order to facilitate the execution of stock/option Qualified Contingent Trades (''QCTs'') that satisfy the requirements of the trade through exemption in connection with Rule 611(d) of the Regulation NMS).

[4] A Floor QCC Order must: (i) Be for at least 1,000 contracts, (ii) meet the six requirements of Rule 1080(o)(3) which are modeled on the QCT Exemption, (iii) be executed at a price at or between the National Best Bid and Offer (''NBBO''); and (iv) be rejected if a Customer order is resting on the Exchange book at the same price. In order to satisfy the 1,000-contract requirement, a Floor QCC Order must be for 1,000 contracts and could not be, for example, two 500-contract orders or two 500-contract legs. *See* Rule 1064(e). *See also* Securities Exchange Act Release No. 64688 (June 16, 2011) (SR–Phlx–2011–56).

[5] Multiply Listed Securities include those symbols which are subject to rebates and fees in Section I, Rebates and Fees For Adding and Removing Liquidity in Select Symbols, and Section II, Equity Options Fees.

[6] A Directed Participant is a Specialist, SQT, or RSQT that executes a customer order that is directed to them by an Order Flow Provider and is executed electronically on PHLX XL II.

[7] A Specialist is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a).

[8] A Registered Options Trader (''ROT'') includes a Streaming Quote Trader (''SQT''), a Remote Streaming Quote Trader (''RSQT'') and a Non-SQT ROT, which by definition is neither a SQT nor a RSQT. A ROT is defined in Exchange Rule 1014(b) as a regular member or a foreign currency options participant of the Exchange located on the trading floor who has received permission from the Exchange to trade in options for his own account. *See* Exchange Rule 1014(b)(i) and (ii).

[9] An SQT is defined in Exchange Rule 1014(b)(ii)(A) as an ROT who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned.

[10] An RSQT is defined Exchange Rule in 1014(b)(ii)(B) as an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange.

[11] The Exchange defines a ''professional'' as any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) (hereinafter ''Professional'').

[12] Section I of the Fee Schedule is entitled ''Rebates and Fees for Adding and Removing Liquidity in Select Symbols.'' The Section I fees and rebates are applicable to certain select symbols which are defined in that section.

[13] Section II of the Fee Schedule is entitled ''Equity Options Fees.'' Section II includes options overlying equities, ETFs, ETNs, indexes and HOLDRS which are Multiply Listed.

[14] QCC Transaction Fees for a Specialist, ROT, SQT, RSQT, Professional, Firm and Broker-Dealer are $0.20 per contract. QCC Transaction Fees apply to QCC Orders, as defined in Exchange Rule 1080(o), and Floor QCC Orders, as defined in 1064(e).

[15] A dividend strategy is defined as transactions done to achieve a dividend arbitrage involving the purchase, sale and exercise of in-the-money options of the same class, executed the first business day prior to the date on which the underlying stock goes ex-dividend. *See* Section II of the Fee Schedule.

[16] A merger strategy is defined as transactions done to achieve a merger arbitrage involving the purchase, sale and exercise of options of the same class and expiration date, executed the first business day prior to the date on which shareholders of record are required to elect their respective form of consideration, i.e., cash or stock. *See* Section II of the Fee Schedule.

[17] A short stock interest strategy is defined as transactions done to achieve a short stock interest arbitrage involving the purchase, sale and exercise of in-the-money options of the same class. *See* Section II of the Fee Schedule.

[18] Specialists, ROTs, SQTs and RSQTs, Professionals, Firms and Broker-Dealers options transaction fees in Multiply Listed Options are capped at $500 per day for reversal and conversion strategies executed on the same trading day in the same options class.

[19] *See* SR–Phlx–2011–168.

[20] The Exchange recently changed the name of the Firm Related Equity Option Cap to the Monthly Firm Fee Cap. *See* Securities Exchange Act Release No. 65888 (December 5, 2011) (SR–Phlx–2011–160). The Monthly Firm Fee Cap is currently $75,000. Firm equity option transaction charges, in the aggregate, for one billing month will not exceed the Monthly Firm Fee Cap per member organization when such members are trading in their own proprietary account. The Firm equity options transaction charges will be waived for members executing facilitation orders pursuant to Exchange Rule 1064 when such members are trading in their own proprietary account. Firms that (i) are on the contra-side of an electronically-delivered and executed Customer complex order; and (ii) have reached the Monthly Firm Fee Cap will be assessed a $0.05 per contract fee. *See* Securities Exchange Act Release No. 63780 (January 26, 2011), 76 FR 5846 (February 2, 2011) (SR–Phlx–2011–07).

[21] *See* Exchange Rule 1064(b). A facilitation order is a separate order type from a QCC Order.

Broker[22] on the floor of the Exchange using the Floor Broker Management System (''FBMS'').[23]

Currently, QCC Transaction Fees apply to Sections I and II of the Fee Schedule and are subject to the Firm Related Equity Option Cap and the Monthly Cap.[24] A Service Fee of $0.05 per side is currently assessed for a Firm that has reached the Firm Related Equity Option Cap. The Service Fee is not assessed to a Firm that does not reach the Firm Related Equity Option Cap in a particular calendar month. The Exchange proposes to increase the Service Fee from $0.05 per contract side to $0.07 per contract side to recoup costs incurred by the Exchange to offer this capability including payment of rebates to encourage market participants to utilize this service. The Exchange also proposes to adopt a Service Fee of $0.07 per contract side for all eQCC Orders and Floor QCC Orders once the ROT or Specialist has reached the Monthly Cap to also recoup costs incurred by the Exchange to offer this capability including payment of rebates to encourage market participants to utilize this service. This $0.07 per side Service Fee will apply to every contract side of an eQCC Order and Floor QCC Order that is executed once a ROT or Specialist has reached the Monthly Cap in a particular calendar month. A ROT or Specialist that does not reach the Monthly Cap in a particular calendar month will not be assessed the Service Fee in that month.

The Exchange proposes to add text to Section II of the Fee Schedule to describe the Service Fee. The Exchange also proposes to amend Section I of the Fee Schedule to include a reference to the proposed rebate.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[25] in general, and furthers the objectives of Section 6(b)(4) of the Act[26] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. The Exchange also believes that there is an equitable allocation of reasonable rebates among Exchange members.

The Exchange believes that it is reasonable to incentivize members to transact both eQCC Orders and Floor QCC Orders in Multiply Listed securities[27] by paying a $0.07 per contract rebate to all members entering such orders. The Exchange believes that paying a rebate of $0.07 will sufficiently incentivize its members to send both eQCC Orders and Floor QCC Orders to the Exchange. Furthermore, the $0.07 rebate is within the range of rebates paid by other exchanges and balances the Exchange's desire to incentivize its members to send order flow to the Exchange while considering the costs attributable to offering such rebates. The Exchange also believes that the $0.07 rebate is reasonable because every QCC Order is entitled to the rebate and therefore all members are equally eligible to receive the rebate without limitation.

The Exchange believes that it is reasonable to offer the rebate for Floor QCC Orders to the Floor Broker. The Floor Broker is in receipt of the Floor QCC Orders and enters those orders into FBMS. The Exchange believes it is necessary from a competitive standpoint to offer this rebate to the executing Floor Broker on a Floor QCC order. The Exchange expects that the rebate offered to executing Floor Brokers will allow them to price their services at a level that will enable them to attract Floor QCC order flow from participants who would otherwise enter these orders electronically from off the floor to the PHLX XL II System. To the extent that Floor Brokers are able to attract these Floor QCC orders, they will gain important information that will allow them to solicit the parties to the Floor QCC orders for participation in other trades, which will in turn benefit all other Exchange participants through the additional liquidity and price discovery that may occur as a result. The proposed rebate is similar to a rebate on the NYSE Arca, Inc. (''NYSE Arca'').[28]

The Exchange believes it is reasonable to not offer a rebate for eQCC Orders and Floor QCC Orders for Customer-to-Customer executions because members executing Customer orders are not assessed a QCC Transaction Fee[29] and therefore do not need to be incentivized to send QCC Orders to the Exchange. Likewise, the Exchange believes that it is reasonable to not offer a rebate for dividend, merger and short stock interest strategies and executions subject to the Reversal and Conversion Cap because the Exchange already provides a cap today on the transaction fees associated with these strategies and therefore does not believe an additional incentive is required.

The Exchange believes that it is equitable and not unfairly discriminatory to pay a $0.07 rebate for executed eQCC Orders to the executing member because all market participants are uniformly eligible for the proposed rebate. Additionally, the proposed rebate is within the range of tiered rebates offered by the International Securities Exchange, LLC (''ISE'').[30]

The Exchange believes that it is equitable and not unfairly discriminatory to pay the rebate for Floor QCC Orders to Floor Brokers because it would uniformly apply to all Floor QCC orders entered by a Floor Broker into FBMS for execution. The rebate is not unfairly discriminatory to firms that enter eQCC Orders directly into PHLX XL II, because the transaction fees and rebates are the same whether the order is entered electronically or through a Floor Broker. In addition, pursuant to Exchange Rule 1080(o)(3), only Floor Brokers may enter a Floor QCC order from the floor of the Exchange; therefore, providing the rebate to Floor Brokers does not discriminate against eQCC orders

[22] Floor QCC Orders must include data reflecting the number of shares of stock sold/purchased in the stock leg of the QCT trade. Floor QCC Orders lacking this data will be rejected by the Exchange system.

[23] Once entered into the FBMS by a Floor Broker, the execution will be executed electronically. Only Floor Brokers will be permitted to enter Floor QCC Orders. *See* Exchange Rule 1064. Exchange Rule 1064(e)(2) prohibits Options Floor Brokers from entering Floor QCC Orders for their own accounts, the account of an associated person, or an account with respect to which it or an associated person thereof exercises investment discretion.

[24] ROTs and Specialists are currently subject to a Monthly Cap of $550,000. The trading activity of separate ROTs and Specialist member organizations will be aggregated in calculating the Monthly Cap if there is at least 75% common ownership between the member organizations. In addition, ROTs and Specialists that (i) are on the contra-side of an electronically-delivered and executed Customer complex order; and (ii) have reached the Monthly Cap will be assessed a $0.05 per contract fee. *See* Securities Exchange Act Release No. 64113 (March 23, 2011), 76 FR 17468 (March 29, 2011) (SR–Phlx–2011–36).

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(4).

[27] The rebate does not apply to Singly Listed Securities. For purposes of this filing, a Singly Listed Option means an option that is only listed on the Exchange and is not listed by any other national securities exchange. *See* Section III of the Exchange's Fee Schedule entitled Singly Listed Options.

[28] *See* NYSE Arca's Fee Schedule. NYSE Arca pays a $0.10 per contract rebate for executed QCC orders entered by a Floor Broker.

[29] Specialists, ROTs, SQTs, RSQTs, Professionals, Firms and Broker-Dealers are assessed a QCC Transaction Fee of $0.20 per contract.

[30] *See* ISE's Schedule of Fees. ISE pays members using its qualified contingent cross and/or solicitation order types a rebate according to a table based on the number of originating contract sides. Once a member reaches a certain volume threshold in qualified contingent cross and/or solicitation orders during the month, ISE pays a rebate to that member entering a qualifying order for all qualified contingent cross and/or solicitation traded contracts for that month. For example, for 0–1,999,999 originating contract sides ISE pays no rebate; for 2,000,000 to 3,499,999 originating contract sides ISE pays $0.03 per contract; for 3,500,000 to 3,999,999 originating contract sides ISE pays $0.05 per contract; and for 4,000,000 or more originating contract sides ISE pays $0.07 per contract.

entered into PHLX XL II. Any participant will be able to engage a rebate-receiving Floor Broker in a discussion surrounding the appropriate level of fees that they may be charged for entrusting the entry of the Floor QCC Order to the Floor Broker into FBMS for execution. The additional order flow attracted by this rebate should benefit all participants. The rebate is meant to assist Floor Brokers to recruit business on an agency basis. The Floor Broker may use all or part of the rebate to offset its fees.

The Exchange believes it is equitable and not unfairly discriminatory to not offer a rebate for eQCC Orders and Floor QCC Orders for Customer-to-Customer executions and for dividend, merger and short stock interest strategies and executions subject to the Reversal and Conversion Cap because the Exchange would not offer a rebate for these two types of transactions for any QCC Order uniformly. Neither Customer-to-Customer executions nor dividend, merger and short stock interest strategies and executions subject to the Reversal and Conversion Cap will receive the rebate. Customers are not assessed a QCC Transaction Fee. Also, as previously mentioned herein, with respect to the Subsidy, the dividend, merger and short stock interest strategies and executions subject to the Reversal and Conversion Cap are not eligible for the Subsidy today, and are excluded form [sic] the rebate. The transaction fees which are associated with these strategies are capped today. The Exchange therefore does not believe an additional incentive is required.

The Exchange believes that the increased Service Fee for Firms and the proposed Service Fee for ROTs and Specialists are reasonable because today Firms, ROTs and Specialists have the ability to cap transaction fees on Multiply-Listed Securities. Notwithstanding the addition of Service Fees, Firms, ROTs and Specialists should generally pay less once they reach the applicable caps because they will not pay the normally applicable transaction fees. These Service Fees will reduce the discrepancy that exists today between Firms, ROTs, Specialists and other market participants where those participants benefit from a cap. For example, Firms, ROTs or Specialists that reach the Firm Related Equity Option Cap or Monthly Cap in a particular month will pay the Service Fee instead of other normally applicable transaction fees as a result of reaching the applicable cap. As stated in the filing, the Service Fees do not apply to Firms, ROTs and Specialists that do not reach the applicable cap. Also, the Exchange believes that the Service Fees are reasonable because the fees will allow the Exchange to defray costs incurred in providing the qualified contingent cross capability and rebates to incentivize trading. Specifically, the Exchange is providing trade matching and processing, post trade allocation, submission for clearing and customer service activities related to trading activity on the Exchange while also incentivizing market participants to transited QCC Orders at the Exchange. The Exchange also believes that the Service Fees are reasonable because they are comparable to a fee assessed by the ISE.[31]

The Exchange believes that the proposed Service Fees are equitable and not unfairly discriminatory because these fees will be uniformly applied to Firms, ROTs and Specialists in the same way that the Firm Related Equity Option Cap and Monthly Cap are uniformly available to Firms, ROTs and Specialists. The Exchange currently assesses a Service Fee of $0.05 per contract side for eQCC Orders and Floor QCC Orders once a Firm reaches the Firm Related Equity Option Cap in order to recoup fees.

The Exchange operates in a highly competitive market comprised of nine U.S. options exchanges in which sophisticated and knowledgeable market participants readily can, and do, send order flow to competing exchanges if they deem fee levels at a particular exchange to be excessive. The Exchange believes that the proposed rebate for eQCC Orders and Floor QCC Orders must be competitive with rebates offered and fees assessed at other options exchanges. The Exchange believes that this competitive marketplace impacts the rebates and fees present on the Exchange today and influences the proposals set forth above.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

[31] ISE assesses a $0.05 per side service fee for qualified contingent cross volume once a member reaches the monthly fee cap. *See* ISE's Schedule of Fees.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[32] 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–Phlx–2011–171 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2011–171. 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

[32] 15 U.S.C. 78s(b)(3)(A)(ii).

printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2011–171 and should be submitted on or before January 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32406 Filed 12–16–11; 8:45 am]

BILLING CODE 8011–01–P

[33] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 7733]

Culturally Significant Objects Imported for Exhibition Determinations: ''Hilda With Bluebells''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the object to be included in the exhibition ''Hilda with Bluebells,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at The Metropolitan Museum of Art, New York, NY, from on or about January 10, 2012, until on or about January 10, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including an art object list, 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: December 12, 2011.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–32412 Filed 12–16–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Delegation of Authority 304]

Delegation of Duties, Functions, and Responsibilities Vested in the Director General of the Foreign Service and Director of Human Resources

By virtue of the authority vested in me as Director General of the Foreign Service and Director of Human Resources, and to the extent authorized by law, I hereby delegate the duties, functions, and authorities vested in me as Director General of the Foreign Service and Human Resources, to my Principal Deputy Steven A. Browning.

This delegation does not include the authorities vested in me by Delegation 151 (related to my consultative role in connection with certain disputes between a labor organization and United States Forces), nor does it include any other duties, functions, and responsibilities required by law to be exercised by other authority. Notwithstanding this delegation, the functions and authorities delegated herein may also be exercised by the Secretary, the Deputy Secretary, the Deputy Secretary for Management and Resources, the Under Secretary for Management, and me.

This delegation will terminate upon the subsequent appointment of a Director General of the Foreign Service and Director of Human Resources, or sooner if revoked by competent authority.

Dated: December 9, 2011.

Nancy J. Powell,

Director General of the Foreign Service and Director of Human Resources.

[FR Doc. 2011–32421 Filed 12–16–11; 8:45 am]

BILLING CODE 4710–35–P

DEPARTMENT OF STATE

[Public Notice 7730]

In the Matter of the Designation of Jose Antonio Urruticoechea Bengoechea Also Known as Jose Antonio Urrutikoetxea Bengoetxea Also Known as Josu Ternera as a Specially Designated Global Terrorist pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the individual known as Jose Antonio Urruticoechea Bengoechea, also known as Jose Antonio Urrutikoetxea Bengoetxea, also known as Josu Ternera, committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that ''prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously,'' I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register.**

Dated: November 28, 2011.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2011–32414 Filed 12–16–11; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 7731]

In the Matter of the Designation of Saleh al-Qarawi also known as Saleh Al Qarawi also known as Saleh Abudullah Saleh Al Qarawi also known as Saleh bin Abdullah al-Qarawi also known as Akhuk al Saghir also known as Fawakeh also known as Mootasem also known as Abu Yahya Al Qarawi also known as Najm Al-Kheir as a Specially Designated Global Terrorist pursuant to Section 1(b) of Executive Order 13224, as amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the individual known as Saleh al-Qarawi, also known as Najm, also known as Saleh Al Qarawi, also known as Saleh Abudullah Saleh Al Qarawi, also known as Saleh bin Abdullah al-Qarawi, also known as Akhuk al Saghir, also known as Fawakeh, also known as Mootasem, also known as Abu Yahya Al Qarawi, also known as Najm Al-Kheir committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in Section 10 of Executive Order 13224 that ''prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously,'' I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated:
December 13, 2011.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2011–32418 Filed 12–16–11; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans), pursuant to 23 U.S.C. 327, and U.S. Army Corps of Engineers (USACE).

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans, and USACE that are final within the meaning of 23 U.S.C. 139(*l*) (1). The actions relate to a proposed highway project, U.S. Route 101 from 1.1 mile north of the Mendocino County line to 2.2 miles north of the Mendocino County line in the County of Humboldt, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before June 18, 2012. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Deborah Harmon, Senior Environmental Planner, North Region Environmental Services, 1656 Union Street, Eureka, CA 95501 8 am to 5 pm, (707) 445–6431, *deborah_harmon@dot.ca.gov.* For USACE: Jane Hicks, Chief Regulatory Branch, 1455 Market Street, San Francisco, CA 94103–1399 8 a.m. to 5 p.m., (415) 503–6771 *Jane.M.Hicks@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans, and USACE have taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: Richardson Grove Operational Improvement Project to provide Surface Transportation Assistance Act (STAA) access on U.S. Route 101. Project limit is from 1.1 mile north of the Mendocino County line to 2.2 miles north of the Mendocino County line and would include minor curve realignments, drainage improvements, shoulder widening, cuts and fills, and a retaining wall. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Assessment/Finding of No Significant Impact (FONSI) for the project, approved on May 18, 2010. The FONSI and other project records are available by contacting Caltrans at the addresses provided above. The Caltrans FONSI can be viewed and downloaded from the Project Web site at *http://www.dot.ca.gov/dist1/d1projects/richardson_grove/* or viewed at public libraries in the project area. The USACE decision and 404 permit [2009–00098] for the drainage improvements is available by contacting USACE at the address provided above. This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. Endangered Species Act.
2. National Historic Preservation Act of 1966 as amended.
3. Wild and Scenic Rivers Act.
4. Section 4(f) of the Department of Transportation Act of 1966.
5. Clean Water Act.
6. National Environmental Policy Act (NEPA).

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

Issued on: December 13, 2011.

Matthew Schmitz,

Director, State Programs, Federal Highway Administration, Sacramento, California.

[FR Doc. 2011–32388 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA–2006–26367 and FMCSA–2011–0131]

Public Meeting of a Joint Subcommittee of the Motor Carrier Safety Advisory Committee and the Medical Review Board; Obstructive Sleep Apnea

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of Joint Subcommittee of the Meeting of Motor Carrier Safety Advisory Committee (MCSAC) and Medical Review Board (MRB).

SUMMARY: FMCSA announces that MCSAC and MRB will hold a joint subcommittee meeting on Wednesday–Thursday, January 4–5, 2012. Both days of the meeting will be open to the public.

Time and Dates: The joint MCSAC–MRB subcommittee meeting will be held on Wednesday–Thursday, January 4–5, 2012, from 8:30 a.m. to 5 p.m., Eastern Time (E.T.). The meeting will be held at the Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314 in the Washington and Jefferson Rooms on the 2nd floor. The Hilton Alexandria Old Town is located across the street from the King Street Metro station.

Matters To Be Considered: The MCSAC–MRB subcommittee will consider ideas and concepts the Agency should consider for potential regulatory changes to the current physical qualifications standards to address the medical certification process for truck and bus drivers that have been diagnosed with OSA or are believed to suffer from the disease but have not been diagnosed at the time of the medical examination. The subcommittee will make its recommendations to the MCSAC and MRB for their deliberation at a joint meeting of the two bodies in February 2012. Upon approval by the MCSAC and MRB, the recommendations will be submitted to FMCSA for consideration. Copies of Task Statement 11–05 and an agenda for the 2-day meeting will be made available on the MCSAC and MRB Web sites at *http://mcsac.fmcsa.dot.gov* and *http://mrb.fmcsa.dot.gov,* respectively.

FOR FURTHER INFORMATION CONTACT: Ms. Shannon L. Watson, Senior Advisor to the Associate Administrator for Policy, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, (202) 385–2395, *mcsac@dot.gov.*

Services for Individuals with Disabilities:

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Elizabeth Turner at (617) 494–2068, *elizabeth.turner@dot.gov*, by Wednesday, December 28, 2011.

SUPPLEMENTARY INFORMATION:

I. Background

MCSAC

Section 4144 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, Public Law 109–59, 119 Stat. 1144, August 10, 2005) required the Secretary of Transportation to establish the MCSAC. The MCSAC provides advice and recommendations to the FMCSA Administrator on motor carrier safety programs and regulations, and operates in accordance with the Federal Advisory Committee Act (FACA, 5 U.S.C. App 2).

MRB

Section 4116 of the SAFETEA–LU requires the Secretary of Transportation, with the advice of the MRB, to ''establish, review, and revise medical standards for operators of CMVs that will ensure that the physical condition of operators of CMVs is adequate to enable them to operate the vehicles safely.'' On November 2, 2010, the Secretary of Transportation announced the five medical experts who serve on the MRB. FMCSA is planning revisions to the physical qualification regulations of CMV drivers, and the MRB will provide the necessary science-based guidance to establish realistic and responsible medical standards. The MRB operates in accordance with FACA.

Obstructive Sleep Apnea

The MCSAC and the MRB met jointly on December 7, 2011, to discuss ideas and concepts the Agency should consider for regulatory guidance and, potentially, for future rulemaking on OSA. The MCSAC and MRB completed their joint recommendation on regulatory guidance on OSA and issued a letter report at the end of the meeting. As a result of these discussions, a joint subcommittee was formed to develop ideas and concepts the Agency should consider for a potential notice-and-comment rulemaking to address the issue of OSA.

II. Meeting Participation

Oral comments from the public will be heard during the last half-hour of the meeting on Wednesday and Thursday. Members of the public may submit written comments on the topics to be considered during the meeting by Wednesday, December 28, 2011, to Federal Docket Management System (FDMC) Docket Number FMCSA–2006–26367 using any of the following methods:

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

Issued on: December 13, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32444 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2011–0277]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt twenty-one individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective December 19, 2011. The exemptions expire on December 19, 2013.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Room W64–224, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue

SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

Background

On October 17, 2011, FMCSA published a notice of receipt of Federal diabetes exemption applications from twenty-one individuals and requested comments from the public (76 FR 64165). The public comment period closed on November 16, 2011 and no comments were received.

FMCSA has evaluated the eligibility of the twenty-one applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current requirement for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that ''A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control''

(49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled ''A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century.'' The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible.

The September 3, 2003 (68 FR 52441) **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777) **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These twenty-one applicants have had ITDM over a range of 1 to 26 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision requirement at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the October 17, 2011, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comment

FMCSA received one comment in this proceeding. The comment was considered and discussed below.

An anonymous individual indicated that he was not convinced that Mr. Randy Voss was qualified to receive a vision exemption.

In response to this comment, FMCSA's exemption process supports drivers with ITDM who seek to operate in interstate commerce. In addition, FMSCA relies on the expert medical opinion of the endocrinologist and the medical examiner, who are required to analyze individual ability to control and manage the diabetic condition, including the individual ability and willingness of the driver to monitor blood glucose level on an ongoing basis. FMCSA will grant exemptions only to those applicants who meet the specific conditions and comply with all the requirements of the exemption.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes requirement in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes requirement in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Conclusion

Based upon its evaluation of the twenty-one exemption applications, FMCSA exempts, Norman Billie (Utah); Jeffry L. Bromby (California); Glenn W. Burke (New York); David P. Charest (New Hampshire); Donald N. Ellis (New Jersey); Timothy J. Flynn (Iowa); Michael T. Heath (Georgia); Edward L. Keith (Illinois); Thomas J. Kelley (Virginia); Jackie L. Lane (Texas); Michael J. Miller (Illinois); Jeremy R. Pendergrass (Utah); Cory J. Rickerl (Arizona); Phillip D. Ross (Texas); Dennis R. Scheel (South Dakota); Andrew P. Shirk (Michigan); Jerry L. Smit (Minnesota); Charles R. Tomassi (New York) and Randy J. Voss (Illinois) from the ITDM requirement in 49 CFR 391.41(b)(3), subject to the conditions listed under ''Conditions and Requirements'' above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid

for two years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails 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. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: December 12, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32441 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2011–0327]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemption from the diabetes mellitus requirement; request for comments.

SUMMARY: FMCSA announces receipt of applications from fifteen individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 18, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2011–0327 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* 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.
- *Fax:* 1 (202) 493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The fifteen individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b) (3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Mathew B. Bartlett

Mr. Bartlett, age 22, has had ITDM since 2006. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bartlett understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Bartlett meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B Commercial Driver's License (CDL) from Iowa.

Colby S. Blank

Mr. Blank, 26, has had ITDM since 2005. His endocrinologist examined him in 2001 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Blank understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Blank meets the vision requirement of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Nebraska.

Gene J. Bottger

Mr. Bottger, 63, has had ITDM since 2009. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in

the last 5 years. His endocrinologist certifies that Mr. Bottger understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Bottger meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Washington.

Ralph F. Caianiello, Jr.

Mr. Caianiello, 42, has had ITDM since 2002. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Caianiello understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Caianiello meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from North Carolina.

Ronald A. Elison

Mr. Elison, 69, has had ITDM since 2009. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Elison understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Elison meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class C CDL from New Jersey.

Vernon L. Esham

Mr. Esham, 55, has had ITDM since 1959. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Esham understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Esham meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Maryland.

Steve R. Fortunat

Mr. Fortunat, 26, has had ITDM since 1997. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Fortunat understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Fortunat meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from New Jersey.

Kenneth J. Hill

Mr. Hill, 33, has had ITDM since 1992. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Hill understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hill meets the vision requirement of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Kentucky.

Cecil T. Keith

Mr. Keith, 57, has had ITDM since 1975. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Keith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Keith meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Georgia.

Mervin R. Koehn

Mr. Koehn, 51, has had ITDM since 2009. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Koehn understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Koehn meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Mississippi.

Leonard E. Lucas, Jr.

Mr. Lucas, 63, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Lucas understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lucas meets the vision requirement of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from California.

Frank E. Ray

Mr. Ray, 60, has had ITDM since 2010. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the

assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ray understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ray meets the vision requirement of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Kansas.

Stanley L. Rybarczyk

Mr. Rybarczyk, 59, has had ITDM since 2002. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Rybarczyk understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Rybarczyk meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class B CDL from Illinois.

Harold J. Smith

Mr. Smith, 58, has had ITDM since 1982. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Smith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smith meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class D operator's license from Wisconsin.

Gene A. Willis

Mr. Willis, 55, has had ITDM since 2007. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Willis understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Willis meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from West Virginia.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 USC. 31136 (e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: December 12, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32440 Filed 12–16–11; 8:45 am]

BILLING CODE P

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2011–0327]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemption from the diabetes mellitus requirement; request for comments.

SUMMARY: FMCSA announces receipt of applications from fifteen individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 18, 2012.

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SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The fifteen individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Mathew B. Bartlett

Mr. Bartlett, age 22, has had ITDM since 2006. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bartlett understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Bartlett meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B Commercial Driver's License (CDL) from Iowa.

Colby S. Blank

Mr. Blank, 26, has had ITDM since 2005. His endocrinologist examined him in 2001 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Blank understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Blank meets the vision requirement of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Nebraska.

Gene J. Bottger

Mr. Bottger, 63, has had ITDM since 2009. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bottger understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Bottger meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Washington.

Ralph F. Caianiello, Jr.

Mr. Caianiello, 42, has had ITDM since 2002. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Caianiello understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Caianiello meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from North Carolina.

Ronald A. Elison

Mr. Elison, 69, has had ITDM since 2009. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Elison understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Elison meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class C CDL from New Jersey.

Vernon L. Esham

Mr. Esham, 55, has had ITDM since 1959. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function

that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Esham understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Esham meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Maryland.

Steve R. Fortunat

Mr. Fortunat, 26, has had ITDM since 1997. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Fortunat understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Fortunat meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from New Jersey.

Kenneth J. Hill

Mr. Hill, 33, has had ITDM since 1992. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Hill understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hill meets the vision requirement of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Kentucky.

Cecil T. Keith

Mr. Keith, 57, has had ITDM since 1975. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Keith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Keith meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Georgia.

Mervin R. Koehn

Mr. Koehn, 51, has had ITDM since 2009. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Koehn understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Koehn meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Mississippi.

Leonard E. Lucas, Jr.

Mr. Lucas, 63, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Lucas understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lucas meets the vision requirement of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from California.

Frank E. Ray

Mr. Ray, 60, has had ITDM since 2010. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ray understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ray meets the vision requirement of 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Kansas.

Stanley L. Rybarczyk

Mr. Rybarczyk, 59, has had ITDM since 2002. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Rybarczyk understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Rybarczyk meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class B CDL from Illinois.

Harold J. Smith

Mr. Smith, 58, has had ITDM since 1982. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Smith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smith meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class D operator's license from Wisconsin.

Gene A. Willis

Mr. Willis, 55, has had ITDM since 2007. His endocrinologist examined him

in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Willis understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Willis meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from West Virginia.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441) [1]. The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C. 31136(e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: December 12, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32439 Filed 12–16–11; 8:45 am]

BILLING CODE P

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2011–0326]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption from the diabetes mellitus requirement; request for comments.

SUMMARY: FMCSA announces receipt of applications from 15 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 18, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2011–0326 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* 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.
- *Fax:* 1 (202) 493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 15 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce.

Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Howard A. Betz

Mr. Betz, age 63, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Betz understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a Commercial Motor Vehicle (CMV) safely. Mr. Betz meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A Commercial Driver's License (CDL) from Ohio.

Keith R. Boyington

Mr. Boyington, 50, has had ITDM since 2009. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Boyington understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Boyington meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Idaho.

Adam C. Cochran

Mr. Cochran, 22, has had ITDM since 1991. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Cochran understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Cochran meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Georgia.

Kevin J. Coppens

Mr. Coppens, 53, has had ITDM since 2010. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Coppens understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Coppens meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable diabetic proliferative retinopathy in the right eye and stable diabetic nonproliferative retinopathy in the left eye. He holds an operator's license from Maine.

Frank H. Ford, Jr.

Mr. Ford, 39, has had ITDM since 2010. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ford understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ford meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Daniel R. Harris

Mr. Harris, 42, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Harris understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Harris meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Texas.

Alva L. Keifer

Mr. Keifer, 56, has had ITDM since 2010. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Keifer understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Keifer meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Ohio.

Edwin J. Lundquist

Mr. Lundquist, 21, has had ITDM since 2003. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Lundquist understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lundquist meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Minnesota.

John B. Marriott

Mr. Marriott, 39, has had ITDM since 2001. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Marriott understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Marriott meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Utah.

Joseph L. Owings

Mr. Owings, 71, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Owings understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Owings meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Alabama.

Richard L. Pinkard

Mr. Pinkard, 47, has had ITDM since 2010. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Pinkard understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pinkard meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Alabama.

Samuel E. Sanders

Mr. Sanders, 42, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Sanders understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sanders meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New York.

Jerry H. Small

Mr. Small, 56, has had ITDM since 1984. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Small understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Small meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from North Carolina.

Michael L. Tyler

Mr. Tyler, 58, has had ITDM since 1983. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Tyler understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Tyler meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Michigan.

Richard D. Wollman

Mr. Wollman, 56, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Wollman understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Wollman meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from South Dakota.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C. 31136(e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: December 14, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32451 Filed 12–16–11; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–1999–6156; FMCSA–2005–22194; FMCSA–2007–0017]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 18 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective January 8, 2012. Comments must be received on or before January 18, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: FMCSA–1999–6156; FMCSA–2005–22194; FMCSA–2007–0017, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* 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.
- *Fax:* 1 (202) 493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Divison, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, 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 that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 18 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 18 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Garry A. Baker (OH)
Richard D. Becotte (NH)
Wayne A. Burnett (NC)
Alex G. Dlugolenski (CT)
Jimmy D. Gregory (AR)
Larry Lentz (OH)
Boleslaw Makowski (WI)
Joseph W. Meacham (LA)
Charles M. Moore (TX)
Gary T. Murray (GA)
Anthony D. Ovitt (VT)
John R. Parsons, III (VA)
Martin Postma (IL)
Steven S. Reinsvold (WI)
Glenn T. Riley (OH)
George E. Todd (WV)
Gary S. Warren (IA)
Bradley A. Weiser (OH)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless

rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails 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.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 18 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (64 FR 54948; 65 FR 159; 66 FR 66969; 68 FR 69432; 70 FR 57353; 70 FR 72689; 71 FR 644; 72 FR 62897; 72 FR 67340; 73 FR 1395; 74 FR 65845). Each of these 18 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 18, 2012.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 18 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: December 12, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32448 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7363; FMCSA–2001–10578; FMCSA–2003–15268; FMCSA–2003–16241; FMCSA–2005–22194]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 10 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective December 31, 2011. Comments must be received on or before January 18, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: FMCSA–2000–7363; FMCSA–2001–10578; FMCSA–2003–15268; FMCSA–2003–16241; FMCSA–2005–22194, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* 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.
- *Fax:* 1-(202) 493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical

Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, 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 that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 10 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 10 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Ronald G. Austin (AL)
Morris R. Beebe, II (CO)
Martiniano L. Espinosa (FL)
James G. LaBair (MI)
Norman R. Lamy (MA)
Lonnie Lomax, Jr. (IL)
John D. McCormick (WY)
Eugene C. Murphy (ME)
John H. Voigts (AZ)
Daniel G. Wilson (IL)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails 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.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 10 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (65 FR 45817; 65 FR 77066; 66 FR 53826; 66 FR 66966; 67 FR 71610; 68 FR 37197; 68 FR 48989; 68 FR 61857; 68 FR 69434; 68 FR 75715; 70 FR 25878; 70 FR 42615; 70 FR 57353; 70 FR 72689; 70 FR 74102; 71 FR 646; 72 FR 40360; 72 FR 62897; 72 FR 71993; 72 FR 71998; 74 FR 34632; 74 FR 64124; 74 FR 60021;74 FR 65846). Each of these 10 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 18, 2012.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 10 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: December 14, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32449 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2011–0085]

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief. The petition has been assigned Docket Number FRA–2011–0085.

The BNSF Railway Company (BNSF) hereby petitions FRA for a waiver from 49 CFR Section 213.109(d)(6) to allow for the use of concrete crossties with one shoulder broken off where, if turned end for end, every other crosstie is

fastened 100 percent on both rails. BNSF claims they have used these ''three-quarter'' (¾) crossties in Class 1 and 2 track for many years, and have demonstrated that this method is safe and results in a stronger track structure in comparison with wood crossties under similar train operations. BNSF proposes that FRA grant BNSF a waiver of compliance that will effectively ''grandfather'' BNSF's continued use of these types of crossties at various locations throughout the BNSF operating system. BNSF also claims that: (1) The performance of ¾ crossties has not resulted in any derailments due to gage or crossties defects in over 20 years of use; (2) FRA has taken no exception to BNSF's use of ¾ concrete crosstie condition in the past; (3) it is unreasonable to expect BNSF to acquire and install approximately 33,000 wood or concrete crossties at an estimated cost of $6,600,000 by the mandated compliance date of November 8, 2011; (4) the removal of service of the existing tracks would cause an adverse impact to customers and operations; (5) the Gage Restraint Measurement System (GRMS) testing of the concrete crossties has confirmed that the installation of ¾ crossties meets the conditions contained in 49 CFR Section 213.110; (6) the ¾ crossties are environmentally sound; (7) BNSF will identify and inventory locations where ¾ crossties are currently installed, and when crosstie replacement is performed through normal maintenance cycles (identified locations will comply with 49 CFR Sections 213.109 and 213.127, accordingly); and (8) walking inspections of ¾ crosstie locations will be performed annually, except where GRMS testing is performed.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2011–0085) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on December 14, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011–32460 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2011–0015]

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated February 10, 2011, Drake Switching Company, LLC (DSC) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 223. FRA assigned the petition Docket Number FRA–2011–0015.

DSC seeks a waiver of compliance from certain provisions of the Safety Glazing Standards–Locomotives, Passenger Cars and Cabooses, 49 CFR part 223, which requires certified glazing in all windows.

This request is for a shuttlewagon (Car Number SWX735), which is used as a locomotive. DSC states that this shuttlewagon is equipped with DOT–002 and DOT–22 glazings, instead of the FRA Type I and II glazing required by 49 CFR part 223. Drake Cement Company's operation requires inbound and outbound rail car movement for raw materials. In order to serve the plant, Drake Cement Company acquired and built approximately 4 miles of yard track and established DSC. The 4-mile track allows the BNSF Railway Company (BNSF) to interchange traffic to and from Drake Cement Company at Drake, AZ. DSC has operating authority from the Surface Transportation Board (STB). DSC also trained its personnel for all rail operations involved in handling the switching. DSC purchased a new shuttlewagon, SWX735, for its self-propelled power (locomotive).

DSC obtained a quote for modifying the shuttlewagon to compliant glazing. DSC believes this cost is not justified because DSC uses it once or twice a week and 100 percent of the use of the shuttlewagon is restricted to yard movement with speeds less than 10 mph.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *http://www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140,

Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 2, 2012 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on December 14, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011–32457 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2011–0092]

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated October 31, 2011, CSX Transportation (CSX) has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of a signal system. FRA has assigned the petition Docket Number FRA–2011–0092.

CSX seeks approval of the proposed modification of the bridge tender controlled signals to automatic signals at the Trout River Drawbridge in Jacksonville, FL, at Milepost S629.0, Kingsland Subdivision, Jacksonville Division. The modification consists of the conversion of bridge tender controlled signals to automatic signals.

The reason given for the proposed change is that the drawbridge tender position is being eliminated. Train crews will request that the bridge open and close via dual-tone multi-frequency radio. Signals will clear automatically for train movements once the bridge has been closed and locked and an approach circuit is occupied. This proven technology will allow the bridge to be safely operated for boat and rail traffic, while reducing the personal safety risk associated with a manned control house located on the center span.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *http://www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 2, 2012 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on December 14, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011–32455 Filed 12–16–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

FY 2011 Discretionary Funding Opportunity; Section 5309 Bus and Bus Facilities Veterans Transportation and Community Living Initiative

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: FTA Veterans Transportation and Community Living Initiative Competitive Grant Program Funds: Announcement of Project Selections.

SUMMARY: The U.S. Department of Transportation's (DOT) Federal Transit Administration (FTA) announces the selection of projects funded under the Veterans Transportation and Community Living Initiative (VTCLI) discretionary grant program, which was announced in the Section 5309 Discretionary Bus and Bus Facilities Program notice of funding availability on July 27, 2011. The VTCLI grant program makes funds available to local, state and tribal agencies to create or expand One-Call/One-Click Transportation Resource Centers in their communities. These centers will increase the availability of community transportation resources to veterans, service members and military families and improve the accessibility of existing mobility resources and other transportation information to the whole community. Additionally, they will enable closer coordination of existing transportation services to improve customer experiences and overall efficiency. The VTCLI supports the Obama Administration's priority of supporting America's veterans and military families, as well as the objectives of the Federal Interagency Coordinating Council on Access and Mobility. The initiative is a joint effort of the Departments of Defense, Health and Human Service, Labor, Transportation and Veterans Affairs.

FOR FURTHER INFORMATION CONTACT: Successful applicants should contact the appropriate FTA Regional office (Appendix) for specific information regarding applying for the funds. Unsuccessful applicants may contact Erik Weber, Office of Program Management at (202) 366–0705, email:

erik.weber@dot.gov, to arrange a proposal debriefing. For general program information on the Veterans Transportation and Community Living Initiative, contact Doug Birnie at (202) 366–1666, email: *douglas.birnie@dot.gov,* or Erik Weber, both of the Office of Program Management. A TDD is available at 1-(800) 877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION: *Veterans Transportation and Community Living Initiative Grant Program:* A total of $30 million was initially made available by FTA for the VTCLI program and additional funds were subsequently added, for a total of $34.6 million allocated to the selected projects. In total, 63 applicants requested $52.9 million. Project proposals were evaluated based on the criteria detailed in the July 27, 2011 Notice of Funding Availability. The projects selected and shown in Table 1 will provide mobility choices to veterans, military families and other community members, increasing their awareness of and access to existing community transportation options and enabling them to remain active in their communities. Funds must be used for eligible purposes defined under 49 U.S.C. 5309(b)(3) and 5302(a)(1), and consistent with the competitive announcement of availability of funds and the applicant's proposal. In selecting projects for this program, FTA ensured that an equitable share of the available funds is allocated to projects that are not in urbanized areas.

Project Implementation: So that funds can be obligated expeditiously, grantees selected for competitive discretionary funding should work with their FTA regional office to finalize the grant application in FTA's Transportation Electronic Award Management system (TEAM) for the projects identified in the attached table. In cases where the allocation amount is less than the proposer's requested amount, grantees should work with the regional office to reduce scope or scale the project such that a complete phase or project is accomplished. A discretionary project identification number has been assigned to each project for tracking purposes and must be used in the TEAM application. No projects under the VTCLI have been extended pre-award authority. Additionally, although several projects contained related training, mobility management or infrastructure initiatives, FTA funds may only be used for eligible purposes defined under 49 U.S.C. 5309(b)(3) and 5302(a)(1), as described in FTA Circular 9030.1C, and further limited by the July 27, 2011 **Federal Register** Notice of Funding Availability. For any VTCLI projects that include lease of space please refer to FTA's guidance on Capital Leases found at *http://www.fta.dot.gov/grants/12865.html* and in Chapter IV, subparagraph 3.j(2) of FTA Circular 5010.1D. Any projects which proposed to use applicant labor to accomplish capital design and engineering tasks, please refer to FTA's guidance on Force Account labor found in Chapter IV, paragraph 4.d of FTA Circular 5010.1D. Sources of any in-kind match proposed should be discussed with the FTA region to ensure eligibility. All capital procurements undertaken with VTCLI funds must comply with FTA's Third Party Procurement Guidelines found at *http://www.fta.dot.gov/legislation_law/12349_8641.html.* Any further questions on procurement guidelines should be discussed with the FTA regional office. Post-award reporting requirements include submission of the Financial Federal Report and Milestone reports in TEAM as appropriate (see FTA Circular 5010.1D). FTA will hold an informational webinar for grantees in the near future to discuss the goals and expectations of the VTCLI and address technical aspects of applying for funds. Details about the time and date of the webinar will be posted at *http://www.fta.dot.gov/veterans.*

The grantee must comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out the project supported by the FTA grant. By statute the funds allocated in this announcement must be obligated in a grant by September 30, 2014, but since project readiness was a factor in selection, applicants are expected to apply promptly in order to begin implementing the project within twelve months.

Issued in Washington, DC, this 14th day of December 2011.

Peter Rogoff,

Administrator.

Appendix

FTA Regional and Metropolitan Offices

Mary E. Mello, Deputy Regional Administrator, Region 1—Boston, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Tel. 617–494–2055. States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.	Robert C. Patrick, Regional Administrator, Region 6—Ft. Worth, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Tel. 817–978–0550. States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas.
Anthony Carr, Acting Regional Administrator, Region 2—New York, One Bowling Green, Room 429, New York, NY 10004–1415, Tel. 212–668–2170. States served: New Jersey, New York. New York Metropolitan Office, Region 2—New York, One Bowling Green, Room 428, New York, NY 10004–1415, Tel. 212–668–2202.	Mokhtee Ahmad, Regional Administrator, Region 7—Kansas City, MO, 901 Locust Street, Room 404, Kansas City, MO 64106, Tel. 816–329–3920. States served: Iowa, Kansas, Missouri, and Nebraska.
Brigid Hynes-Cherin, Acting Regional Administrator, Region 3—Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7100. States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia. Washington D.C. Metropolitan Office, 1990 K St NW Suite 510, Washington, DC 20006, Tel: (202) 219–3562.	Terry Rosapep, Regional Administrator, Region 8—Denver, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, Tel. 720–963–3300. States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
Yvette Taylor, Regional Administrator, Region 4—Atlanta, 230 Peachtree Street NW., Suite 800, Atlanta, GA 30303, Tel. 404–865–5600.	Leslie T. Rogers, Regional Administrator, Region 9—San Francisco, 201 Mission Street, Room 1650, San Francisco, CA 94105–1926, Tel. 415–744–3133.

FTA REGIONAL AND METROPOLITAN OFFICES—Continued

States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North, Carolina, Puerto Rico, South Carolina, Tennessee, and Virgin Islands.	States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands. Los Angeles Metropolitan Office, Region 9—Los Angeles, 888 S. Figueroa Street, Suite 1850, Los Angeles, CA 90017–1850, Tel. 213–202–3952.
Marisol Simon, Regional Administrator, Region 5—Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789. States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. Chicago Metropolitan Office, Region 5—Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789.	Rick Krochalis, Regional Administrator, Region 10—Seattle, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Tel. 206–220–7954. States served: Alaska, Idaho, Oregon, and Washington.

BILLING CODE 4910–57–P

Table I

VETERANS TRANSPORTATION AND COMMUNITY LIVING INITIATIVE GRANT PROGRAM PROJECT SELECTIONS

State	Project ID	Recipient	Project Description	Allocation
AK	D2011-BUSP-138	Municipality of Anchorage	Creation of mobile smartphone applications to extend the reach of the existing one-call center.	$120,000
CA	D2011-BUSP-139	Los Angeles County Metropolitan Transportation Authority	Technology upgrades to Southern California 511 system to improve the information accessibility of the area's transportation services.	$2,000,000
CA	D2011-BUSP-140	Omnitrans	Hardware and software purchase to expand the capacity of the 211 system. Real-time arrival displays at VA hospital and mobile application.	$227,240
CO	D2011-BUSP-141	Colorado Department of Transportation	All Points Transit will purchase software upgrades for the existing one-call center to enable scheduling rides for military & veterans service providers.	$29,052
CO	D2011-BUSP-142	Colorado Department of Transportation	DRMAC will create a one-call/one-click center with an information and assistance function and pilot coordinated reservations and scheduling system.	$613,580
CO	D2011-BUSP-143	Colorado Department of Transportation	Accessible Cordinated Transportation will upgrade software capabilities for the existing Joint Dispatch and Call Center.	$362,500
CO	D2011-BUSP-144	Colorado Department of Transportation	NW Colorado COG will create a one-call/one-click center and a regional billing center to enhance veterans travel training program.	$321,600
FL	D2011-BUSP-145	Broward Metropolitan Planning Organization	Upgrade 211 system to serve as one-call/one-click center, bringing transportation into the employment, housing, food and counseling information system.	$539,937
FL	D2011-BUSP-146	Central Florida Regional Transportation Authority (LYNX)	New customer information system including one-call service integrated with transit website & transportation information kiosks throughout project area.	$1,056,800
FL	D2011-BUSP-147	City of Tallahassee	Expand existing transit call center to provide information, transportation and scheduling for veterans, add customer scheduling website.	$1,200,000
FL	D2011-BUSP-148	Jacksonville Transportation Authority	Build a one-call/one-click transportation resource center to expand access to the regional scheduling system via the internet and telephone.	$1,925,200
FL	D2011-BUSP-149	Pinellas County Metropolitan Planning Organization	Create a one-stop center with online tool, toll-free phone number, interactive voicemail system, mobile applications for real-time information.	$1,098,339
FL	D2011-BUSP-150	Polk County Board of County Commissioners	Consolidation of 3 call centers into single one-call center with centralized website and phone number for coordinated delivery of transportation.	$1,542,267
GA	D2011-BUSP-151	Atlanta Regional Commission (ARC)	Link multiple call centers to centralized database through multi-functional website to improve mobility planning by tracking requests & gaps in service.	$419,855
GU	D2011-BUSP-152	Guam Regional Transit Authority	Create a one-call/one-click transportation center for military, veterans and community transportation providers in multi-discipline Disabilities Center.	$1,305,000
HI	D2011-BUSP-153	County of Maui Department of Transportation	Create one-call center integrated with Aging & Disability Resource Center; allow multiple providers to streamline eligibility, application & scheduling.	$233,129
ID	D2011-BUSP-154	Idaho Transportation Department	Create searchable resource directory, as well as an automated provider information update system for the state, link to 511 system and build mobile app.	$39,600
ID	D2011-BUSP-155	Idaho Transportation Department	Implement a one-call center, incorporate volunteer drivers into coordinated scheduling system; establish reservation system to share trip requests.	$284,058
ID	D2011-BUSP-156	Idaho Transportation Department	Purchase base software and hardware for a one-call resource center in Kootenai County.	$220,000
IL	D2011-BUSP-157	Illinois Department of Transportation	Implement a statewide one-click website using transportation provider inventory, including local, intercity, rideshare options.	$362,000
IL	D2011-BUSP-158	Lee County	Implement one-call/one-click center with single information source and scheduling point for 5 existing human service transportation providers.	$131,325

State	Project ID	Recipient	Project Description	Allocation
IN	D2011-BUSP-159	Central Indiana Regional Transportation Authority	Combine existing database with regional commuter hotline, website. Incorporate demand-response, senior & VA medical transportation & 3 transit services.	$40,000
KY	D2011-BUSP-160	Kentucky Transportation Cabinet	Purchase one-call technology for regional community & Medicaid transportation providers. Expand statewide call center with state Dept of Vets Affairs.	$797,506
MA	D2011-BUSP-161	Montachusett Regional Transit Authority (MART)	Expand one-call center to include veterans agencies. Upgrade in-vehicle technology to enable Vets Charlie Cards (electronic fare card).	$2,000,000
MD	D2011-BUSP-162	Maryland Department of Transportation	Implement a one-call/one-click center for veterans and their transit needs in rural Eastern Maryland. Purchase of technology & space.	$400,000
MD	D2011-BUSP-163	Maryland Department of Transportation	Connect web info system with 211 system, human service & workforce programs. Install transportation info kiosks at military installations, VA facilities.	$1,572,116
MI	D2011-BUSP-164	Suburban Mobility Authority for Regional Transportation (SMART)	Purchase technology for same-day scheduling, improve access to web portal and upgrade the phone systems for elderly users and persons with disabilities.	$101,776
MN	D2011-BUSP-165	Minnesota Department of Transportation	Upgrade existing statewide one-call/one-click center, add info about transportation options, integrate with state's LinkVet program.	$1,188,000
MO	D2011-BUSP-166	Mid-America Regional Council	Implement an integrated and shared transportation database with public user interface, focusing on information & referral.	$160,855
NC	D2011-BUSP-167	Wake County by and through its Department of Human Services	Upgrade one-call center system to offer 24-hr availability, create a one-click website that will allow individuals & agencies to schedule trips online.	$601,661
NE	D2011-BUSP-168	Omaha-Council Bluffs Metropolitan Area Planning Agency	Expand and upgrade the existing computer aided scheduling and dispatching system to a region-wide system, adding automated customer phone scheduling.	$933,750
NH	D2011-BUSP-169	Cooperative Alliance for Seacoast Transportation	Purchase enhanced web-based coordination software, call–taking hardware & mobile data terminals for vehicles in the coordinated transportation effort.	$324,000
NJ	D2011-BUSP-170	New Jersey Transit Corporation	Implement a final phase of construction which will expand its existing facility. Purchase in-vehicle technology and increase capacity for veterans needs.	$1,463,646
NV	D2011-BUSP-171	Regional Transportation Commission of Southern Nevada	Establish a communication network between current human service transportation providers.	$1,016,864
NY	D2011-BUSP-172	County of Schuyler	Implement a one-call/one-click system to process reservations, integrated with scheduling, routing, and billing and reporting.	$93,750
OH	D2011-BUSP-173	Stark Area Regional Transit Authority	Improve demand-response system & offer services to veterans; create brokerage to share dispatching between paratransit service & private providers.	$336,011
OH	D2011-BUSP-174	Western Reserve Transit Authority	Expand existing customer service center into a one-call/one-click center, integrated with a 211 Help Hotline to facilitate inter-agency trip sharing.	$732,000
OK	D2011-BUSP-175	Indian Nations Council of Governments (INCOG)	Create 26-county one-call center coordinating transportation in/around Tulsa & Muskogee VAMC, incorporating urban, rural, tribal, DAV/VA transportation.	$607,752
OR	D2011-BUSP-176	Lane Transit District	Upgrade existing one-call center with new scheduling/dispatching software, new telephone systems with interactive voice response & mobile data computers.	$1,088,000
OR	D2011-BUSP-177	Tri-County Metropolitan Transportation District of Oregon	Expand one-call center to connect additional transportation resources. Update IT infrastructure to enable coordination with VA transportation.	$330,728
PA	D2011-BUSP-178	County of Cambria	Implement county one-call/one-click center in Rural Transit Center, helping coordinate transit, paratransit, and senior transportation.	$190,500
PA	D2011-BUSP-179	Pennsylvania Dept of Transportation	Create a network of four regional one-call centers with websites to bring together individual transportation providers into regional coordinated system.	$2,000,000

State	Project ID	Recipient	Project Description	Allocation
SC	D2011-BUSP-180	Lowcountry Council of Governments	Install mobile data terminals in regional transit vehicles to implement automatic vehicle location and create customer portal website.	$124,480
SD	D2011-BUSP-181	South Dakota Department of Transportation	River Cities Transit will upgrade scheduling and dispatching system, add mobile data terminals to vehicles, as well as create online ride scheduling.	$319,200
SD	D2011-BUSP-182	South Dakota Department of Transportation	Prarie Hills Transit will create interactive webpage and database for scheduling trips located in existing regional call center.	$183,680
TX	D2011-BUSP-183	City of El Paso	Create one-call/one-click system by purchasing technology upgrades to better access common transportation resource database; assign and schedule trips.	$1,216,318
TX	D2011-BUSP-184	Corpus Christi Regional Transportation Authority	Expand the capacity of the Customer Service Center to house regional call center for transportation, human services and community information.	$848,480
TX	D2011-BUSP-185	VIA Metropolitan Transit	Create an information database on transportation program eligibility and availability from all local transportation providers.	$148,000
UT	D2011-BUSP-186	Tooele County	Create one-call center to coordinate trips between participating providers. Purchase scheduling/dispatching system & in-vehicle hardware for providers.	$177,230
VT	D2011-BUSP-187	Vermont Agency of Transportation	Implement new scheduling/dispatching system to include DAV/VA transportation services. Create website connections for one-click service.	$352,900
WA	D2011-BUSP-188	County of Pierce	Expand local 211 transportation center to a one-call/one-click center with technology upgrades for center and providers, allowing efficient brokerage.	$211,921
WA	D2011-BUSP-189	Washington State Department of Transportation	Hopelink will build mobile smart phone application & a one-click website that will connect veterans to community transportation providers.	$168,000
WA	D2011-BUSP-190	Washington State Department of Transportation	Human Service Council will implement one call/one click center to improve compatibility of transportation programs in the region.	$130,315
WA	D2011-BUSP-191	Washington State Department of Transportation	Paratransit Services will upgrade scheduling software for compatibility with systems at VAMCs & existing non-emergency medical transportation broker.	$438,776
WI	D2011-BUSP-192	Aging & Disability Resource Center of Eau Claire County	Create two call centers in Western Wisconsin, integrated with ADRC, with a particular focus on the mobility needs of veterans in the area.	$292,812
			Total……	**$34,622,509**

[FR Doc. 2011–32447 Filed 12–16–11; 8:45 am]
BILLING CODE 4910–57–C

DEPARTMENT OF THE TREASURY

Proposed Collection; Comment Request; TIGTA Generic Survey Request

AGENCY: Departmental Offices, Department of 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)). The Department of the Treasury is soliciting comments on this collection of information that is scheduled to expire April 30, 2012.

DATES: Written comments must be received on or before February 17, 2012 to be assured of consideration.

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

www.PRAComment.gov. To provide your comments, selected the ''comment page'' link and follow the instructions for submitting comments.

Email: Kim.Hyatt@tigta.treas.gov; subject line: Comment on TIGTA Generic Survey Request.

Mail: Kimberly A. Hyatt, Treasury Inspector General for Tax Administration, City Center Bldg., 1401 H St. NW., Suite 469, Washington, DC 20005.

All responses to this notice will be included in the request for OMB's approval. All comments will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or request a copy of the information collection should be directed to Kim Hyatt (202) 622–5913.

SUPPLEMENTARY INFORMATION:

OMB Number: 1505–0217.

Type of Review: Extension without change of a currently approved collection.

Title: Treasury Inspector General for Tax Administration (TIGTA) Generic Survey Request.

Abstract: The TIGTA's Office of Audit's mission is to provide independent oversight of IRS activities. Through its audit programs TIGTA promotes efficiency and effectiveness in the administration of internal revenue laws, including the prevention and detection of fraud, waste, and abuse affecting tax administration. To accomplish this, TIGTA Office of Audit at times finds it necessary to contact a limited number of taxpayers (including businesses) for various reasons.

Affected Public: Individuals and Households.

Estimated Number of Respondents: 2,500.

Estimated Total Annual Burden Hours: 2,500.

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 has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information,

including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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.

Dated: December 13, 2011.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2011–32353 Filed 12–16–11; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0722]

Agency Information Collection (Health Surveillance for a New Generation of U.S. Veterans) 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 January 18, 2012.

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. 2900–0722'' 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) 632–7479, FAX (202) 273–0487 or email *denise.mclamb@va.gov.* Please refer to ''OMB Control No. 2900–0722.''

SUPPLEMENTARY INFORMATION:

Title: Health Surveillance for a New Generation of U.S. Veterans Survey.

OMB Control Number: OMB Control No. 2900–0722.

Type of Review: Extension of a currently approved collection.

Abstract: The Health Surveillance for a New Generation of U.S. Veterans survey will be used to collect data from Operation Iraqi Freedom and Operation Enduring Freedom veterans regarding their current health status and concerns, exposures of concern in the theater, health care preferences, and health behaviors and attitudes, and to gain knowledge on veterans who have not used VA health care since returning from the current conflict. The data collected will help VA to plan and provide better health care to Operation Iraqi Freedom and Operation Enduring Freedom veterans, as well as understanding the long-term consequences of military deployment.

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 October 12, 2011 at pages 63352–63353.

Estimated Annual Burden: 24,858 hours.

Estimated Average Burden per Respondent: 39 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 38,300.

Dated: December 13, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–32265 Filed 12–16–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0519]

Agency Information Collection (Locality Pay System for Nurses and Other Health Care Personnel) Activity Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration, 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 and includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 18, 2012.

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. 2900–0519'' 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) 632–7479, fax (202) 273–0487 or email *denise.mclamb@va.gov.* Please refer to ''OMB Control No. 2900–0519.''

SUPPLEMENTARY INFORMATION:

Title: Locality Pay System for Nurses and Other Health Care Personnel.

OMB Control Number: 2900–0519.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 10–0132 is used to collect data from the Bureau of Labor Statistics or other third party industry surveys to determine locality pay system for certain health care personnel. VA medical facility Directors will use the data collected to determine the appropriate pay scale for registered nurses, nurse anesthetists, and other health care personnel.

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 October 12, 2011, at page 63356.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 67 hours.

Estimated Average Burden per Respondent: 45 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 90.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–32266 Filed 12–16–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0620]

Agency Information Collection (Payment and Reimbursement for Emergency Services for Non Service–Connected Conditions in Non-VA Facilities) Activity Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration, 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 January 18, 2012.

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. 2900–0620'' 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) 632–7479, Fax (202) 273–0487 or email *denise.mclamb@va.gov*. Please refer to ''OMB Control No. 2900–0620.''

SUPPLEMENTARY INFORMATION:

Title: Payment and Reimbursement for Emergency Services for Non Service-Connected Conditions in Non-VA Facilities, 38 U.S.C. 1725.

OMB Control Number: 2900–0620.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans enrolled in VA's health-care system are personally liable for emergency treatment rendered at non-VA health facilities. Veterans or their representative, and the health care provider of the emergency treatment furnished to the veteran must submit a claim in writing or complete a Health Insurance Claim Form CMS 1500 or Medical Uniform Institutional Provider Bill Form UB–04 to request payment or reimbursement for such treatment. VA uses the data collected to determine the claimant's eligibility for payment or reimbursement.

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 October 12, 2011, at page 63353.

Affected Public: Business or other for–profit.

Estimated Total Annual Burden: 51,768 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 207,071.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–32268 Filed 12–16–11; 8:45 am]

BILLING CODE;P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0630]

Agency Information Collection (Regulation on Application for Fisher Houses and Other Temporary Lodging and VHA Fisher House Application) Activity Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration, 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 January 18, 2012.

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. 2900–0630'' 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) 632–7479, FAX (202) 273–0487 or email *denise.mclamb@va.gov.* Please refer to ''OMB Control No. 2900–0630.''

SUPPLEMENTARY INFORMATION:

Title: Regulation on Application for Fisher Houses and Other Temporary Lodging and VHA Fisher House Application, VA Forms 10–0408 and 10–0408a.

OMB Control Number: 2900–0630.

Type of Review: Extension of a currently approved collection.

Abstract: VA provides temporary lodging to veterans receiving VA medical care or Compensation and Pension examinations and to family members or other persons accompanying the veteran. Application for temporary lodging may be by letter, telephone, email, facsimile or in person at the VA healthcare facility of jurisdiction. VA Forms 10–0408 and 10–0408a can be used to collect data during the application process to determine the claimant's eligibility for temporary lodging. Temporary lodging services are provided on a first come, first served basis.

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 October 12, 2011, at pages 63355–63356.

Affected Public: Business or other for-profit.

Estimated Total Annual Burden: 83,333 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Semi-annually.

Estimated Number of Respondents: 250,000.

Estimated Total Annual Responses: 500,000.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–32267 Filed 12–16–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0719]

Agency Information Collection (Prevalence and Clinical Course of Depression Among Patients With Heart Failure) Activity Under OMB Review

AGENCY: Veterans Health 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 Health Administration, 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 and includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 18, 2012.

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. 2900–0719'' 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) 632–7479, fax (202) 273–0487 or email *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0719.''

SUPPLEMENTARY INFORMATION:

Titles: Prevalence and Clinical Course of Depression Among Patients with Heart Failure, VA HSR&D, Nursing Research Initiative No. 05–209–3, VA Form 10–21085a–e(NR).

OMB Control Number: 2900–0719.

Type of Review: Extension of a currently approved collection.

Abstracts: The data collected will be used to evaluate the prevalence of clinical depression and depressive symptoms among Veterans with heart failure during periods of hospitalization and outpatient care, and to understand the temporal relationship between clinical depression, alterations in physical functioning, and the levels of circulating biochemical markers in Veterans heart failure patients.

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 October 12, 2011, at page 63355.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,362.

a. VA Form 10–21085a(NR)—18 hours.
b. VA Form 10–21085b(NR)—109 hours.
c. VA Form 10–21085c(NR)—872 hours.
d. VA Form 10–21085d(NR)—218 hours.
e. VA Form 10–21085e(NR)—145 hours.

Estimated Average Burden per Respondent:

a. VA Form 10–21085a(NR)—5 minutes.
b. VA Form 10–21085b(NR)—5 minutes.
c. VA Form 10–21085c(NR)—40 minutes.
d. VA Form 10–21085d(NR)—10 minutes.
e. VA Form 10–21085e(NR)—10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 5,014.

a. VA Form 10–21085a(NR)—218.
b. VA Form 10–21085b(NR)—1,308.
c. VA Form 10–21085c(NR)—1,308.
d. VA Form 10–21085d(NR)—1,308.
e. VA Form 10–21085e(NR)—872.

Dated: December 13, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–32269 Filed 12–16–11; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 76 Monday,

No. 243 December 19, 2011

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 402 and 403

Medicare, Medicaid, Children's Health Insurance Programs; Transparency Reports and Reporting of Physician Ownership or Investment Interests; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 402 and 403

[CMS–5060–P]

RIN 0938–AR33

Medicare, Medicaid, Children's Health Insurance Programs; Transparency Reports and Reporting of Physician Ownership or Investment Interests

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would require applicable manufacturers of drugs, devices, biologicals, or medical supplies covered by Medicare, Medicaid or the Children's Health Insurance Program (CHIP) to report annually to the Secretary certain payments or transfers of value provided to physicians or teaching hospitals (''covered recipients''). In addition, applicable manufacturers and applicable group purchasing organizations (GPOs) are required to report annually certain physician ownership or investment interests. The Secretary is required to publish applicable manufacturers' and applicable GPOs' submitted payment and ownership information on a public Web site.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. Eastern Standard Time on February 17, 2012.

ADDRESSES: In commenting, please refer to file code CMS–5060–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov*. Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–5060–P, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–5060–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments only to the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–1066 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Erica Breese (202) 260–6079.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov*. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–(800) 743–3951.

I. Background

A. Statutory Background

Section 6002 of the Affordable Care Act added section 1128G to the Social Security Act (the Act), which requires applicable manufacturers of drugs, devices, biologicals, or medical supplies covered under title XVIII of the Act (Medicare) or a State plan under title XIX (Medicaid) or XXI of the Act (the Children's Health Insurance Program, or CHIP) to report annually to the Secretary certain payments or other transfers of value to physicians and teaching hospitals. Section 1128G of the Act also requires applicable manufacturers and applicable group purchasing organizations (GPOs) to report certain information regarding the ownership or investment interests held by physicians or the immediate family members of physicians in such entities.

Specifically, manufacturers of covered drugs, devices, biologicals, and medical supplies (applicable manufacturers) are required to submit on an annual basis the information required in section 1128G(a)(1) of the Act for certain payments or other transfers of value made to physicians and teaching hospitals (collectively called covered recipients) during the course of the preceding calendar year. Similarly, section 1128G(a)(2) of the Act requires applicable manufacturers and applicable GPOs to disclose any ownership or investment interests in such entities held by physicians or their immediate family members, as well as information on any payments or other transfers of value provided to such physicians. Applicable manufacturers must report the required payment and other transfer of value information to CMS in an electronic format by March 31, 2013, and on the 90th day of each calendar year thereafter. Applicable manufacturers and applicable GPOs must report the required information about physician ownership and investment interests, including those held by immediate family members, as well as information on any payments or other transfers of value to such physician owners or investors in the same format, by the same date. Applicable manufacturers and applicable GPOs are subject to civil monetary penalties (CMPs) for failing to comply with the reporting requirements of the statute. We are required by statute

to publish the reported data on a public Web site. The data must be downloadable, searchable, and easily aggregated. In addition, we must submit annual reports to the Congress and each State summarizing the data reported. Finally, section 1128G of the Act generally preempts State laws that require disclosure of the same type of information by manufacturers.

2. Transparency Overview

Collaboration among physicians, teaching hospitals, and industry manufacturers may contribute to the design and delivery of life-saving drugs and devices. However, while some collaboration is beneficial to the continued innovation and improvement of our health care system, payments from manufacturers to physicians and teaching hospitals can also introduce conflicts of interests that may influence research, education, and clinical decision-making in ways that compromise clinical integrity and patient care, and may lead to increased health care costs.

We recognize that disclosure alone is not sufficient to differentiate beneficial, legitimate financial relationships from those that create conflict of interests or are otherwise improper. Moreover, financial ties alone do not signify an inappropriate relationship. However, transparency can shed light on the nature and extent of relationships, and may dissuade inappropriate conflicts of interest from developing. Given the intricacies of disclosure and the importance of discouraging inappropriate relationships without harming beneficial ones, we sought to better understand the current scope of the interactions among physicians, teaching hospitals, and industry manufacturers. We solicited stakeholder feedback through a CMS Open Door Forum on March 24, 2011 in order to guide our implementation of section 1128G of the Act. The transcript of this Open Door Forum can be found on the regulatory docket on Regulations.gov. In addition to this feedback, we consulted with the Inspector General of the Department of Health and Human Services (HHS), as required by the statute.

II. Provisions of the Proposed Regulations

The following sections outline the agency's proposals concerning implementation of section 1128G of the Act, including clarification of the terms and definitions used in the statute, as well as proposed procedures for the submission, review, and publication of the reported data. For terms undefined by the statute, we sought to provide, where necessary, appropriate definitions, and explanations of how we propose to interpret them. Due to the timing of the publication of this notice of proposed rulemaking, a final rule will not be published in time for applicable manufacturers and applicable GPOs to begin collecting the information required in section 1128G of the Act on January 1, 2012, as indicated in the statute. We will not require applicable manufacturers and applicable GPOs to begin collecting the required information until after the publication of the final rule; however, we recognize that some manufacturers and GPOs may begin to collect certain data voluntarily. We seek comment on the amount of time applicable manufacturers and applicable GPOs will need following publication of the final rule in order to begin complying with the data collection requirements of section 1128G of the Act. We are considering a preparation period of 90 days, since we believe that was the time period intended by Congress based on the timeline indicated in the statute and are requesting comments on whether that is a sufficient amount of time. Finally, we also seek input on specific challenges that applicable manufacturers and applicable GPOs may face when setting up the necessary data collection and reporting systems.

We hope to finalize this rule as soon as possible during calendar year (CY) 2012 and, depending on the publication date of the final rule, we are considering requiring the collection of data for part of 2012, to be reported to CMS by the statutory date of March 31, 2013. We seek comments on the feasibility of submitting the required information for part of CY 2012 by March 31, 2013.

A. Transparency Reports

Section 1128G(a) of the Act outlines the transparency reporting requirements and consists of two parts. The first part, section 1128G(a)(1) of the Act, outlines the required reports from applicable manufacturers on payments or other transfers of value to covered recipients. The second part, section 1128G(a)(2) of the Act, outlines the reporting requirements for applicable manufacturers and applicable GPOs concerning ownership and investment interests of physicians, and their immediate family members, as well as information on any payments or other transfers of value provided to such physician owners or investors. While there is some overlap between these submissions, we propose that these two types of information be reported separately to ensure that the relevant reporting obligations of applicable manufacturers and applicable GPOs are clearly distinguished. We seek comments on this general approach. We want to emphasize that compliance with the reporting requirements of section 1128G of the Act does not exempt applicable manufacturers, applicable GPOs, covered recipients, physician owners or investors, or anyone else from any potential liability associated with payments or other transfers of value, or ownership or investment interests (for example, potential liability under the Federal Anti-Kickback statute or False Claims Act).

1. Reports on Payments and Other Transfers of Value Under Section 1128G(a)(1) of the Act

a. Applicable Manufacturers

(1) Manufacturers

Section 1128G(a) of the Act requires that applicable manufacturers disclose certain payments or other transfers of value to covered recipients. In defining applicable manufacturer, we sought a comprehensive definition to ensure the full transparency and complete reporting envisioned by the statute. Section 1128G(e)(9) of the Act defines a ''manufacturer of a covered drug, device, biological, or medical supply'' as—:

> Any entity which is engaged in the production, preparation, propagation, compounding, or conversion of a covered drug, device, biological, or medical supply (or any entity under common ownership with such entity which provides assistance or support to such entity with respect to the production, preparation, propagation, compounding, conversion, marketing, promotion, sale, or distribution of a covered drug, device, biological, or medical supply).

Section 1128G(e)(2) of the Act clarifies that an ''applicable manufacturer'' of a covered drug, device, biological, or medical supply, is one which is ''operating in the United States, or in a territory, possession, or commonwealth of the United States.''

Given these statutory definitions and relevant considerations, we propose to interpret ''applicable manufacturer'' for the purposes of this regulation as an entity that is:

> (1) Engaged in the production, preparation, propagation, compounding, or conversion of a covered drug, device, biological, or medical supply for sale or distribution in the United States, or in a territory, possession, or commonwealth of the United States; or
>
> (2) Under common ownership with an entity in paragraph (1) of this definition, which provides assistance or support to such entity with respect to the production, preparation, propagation, compounding, conversion, marketing, promotion, sale, or

distribution of a covered drug, device, biological, or medical supply for sale or distribution in the United States, or in a territory, possession, or commonwealth of the United States.

We recognize that there are other definitions of ''manufacture,'' ''manufacturer'' and ''manufacturing'' with which industry may be familiar (such as those in 21 CFR 207.3, 21 CFR 210.3(b)(12), 21 CFR 820.3(o), and 42 USC 1396r–8(k)(5)). We note that this proposed definition, which generally tracks the statute, is somewhat more limited than those definitions.

Under this definition, manufacturers of a covered drug, device, biological, or medical supply (under either paragraph (1) or paragraph (2) of the definition) are deemed to be an ''applicable manufacturer'' if their products are sold or distributed in the United States (U.S.), regardless of where the covered drug, device, biological, or medical supply is actually produced or where the entity is actually located or incorporated. Given the global nature of these industries, we believe that any entity manufacturing covered drugs, devices, biologicals, or medical supplies for sale or distribution in the U.S. (or any entity under common ownership which provides assistance or support in the production, preparation, propagation, compounding, conversion, marketing, promotion, sale, or distribution of such items) should be subject to the requirements of section 1128G of the Act. The opportunity for undue influence or inappropriate relationships caused by payments or transfers of value to covered recipients is the same for manufacturers of drugs, devices, biologicals, or medical supplies sold or distributed in the United States regardless of where the product is actually manufactured, and we, therefore, propose to treat them the same.

We also seek to clarify that any manufacturer that meets the definition of applicable manufacturer by selling or distributing in the United States at least one covered drug, device, biological, or medical supply is considered an applicable manufacturer, even though it may also manufacturer products that do not fall within that category (as defined later in this section). We propose that all payments or transfers of value made by an applicable manufacturer to a covered recipient must be reported as required under section 1128G of the Act regardless of whether the particular payment or other transfer of value is associated with a covered drug, device, biological, or medical supply. Additionally, we seek to clarify that the proposed definition includes entities that hold Food and Drug Administration (FDA) approval, licensure, or clearance for a covered drug, device, biological, or medical supply, even if they contract out the actual physical manufacturing of the product to another entity. We interpret these entities as being ''engaged in the production, preparation, propagation, compounding, or conversion of a covered drug, device, biological, or medical supply.'' We seek comment on this interpretation.

As noted previously, section 1128G(e)(9) of the Act states that certain companies which are under ''common ownership'' with an entity that produces, prepares, propagates, compounds, or converts a covered drug, device, biological, or medical supply are also subject to the reporting requirements under this provision, even though they themselves may not be involved in the ''manufacturing'' process. Specifically, this applies to entities under ''common ownership'' with an applicable manufacturer which provide assistance or support to the applicable manufacturer with respect to the production, preparation, propagation, compounding, conversion, marketing, promotion, sale, or distribution of a covered drug, device, biological, or medical supply for sale or distribution in the U.S., or in a territory, possession, or commonwealth of the U.S. We propose to define ''common ownership'' as when the same individual, individuals, entity, or entities, directly or indirectly, own any portion of two or more entities. The common ownership definition would apply to a range of corporate arrangements, including, but not limited to, parent companies and subsidiaries and brother/sister corporations.

We are also considering an alternate interpretation that would limit the common ownership definition to circumstances where the same individual, individuals, entity, or entities own 5 percent or more of total ownership in two or more entities. This would be subject to the same requirements as the proposed definition described previously, but would only apply to interests of 5 percent of more. We seek comments on our proposed definition of ''common ownership,'' including, whether a more specific definition is needed and, if a minimum percentage threshold is adopted, whether 5 percent is appropriate. We intend to finalize the agency's position on this in the final rule based on comments received.

If two entities are under common ownership with one another, and both individually meet the definition of an applicable manufacturer under paragraph (1) of the definition, then we propose that the entities should report separately under section 1128G of the Act. For example, if company A and company B are both owned by company C, and companies A, B and C all meet the definition of applicable manufacturer under paragraph (1), then all three have to report separately. However, if only one company under common ownership meets the definition of applicable manufacturer under paragraph (1), and the other company is required to report under paragraph (2) of the definition, then we propose that the affected entities can choose whether or not to report together. For example, if only company C meets the definition of applicable manufacturer under paragraph (1) and companies A and B meet the definition of applicable manufacturer under paragraph (2), then the companies can decide whether to report together. If an applicable manufacturer under paragraph (1) reports for itself as well as for entities under common ownership that are required to report under paragraph (2), the report should clearly name all of the entities that are included in the report. Given the various relationships between entities under common ownership, we propose that if an applicable manufacturer under paragraph (1) reports for at least one additional entity under common ownership, the applicable manufacturer may decide whether to identify the payments as those from the entity under common ownership, or whether to combine them with their payments or other transfers of value.

In addition to payments or other transfers of value to covered recipients made by applicable manufacturers themselves, applicable manufacturers (under both paragraphs (1) and (2) of the definition) are also required by statute to report payments and other transfers of value provided indirectly to covered recipients through third parties, if the applicable manufacturer is aware of the identity of the covered recipient. This is addressed in more detail in the discussion of third party payments found later in this preamble.

(2) Covered Drug, Device, Biological, or Medical Supply

The reporting requirements are limited to applicable manufacturers of a ''covered drug, device, biological, or medical supply.'' The phrase ''covered drug, device, biological, or medical supply'' is defined in section 1128G(e)(5) of the Act as any drug, biological product, device, or medical supply for which payment is ''available'' under Medicare, Medicaid,

or CHIP. Many drugs, devices, biological, and medical supplies are reimbursed separately under these programs, making payment availability clear. However, others are paid for as a part of a composite rate payment, such as the Medicare hospital inpatient prospective payment system (IPPS), the outpatient prospective payment system (OPPS), or the end-stage renal disease (ESRD) prospective payment system. Since payment, while indirect, is still being provided for the bundled drug, device, biological or medical supply, we propose that payment is considered ''available'' under Medicare, Medicaid or CHIP for items included in a composite payment rate. Therefore, we propose that drugs, devices, biologicals, or medical supplies included in a composite payment rate, as well as those reimbursed separately, are considered to be covered drugs, devices, biologicals, or medical supplies under section 1128G of the Act.

Given these proposals, we propose to define ''covered drug, device, biological, or medical supply'' as:

Any drug, device, biological, or medical supply for which payment is available under Title XVIII of the Act or under a State plan under Title XIX or XXI (or a waiver of such plan), either separately, as part of a fee schedule payment, or as part of a composite payment rate (for example, the hospital inpatient prospective payment system or the hospital outpatient prospective payment system). With respect to a drug or biological, this definition is limited to those drug and biological products that, by law, require a prescription to be dispensed. With respect to a device or medical supply, this definition is limited to those devices (including medical supplies) that, by law, require premarket approval by or premarket notification to the Food and Drug Administration.

We are proposing to limit drugs and biologicals in the definition of ''covered drug, device, biological, and medical supply,'' to drugs and biologicals that, by law, require a prescription to be dispensed, thus excluding drugs and biologicals that are considered ''over-the-counter'' (OTC). We believe this limitation will reduce the number of manufacturers subject to the reporting requirements by excluding those that only manufacturer OTC drugs or biologicals. We believe that this exclusion may be appropriate for manufacturers that manufacture only these products (and not also products which fall within the proposed definition of ''covered drug, device, biological, or medical supply''), since physicians and teaching hospitals have less influence over patients' choice of OTC products. We seek comments on the proposal to limit covered drugs and biologicals to those that require a prescription to be dispensed. In the event we adopt this interpretation, applicable manufacturers who manufacturer only OTC drugs or biologicals (and not also products which fall within the proposed definition of ''covered drug, device, biological, or medical supply''), would not be required to report at all under section 1128G of the Act. However, manufacturers who manufacture both OTC drugs or biologicals and at least one product that falls within the definition of a covered drug, device, biological or medical supply would be required to report all payments or transfers of value to covered recipients required by section 1128G of the Act (whether or not associated with a covered drug, device, biological, or medical supply), as previously explained.

Similarly, we are also proposing an additional limitation to the definition as it pertains to devices and medical supplies, which would limit them to those devices (including medical supplies) that, by law, require premarket approval by or notification to FDA. This would exclude many Class I devices and certain Class II devices, which are exempt from premarket notification requirements under 21 U.S.C. 360(l) or (m), such as tongue depressors and elastic bandages. Some of these devices and medical supplies are so routinely provided in the course of medical care that the Congress may not have intended to capture manufacturers of such items under these reporting requirements. We believe this limitation may be appropriate for applicable manufacturers, because manufacturers that solely produce these exempt products have not been shown to have extensive relationships with covered recipients. Additionally, we believe this limitation might be appropriate because these financial relationships (to the extent they exist) are less likely to influence patient care. However, we are also concerned that this would be overly limiting for the definition of applicable GPOs, which also incorporates the phrase ''covered drug, device, biological, or medical supply.'' We discuss this more in the applicable GPO definition section. We seek comment on this additional limitation that we are proposing. We note that in the event this interpretation is adopted, applicable manufacturers who manufacture only devices or medical supplies that are exempt from premarket notification requirements (and not also products which fall within the proposed definition of ''covered drug, device, biological, or medical supply''), would not be required to report at all under section 1128G of the Act. However, manufacturers who manufacture both devices or medical supplies that are exempt from premarket notification requirements and at least one product that falls within the definition of a covered drug, device, biological or medical supply would be required to report *all* payments or transfers of value to covered recipients required by section 1128G of the Act (whether or not associated with a covered drug, device, biological, or medical supply), as previously explained.

b. Covered Recipients

Under section 1128G(a)(1) of the Act, applicable manufacturers are required to disclose certain payments or other transfers of value made to covered recipients, or to entities or individuals at the request of, or designated on behalf of, a covered recipient. Section 1128G(e)(6) of the Act defines ''covered recipient'' as: (1) A physician, other than a physician who is an employee of an applicable manufacturer; or (2) a teaching hospital. Section 1128G(e)(11) of the Act defines ''physician'' to have the meaning set forth in section 1861(r) of the Act, which includes doctors of medicine and osteopathy, dentists, podiatrists, optometrists and licensed chiropractors. ''Employee'' is also defined in section 1128G(e)(7) of the Act to have the meaning set forth in section 1877(h)(2) of the Act, which is defined as follows: ''An individual who is considered to be ''employed by'' or an ''employee'' of an entity if the individual would be considered to be an employee of the entity under the usual common law rules applicable in determining the employer-employee relationship (as applied for purposes of section 3121(d)(2) of the Internal Revenue Code of 1986).'' We note that these common law rules are discussed in 20 CFR 404.1007 and 26 CFR 31.3121(d) through 1(c).

The term ''teaching hospital'' is not explicitly defined in section 1128G of the Act or elsewhere in the Act. One possible way to define the term ''teaching hospital'' is by linking it to Medicare graduate medical education (GME). We believe this is an appropriate way to identify teaching hospitals because GME payments are provided to support the training of medical residents, and hospitals that receive such payments are easily identifiable. Therefore, we propose to define a teaching hospital as any institution that received payments under section 1886(d)(5)(B) of the Act (IPPS Indirect Medical Education (IME)), section 1886(h) of the Act (direct GME), or

section 1886(s) of the Act (psychiatric hospitals IME) during the most recent year for which such information is available. While we recognize that this definition may not capture hospitals with accredited resident programs that do not receive IME or GME payments, we are unable to include these hospitals since we cannot readily identify them based on Medicare payment data. We seek comment on this proposed definition.

c. Identification of Covered Recipients

In order to accurately distinguish covered recipients, section 1128G of the Act requires that applicable manufacturers report the covered recipient's name and business address, and for physician covered recipients, report the physician's National Provider Identifier (NPI), and specialty. The collection of this information is necessary for applicable manufacturers, in order to distinguish individual covered recipients when reporting to CMS. Similarly, it is also important for CMS when aggregating the data. However, it is not simple given the number of covered recipients. In order to identify physicians covered recipients, we suggest that applicable manufacturers use the National Plan & Provider Enumeration System (NPPES), which CMS currently maintains and updates on its public Web site. The NPPES Web site includes a database of physician NPIs and has an NPI Registry function which allows applicable manufacturers to look up individual physician's NPIs.[1] Similarly, the full database can be downloaded from the CMS Web site.[2] The NPPES system is updated frequently and NPIs do not generally change over time, so we believe this is the best source of information for applicable manufacturers to obtain physician NPIs. We realize that the NPPES system may not contain NPI information for every physician covered recipient as defined in this provision. However, we believe that NPPES represents the most comprehensive listing of physicians available. If a physician is not listed in the NPPES NPI registry, the applicable manufacturer will be responsible for obtaining the physician's individual NPI directly from the physician, to the extent that the physician has an NPI.

We are also considering whether we should require, under the authority granted in section 1128G(a)(1)(A)(viii) of the Act, that applicable manufacturers report another unique identifier, such as State license number, for physicians who are identified, but do not have an NPI. We seek comments on what other unique identifiers could be used, including whether these unique identifiers are readily obtainable by applicable manufacturers.

With respect to teaching hospitals, we propose to publish a list of hospital covered recipients (that is, those hospitals that received Medicare direct or indirect GME) on the CMS Web site once per year. We believe publication of this list is necessary because it may not be immediately apparent to applicable manufacturers whether a particular hospital meets our proposed definition of a teaching hospital, and there is no currently published database that includes this information. The list for the reporting year would include the most recent data available. We propose that the list of teaching hospital covered recipients should include the name and address of each teaching hospital. We seek comments on this proposal.

d. Payments or Other Transfers of Value

''Payment or other transfer of value'' is defined broadly in section 1128G(e)(10)(A) of the Act as ''a transfer of anything of value.'' This includes all payments or other transfers of value given to a covered recipient, regardless of whether the covered recipient specifically requested the payment or other transfer of value. In addition, payments or transfers of value made to an individual or entity at the request of or designated on behalf of a covered recipient must be reported under the name of the covered recipient. We propose that this includes payments or other transfers of value provided to a physician (or physicians) through a physician group or practice. We propose that payments or other transfers of value provided through a group or practice should be reported individually under the name(s) of the physician covered recipient(s).

In addition, there may be other situations when a covered recipient may request that a payment or other transfer of value be transferred by the applicable manufacturer to another individual or entity instead of being provided directly to himself/herself or the hospital itself. As required in section 1128G(a)(1)(A) of the Act, these payments should be reported under the name of the covered recipient since they are made at the request of, or designated on behalf of, a covered recipient. Additionally, we propose that applicable manufacturers report the name of the entity or individual that received the payment at the request of or designated on behalf of the covered recipient. Reporting the entity or individual paid will maximize transparency about the details of the payment or other transfer of value, by allowing end users to discern whether a covered recipient actually received the payment, and if not, where the payment went. We do not believe it is feasible to provide a review period for these entities or individuals before the data is made publicly available on the CMS Web site. Instead, we believe that review by the covered recipient is sufficient. We welcome comment on this approach. We believe that the collection of this information is within the discretion provided in section 1128G(a)(1)(A)(viii) of the Act to require reporting of additional categories of information regarding a payment or other transfer of value.

e. Payment and Other Transfer of Value Report Content

The specific categories of information required to be reported for each payment or transfer of value provided to a covered recipient are set forth in section 1128G(a)(1)(A) of the Act. We have provided the following explanations and details on how we propose that applicable manufacturers report some of this information to CMS.

(1) Name

When reporting the name of physician covered recipients, we propose reporting the first name, last name, and middle initial for physician covered recipients.

(2) Business Address

We propose that applicable manufacturers report the full street address. For teaching hospital covered recipients, we propose using only the address included in the CMS-published list of teaching hospitals. For physician covered recipients, we propose that applicable manufacturers report the physician's primary practice location address since this is more easily recognizable to end users of the data. The practice location can be found in NPPES as the ''provider business practice location.''

(3) Specialty and NPI

Applicable manufacturers are also required to report specialty and NPI for physician covered recipients. If using NPPES, we suggest using the ''provider taxonomy'' field when reporting the physician specialty. We propose that applicable manufacturers only report a single specialty for each physician covered recipient. We propose that applicable manufacturers use only the specialties available for the ''provider

[1] NPI Registry can be found at *https://nppes.cms.hhs.gov/NPPES/NPIRegistryHome.do.*

[2] Database can be downloaded at *http://nppes.viva-it.com/NPI_Files.html.*

taxonomy'' field in NPPES; details on these terms are available online.[3] As explained previously, for NPI, we propose that applicable manufacturers report the physician's individual NPI, rather than any group NPI, with which the physician may be associated.

(4) Date of Payment

Applicable manufacturers must provide the date upon which a payment or transfer of value was provided to the covered recipient. Some payments or transfers of value may be provided over multiple dates, such as a consulting agreement with monthly payments. We propose that applicable manufacturers use their discretion over whether to report the total payment on the date of the first payment as a single line item, or to report each individual payment as a separate line item. Under this proposal, either approach would comply with these regulations. We are also considering requiring manufacturers to report multiple payments in a single consistent manner. We seek comments on these proposals.

(5) Associated Covered Drug, Device, Biological, or Medical Supply

Section 1128G(a)(1)(A)(vii) of the Act requires applicable manufacturers to report the name of the covered drug, device, biological, or medical supply associated with that payment, if the payment is related to ''marketing, education, or research'' of a particular covered drug, device, biological, or medical supply. We realize that not every financial relationship between an applicable manufacturer and a covered recipient is explicitly linked to a particular covered drug, device, biological, or medical supply. However, in cases when a payment or other transfer of value is reasonably associated with a specific drug, device, biological, or medical supply, the name of the specific product must be reported. For example, if a sales representative takes a physician to dinner to explain the benefits of the applicable manufacturer's new product, the name of the product must be included since it was associated with the dinner. We propose that the applicable manufacturer should report a related covered drug, device, biological, or medical supply (if there is one) using the name under which the product is marketed, since this name is probably most recognizable to the consumer. In the event that a covered drug, device, biological or medical supply does not yet have a market name, the applicable manufacturer should report the scientific name. Additionally, we propose that applicable manufacturers report only one covered drug, device, biological, or medical supply as related to a payment or other transfer of value, even though there arguably may be multiple products related to the payment. We are considering, as an alternative, allowing applicable manufacturers to report multiple covered drugs, devices, biologicals, or medical supplies as related to a single payment or other transfer of value. Allowing the reporting of multiple covered drugs, devices, biologicals and medical supplies may be easier for applicable manufacturers since many financial relationships are not specific to one product only, but would make aggregating payments by product difficult. We seek comment on this approach. Finally, if an applicable manufacturer is not reporting the name of the drug, device, biological, or medical supply as appropriate, then the applicable manufacturer may be subject to penalties under section 1128G(b) of the Act.

(6) Form of Payment and Nature of Payment

The statute requires reporting on both the form of payment and the nature of payment for each payment or transfer of value made by an applicable manufacturer to a covered recipient. The statute provides a list of categories for both the form of payment and nature of payment and gives the Secretary discretion to define additional categories, if necessary. These categories are described in more detail later in this section.

We propose that the categories within both the form of payment and the nature of payment should be defined as distinct from one another. We believe that any overlap among the categories will decrease the overall utility of the information submitted to CMS. For example, a payment for activities under the nature of payment category ''education'' should be separate from activities under the nature of payment category ''research.'' If a payment or other transfer of value for an activity is associated with multiple categories, such as travel to a meeting under a consulting contract, we propose that the travel expenses should remain distinct from the consulting fee expenses and both categories would need to be reported to accurately describe the relationship. However, we believe that reporting multiple categories to describe a single payment or transfer of value may be confusing for end users, so we propose that for each payment or other transfer of value reported, applicable manufacturers may only report a single nature of payment and a single form of payment. For example, if a physician received meals and travel in association with a consulting fee, we propose that each segregable payment be reported separately in the appropriate category. The applicable manufacturer would have to report three separate line items, one for consulting fees, one for meals and one for travel. The amount of the payment would be based on the amount of the consulting fee, and the payments for the meals and travel. For these lump sum payments or other transfers of value, we propose that the applicable manufacturer break out the disparate aspects of the payment that fall into multiple categories for both form of payment and nature of payment. This approach should be easier for users to understand since they will know the totals for each form of payment, and each nature of payment, rather than totals for various combinations of categories, which may differ across applicable manufacturers. In addition, this should lead to greater consistency within the database because applicable manufacturers will separate all payments, rather than each applicable manufacturer combining payments differently. We seek comment on the proposal to require reporting payments under a single form of payment and nature of payment. We welcome comments about the usefulness of this data as well as any operational issues that applicable manufacturers might face in reporting it.

We also solicit comment on an alternative approach of allowing a payment or other transfer of value for an activity that is associated with multiple segregable categories to be reported as a single lump sum, rather than separately by each segregable category. This approach may be more compatible with existing business processes, but it might also make the public disclosure database more confusing for end users. We welcome comment on the costs and relative advantages and disadvantages of this approach.

f. Forms of Payments

Section 1128G(a)(1)(A)(v) of the Act lists the following forms of payment that applicable manufacturers must use to describe payments or other transfers of value:

- Cash or a cash equivalent.
- In-kind items or services.
- Stock, a stock option, or any other ownership interest, dividend, profit, or other return on investment.

[3] Health care provider taxonomy codes are available through a link on the NPPES Web site: *https://nppes.cms.hhs.gov/NPPES/StaticForward.do?forward=static.instructions.*

• Any other form of payment determined by the Secretary.

We do not propose to add any forms of payment beyond those outlined in the statute because we believe what is provided in the statute is sufficient to describe payments and other transfers of value. We seek comments on whether other categories are necessary or would be helpful. Additionally, we believe that these terms are understandable as written and propose that each form of payment be defined by the term's dictionary definition. Applicable manufacturers must assign each individual payment or other transfer of value, or separate parts of a payment, to one and only one of these categories.

g. Nature of Payment

Section 1128G(a)(1)(A)(vi) of the Act lists the categories for the nature of payment or other transfer of value that applicable manufacturers must use to describe each payment. As explained previously, we propose that each of these categories should be distinct and that only one nature of payment can be indicated for each individual payment or other transfer of value reported. When selecting natures of payment, we encourage applicable manufacturers to consider the purpose and the manner of the payment or other transfer of value. If a payment could conceivably fall into more than one category, we ask applicable manufacturers to make reasonable determinations about the nature of payment reported for the payment or transfer of value. Section 1128G(a)(1)(A)(vi) of the Act lists the following categories for nature of payment:

• Consulting fees.
• Compensation for services other than consulting.
• Honoraria.
• Gift.
• Entertainment.
• Food.
• Travel (including the specified destinations).
• Education.
• Research.
• Charitable contribution.
• Royalty or license.
• Current or prospective ownership or investment interest.
• Direct compensation for serving as faculty or as a speaker for a medical education program.
• Grant.
• Any other nature of the payment or other transfer of value (as defined by the Secretary).

We believe that these terms have meanings to the general public that are familiar to the industry and propose defining each nature of payment category by its dictionary definition. To ensure consistency in the reporting and selection of categories, we will allow applicable manufacturers to submit with their data a document describing the assumptions used when categorizing the natures of payments. Submission of the assumptions document will not be mandatory, but we believe that applicable manufacturers may want to explain the reasoning behind their categories. Additionally, we believe that the information may be useful for CMS to monitor how applicable manufacturers are reporting data and whether significant differences among applicable manufacturers exist. The assumptions documents will not be posted on the public Web site because they may contain information applicable manufacturers would consider proprietary. However, based on our review and assessment of these assumptions, we may choose to offer further guidance to applicable manufacturers regarding how natures of payment should be classified. We recognize that many of these categories are similar, so the assumptions document can also help us understand the assumptions made by applicable manufacturers when classifying payments or other transfers of value. We seek comment on this proposal, including whether we should make submission of the assumptions document mandatory instead of voluntary.

We are providing some explanation of the following categories to provide additional context: Charitable contribution, food, research, and direct compensation for serving as faculty or as a speaker for a medical education program. These explanations are not exhaustive (unless specified as such), but rather are intended to provide guidance to applicable manufacturers when they are categorizing payments.

(1) Charitable Contributions

Charitable contributions to, at the request of, or on behalf of covered recipients by applicable manufacturers must be reported. For purposes of the reporting requirement, a charitable contribution is any payment or transfer of value made to an organization with tax-exempt status under the Internal Revenue Code of 1986 that is not more specifically described by one of the other nature or payment categories. Payments that do not meet this requirement made to, at the request of, or designated on behalf of a covered recipient must be reported in another appropriate category.

(2) Food and Beverage

We propose that applicable manufacturers should report the value of any food or beverage items provided to covered recipients, subject to the minimum threshold as discussed in more detail in section II.A.1.h.(1). of this proposed rule. This would be more straightforward in circumstances where covered recipients who partake in the meal are easily identifiable (for example, when a sales representative takes a specific number of physician covered recipients to a restaurant). However, we recognize that in instances where group meals are being provided in group settings (for example, buffet-style food in a physician's office), it may be more difficult to keep track of which covered recipients are partaking in the food and beverage. We propose that in this type of scenario, applicable manufacturers should report the cost per covered recipient receiving the meal (even if the covered recipient does not actually partake of the meal). For example, if once during the calendar year, a sales representative from an applicable manufacturer brings $25 worth of bagels and coffee to a solo physician's office for a morning meeting, regardless of the number of individuals who partake (such as non-covered recipient staff members), the per covered recipient cost is $25. Since this falls above the $10 minimum threshold for reporting a payment or other transfer of value, which is statutorily required and discussed in detail in section II.A.1.h.(1). of this proposed rule, this meal must be reported. However, if the practice group includes five physicians, then the per-covered recipient cost is $5 (regardless of whether all five physicians actually consumed any of the food provided), so the payment would not need to be reported. We recognize that this may be difficult for large group practices or hospital-based physicians, where an applicable manufacturer may be bringing bagels for a meeting with two specialists. We are considering whether to adopt a different approach for these situations, such as counting the number of physicians by department. We seek comment on these proposals and whether there is a more equitable, but not overly burdensome, way to report these payments or other transfers of value. Additionally, we propose that applicable manufacturers do not need to report any offerings of buffet meals, snacks or coffee at booths at conferences or other similar events where it would be difficult for applicable manufacturers to definitively establish the identities of

the individuals who accept the offerings.

(3) Research

We seek to limit the research category to bona fide research activities, including clinical investigations that are subject to both a written agreement or contract between the applicable manufacturer and the organization conducting the research, as well as a research protocol. We propose to use this method to distinguish the research nature of payment category from other natures of payment categories because this method is also used to identify payments or other transfers of value eligible for delayed publication to protect the proprietary interests of applicable manufacturers. More details and an explanation of the written agreement and research protocol, as well as a definition of clinical investigation, are discussed more fully in the section of this preamble regarding delayed publication.

We recognize that reporting payments or other transfers of value for research activities may be complicated, since many research activities include large payment amounts which are spread across numerous activities and parties. Additionally, the payments are often not provided directly to a covered recipient, but to a clinic, hospital, or institution administering the research that is often led by a physician-covered recipient(s) as the principal investigator(s). This situation is further complicated because many applicable manufacturers use contract research organizations (CROs), as defined in 21 CFR 312.3(b), or other similar entities, such as site management organizations (SMOs) to manage their clinical research activities. Due to the complexities in the flow of research payments, we have outlined a proposed method for reporting research payments. However, we request comment on whether our proposed method is viable and not overly burdensome, and whether an alternative method would be preferable.

We propose to separate the classification of research payments to clarify whether the payment or other transfer of value went indirectly or directly to the covered recipient. Indirect research would be used when a research payment is made to a clinic, hospital (other than a teaching hospital), or institution conducting the research (either by an applicable manufacturer or a CRO entity) and that organization in turn pays the physician covered recipient (or multiple physician covered recipients) serving as a principal investigator(s). Conversely, direct research would be used when a research payment or other transfer of value was provided directly to a physician covered recipient or teaching hospital covered recipient by an applicable manufacturer or CRO entity. When reporting payments or other transfers of value designated as research, we propose that applicable manufacturers must report the payment or other transfer of value as either ''indirect research'' or ''direct research.''

When reporting indirect or direct research, we propose that the payment or other transfer of value should be reported individually under the names and NPIs of physician covered recipients serving as principal investigators. For indirect payments, this includes the physician covered recipient(s) serving as principal investigator(s) who would ultimately receive payments from the clinic, hospital, or other research institution, assuming the applicable manufacturer is aware of the identity of the principal investigator(s). This is consistent with section 1128G(a)(1)(B) of the Act, which requires payments to an entity or individual at the request of or designated on behalf of a covered recipient to be disclosed under the name of the covered recipient. Payments or other transfers of value reported as indirect research should also include the name of the entity or individual that received the payment or other transfer of value.

Teaching hospitals are also defined as covered recipients, and may conduct research led by a physician covered recipient(s) acting as (a) principal investigator(s). While these payments could be reported as direct research to the teaching hospital covered recipient, we do not want to establish different reporting requirements for physician covered recipients acting as principal investigators at teaching hospitals versus other research institutions. To maintain consistency, we propose that research payments provided to teaching hospitals and ultimately to physician covered recipients must be reported for both the teaching hospital covered recipient, and the physician covered recipient(s). The payment or other transfer of value to the teaching hospital covered recipient should be reported as a direct research payment; whereas the payment or other transfer of value for the principal investigator(s) (physician covered recipient(s)) should be reported as indirect research.

We understand that reporting the amount of the payment or other transfer of value may be difficult because neither the applicable manufacturer nor the CRO generally know how the research payment is distributed because the payment includes all items and activities associated with the research project, not only the physician's time and services. This is particularly important for indirect research, since a principal investigator(s) may be receiving his/her usual salary from the institution for conducting the study. Additionally, we do not believe the total costs should be attributed personally to the principal investigator(s). However, we do believe it would be burdensome for applicable manufacturers to accurately determine the exact amount a physician covered recipient received. Finally, we also believe that reporting the total research payment amount provides additional transparency to end users about the applicable manufacturers' total research payments.

Based on these considerations, we propose that for both direct and indirect research, applicable manufacturers must report the entire payment amount for each research payment (whether to the covered recipient or research institution), rather than the specific amount that was provided to the covered recipient. However, we propose that on the public Web site, we would report the payment amount separately and would not aggregate it into the total for physician covered recipients. For teaching hospitals, we believe end users would understand that the research payment covered all aspects of the research, so we believe it is appropriate to aggregate this into the teaching hospital's total payment amount. However, for physician covered recipients we believe attributing the full research payment to the physician could be misleading, due to the nature of research payments as described. We seek comment on these proposals.

We are also considering attributing the total payment to the covered recipient for direct research. We believe this may be necessary because in direct research, the covered recipient is individually receiving the payment, so the specific amount the covered recipient is receiving is clearly defined and available to the applicable manufacturer.

We recognize that the proposed reporting requirements for research payments and transfers of value may not cover all circumstances in which applicable manufacturers make payments or other transfers of value to covered recipients for research-related activities (for example, post-marketing research or other research or studies not conducted pursuant to a written contract between the applicable manufacturer and the organization conducting the research, and those studies without a research protocol). We

solicit comments about which existing nature of payment category (previously described) would apply to these other types of research, whether the scope of the ''research'' nature of payment should be broadened, and/or whether another nature of payment category should be added to address such research. Finally, we note that some of the reporting requirement will duplicate requirements already required under FDA regulations at 21 CFR part 54.

(4) Direct Compensation for Serving as a Faculty or as a Speaker for a Medical Education Program

We propose that this category be interpreted broadly to encompass all instances in which applicable manufacturers pay physicians to serve as speakers, and not just those situations involving ''medical education programs.'' We believe that this interpretation is consistent with the authority granted in section 1128G(a)(1)(A)(vi)(XV) of the Act to add additional nature of payment categories. Alternatively, we are considering adding another nature of payment category to describe situations when a covered recipient provides speaking services that are outside of medical education programs; however we believe that fewer categories for nature of payment is preferable. Additionally, it is simpler to only have one category for speaker fees to minimize potential inconsistencies in how applicable manufacturers categorize payments. We welcome comment on this proposal and the appropriate distinction between this nature of payment category and other categories, such as honoraria.

We realize that this interpretation does not allow for differentiation between continuing medical education (CME) accredited speaking engagements, and all other speaking engagements. We are considering, and welcome comments on, whether to limit this category to CME-accredited speaking engagements and report other speaking engagements in another category, such as compensation for services other than consulting, or additional category.

(5) Other

Under the Act, all payments or transfers of value from applicable manufacturers to covered recipients (other than those excluded under section 1128G(e)(10)(B) of the Act) must be reported. For simplicity, and under the discretion provided in section 1128G(a)(1)(A)(vi)(XV) of the Act, we propose the addition of a nature of payment category to serve as a catch all for all payments or other transfers of value that do not fit into one of the listed natures of payment. Any payments or transfers of value that are not specifically excluded, and do not fit into another category should be reported with a nature of payment of ''other.''

h. Exclusions

Section 1128G(e)(10)(B) of the Act excludes the following types of payments and other transfers of value from the reporting requirements:

- Transfers of value less than $10, unless the aggregate amount transferred to, requested by, or designated on behalf of the covered recipient exceeds $100 in a calendar year.
- Product samples that are not intended to be sold and are intended for patient use.
- Educational materials that directly benefit patients or are intended for patient use.
- The loan of a covered device for a short-term trial period, not to exceed 90 days, to permit evaluation of the covered device by the covered recipient.
- Items or services provided under a contractual warranty, including the replacement of a covered device, where the terms of the warranty are set forth in the purchase or lease agreement for the covered device.
- A transfer of anything of value to a covered recipient when the covered recipient is a patient and not acting in the professional capacity of a covered recipient.
- Discounts, including rebates.
- In-kind items used for the provision of charity care.
- A dividend or other profit distribution from, or ownership or investment interest in, a publicly traded security or mutual fund.
- In the case of an applicable manufacturer who offers a self-insured plan, payments for the provision of health care to employees under the plan.
- In the case of a covered recipient who is a licensed non-medical professional, a transfer of anything of value to the covered recipient if the transfer is payment solely for the non-medical professional services of the licensed non-medical professional.
- In the case of a covered recipient who is a physician, a transfer of anything of value to the covered recipient if the transfer is payment solely for the services of the covered recipient with respect to a civil or criminal action or an administrative proceeding.
- Transfers of value made indirectly to a covered recipient through a third party in cases when the applicable manufacturer is unaware of the identity of the covered recipient.

We anticipate that the public may inquire about the treatment of payments or other transfers of value between individuals who happen to have existing personal relationships. It is not our intent to capture purely personal transfers of value (for example, if one spouse, who works for an applicable manufacturer, gives a present to the other spouse who is a covered recipient). We welcome suggestions on how to incorporate this into the codified language of the final rule.

We propose that applicable manufacturers use the dictionary definitions for the exclusions. However, we are providing some clarification on how we propose applying the following types of exclusions:

(1) Transfers of Value Less Than $10

Small payments, which the statute defines as payments or other transfers of value less than $10, do not need to be reported, except when the total annual value of payments or other transfers of value provided to a covered recipient exceeds $100. As defined in section 1128G of the Act for subsequent calendar years the dollar amounts specified will be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) for the 12-month period ending with June of the previous year. We propose to publish the updated threshold amounts annually on the CMS Web site. We propose that applicable manufacturers should not report to CMS any payments or other transfers of value less than $10 individually and all small payments or transfers of value in the same nature of payment category should be reported as one total amount for that category. This would simplify reporting for applicable manufacturers and prevent the reporting of payments less than $10 individually. We have provided a few examples to ensure that this exclusion is applied consistently.

- *Example 1:* An applicable manufacturer takes a physician out to lunch four times during the year and each lunch costs $9. The applicable manufacturer has no other relationships with the physician. Since the aggregate cost of the four meals is $36 for the year, these payments would not need to be reported.
- *Example 2:* An applicable manufacturer provides a physician with five meals, each worth $9, a speaker fee of $150, and pens worth $5. The aggregate amount is greater than $100 so all the payments need to be reported. The speaker fee should be reported as $150 under ''direct compensation for serving as faculty or as a speaker for a medical education programs,'' the meals

would be reported together as food for $45, and the pens would be reported as gifts for $5.

(2) Educational Materials That Directly Benefit Patients or Are Intended for Patient Use

Educational materials must consist of materials (such as pamphlets) that directly benefit patients or are intended for patient use. We want to clarify that this exclusion is limited to ''materials'' (including, but not limited to, written or electronic materials) and does not include services or other items. We are considering whether certain materials provided by applicable manufacturers to covered recipients to educate the covered recipients themselves, but which are not actually given to patients (for example, medical textbooks), should be interpreted as educational materials that ''directly benefit patients.'' We seek comments on whether such materials should be included in this exclusion and, if so, which types of educational materials provided to covered recipients should be deemed to ''directly benefit patients.'' We intend to finalize the agency's position on this in the final rule based on comments received.

(3) Discounts and Rebates

Discounts and rebates for covered drugs, devices, biologicals, and medical supplies provided by applicable manufacturers to covered recipients are excluded from reporting under section 1128G(e)(10)(B)(vii) of the Act. Discounts and rebates are common in the industry and may be beneficial to payers (including Federal health care programs) and beneficiaries. We remind manufacturers of their obligations to appropriately report discounts and rebates for purposes of the Medicare and Medicaid programs and to comply with fraud and abuse laws, including the Federal Anti-Kickback statute.

(4) In-Kind Items for the Provision of Charity Care

We recognize the extensive philanthropic activities of many applicable manufacturers, such as the provision of supplies (both in the U.S. and abroad) to provide care for those who are unable to pay. We propose defining ''charity care'' as items provided to a covered recipient for one or more patients who cannot pay, where the covered recipient neither receives, nor expects to receive, payment because of the patient's inability to pay. Any items provided by the applicable manufacturer to a covered recipient that meet the definition of charity care, are excluded from reporting. This does not include the provision of in-kind items to a covered recipient, even if the covered recipient is a charitable organization, for the care of all of the covered recipient's patients (both those who can and cannot pay). For example, the donation of an imaging machine to a covered recipient that would be for the use of both paying and non-paying patients would not be excluded under this category, even if the covered recipient is a charitable organization. If a payment or other transfer of value is not an in-kind item and/or not for the provision of charity care, as defined, then the payment must be reported as required under section 1128G of the Act.

(5) Indirect Payments Through a Third Party

Section 1128G(e)(10)(A) of the Act also excludes the reporting of payments or other transfers of value that an applicable manufacturer makes indirectly to a covered recipient through a third party when the applicable manufacturer is unaware of the identity of the covered recipient. However, any payment or other transfer of value provided to a covered recipient through a third party, whether or not the third party is under common ownership with an applicable manufacturer or operating in the U.S., must be reported, if the applicable manufacturer is aware of the covered recipient's identity.

This exclusion hinges on whether an applicable manufacturer is ''unaware'' of the identity of the covered recipient. To ensure that payments via third parties are reported, where appropriate, we propose that an applicable manufacturer is aware of the identity of a covered recipient if the applicable manufacturer has actual knowledge of, or acts in deliberate ignorance or reckless disregard of, the identity of the covered recipient. For example, if an applicable manufacturer provides a payment through a third party to the department chairs at a specific hospital, this payment would need to be reported because even though the applicable manufacturer did not name the recipients, their identities are publicly available. This standard is consistent with the knowledge standard set forth in many fraud and abuse laws, including the False Claims Act, and we believe it is one with which applicable manufacturers are already familiar. In addition, we propose that awareness of the identity of the covered recipient by an agent of the applicable manufacturer will be attributed to the applicable manufacturer.

2. Reports on Physician Ownership and Investment Interests Under Section 1128G(a)(2) of the Act

Section 1128G(a)(2) of the Act requires applicable manufacturers, as well as applicable GPOs, to report to the Secretary, in electronic form, certain information concerning ownership and investment interests held by physicians or their immediate family members in such applicable manufacturers and applicable GPOs, and payments or other transfers of value to such physician owners or investors. There is significant overlap between the requirements under section 1128G(a)(1) and (a)(2) of the Act. We note the areas of overlap and, when necessary, refer to the sections of this proposed rule that apply.

a. Reporting Entities

(1) Applicable Manufacturers

Section 1128G(a)(2) of the Act includes applicable manufacturers as defined for section 1128G(a)(1) of the Act, as entities subject to the reporting requirements in section 1128G(a)(2) of the Act.

(2) Applicable Group Purchasing Organizations

Section 1128G(a)(2) of the Act also includes applicable GPOs as entities required to submit reports on physician ownership or investment interests; these reports are required to include any payments or other transfers of value provided to the applicable GPO's physician owners or investors. Section 1128G(e)(1) of the Act defines ''applicable group purchasing organization'' as ''a group purchasing organization (as defined by the Secretary) that purchases, arranges for or negotiates the purchase of a covered drug, device, biological, or medical supply, which is operating in the United States, or in a territory, commonwealth or possession of the United States.'' Many hospitals and other types of health care providers rely on GPOs to lower their acquisition costs for supplies, devices, and services. We note that Congress gave the Secretary authority to define a GPO for purposes of reporting under section 1128G of the Act, and also specified that such organizations would include organizations that purchase covered drugs, devices, biologicals, and medical supplies, as well as organizations that arrange for or negotiate the purchase of covered drugs, devices, biologicals, and medical supplies. We thus interpret the statute to encompass not only more traditional GPOs that negotiate contracts for their members, but also entities that purchase covered drugs, devices,

biologicals, and medical supplies for resale or distribution to groups of individuals or entities. This would include, for example, physician owned distributors (PODs) of covered drugs, devices, biologicals, and medical supplies. We propose to define ''applicable GPOs'' as—

An entity that (1) operates in the United States, or in a territory, possession or commonwealth of the United States, and (2) purchases, arranges for or negotiates the purchase of a covered drug, device, biological, or medical supply for a group of individuals or entities, and not solely for use by the entity itself.

We propose that the definition will not include entities that buy covered drugs, devices, biologicals, or medical supplies solely for their own use, such as some large practices or hospitals (including those owned by physicians). Rather, it is our intent to capture entities (including physician-owned entities) that purchase covered drugs, devices, biologicals, or medical supplies for resale or distribution to others. We solicit comments on this proposal.

As discussed in the section on covered drug, device, biological, and medical supply, we are proposing limiting the definition to only those drugs and biologicals that, by law, require a prescription to be dispensed and to only those devices (including medical supplies) that require premarket approval by or notification to FDA. We believe the device limitation may be appropriate for defining the universe of applicable manufacturers, but are considering that it may be overly limiting for the definition of applicable GPOs, since GPOs often purchase, arrange for, or negotiate the purchase of routine devices and medical supplies. We seek comment on whether to include the proposed limitation on devices and medical supplies in the definition of covered drug, device, biological, or medical supply.

b. Physicians

Section 1128G(a)(2) of the Act differs from section 1128G(a)(1) of the Act in that section 1128G(a)(2) of the Act does not use the term ''covered recipient'' as defined in 1128G(e)(6) of the Act, which explicitly excludes payments or other transfers of value to employees of an applicable manufacturer from the reporting requirements. Instead, section 1128G(a)(2) of the Act uses the term ''physician'' as defined in section 1861(r) of the Act. Based on this definition of ''physician,'' the requirement to report physician ownership and investment interests includes any physician, regardless of whether the physician is an employee of the applicable manufacturer or applicable GPO. Similarly, ownership and investment interests of immediate family members of physicians must also be reported under this provision. As required by section 1128G(a)(2) of the Act, we propose to define ''immediate family member'' as it relates to a person as one of the following (as defined for purposes of section 1877(a) of the Act at 42 CFR 411.351):

- Spouse.
- Natural or adoptive parent, child, or sibling.
- Stepparent, stepchild, stepbrother, or stepsister.
- Father-, mother-, daughter-, son-, brother-, or sister-in-law.
- Grandparent or grandchild.
- Spouse of a grandparent or grandchild.

c. Ownership or Investment Interests

We propose to define an ownership or investment interest in an applicable manufacturer or applicable GPO in a similar manner as in the physician self-referral regulation (42 CFR 411.354(b)). Specifically, we propose to define an ownership or investment interest as one that may be direct or indirect, and through debt, equity, or other means. Ownership or investment interest includes, but is not limited to, stock, stock options (other than those received as compensation, until they are exercised), partnership shares, limited liability company memberships, as well as loans, bonds, or other financial instruments that are secured with an entity's property or revenue or a portion of that property or revenue. As required by statute, an ownership or investment interest shall not include an ownership or investment interest in a publicly traded security or mutual fund, as described in section 1877(c) of the Act. Additionally, ownership or investment interest shall not include the following:

(i) An interest in an applicable manufacturer or applicable GPO that arises from a retirement plan offered by that applicable manufacturer or applicable GPO to the physician (or a member of his or her immediate family) through the physician's (or immediate family member's) employment with that applicable manufacturer or applicable GPO;

(ii) Stock options and convertible securities received as compensation, until the stock options are exercised or the convertible securities are converted to equity;

(iii) An unsecured loan subordinated to a credit facility.

We also note that ''ownership and investment interests'' is listed in section 1128G(a)(1)(A)(vi)(XII) of the Act as a nature of payment for transparency reports on payments and other transfers of value. We would like to clarify that any payments or other transfers of value of an ownership or investment interest made to a covered recipient (as defined) must be reported under section 1128G(a)(1) of the Act. Additionally, all ownership and investment interests held by a physician must also be reported under section 1128G(a)(2) of the Act, which also requires reporting of payments or other transfers of value to physician owners or investors. In order to prevent the duplicative reporting, we propose that if an ownership or investment interest is required to be reported under section 1128G(a)(1) of the Act and under section 1128G(a)(2) of the Act, then the applicable manufacturer need only to report under section 1128G(a)(1) and should not re-report the provision of the ownership or investment interest under the reporting requirements in section 1128G(a)(2)(C) of the Act.

d. Physician Ownership or Investment Report Content

Under section 1128G(a)(2) of the Act, applicable manufacturers and applicable GPOs are required to report information about each ownership or investment interest held by physician owners or investors (or their immediate family member(s)). We propose that the applicable manufacturer or applicable GPOs should report the name, address, NPI, and specialty of the physician owner or investor, as required in section 1128G(a)(2) of the Act. In cases when the ownership or investment interest is held by an immediate family member of a physician, we propose that applicable manufactures and applicable GPOs should report not only the required information for the physician, but also that the ownership or investment interest is held by an immediate family member of the physician. We are considering whether to require the reporting of the immediate family member's relationship to the physician, as well as the immediate family member's name, in order to bring additional transparency to the nature of the relationship. We believe this would provide additional details on the nature of the relationship; however, we wonder whether this information is worth the additional collection of information, particularly since we believe, due to privacy concerns, that the name of the immediate family member should not be made public. We seek comment on whether to report the relationship and/or the name of the immediate family member holding the ownership and investment interest.

Section 1128G(a)(2)(C) of the Act requires the reporting of ''[a]ny payment

or other transfer of value provided to a physician holding such an ownership or investment interest (or to an entity or individual at the request of or designated on behalf of a physician holding such an ownership interest)…'' Applicable manufacturers and applicable GPOs must report all the information required in section 1128G(a)(1)(A) of the Act for those physicians who hold ownership or investment interests in such entity. With regard to reporting payments and transfers of value to physician owners or investors, we propose that applicable manufacturers and applicable GPOs follow the procedures outlined in this preamble for reporting payments and other transfers of value. Given this overlap, we are concerned about duplicative reporting, since applicable manufacturers must submit both reports and there may be overlap between physicians holding an ownership or investment interest and physicians being considered covered recipients for the purposes of reporting payments or transfers of value. We propose that applicable manufacturers submit one file for all their payments and other transfers of value and another for all their physician ownership or investment interests. To comply with section 1128G(a)(2)(C) of the Act, we propose that applicable manufacturers report the payments or other transfers of value to physician owners or investors (regardless of whether the physician owner is a covered recipient) in the section for all payments and other transfers of value, but should note that the covered recipient receiving the payment or other transfers of value is a physician owner or investor. This would prevent double counting of payments or other transfers of value to physicians that meet the definition of a covered recipient and are a physician owner or investor of the applicable manufacturer.

Since applicable GPOs are not subject to the reporting requirements in section 1128G(a)(1) of the Act, we propose that applicable GPOs are only required to submit a report on physician ownership or investment interests. However, in the event that an applicable GPO has payments or other transfers of value to report for their physician owners or investors, we propose that applicable GPOs use the data elements outlined in the preamble section on payments and other transfers of value report contents for payments or other transfers of value, but that they would only be required to report payments to physician owners or investors.

B. Report Submission and Correction

The statute requires the Secretary to establish procedures for applicable manufacturers and applicable GPOs to submit the required information. We recognize that these regulations would require applicable manufacturers and applicable GPOs to collect and submit large amounts of new data, so we strive to be as flexible as possible about the data collection and submission methods. However, we believe that we also need standardization to ensure that we can aggregate the data correctly and efficiently to make it publicly available. Given these considerations, we plan to work with applicable manufacturers and applicable GPOs to create the best system for all parties involved. Based on our stakeholder outreach and analysis of the data systems available, we are proposing a potential system for the submission of data to CMS. We seek comments on the proposed approach and whether an alternative system would be preferable.

1. Prior to Submission

We are considering ways to ease the post-submission review process of this information and facilitate early resolution of conflicts between applicable manufacturers, applicable GPOs, covered recipients and physician owners or investors. We seek comments on a way for applicable manufacturers and applicable GPOs to make necessary corrections prior to submission to CMS, thus lessening potential changes during the statutory review and correction period, and thereby strengthening the accuracy of the data. One way to achieve this is for applicable manufacturers, prior to submitting data to CMS, to provide each covered recipient with information regarding the payments or other transfers of value that the applicable manufacturer plans to report to CMS as having made to the covered recipient. Similarly, applicable manufacturers and applicable GPOs could provide to each physician owner or investor the information they plan to report regarding the ownership and investment interests held by the physician owner or investor. While CMS is not proposing to require this type of pre-review, we recommend that applicable manufacturers and applicable GPOs provide for a ''pre-submission review,'' and we seek comment on whether a pre-review of this nature would be useful.

2. Report Submission

Applicable manufacturers and applicable GPOs are statutorily required to submit their reports electronically to CMS on March 31, 2013 and on the 90th-day of each calendar year thereafter. We propose to interpret ''on'' March 31, 2013 or the 90th of the each year thereafter as ''by'' March 31, 2013 or the 90th of each year thereafter and intend to allow applicable manufacturers and applicable GPOs to submit data prior to this date to provide applicable manufacturers and applicable GPOs with more flexibility for submission. We propose that only applicable manufacturers that have payments or other transfers of value and/or physician ownership or investment interests to disclose for the previous calendar year must register and submit reports. If an applicable manufacturer neither made any payments or other transfers of value required to be reported nor had any physician owners or investors in the previous calendar year, it need not submit a report to CMS. Similarly, only applicable GPOs with physician owners or investors are required to submit information.

For applicable manufacturers and applicable GPOs that do have information to disclose, we propose that applicable manufacturers and applicable GPOs register with us prior to submission to facilitate communication. This registration process would require the applicable manufacturer or applicable GPO to designate a point of contact, which we would use for communications related to the submitted data. We propose that applicable manufacturers or applicable GPOs must register prior to the submission of data for the current reporting cycle. We do not limit the time prior to the submission of data, so an applicable manufacturer or applicable GPO could choose to submit the data immediately after registration. We are proposing to open the registration process at the beginning of the calendar year, giving applicable manufacturers and applicable GPOs time to register and submit their data. The first opportunity for registration and the data submission would be January 1, 2013. We seek comment on the proposed timing of the registration and submission process.

Alternatively, we are considering requiring that all applicable manufacturers and applicable GPOs register with CMS, regardless of whether they have information to report. If an applicable manufacturer or applicable GPO had no payments or transfers of value and/or ownership or investment interests to report, the chief executive officer, chief financial officer or chief compliance officer would be required to submit an attestation that, to the best of

his or her knowledge and belief, there were no reportable payments or transfers and value and/or ownership or investment interests during the previous calendar year. We believe this may help us better understand the extent of these relationships (including which types of entities have financial relationships with covered recipients and physician owners and investors and which do not). Additionally, we believe such a requirement would ensure that applicable manufacturers and applicable GPOs perform a more thorough evaluation to determine whether they have any reportable information. However, we are seeking input on whether requiring registration for all entities and an attestation from entities with no reportable information would be more burdensome than beneficial. We seek comment on both the benefits and burdens of this consideration and intend to finalize the agency's position on this in the final rule based on comments received. We propose that applicable manufacturers and applicable GPOs submit their data electronically in a comma-separated value (CSV) format. Each line item in the dataset should represent a unique payment or other transfer of value, or a unique ownership or investment interest. In the event that a single file does not have sufficient volume for all the data required, then the applicable manufacturer or applicable GPO may submit as many files as necessary to provide the entirety of its data. We seek comments on the appropriateness of the CSV format for data submission, and suggestions for alternative formats. Additionally, we propose that annually, following the submission of data, an authorized representative from each applicable manufacturer and applicable GPO will be required to submit a signed attestation certifying the truth, correctness, and completeness of the data submitted to the best of the signer's knowledge and belief. Such attestations must be signed by the chief executive officer, chief financial officer or chief compliance officer.

3. Report Format

We have outlined the fields of information to be included when reporting payments or other transfers of value and physician ownership and investment interests . The asterisks indicate the additional information, which we propose to require under the discretion provided by the statute. The justification for the submission of these additional data requirements is provided throughout the preamble. In the Addendum to this proposed rule, we have provided a sample of the reporting template, and we will place a spreadsheet in the regulatory docket on Regulations.gov. We note that this is a mock up table (not in CSV format) to demonstrate how we expect this data to be reported. This is not an official reporting document, but only an example for the purposes of the proposed rule.

For each payment and other transfer of value, we are proposing that the following information is required:

- Applicable manufacturer or applicable GPO name.
- Covered recipient's or physician owner's (as applicable)—
  - ++ Name (for physicians include first and last name, and middle initial);
  - ++ Specialty (physician only);
  - ++ Business street address (practice location);
  - ++ NPI (physician only);
- Amount of payment or other transfer of value in U.S. dollars.
- Date of payment or other transfer of value.
- Form of payment or other transfer of value.
- Nature of payment or other transfer of value.
- Name of the associated covered drug, device, biological, or medical supply, as applicable.
- Name of entity that received the payment or other transfer of value, if not provided to the covered recipient directly.*
- Whether the payment or other transfer of value was provided to a physician holding ownership or investment interests in the applicable manufacturer. (Yes or No response)
- Whether the payment or other transfer of value should be granted a delay in publication because it was made pursuant to a product research agreement, development agreement, or clinical investigation. (Yes or No response)

For each physician ownership or investment interest, the following information is required:

- Applicable manufacturer or applicable GPO name.
- Ownership or investment physicians'—
  - ++ Name (for physicians include first and last name, and middle initial)
  - ++ Specialty;
  - ++ Business street address (practice location);
  - ++ NPI;
- Whether the ownership or investment interest is held by the physician, or an immediate family member of the physician.
- Dollar amount invested.
- Value and terms of each ownership or investment interest.
- For applicable GPOs only: Any payments or other transfers of value provided to the physician owner or investor, including the following (applicable manufacturers should report this information with their other payments or other transfers of value, and indicate that the covered recipient is a physician investor or owner):
  - ++ Amount of payment or other transfer of value in U.S. dollars.
  - ++ Date of payment or other transfer of value.
  - ++ Form of payment or other transfer of value.
  - ++ Nature of payment or other transfer of value.
  - ++ Name of the associated covered drug, device, biological, or medical supply, as applicable.

We seek comment on our proposed requirements regarding the data elements that should be submitted and plan to finalize them in the final rule based on comments received.

4. 45-Day Review Period for Applicable Manufacturers, Applicable GPOs, and Covered Recipients

Section 1128G(c)(1)(C)(ix) of the Act requires that the Secretary allow applicable manufacturers, applicable GPOs, covered recipients, and physician owners or investors the opportunity to review the data submitted for a period of at least 45-days prior to the data being made available to the public. After the due date has passed, and we have received the data from the applicable manufactures and applicable GPOs, we will aggregate the data by individual covered recipient and physician owner or investor, across applicable manufacturers and applicable GPOs. Once the data aggregation is complete, we plan to notify all applicable manufacturers, applicable GPOs, covered recipients, and physician owners or investors about the procedures for the review. We recognize it may be difficult for CMS to contact covered recipients and physician owners or investors, since they do not actively participate in the data submission process with CMS prior to their review, so we propose to notify covered recipients and physician owners or investors in a few ways. We propose to allow, but not require, covered recipients, and physician owners or investors to register with CMS to ensure they receive communication about the processes for review. Additionally, we propose to notify physicians and hospitals through CMS' list serves and posting the information publicly. We are considering a posting either on the CMS Web site or on the **Federal Register**, and

seek comment on which would be most useful to physicians and teaching hospitals. We propose that these notifications would be provided annually to announce the covered recipient and physician owner and investor review and correction period, and would include the specific instructions for performing this review. For example, we are considering that covered recipients and physician owners and investors would sign in to a secure Web site to see the information reported about them. We are also considering an alternative method, in which we would require applicable manufacturers and applicable GPOs to collect and report whether the covered recipient, or physician owner or investor would like to be notified by USPS or email of the processes for their review, as well as the individual's email address, if indicated. We seek comment on our proposed method of notification, as well as the alternative method provided. We solicit comments on other ways that CMS, applicable manufacturers, or applicable GPOs can provide timely, adequate, and cost-effective notice to covered recipients and physician owners or investors of their opportunity to review the collected data.

In addition, we believe that we should not be actively involved in arbitrating disputes between applicable manufacturers or applicable GPOs, and covered recipients, or physician owners or investors regarding the receipt, classification or amount of any payment or other transfer of value, or ownership or investment interest. However, we are working on identifying a streamlined and automated process for reporting disputes and changes to ensure that the review and correct process is as smooth as possible. We plan to provide more information on the details of this process once it has been fully developed, but provide general guidelines for comment at this time. We propose that covered recipients, and physician owners or investors may request from CMS the contact information for a specific applicable manufacturer or applicable GPO, in the event of a potential dispute over the reported data. However, it would be the responsibility of the covered recipient, or physician owner or investor to contact and try to resolve the dispute with the applicable manufacturer or applicable GPO. We propose that at least one of any entity involved (applicable manufacturer, applicable GPO, covered recipient, or physician owner or investor) must report to CMS that a payment or other transfer of value, or ownership or investment interest is disputed and the results of that dispute at the end of the 45-day review period.

If an applicable manufacturer or applicable GPO, and covered recipient, or physician owner or investor have contradicting information that cannot be resolved by the parties involved, then we propose that the data would be identified as contradictory and both the original submission from the applicable manufacturer or applicable GPO, and the modified information provided by the covered recipient, or physician owner or investor would appear in the final publicly available Web site. We recognize that publishing disagreements in this manner may make it difficult to aggregate the data and report it in a meaningful way to the public and are considering how to best aggregate reports that note contested information but do not double count payments or other transfers of value or ownership and investment interests. Given these concerns, we are considering that in these cases (when a dispute over the data cannot be resolved by the parties), the individual payment would be flagged as contested, but the contradictory data, as corrected by the covered recipient or physician owner or investor, would be used for aggregated totals for the physician, as necessary. We believe that this is preferable since the covered recipient and physician owner or investor stakeholders have expressed concern about the accuracy of information submitted by the applicable manufacturer or applicable GPO. However, we are also considering aggregating the original information, as submitted by the applicable manufacturer and applicable GPO. We seek comment on this proposal and suggestions for how best to handle instances where there are outstanding disagreements.

Finally, we propose that the 45-day review period is the primary opportunity to correct errors or contest the data submitted by applicable manufacturers and applicable GPOs to CMS. Once the 45-day review period has passed and the parties have identified all changes or disputes and CMS has made or noted them all, we propose that neither applicable manufacturers, applicable GPOs, covered recipients, nor physician owners or investors would be permitted to amend the data for that calendar year. We believe that allowing continual changes would be operationally difficult for CMS to handle and would reduce the utility of the data set. We propose that applicable manufacturers, applicable GPOs, covered recipient, or physician owners or investors alert CMS as soon as possible regarding any errors or omissions, but these changes may not be made until the data is refreshed for the following reporting year. At that time, all parties would once again have an opportunity to review and amend the data. However, we propose that we would have the option to make changes to the data at any time (for example, to correct mathematical mistakes). We also propose that only the current and previous year would be available for review and correction. For example, during the 45-day review period in 2014, applicable manufacturers, applicable GPOs, covered recipients, and physician owners or investors would be able to review and amend the data submitted for 2012 and 2013. However, during the 2015 review, only 2013 and 2014 would be available for changes. We seek comments on the procedures outlined for data submission and the 45-day review period, particularly the best way to contact covered recipients and physician owners or investors to ensure they receive notification of the review period.

C. Public Availability

Under the statute, we are required to publish on a publicly available Web site the data reported by applicable manufacturers and applicable GPOs for CY 2012 by September 30, 2013. For each year thereafter, we must publish the data for the preceding calendar year by June 30th. The public Web site must be searchable, understandable, downloadable, and easily aggregated on various levels, as stated in the statute. In addition, section 4 of Executive Order 13563 calls upon agencies to consider approaches that ''maintain flexibility and freedom of choice for the public,'' including the ''provision of information to the public in a form that is clear and intelligible.'' We request comments on how to structure this Web site for ultimate usability.

As required in section 1128G(c)(1)(C)(ii) of the Act, we propose that the following information on payments and other transfers of value would be included on the public Web site in a format that is searchable, downloadable, understandable and able to be aggregated:

- Applicable manufacturer name.
- Covered recipient's—
  - ++ Name;
  - ++ Specialty (physician only); and
  - ++ Business street address (practice location).
- Amount of payment or other transfer of value in U.S. dollars.

• Date of payment or other transfer of value.
• Form of payment or other transfer of value.
• Nature of payment or other transfer of value.
• Name of the covered drug, device, biological, or medical supply, when applicable.
• Name of entity that received the payment or other transfer of value, if not provided to the covered recipient directly.

For physician ownership and investment interests, the following information would be included on the public Web site in a format that is searchable, downloadable, understandable and able to be aggregated:

• Applicable manufacturer or applicable GPO name.
• Physician owner's—
++ Name;
++ Specialty; and
++ Business street address.
• Whether the ownership or investment interest is held by the physician or an immediate family member of the physician.
• Dollar amount invested.
• Value and terms of each ownership or investment interest.
• Any payment or other transfer of value provided to the physician owner, including:
++ Amount of payment or other transfer of value in U.S. dollars.
++ Date of payment or other transfer of value.
++ Form of payment or other transfer of value.
++ Nature of payment or other transfer of value.
++ Name of the covered drug, device, biological, or medical supply, as applicable.

In addition, as required by statute, we propose that the Web site will include information on any enforcement activities taken under section 1128G of the Act for the previous year, background or other helpful information on relationships between the drug and device industry and physicians and teaching hospitals, and publication of information on payments or other transfers of value that were granted delayed reporting, as required under section 1128G(c)(1)(C) of the Act. Beyond the information required by statute, we propose that the Web site clearly state that disclosure of a payment or other transfer of value on the Web site does not indicate that the payment was legitimate nor does it necessarily indicate a conflict of interest or any wrongdoing. We welcome comment regarding the details and format for how this information should be displayed on the Web site.

D. Delayed Publication for Payments Made Pursuant to Product Research or Development Agreements and Clinical Investigations

Section 1128G(c)(1)(E) of the Act provides for delayed publication of payments or other transfers of value from applicable manufacturers to covered recipients made pursuant to product research or development agreements or clinical investigations. The granting of delayed publication aims to maintain confidentiality for proprietary information relating to development of new drugs, devices, biologicals, and medical supplies. The statute outlines several statutorily required instances when publication of a payment or transfer of value should be delayed in the context of a product research or development agreement or clinical investigation.

The statute requires that information about payments and other transfers of value that are delayed from publication must be made publicly available on the first publication date after the earlier of either: (1) The approval, licensure or clearance by the FDA of the covered drug, device, biological or medical supply; or (2) 4-calendar years after the date of payment. For example, if in April of 2013 an applicable manufacturer provides a research grant to a teaching hospital for an initial trial of a new product under a product research or development agreement, the applicable manufacturer would be required to report this payment to us under section 1128G(a)(1) of the Act by March 31, 2014. However, the payment would not be published on the public Web site in 2014 since the product had not yet been granted FDA approval, licensure or clearance. If the product is granted FDA approval, licensure or clearance in October of 2015, then we would publish the payment by the applicable manufacturer to the covered recipient as part of the public release of CY 2015 data in 2016. If the product had not been approved or cleared by the FDA by the beginning of 2018 (4-calendar years after the payment date in 2013), we would publish the 2013 payment during the data release in 2018.

We propose that applicable manufacturers should indicate on their reports whether or not a payment or other transfer of value should be granted a delay in publication on the public Web site. In the absence of notification by an applicable manufacturer that a payment or other transfer of value is subject to delayed publication, we would have no way of knowing that such a payment or other transfer of value should not be published. In addition, we propose that payments or other transfers of value subject to delayed reporting need to be reported each year with a continued indication that publication should remain delayed and any updated information on the payment or other transfer of value, as necessary.

Further, we propose that following FDA approval, licensure or clearance, applicable manufacturers must indicate in their next annual submission that the payment should no longer be granted a delay and should be published in the current reporting cycle. Failure to indicate to CMS in a timely fashion that a payment or other transfer of value should no longer be granted a delay in publication, due to FDA approval, licensure or clearance, may be subject to penalties under section 1128G(b) of the Act. Finally, if a report includes a date of payment 4 years prior to the current year, then the payment or other transfer of value would be automatically published, regardless of whether the applicable manufacturer indicates that the payment should be delayed. For example, in 2019, all payments or transfers of value with a payment date in 2014 (which were initially submitted to CMS in 2015) would be published in the public database in 2019. With an annual publication, it is difficult to grant each payment an exactly 4-year delay and we recognize that payments made early in the year would be granted more than a full 4-year delay period under this proposal. We believe that this method is preferable because it allows all payments, even those made late in the year, a full 4 year delay. We seek comment on these proposals.

We propose that payments or other transfers of value granted delayed publication are limited to relationships for bona fide research or investigation activities, which, if made public, would damage the manufacturers' competitive and/or proprietary interests. In order to ensure that the payments or other transfers of value granted a delay are for bona fide research, we propose that the ''product research or development agreement'' referenced in the statute include a written statement or contract between the applicable manufacturer and covered recipient, as well as a written research protocol. Additionally, the Act defines ''clinical investigation'' in section 1128G(e)(3) of the Act as ''[a]ny experiment involving 1 or more human subjects, or materials derived from human subjects, in which a drug or device is administered, dispensed, or used.'' We propose that in the context

of this definition, a clinical investigation is limited to one which is memorialized in a written research protocol between the covered recipient and the applicable manufacturer.

We realize that many applicable manufacturers contract with CROs, to facilitate their clinical research. In these cases, as long as the applicable manufacturer has a written agreement with the CRO, we propose that the CRO may have the written research agreement with the covered recipient, rather than the applicable manufacturer.

The statute provides for delayed publication of payments for services furnished in connection with research on ''medical technology'' with regard to both research on potential new medical technologies and new applications of existing medical technologies. In contrast, the statute provides for delayed publication for services furnished in connection with the development of, or a clinical investigation for, a new drug, device, biological, or medical supply (as opposed to a new application of an existing drug, device, biological, or medical supply as well). However, given the close relationship and significant overlap among the phrases ''medical technology'' and ''drug, device, biological, and medical supply,'' we propose to consider ''medical technology'' broadly as any drug, device, biological, or medical supply. We propose this interpretation because we believe that the rationale underlying the statutory inclusion of the delayed publication provision—protecting an applicable manufacturer's legitimate proprietary and competitive interests in research and development—should apply to all applicable manufacturers under this statute. Moreover, it is difficult to fairly carve out certain applicable manufacturers or certain products for differing standards of delayed publication. Alternatively, we are considering defining ''medical technology'' more narrowly as a subset of drugs, devices, biologicals, and medical supplies. We seek comments on both approaches, including suggestions for a narrower definition of ''medical technology.''

The statute also distinguishes between the scope of delayed publication permitted for payments related to ''research'' versus payments related to ''development'' or ''clinical investigations.'' Delayed publication is allowed for payments or other transfers of value for research-related services for both new medical technologies and new applications of existing medical technologies, whereas, delayed publication for development and clinical investigations are limited solely to new drugs, devices, biologicals, and medical supplies. It is difficult to meaningfully separate research and development due to the overlap in the activities associated with them, and the fact that they are commonly used synonymously. Given this close association between the terms, we propose to treat them similarly in this provision. However, we are also considering the possibility of assigning different meanings to ''research'' and ''development,'' and we seek comments on this approach and suggestions for meaningful distinctions for the two terms. With regard to clinical investigations, we believe they have a distinct meaning as set forth in section 1128G(e)(3) of the Act, which is separate from both ''research'' and ''development'' for the purposes of the Act. Specifically, section 1128G(e)(3) provides that clinical investigations involve human subjects or materials derived from human subjects. We note that this definition may differ from those that applicable manufacturers may be familiar with in 21 CFR 312.3 and 812.3.

Given these interpretations, we propose that delayed publication should apply to payments to covered recipients for services in connection with research on, or development of new drugs, devices, biologicals, or medical supplies, as well as new applications of existing drugs, devices, biologicals, or medical supplies. Conversely, we propose limiting delayed publication for payments in connection with clinical investigations for *new* drugs, devices, biologicals, or medical supplies, and not new applications of existing drugs, devices, biologicals, or medical supplies. We seek comment on these proposals and solicit comment on whether there are better ways to distinguish among these categories for the purposes of delayed publication, including treating payments and transfers of values made in connection with clinical investigations the same as those made in connection with research and development.

Pursuant to the statute, information reported by applicable manufacturers that is subject to delayed publication under section 1128G(c)(1)(E) of the Act shall be considered confidential and shall not be subject to disclosure under 5 U.S.C. 552, or any other similar Federal, State or local law, until after the date on which the information is made available to the public via publication on the Web site.

E. Penalties

Section 1128G(b) of the Act authorizes the imposition of CMPs for failures to report required information on a timely basis in accordance with our regulations. If an applicable manufacturer or applicable GPO fails to submit the required information, then the applicable manufacturer or applicable GPO may be subject to a CMP of at least $1,000, but no more than $10,000, for each payment or other transfer of value, or ownership or investment interest not reported as required. The maximum CMP with respect to each annual submission for failure to report is $150,000. For knowing failure to submit required information in a timely manner, an applicable manufacturer or applicable GPO will be subject to a CMP of at least $10,000, but no more than $100,000, for each payment or other transfer of value, or ownership or investment interest not reported as required. The maximum CMP with respect to each annual submission for a knowing failure to report is $1,000,000. The term ''knowingly'' is given the meaning from the False Claims Act, 31 U.S.C. 3729(b).

All CMPs would be collected and imposed in the same manner as the CMPs collected and imposed under section 1128A of the Act. Additionally, we propose that the procedures in 42 CFR part 402 subpart A would apply with regard to imposition and appeal of CMPs.

As noted previously, applicable manufacturers and applicable GPOs may be subject to a CMP for a failure to report information timely in accordance with our regulations. This proposed rule interprets the statute to require the submission of information that is accurate and complete. Therefore, we propose that a CMP may be imposed for failure to report information in a timely, accurate, and complete manner. As set forth in section 1128G(c)(1)(C)(ix) of the Act, applicable manufacturers and applicable GPOs are allowed 45-days prior to publication to review their data. Outside this period, any additions or oversights would be considered late and subject to penalties. Together with the annual submission of data, an authorized representative from each applicable manufacturer and applicable GPO would be required to submit a signed attestation certifying the truth, correctness, and completeness of the data submitted to the best of the signer's knowledge and belief.

In determining the amount of the CMP, we propose that the factors to be considered include, but are not limited to, the following:

- The length of time the applicable manufacturer or applicable GPO failed to report, including the length of time the applicable manufacturer and applicable GPO knew of the payment or other transfer of value, or ownership or investment interest.
- Amount of the payment or other transfer of value or the value of the ownership or investment interest the applicable manufacturer or applicable GPO failed to report.
- Level of culpability.
- Nature and amount of information reported in error.
- Degree of diligence exercised in correcting information reported in error.

We seek comments on these proposals.

In addition, we also propose that the Secretary, CMS, OIG or their designees may audit, evaluate, or inspect applicable manufacturers and applicable GPOs for their compliance with timely, complete and accurate submission of information required in section 1128G of the Act and the implementing regulations. Access to this information is implicit in the statute in order to enforce the requirements outlined. To facilitate this review, applicable manufacturers and applicable GPOs must maintain all books, records, documents, and other materials sufficient to enable an audit, evaluation or inspection of the applicable manufacturer's or applicable GPO's compliance with the requirements in section 1128G of the Act and the implementing regulations. We propose that applicable manufacturers and applicable GPOs must maintain these books, records, documents, and other materials for a period of at least 5 years from the date the payment or other transfer of value, or ownership or investment interest is published publicly on the Web site. We believe that 5 years from the date of publication is sufficient for all audit, inspection, or evaluation activities. The requirements set forth in this proposed rule are in addition to, and do not limit, any other applicable requirements that may obligate applicable manufacturers or applicable GPOs to retain and allow access to records. We seek comments on these proposals.

F. Annual Reports

We are required to submit annual reports to Congress and the States. The Report to Congress is due annually on April 1st beginning in 2013 and shall include aggregated information on each applicable manufacturer and applicable GPO for the preceding calendar year, as well as any enforcement action taken and any penalties paid. Since we will not receive data for the prior year until the 90th day of each year, the data submitted that year will not be ready for the April 1st report. Instead, we propose that we report to Congress information submitted by applicable manufacturers and applicable GPOs during the preceding year. Similarly, we must report to States annually by September 30, 2013 and June 30 for each year thereafter. The reports would be State specific and include summary information on the data submitted regarding covered recipients and physician owners or investors in that State. Since these reports are due later in the year than the Report to Congress, we propose that the reports would include data collected during the previous calendar year which was submitted in the current year. These reports would not include any payments or other transfers of value that were not published under the delayed publication requirements in section 1128G(c)(1)(E) of the Act.

G. Relation to State Laws

Section 1128G(d)(3) of the Act preempts any State or local laws requiring reporting, in any format, of the same type of information concerning payments or other transfers of value made by applicable manufacturers to covered recipients. No State or local government may require the separate reporting of any information regarding a payment or other transfer of value that is required to be reported under section 1128G(a) of the Act, unless such information is being collected by a Federal, State, or local governmental agency for public health surveillance, investigation, or other public health purposes or health oversight. Such agencies include those that are charged with preventing or controlling disease, injury, or disability and/or with conducting oversight activities authorized by law, including audits, investigations, inspections, licensure or disciplinary actions, or other activities necessary for oversight of the health care system. However, this exception does not apply to State or local reporting requirements related to information on payments or other transfers of value included in section 1128G of the Act.

In addition, State and local governments may require reporting of information other than that required under this provision, including the types of information excluded by section 1128G(e)(10)(B) of the Act, with the exception of payments that fall below the $10 individual or $100 aggregate threshold in section 1128G(e)(10)(B)(i).

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on the following requirements:

A. ICRs Regarding Reports of Payments or Other Transfers of Value and Physician Ownership and Investment Interests (§ 403.904, § 403.906 and § 403.908(a) Through (g))

Proposed § 403.904 would require applicable manufacturers of covered drugs, devices, biologicals, and medical supplies to report annually to CMS all payments and other transfers of value to physicians and teaching hospitals (collectively, covered recipients). Applicable manufacturers and applicable GPOs would also be required to report ownership and investment interests held by physicians or the immediate family members of physicians in such entities. This information is to be aggregated and posted publicly by CMS on a searchable Web site. Covered recipients and physician owners or investors must be provided with the opportunity to review and, if necessary, correct the information before it is posted publicly. When reporting the burden of this provision, we considered the impact in the first year of the program when applicable manufacturers and applicable GPOs must build reporting systems, and covered recipients and physician owners or investors are becoming accustomed with the review and correction requirements, as well as year 2 and annually thereafter. We anticipate that the burden will be reduced by roughly 25 percent in year 2 and remain the same annually thereafter.

The burden associated with these requirements is the time and effort spent by applicable manufacturers and applicable GPOs collecting the data, compiling reports to send to CMS, as well as the processes for registering and submitting the data, and any corrections, if necessary, to CMS. We estimate that approximately 1,150 applicable manufacturers, (150 drug and biologic manufacturers, and 1,000 device and medical supply manufacturers), and approximately 420 applicable GPOs would submit reports. We based these estimates on the number of manufacturers reporting in States with similar transparency provisions, as well as the number of manufacturers registered with FDA. The number of drug manufacturers is based on reporting in Massachusetts, Minnesota, and Vermont, and the number of device manufacturers is based on reporting in Massachusetts, since Minnesota and Vermont do not require device manufacturers to report. Because the State laws have higher payment thresholds and are specific to the physicians in the State, we estimated that the number of manufacturers reporting would be greater under section 1128G of the Act. For device manufacturers, we used data from the FDA to identify the total number of manufacturers to use as a ceiling for our estimate. We seek comment on whether there are any other sources of data available.

It is difficult to establish with precision the number of GPOs, as proposed, because the definition of GPO includes physician owned distributorships (PODs). However, we did rely on a recent report by the Senate Finance Committee which identified 20 States with multiple PODs and more than 40 PODs in California. When we extrapolate these estimates to the national level, taking into account the disproportionately higher number in California, we estimate that there are approximately 260 PODs currently in the U.S. We further estimate that there are an additional 160 GPOs, which have some form of physician ownership or investment. This is based on judgmental estimates, from a review of what little literature exists, and discussions with knowledgeable persons. Our research found that there are approximately 800 GPOs and that approximately 20 percent of GPOs have at least one physician owner or investor.

We believe that larger companies that manufacture more products may have a greater number of financial relationships with a more diverse group of covered recipients. Coordinating the data collection will require ensuring that all payments and other transfers of value are attributed to the correct covered recipient and reported in the manner proposed in this proposed rule. These estimates include our aggregate estimate of the overall time required to build and maintain the reporting systems (including the development of new information technology systems), obtain NPI and other information from the NPPES system (and if necessary supplement that information), establish whether any owners or investors have physicians as immediate family members (if necessary), organize the data for submission to CMS (within the organization and with any third party vendors), register with CMS and submit the required data, review the aggregated data that CMS produces, respond to any physician or teaching hospital queries during the review process, and resubmit certain disputed information (if necessary). It allows for time applicable manufacturers and applicable GPOs may sometimes use for ''pre-submission'' reviews but assumes that would be rarely used, and only for complex cases. It also includes the time that applicable manufacturers may elect to spend to submit with their data a document describing their assumptions and methodology for categorizing the nature of payments. The estimates also include the potentially substantial time savings that would accrue to them as registrants through the ability to query CMS, and receive informal guidance through a listserv or other methods of providing technical assistance and useful information on low cost methods of compliance. As a technical point, we note that we propose a 5-year records retention requirement. We believe the costs of this are negligible for electronic recordkeeping, but solicit comment on this approach. Additionally, the estimates also include the time of employees, such as sales representatives, who have direct relationships with covered recipients and physician owners or investors. These employees would have to record the details of each relationship with the covered recipient, or physician owner or investor for reporting purposes.

This overall estimate is based primarily on the judgmental estimates of persons we have consulted that are expert in the overall cost of existing reporting systems. We welcome more detailed and disaggregated information that would help us improve the overall estimate or better craft the final rule to deal with specific problems or time-saving options. We are particularly interested in the burden of collecting and recording information for each payment or transfer of value by the staff and identifying whether individuals with ownership or investment interests have physicians as immediate family members.

We estimate that on average, smaller applicable manufacturers will have to dedicate 50 percent of a full time equivalent (FTE) employee (mainly in the range of zero to one), whereas larger applicable manufacturers may have to dedicate 5 to 15 FTE employees to comply with the reporting requirements (we assume 10 on average). Large manufactures are often multinational enterprises that employ tens of thousands of people worldwide, whereas many small manufacturers only have a few products and employ significantly fewer people. Since there are many more small companies, we estimate that on average, 1.74 FTE employees would be needed for each applicable manufacturer in the first year (150 larger firms times 10 FTE and 1000 smaller firms times 0.5 FTE). We appreciate that this is considerable simplification of a far more complex distribution of firms, but we think that it captures the skewness of the distribution in manufacturing sectors where a relative handful of firms have sales in the billions of dollars annually over a wide range of products, and a far larger number have annual sales in low millions of dollar annually for just a few products, with practices regarding financial relationships with physicians varying widely within each group and, in many cases by product or product class.

The greater staff time for year 1 represents time for applicable manufacturers to alter their systems to collect and report this data. We estimate that once procedures and systems are modified, costs would be 25 percent lower, which reduces this value to an average of 1.3 FTEs in year 2 and annually thereafter. We emphasize that these are very rough estimates. The actual burdens could easily average 25 percent lower or higher, and would depend on manufacturers' changes in practices after the regulations are made final. Some may welcome the new transparency; others may decide to change or eliminate their current practices. Our assumption that smaller firms could in some cases incur no new costs assumes that some do not now have any such financial relationships and that this proportion would grow as some firms decide that the benefits of such relationships are less than the costs of reporting. Other smaller firms with only a few products and only a few financial relationships might well already have systems in place that

essentially meet the proposed requirements or that could do so with minimal effort. We welcome comments that can provide empirical data on the costs to implement the requirements in firms of varying sizes and product portfolios, on the extent to which systems already in place meet the proposed requirements in firms of various kinds and sizes, and on the extent to which firms would modify their practices to avoid reporting costs.

We anticipate it would be less burdensome for an applicable GPO to comply with these proposed reporting requirements, since we believe companies will have fewer relationships with physician owners or investors (or immediate family members). This will make it much easier for applicable GPOs to match ownership and investment interests to the appropriate physicians (or family members). Based on discussions with officials of some GPOs and industry observers, we estimate that it would take from 5 to 25 percent of a FTE staff member, depending on the size of the applicable GPO. Once again, this includes time of many individuals, particularly the ones who are in direct contact with the physician and are required to record the details of the interaction. We assume that applicable GPOs already know the ownership and investment interests of its major investors, so the burden of these requirements include any changes to internal procedures to record and report the information. Also again, we have not found any empirical studies to better inform this estimate. Accordingly, we estimate that on average, an applicable GPO would dedicate 10 percent of an FTE employee to reporting under this section for year 1, followed by 7.5 percent for year 2 and annually thereafter. We welcome any comments or data that would improve this estimate.

While many individuals within the applicable manufacturer or applicable GPO may contribute to the data collection and reporting, we believe that majority of the work will be performed by a compliance officer. According to the Bureau of Labor Statistics Occupational Employment Statistics, in 2010, the annual compensation for a compliance officer in the pharmaceutical and medicine manufacturing field was $73,380. We applied a 33 percent increase to this amount to account for fringe benefits and overhead, making the total annual cost of a compliance officer $97,595. The total number of hours for applicable manufacturers during year 1 would be 4,186,000 (1,150 applicable manufacturers × 70 hours (1.74 FTEs) × 52 weeks). For year 2 and subsequent years, we estimate a total of 3,110,000 hours (1,150 applicable manufacturers × 52 hours (1.3 FTEs) × 52 weeks). On average, this equals 3,460,000 hours annually for all applicable manufacturers for the first 3 years. The total number of hours for applicable GPOs for year 1 would be 87,400 (420 applicable GPOs × 4 hours (0.10 FTE) × 52 weeks) and for year 2 would be 65,500 hours (420 applicable GPOs × 3 hours (0.075 FTE) × 52 weeks). For the first 3 years, in total applicable GPOs will spend on average 72,800 hours annually.

The following tables provide our total cost estimates for applicable manufacturers and applicable GPOs to collect and submit the information required in section 1128G of the Act for year 1 and year 2. In total, we estimate that for applicable manufacturers and applicable GPOs required to report, it will cost $199,387,000 for year 1 and will cost $148,979,000 for year 2 and annually thereafter. For the first 3 years, this averages to a cost of $165,781,000 annually. All estimates are in 2010 dollars.

TABLE 1—YEAR 1 ESTIMATED BURDEN FOR APPLICABLE MANUFACTURERS AND APPLICABLE GPOS

	Estimated reporting organizations	Average FTE per reporting organization	Average annual rate (with 33% fringe/overhead)	Average total cost per organization	Total burden
Applicable Manufacturers	1,150	1.74 FTE (70 hrs × 52 wks)	$97,595	$169,815	$195,288,000
Applicable GPOs	420	0.10 FTE (4 hrs × 52 wks)	97,595	9,759.54	4,098,990

TABLE 2—YEAR 2 AND SUBSEQUENT YEAR ESTIMATED COSTS FOR APPLICABLE MANUFACTURERS AND APPLICABLE GPOS

	Estimated reporting organizations	Average FTE per reporting organization	Average annual rate (with 33% fringe/overhead)	Average total cost per organization	Total cost
Applicable Manufacturers	1,150	1.3 FTE (52 hrs × 52 wks)	$97,595	$126,874	$145,905,000
Applicable GPOs	420	0.075 FTE (3 hrs × 52 wks)	97,595	7,320	3,074,000

B. ICRs Regarding Review and Correction by Physicians and Teaching Hospitals (§ 403.908(h))

An additional burden associated with section 1128G of the Act is the time and effort spent by covered recipients, and physician owners or investors reviewing, and if necessary, correcting the data before it is reported publicly. Neither the statute, nor this proposed rule, contains a recordkeeping requirement for physicians or teaching hospitals. Therefore, while we evaluated the burden associated with the review and correction process, we do not include an estimate of the burden for keeping records. We seek comments on this assumption, and on the extent to which physicians and teaching hospitals will keep records in the absence of a requirement to do so. While this would not be considered an information collection under the Paperwork Reduction Act, this will be helpful information to consider at the final rule stage related to the overall costs of this regulatory action.

The statute uses the definition of physician in section 1861(r) of the Act, which includes doctors of medicine and osteopathy, dentists, podiatrists, optometrists and licensed chiropractors. Using the Bureau of Labor Statistics Occupational Outlook Handbook, we estimate that information may be available for as many as 892,000 physicians. However, we believe that not all physicians will have relationships with applicable manufacturers or applicable GPOs. Based on feedback we received from stakeholders, we estimate that 25 percent of physicians have no relationships with applicable

manufacturers or applicable GPOs, which reduces our universe of affected physicians to approximately 669,000. Further, stakeholders have expressed that many physicians maintain relationships with applicable manufacturers that are relatively insignificant from a financial point of view, so we estimate that many physicians will not devote any time to reviewing and correct the aggregated reports from CMS. We estimate that only 50 percent of the remaining 669,000 physicians will review the report, which reduces our universe of affected physicians to 334,500 for year 1. For year 2, we anticipate that there would be a further reduction in the number of physicians reviewing the data because they would be familiar with the information, so we reduced the number of physicians reviewing by another 25 percent, to 250,875 physicians. For teaching hospitals, we know that about 1,100 hospitals receive Medicare GME or IME payments, all of which are defined as teaching hospitals for this provision. We believe that the vast majority of teaching hospitals would have at least one financial relationship with an applicable manufacturer, so we did not apply any adjustments to this estimate. We also anticipate that there would not be a reduction in the number of teaching hospitals that review the information after the first year because teaching hospitals probably have more complex financial relationships.

Each physician and teaching hospital would be only allowed to review the information attributed to them by all applicable manufacturers and applicable GPOs. We estimate that on average, physicians would need one hour to review the information reported. For physicians that choose to review the information, this would range from a few minutes for physicians with few relationships with applicable manufacturers, to at most 10 or 20 hours for the small number of physicians who have lengthy disputes over a payment or other transfer of value, or ownership or investment interest. We believe that teaching hospitals would have to review more payments or other transfers of value and have more complex relationships, so we estimate that, on average, it would take a representative from a teaching hospital 10 hours to review the submitted data, ranging from 3 hours for small teaching hospitals that receive few payments or other transfer of value, to 60 hours for teaching hospitals that have lengthy disputes. We welcome comment and data on these estimates, and particularly welcome data from physicians and institutions in States that have required similar reporting in the past.

The Bureau of Labor Statistics Occupational Employment Statistics publishes data on hourly compensation for Healthcare Practitioners and Technical Occupations in physicians' offices. Although this category is broader than the provider types listed in the definition of physician in section 1861(r) of the Act, we believe that many physicians would delegate their review responsibilities to their nurses and office assistants. Given this expectation, we believe that the Healthcare Practitioners and Technical Occupations cost estimate is appropriate for this calculation. The average hourly rate for Healthcare Practitioners and Technical Occupations is $54.53 in physician offices (see *http://www.bls.gov/oes/current/oes290000.htm*), which rises to $72.52 with 33 percent fringe benefits and overhead costs. This average includes physicians, who account for about half of the employment in this category. The total number of hours for physicians (including physician offices) would be 334,500 for year 1 and 188,156 hours (250,875 × 0.75 hours) for year 2, which averages to 236,938 hours annually for the first 3 years. The total estimated cost for the review and correction period for physicians in year 1 is $24,258,000. For year 2 and annually thereafter, the estimated cost for physician review and correction is $13,645,000. For the first 3 years, the average cost for all physicians review and correction will be $17,190,000 annually.

For teaching hospitals, we expect a manager to review the payments and other transfers of value. Since this review could be done by employees with multiple titles, we used the Bureau of Labor Statistics Occupational Employment Statistics reported compensation for Management Occupations at General Medical and Surgical Hospitals in 2010. The hourly average rate for Management Occupations is $48.88, or $65.01 when fringe and overhead costs are applied. For year 1, the total number of hours would be 11,000 (1,100 × 10 hours) at $65.01 per hour. For year 2 this would decrease to 8,250 hours (1,100 × 7.5 hours) at $65.01 per hour. For the first 3 years, the total number of hours for teaching hospitals will be 9,167 annually. The total estimated cost for the review and correction period for teaching hospitals is $715,000 for year 1 and $536,332 for year 2 and annually thereafter. On average, the cost for all teaching hospitals will be $595,925 annually for the first 3 years.

TABLE 3—YEAR 1 ESTIMATED BURDEN FOR PHYSICIANS AND TEACHING HOSPITALS

	Estimated entities reviewing	Estimated hours for review	Hourly rate	Average total cost per entity	Total burden
Physicians	334,500	1.0	$72.52	$75.52	$24,258,000
Teaching Hospitals	1,100	10.0	65.01	650.10	715,000

TABLE 4—YEAR 2 AND SUBSEQUENT YEAR ESTIMATED COSTS FOR PHYSICIANS AND TEACHING HOSPITALS

	Estimated entities reviewing	Estimated hours for review	Hourly rate	Average total cost per entity	Total cost
Physicians	250,875	0.75	$72.52	$56.64	$13,645,000
Teaching Hospitals	1,100	7.5	65.01	487.57	536,000

Based on the assumptions presented here, we anticipate that the total estimated burden of section 1128G of the Act for year 1 is 4,619,000 hours, at a cost of $224,360,000. For year 2 and annually thereafter, the total estimated burden is 3,372,000 hours, at a cost of $163,087,390. Annualized over 3 years, the total number of hours per year is 3,788,000 with a cost of $183,560,000.

TABLE 5—ESTIMATED ANNUAL INFORMATION COLLECTION BURDEN

Regulation section(s)	OMB Control No.	Number of respondents	Number of responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting ($)	Total labor cost of reporting ($)	Total capital/maintenance costs ($)	Total cost ($)
§ 403.904 and § 404.908(a)–(g)—Applicable Manufacturer Data Collection and Reporting.	0938–New ..	1,150	1,150	3,009	3,460,427	$46.92	$162,365,548	$0	$162,365,548
§ 403.906 and § 404.908(a)–(g)—Applicable GPO Data Collection and Reporting.	.....	420	420	173	72,800	46.92	3,415,825	0	3,415,825
§ 403.908—Physician Review and Correction Period.	.....	278,750	278.750	0.85	236,938	72.52	17,182,708	0	17,182,708
§ 403.906—Teaching Hospital Review and Correction Period.	.....	1,100	1,100	8.33	9,167	65.01	595,925	0	595,925
Total	.....	281,410	281,410	13.43	3,779,331	48.57	183,560,006	0	183,560,006

We emphasize that these estimates are, by necessity, uncertain, and that we particularly solicit comments providing us a better basis for final estimates.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget,

Attention: CMS Desk Officer, CMS–5060–P.

Fax: (202) 395–5806; or

Email: *OIRA_submission@omb.eop.gov.*

IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact Analysis

A. Statement of Need

This proposed rule is necessary to implement the requirements in section 1128G of the Act (as added by section 6002 of the Affordable Care Act), which requires applicable manufacturers of covered drugs, devices, biologicals and medical supplies to report annually to the Secretary all payments and other transfers of value to physicians and teaching hospitals (collectively, covered recipients). Section 1128G of the Act also requires applicable manufacturers and applicable group purchasing organizations (GPOs) to report ownership and investment interests held by physicians or the immediate family members of physicians in such entities.

These provisions of the Act were modeled largely on the recommendations of the Medical Payments Advisory Commission (MedPAC), which voted in 2009 to recommend Congressional enactment of a new regulatory program. The problem addressed, as stated by MedPAC, is that ''at least some'' drug and device manufacturer interactions with physicians ''are associated with rapid prescribing of new, more expensive drugs and with physician requests that such drugs be added to hospital formularies,'' as well as ''concern that manufacturers' influence over physicians' education may skew the information physicians receive.'' MedPAC went on to say that ''there is no doubt that those relationships should be transparent,'' while pointing out that ''transparency does not imply that all—or even most—of these financial ties undermine physician-patient relationships.''[4]

B. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and promoting flexibility. Section 4 of Executive Order 13563 calls upon agencies to consider approaches that ''maintain flexibility and freedom of choice for the public,'' including the ''provision of information to the public in a form that is clear and intelligible.'' A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We estimate that this rulemaking is ''economically significant'' as measured by the $100 million threshold. Accordingly, we have prepared a Regulatory Impact Analysis that presents estimated costs and benefits of the rulemaking. We solicit comments on all assumptions and estimates in this regulatory impact analysis. As is standard practice in meeting these various requirements for regulatory analysis, this section of the preamble addresses all of them together. Other parts of the preamble, together with this analysis, meet all statutory and Executive Order requirements.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. Under the RFA, ''small entities'' are those that fall below size thresholds set by the Small Business Administration, or are not-for-profit

[4] All quotes from pages 315–316 of ''Public reporting of physicians' financial relationships'' at *http://www.medpac.gov/chapters/Mar09_Ch05.pdf.*

organizations or governmental jurisdictions with a population of less than 50,000. For purposes of the RFA, we estimate that the majority of teaching hospitals and physicians, and most applicable manufacturers and applicable GPOs are small entities under either the size or not-for-profit standard. We seek comment on our assumptions and estimations regarding the RFA. According to the Small Business Administration size standards [5] the threshold size standard for ''small'' pharmaceutical manufacturers is 750 employees, for biological products, and surgical equipment, surgical supplies, and electromedical/electrotherapeutic apparatus manufacturers is 500 employees and for drug and medical equipment wholesalers is 100 employees. We estimate that approximately 75 percent of applicable manufacturers and applicable GPOs are smaller than these size standards. In this proposed rule, we propose that applicable manufacturers that do not have payments or other transfers of value or physician ownership or investment interests to report do not need to submit a report. We believe that many small applicable manufacturers and applicable GPOs will have no relationships, thus will not have to report, so the burden on them will be negligible. For small entities with financial relationships to report, we believe that they will only have a small number to report, making the reporting process significantly less burdensome. We believe that the average burden of the reporting requirements will be about $50,000 in the first year (average annual wage rate of $97,595 times 0.5 FTE) for smaller manufacturers, and even less in subsequent years. This amount is far below the 3 percent of revenues that HHS uses as a threshold for ''significant impact'' under the RFA, so these regulations will not have a significant effect on these small entities. For example, if a firm with only 100 employees generates annual revenues of $200,000 per employee, or $20 million, a cost of $50,000 would be about one-fourth of 1 percent of revenues. Firms this small would potentially face costs considerably less than $50,000, and hence an even lower effect.

As previously noted, most teaching hospitals and physicians are small entities under the RFA, since most teaching hospitals are not-for-profit and some have revenues below $34.5 million. We estimate that 95 percent of physician practices have revenues under $10 million. We believe the regulatory effects of this provision on physicians and teaching hospitals are relatively minor. Physicians and teaching hospitals are provided with the opportunity to review and correct this information, but are not involved in the data collection or reporting processes. We estimated that this review would take the great majority of individual physicians and/or their office staff one hour or less to perform annually and 10 hours or less annually for teaching hospitals, on average. Given that their review will take such a small amount of their time annually, the costs faced by physicians and teaching hospitals are not substantial. As a result, we believe that the cost burden of this review and correction period will be far below the 3 percent threshold for ''significant impact.'' Moreover, the amount of time spent on such reviews is entirely discretionary. Therefore, we have determined that this proposed rule will not have a significant economic impact on a substantial number of small entities in any category of entities it affects.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. We do not believe that any of the affected teaching hospitals are small rural hospitals. Therefore, we have determined that this proposed rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any single year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold is approximately $136 million. The estimates presented in this section of this proposed rule exceed this threshold and as a result, we have provided a detailed assessment of the anticipated costs and benefits in section V.C.4. of this proposed rule. Reporting under section 1128G of the Act is required by law, so we are limited in another policy avenue for achieving the expected benefits. Section V.D. of this proposed rule, as well as other parts of the preamble, provide detailed additional information on the alternatives we considered.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. While this proposed rule does preempt certain elements of State law, the regulatory standard simply follows the express preemption provision in the statute. Because of this and the fact that this regulation does not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable. We offer a more detailed discussion of preemption in section II.G. of this proposed rule.

C. Anticipated Effects

The regulatory impact of this provision includes applicable manufacturers and applicable GPOs collection and submitting this information to CMS, and physician and teaching hospital review and correction period. The costs of these requirements are outlined in section III. of this proposed rule. As a reminder, we estimate a total cost of about $224 million for the first year of reporting, followed by about $163 million in the second year and annually thereafter. Because of a paucity of existing data on which to base these estimates they are very uncertain. We solicit comments on the assumptions, data, estimates, and anticipated effects described throughout this analysis and section III. of this proposed rule.

1. Effects on Applicable Manufacturers and Applicable GPOs

Only applicable manufacturers that made reportable payments or other transfers of value, or have physicians (or immediate family members of physicians) holding ownership and investment interests, would be required to submit reports. Similarly, only applicable GPOs that have ownership or investment interests held by physicians (or immediate family members of physicians) would be required to submit reports. We estimate that approximately 1,150 applicable manufacturers (150 drug and biologic manufacturers and 1,000 device and medical supply manufacturers) and 420 applicable GPOs would submit reports. Across applicable manufacturers we estimate that, on average, fewer than two FTE employees would be needed for each applicable manufacturer submitting a report, and that for smaller manufacturers the effort would be on average about half of an FTE employee. For applicable GPOs, we estimate that

[5] *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.*

on average an applicable GPO would dedicate 10 percent of an FTE employee to reporting under section 1128G of the Act. The rationale for these estimations is included in section III.A. of this proposed rule and Tables 1A and 1B provide our total cost estimates for applicable manufacturers and applicable GPOs to collect and submit the information required in section 1128G of the Act.

We note, and discuss in the benefits section later in this section, that the costs of applicable manufacturers may be partially offset because many companies are already required to report to States with similar disclosure requirements, but would no longer be so required to report the same information to States after the final rule is issued. In addition, a few large companies are already reporting similar information on a national level in order to comply with Corporate Integrity Agreements (CIAs) with HHS OIG. These companies may not have to invest as much to comply with the requirements in section 1128G of the Act, so the burden of these requirements may be lower for these companies. However, given the differing requirements for each State and CIA, and broad scope of section 1128G of the Act, we do not believe it is possible to approximate the lessened burden for entities already reporting. We seek comment on this interpretation and whether there is a more precise way to quantify these estimates. Further, we estimate that applicable manufacturers and applicable GPOs may face significant first year costs in scaling and staffing up to meet the reporting requirements. However, once systems are in place and reporting becomes routine, such costs would decrease in subsequent years. Therefore we estimate that the cost for year 2 would be approximately 25 percent less for applicable manufacturers and applicable GPOs.

2. Effects on Physicians and Teaching Hospitals

We also have estimated costs for physicians and teaching hospitals, since they would have an opportunity to review and correct the data submitted by applicable manufacturers. We estimated the number of physicians as defined in the statute, which includes a number of provider types, including doctors of medicine and osteopathy, dentists, podiatrists, optometrists, and licensed chiropractors. We also reduced these numbers to adjust for physicians with no financial relationships and those who would not review and correct the data submitted on their behalf. See the Table 6 for a breakdown of this calculation. Roughly 1,100 teaching hospitals meet the proposed definition of teaching hospital and would need to review the data submitted during the 45-day review period.

TABLE 6—NUMBER OF PHYSICIANS BY TYPE

Physician type	Number
Doctor of Medicine/Doctor of Osteopathy	660,000
Doctor of Dental Medicine	150,000
Doctor of Podiatric Medicine	12,000
Doctor of Optometry	35,000
Licensed Chiropractors	*35,000
Total	892,000
Adjustment for physicians with no reports (reduction by 25%)	669,000
Adjustment for physicians who do not review reports (year 1—reduction by 50%)	334,500
Adjustment for physicians who do not review reports (year 2—reduction by 25%)	250,875

*Reduced from 50,000 in BLS to account for licensure.

We estimate that it would take on average one hour for physicians or their office staffs to review the information reported. For teaching hospitals, we estimate that, on average, it would take a representative from a teaching hospital 10 hours to review the submitted data, ranging from 3 hours for small teaching hospitals that receive few payments or other transfer of value, to 60 hours for teaching hospitals that have lengthy disputes. Further we estimate that as physicians and teaching hospitals become accustomed to receiving these reports that the amount of time they spend reviewing them and interacting with applicable manufacturers and applicable GPOs would decrease in year 2 and subsequent years of reporting. These assumptions are described in more detail in section III.B. of this proposed rule. Additionally, more detailed information regarding these costs is provided in Tables 3 and 4 of this proposed rule.

3. Effects on the Medicare, Medicaid, and CHIP

Although the Department proposes to administer this program through the Centers for Medicare and Medicaid Services, the proposed rules would have no direct effects on the Medicare, Medicaid, and CHIP. Reporting is required for all physicians and teaching hospitals regardless of their association with Medicare, Medicaid, or CHIP. Manufacturers are identified by whether the company has a product eligible for payment by Medicare, Medicaid or CHIP, but this does not affect whether or not the product may be covered under titles XVIII, XIX, or XXI of the Act.

4. Benefits

Collaboration among physicians, teaching hospitals, and industry manufacturers can contribute to the design and delivery of life-saving drugs and devices. While collaboration is beneficial to the continued innovation and improvement of our health care system, some payments from manufacturers to physicians and teaching hospitals can introduce conflicts of interests that may influence research, education, and clinical decision-making in ways that compromise clinical integrity and patient care, and lead to increased program costs. It is important to understand the extent and nature of relationships between physicians, teaching hospitals, and industry manufacturers through increased transparency, and to permit patients to make better informed decisions when choosing health care professionals and making treatment decisions. Additionally, it is important to develop a system that encourages constructive collaboration, while also discouraging relationships that threaten the underlying integrity of the health care system.

Recent increases in both the amount and scope of industry involvement in medical research, education, and clinical practice has led to considerable scrutiny. Both the Institute of Medicine and other experts, such as the Medicare Payment Advisory Commission (MedPAC), have recommended enhanced disclosure and transparency to discourage the inappropriate use of financial incentives and lessen the risk of such incentives interfering with medical judgment and patient care. We recognize that disclosure is not sufficient to differentiate beneficial, legitimate financial relationships from those that create a conflict of interest or are otherwise improper. However, transparency can shed light on the nature and extent of relationships, and discourage inappropriate conflicts of interest.[6]

We have no empirical basis for estimating the frequency of such problems, the likelihood that transparent reporting will reduce them, or the likely resulting effects on reducing the costs of medical care.

[6] Information on the IOM recommendations may be found here: *http://www.iom.edu/Reports/2009/Conflict-of-Interest-in-Medical-Research-Education-and-Practice.aspx.*

However, we observe that the costs of the proposed rule for preparing reports are small in relation to the size of the affected industry sectors.

Finally, section 1128G(d)(3) of the Act preempts State laws requiring the reporting of the same type of information as required by section 1128G(a) of the Act. Applicable manufacturers and applicable GPOs subject to State requirements would not have to comply with multiple State requirements, and instead would only have to comply with a single Federal requirement with regard to the types of information required to be reported under 1128G(a) of the Act. This benefits applicable manufacturers and applicable GPOs by allowing them a single set of reporting requirements with which to comply, lessening the potential for multiple, conflicting State requirements. We do not have a basis for estimating the amount of savings that manufacturers would realize through immediate elimination of duplicative reporting, but these could be substantial. Future savings from the preemption could be far greater, since manufacturers were facing potentially dozens of State-mandated reporting systems, all differing in reporting requirements and detail.

D. Alternatives Considered

Reporting under section 1128G of the Act is required by law, which limits the other policy options available. Section 1128G of the Act encourages transparency of financial relationships between physicians and teaching hospitals, and the pharmaceutical and device industry. Although, many of these relationships are beneficial, close relationships between manufacturers and prescribing providers can lead to conflicts of interests that may affect clinical decision-making. Increased transparency of these relationships tries to discourage inappropriate relationships, while maintaining the beneficial relationships. Public reporting and publication is the only identified option for obtaining this transparency and achieving the intensions of this provision. In developing this proposed rule, we tried to minimize the burden on reporting entities by trying to simplify the reporting requirements as much as possible within the statutory requirements.

The statute is prescriptive as to the types of information required to be reported, and the ways in which it is required to be reported; however wherever possible we tried to allow flexibility in the reporting requirements. For example—

- We do not propose to require the submission of an assumptions document for nature of payment categories, but allow applicable manufacturers and applicable GPOs to submit this voluntarily; and
- The Secretary is allowed discretion to require the reporting of additional information, but we tried to use this discretion as sparingly as possible, in large part because of the strong desire expressed by stakeholders that we not expand reporting categories. For example, we considered asking applicable manufacturers and applicable GPOs to report the method of preferred communication and email address for physicians and teaching hospitals with which they have relationships, but have solicited comment on whether this would be useful or additionally burdensome.

These examples demonstrate our effort to minimize the regulatory burden of this proposed rule and we solicit comments on all the alternatives considered in this section or elsewhere in the preamble.

Throughout this preamble we have identified alternatives that are possible within the statutory framework. While we do not have precise cost estimates for these, our qualitative assessment of each is as follows.

- We are considering not including the two proposed limitations on the definition of covered drug, device, biological, and medical supply. We propose limiting covered drugs and biologicals to those that require a prescription to be dispensed and limiting covered devices (including medical supplies) to those that require premarket approval by or notification to the FDA. These limitations may reduce the number of entities meeting the definition of applicable manufacturer and applicable GPO. However, we do not expect that removing these limitations would significantly change the regulatory burden because we do not expect many companies that manufacture only these exempt products to have significant relationships with physicians and teaching hospitals. As a result, if the companies were included as applicable manufacturers, they would likely not be required to file a report, or would only have a few relationships to report, thus minimizing the burden. We request information on the potential cost and transparency implications of including these products.
- We propose to define ''common ownership'' as covering any ownership portion of two or more entities, but are also considering an alternate interpretation that would limit the common ownership definition to circumstances where the same individual, individuals, entity, or entities own 5 percent or more of total ownership in two or more entities. We solicit information on the potential implications of this option or of variations for ease of implementation, scope of covered entities or transparency implications.
- We are also considering whether we should require that applicable manufacturers report another unique identifier, such as State license number, for physicians who are identified but do not have an NPI. Such an approach would provide additional information by which to cross-reference physicians who do not have an NPI, but it may be confusing to interpret if it is not captured in a consistent manner. Instead, we are proposing that applicable manufacturers may leave the NPI blank for physicians that do not have an NPI. We seek comments on this alternative.
- The Congress gave the Secretary authority to define a GPO and also specified that such organizations would include organizations that purchase covered drugs, devices, biologicals, and medical supplies, as well as organizations that arrange for or negotiate the purchase of covered drugs, devices, biologicals, and medical supplies. We therefore interpret the statute to encompass entities that purchase covered drugs, devices, biological, and medical supplies for resale or distribution to groups of individuals or entities. This would include physician owned distributors (PODs) of covered drugs, devices, biological, and medical supplies. We welcome comment on this interpretation and on whether there is some variation that would reasonably distinguish entities according to potential for improper influence.
- We are proposing, as required by statute, a 45-day review period during which applicable manufacturers and GPOs, covered recipients, and physician owners or investors can review the data before it is made available to the public. As discussed earlier in the preamble, there are some complexities involved, especially regarding the latter two groups. We request comments on alternative time periods and, especially, on possible alternatives to this approach that might better serve the interest of all concerned in publication of accurate information. For example, should there be a two-step process, in which the information when first released is labeled provisional, and ''final'' data is labeled as such after a second opportunity for correction? As

previously discussed, what about mail or email options? Should applicable manufacturers and applicable GPOs be required to inquire of covered recipients and physician owners or investors of their opportunity to review the data? We welcome comments on any approach that minimizes costs or improves accuracy of the information. We also would welcome information on the likely frequency of cases in which additional communication methods would be necessary, useful, costly, inexpensive, or otherwise better or worse.

As these alternatives suggest, we welcome ideas on how to improve the quality and utility of the program, while minimizing unnecessary costs. We particularly welcome comments that can provide not only better methods, but also ways to quantify the potential savings from those methods.

E. Accounting Statement (Table 7)

The Office of Management and Budget, in Circular A–40, requires an accounting statement for rules with significant economic impacts. The table that follows shows the costs we have estimated by the first year, the second year, and annualized over 10 years. We assume that future outlay costs may be similar to those costs experienced in year two. We envision that the number of financial relationships required to be reported will remain similar, so the cost of reporting the information will not change significantly. However, we welcome information on the burden in these future years and seek comment on our assumptions for the burden beyond year two.

TABLE 7—ACCOUNTING STATEMENT

Category	Costs
CY 2013 Monetized Costs	Estimated increase in expenditures of $224 million for year one for the implementation of section 1128G of the Act.
CY 2014 Annualized Monetized Costs	Estimated increase in expenditures of $163 million for year two and beyond for the implementation of section 1128G of the Act.
CY 2013–CY 2022 Annualized Monetized Costs.	Estimated increase in expenditures of $170 million at discount rate of 3% or $171 million at discount rate of 7%.
From Whom To Whom?	Increased costs for manufacturers and GPOs of covered drugs, devices, biologicals, and medical supplies, as well as physicians and teaching hospitals.
Benefits	Public reporting of the extent and nature of relationships between physicians, teaching hospitals, and industry manufacturers through increased transparency will permit patients to make better informed decisions when choosing health care professionals and making treatment decisions, and deter inappropriate financial relationships.

F. Conclusions

Section 1128G of the Act requires applicable manufacturers to report annually to CMS certain payments or transfers of value provided to physicians or teaching hospitals. In addition, applicable GPOs are required to report annually certain physician ownership interests. We estimate that the impact of these reporting requirements will be about $224 million for the first year of reporting, and $163 million for the second year and annually thereafter. As we have indicated throughout, these are rough estimates and subject to considerable uncertainty. Better estimates might well be 25 percent higher or lower. Nonetheless, we believe that the public comment period offers an excellent opportunity for all stakeholders to consider alternatives and to present quantitative or qualitative information that will enable us to both improve the effectiveness and lower the costs of the final rule. Therefore, we solicit comments on the analysis and assumptions provided throughout this preamble and in the alternatives section of the regulatory impact analysis in particular.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 402

Administrative practice and procedure, Medicaid, Medicare, Penalties.

42 CFR Part 403

Grant programs—health, Health insurance, Hospitals, Intergovernmental relations, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

PART 402—CIVIL MONEY PENALTIES, ASSESSMENTS, AND EXCLUSIONS

Subpart A—General Provisions

1. The authority citation for part 402 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

2. Section 402.1 is amended as follows:

A. In paragraph (c) introductory text, by removing the reference ''(c)(33)'' and adding the reference ''(c)(34)'' in its place.

B. Adding a new paragraph (c)(34).

The addition reads as follows:

§ 402.1 Basis and scope.

* * * * *

(c) * * *

(34) Section 1128G (b)(1) and (2) of the Act—Any applicable manufacturer or applicable group purchasing organization that fails to report information to CMS as required under Part 403 Subpart I.

* * * * *

3. Section 402.105 is amended as follows:

A. In paragraph (a), by removing the reference to ''paragraphs (b) through (g)'' and adding the reference ''paragraphs (b) through (h)'' in its place.

B. Adding paragraphs (d)(5) and (h).

The additions read as follows:

§ 402.105 Amount of penalty.

* * * * *

(d) * * *

(5) CMS or OIG may impose a penalty of not more than $10,000 for each failure of an applicable manufacturer to report timely, accurately, and completely a payment or other transfer of value, or each failure of an applicable manufacturer or an applicable group purchasing organization to report timely, accurately, and completely an ownership or investment interest (§ 402.1(c)(34)). The total penalty imposed with respect to each annual

submission of information will not exceed $150,000.

* * * * *

(h) *$100,000.* CMS or OIG may impose a penalty of not more than $100,000 for each knowing failure of an applicable manufacturer to report timely, accurately and completely a payment or other transfer of value, or each knowing failure of an applicable manufacturer or an applicable group purchasing organization to report timely an ownership or investment interest (§ 402.1(c)(34)). The total penalty imposed with respect to each annual submission of information will not exceed $1,000,000.

PART 403—SPECIAL PROGRAMS AND PROJECTS

4. The authority citation for part 403 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

5. Subpart I is added to part 403 to read as follows:

Subpart I—Transparency Reports and Reporting of Physician Ownership or Investment Interests

Sec.
403.900 Purpose and scope.
403.902 Definitions.
403.904 Reports of payments or other transfers of value.
403.906 Reports of physician ownership and investment interests.
403.908 Procedures for electronic submission of reports.
403.910 Delayed publication for payments made under product research or development agreements and clinical investigations.
403.912 Penalties for failure to report.
403.914 Preemption of State laws.

Subpart I—Transparency Reports and Reporting of Physician Ownership or Investment Interests

§ 403.900 Purpose and scope.

The regulations in this subpart implement section 1128G of the Act. These regulations apply to applicable manufacturers and applicable group purchasing organizations and describe the requirements and procedures for applicable manufacturers to report payments or other transfers of value to physicians and teaching hospitals, as well as for applicable manufacturers and applicable group purchasing organizations to report ownership or investment interests held by physicians or immediate family members of physicians.

§ 403.902 Definitions.

Applicable group purchasing organization means an entity that—

(1) Operates in the United States, or in a territory, possession or commonwealth of the United States; and

(2) Purchases, arranges for or negotiates the purchase of a covered drug, device, biological, or medical supply for a group of individuals or entities, and not solely for use by the entity itself.

Applicable manufacturer means an entity that is—

(1) Engaged in the production, preparation, propagation, compounding, or conversion of a covered drug, device, biological, or medical supply for sale or distribution in the United States, or in a territory, possession, or commonwealth of the United States; or

(2) Under common ownership with an entity in paragraph (1) of this definition, which provides assistance or support to such entity with respect to the production, preparation, propagation, compounding, conversion, marketing, promotion, sale, or distribution of a covered drug, device, biological, or medical supply for sale and distribution in the United States, or in a territory, possession, or commonwealth of the United States.

Charity care means services provided by a covered recipient specifically for a patient who cannot pay, where the covered recipient neither receives, nor expects to receive, payment because of the patient's inability to pay.

Charitable contribution includes, but is not limited to, any payment or transfer of value made to an organization with tax-exempt status under the Internal Revenue Code of 1986.

Clinical investigation means any experiment involving one or more human subjects, or materials derived from human subjects, in which a drug or device is administered, dispensed, or used.

Common ownership means entities that are owned, in whole or in part, by the same individual, individuals, entity, or entities, directly or indirectly. This includes, but is not limited to, parent corporations, direct and indirect subsidiaries, and brother or sister corporations.

Covered device means any device for which payment is available under Title XVIII of the Act or under a State plan under Title XIX or XXI of the Act (or a waiver of such plan), either separately, as part of a fee schedule payment, or as part of a composite payment rate (for example, the hospital inpatient prospective payment system or the hospital outpatient prospective payment system). This definition is limited to those devices (including medical supplies) that, by law, require premarket approval by or premarket notification to the Food and Drug Administration.

Covered drug, device, biological, or medical supply means any drug, device, biological, or medical supply for which payment is available under Title XVIII of the Act or under a State plan under Title XIX or XXI of the Act (or a waiver of such plan), either separately, as part of a fee schedule payment, or as part of a composite payment rate (for example, the hospital inpatient prospective payment system or the hospital outpatient prospective payment system). With respect to a drug or biological, this definition is limited to those drug and biological products that, by law, require a prescription to be dispensed. With respect to a device or medical supply, this definition is limited to those devices (including medical supplies) that, by law, require premarket approval by or premarket notification to the Food and Drug Administration.

Covered recipient means—

(1) Any physician, except for a physician who is an employee (as defined in section 1877(h)(2) of the Act) of an applicable manufacturer; or

(2) A teaching hospital, which is any institution that received a payment under 1886(d)(5)(B), 1886(h), or 1886(s) of the Act during the last calendar year for which such information is available.

Employee means an individual who is considered to be ''employed by'' or an ''employee'' of an entity if the individual would be considered to be an employee of the entity under the usual common law rules applicable in determining the employer-employee relationship (as applied for purposes of section 3121(d)(2) of the Internal Revenue Code of 1986).

Immediate family member means any of the following:

(1) Spouse.

(2) Natural or adoptive parent, child, or sibling.

(3) Stepparent, stepchild, stepbrother, or stepsister.

(4) Father-, mother-, daughter-, son-, brother-, or sister-in-law.

(5) Grandparent or grandchild.

(6) Spouse of a grandparent or grandchild.

Know, knowing, or knowingly. (1) Means that a person, with respect to information—

(i) Has actual knowledge of the information;

(ii) Acts in deliberate ignorance of the truth or falsity of the information; or

(iii) Acts in reckless disregard of the truth or falsity of the information; and

(2) Requires no proof of a specific intent to defraud.

Ownership or investment interest. (1) Includes, but is not limited to—

(i) Stock, stock option(s) (other than those received as compensation, until they are exercised);

(ii) Partnership share(s);

(iii) Limited liability company membership(s);

(iv) Loans, bonds, or other financial instruments that are secured with an entity's property or revenue or a portion of that property or revenue.

(2) May be direct or indirect and through debt, equity or other means; and

(3) Must not include an ownership or investment interest in a publicly traded security or mutual fund, as described in section 1877(c) of the Act, nor any of the following:

(i) An interest in an applicable manufacturer or applicable group purchasing organization that arises from a retirement plan offered by the applicable manufacturer or applicable group purchasing organization to the physician (or a member of his or her immediate family) through the physician's (or immediate family member's) employment with that applicable manufacturer or applicable group purchasing organization.

(ii) Stock options and convertible securities received as compensation, until the stock options are exercised or the convertible securities are converted to equity.

(iii) An unsecured loan subordinated to a credit facility.

Physician has the same meaning given that term in section 1861(r) of the Act.

§ 403.904 Reports of payments or other transfers of value.

(a) *General rule.* Payments or other transfers of value provided to any covered recipient, including payments to another individual or entity at the request of (or designated on behalf of) a covered recipient, by an applicable manufacturer or a third party (on behalf of an applicable manufacturer) must be reported to CMS by the applicable manufacturer on an annual basis.

(b) *Required information to report.* A report must contain all of the following information for each payment or other transfer of value:

(1) Name of the covered recipient. If the payment or other transfer of value was provided to another individual or entity at the request of (or designated on behalf of) any covered recipient, the payment or transfer of value must be disclosed in the name of that covered recipient.

(2) Business address of the covered recipient, including street address, suite or office number (if applicable), city, state, and ZIP code.

(3) In the case of a covered recipient who is a physician, the specialty and National Provider Identifier (if applicable) of the covered recipient.

(4) Amount of each payment or other transfer of value to the covered recipient.

(5) Date of each payment or transfer of value to the covered recipient.

(6) Form of each payment or other transfer of value, as described in paragraph (c) of this section.

(7) Nature of each payment or other transfer of value, as described in paragraph (d) of this section.

(8) If a payment or other transfer of value is related to marketing, education, or research specific to a covered drug, device, biological, or medical supply, the name under which the covered drug, device, biological, or medical supply is marketed. If the marketed name has not yet been selected, applicable manufacturer must indicate the scientific name. Applicable manufacturers may only report a single covered drug, device, biological or medical supply for each payment or other transfer of value.

(9) The applicable manufacturer must indicate that a payment or other transfer of value is subject to delayed publication, if the payment or other transfer of value is made under any of the following arrangements:

(i) In accordance with a product research or development agreement for services furnished in connection with research on or development of a new drug, device, biological, or medical supply or a new application of an existing drug, device, biological or medical supply.

(ii) In connection with a clinical investigation regarding a new drug, device, biological, or medical supply.

(10) If the payment or other transfer of value is made to an entity or individual at the request of (or designated on behalf of) a covered recipient, the name of the other individual or entity that receives the payment or other transfer of value.

(11) Whether the payment or other transfer of value was provided to a physician who holds an ownership or investment interest (as defined § 403.902) in the applicable manufacturer.

(c) *Reporting the form of payment or other transfer of value.* An applicable manufacturer must report each payment or transfer of value, or separable part of that payment or transfer of value, as taking one of the following forms, using the designation that best describes the form of the payment or other transfer of value, or separable part of that payment or other transfer of value. Each of the following terms has its dictionary definition:

(1) Cash or cash equivalent.

(2) In-kind items or services.

(3) Stock, a stock option, or any other ownership interest, dividend, profit, or other return on investment.

(d) *Reporting the nature of the payment or other transfer of value*—(1) *General rule.* The categories describing the nature of a payment or other transfer of value are mutually exclusive.

(2) *Rules for categorizing natures of payment.* An applicable manufacturer must categorize each payment or other transfer of value, or separable part of that payment or transfer of value, in one of the categories listed in this paragraph (d)(2), using the designation that best describes the nature of the payment or other transfer of value, or separable part of that payment or other transfer of value. If a payment or other transfer of value could reasonably be considered as falling within more than one category, the applicable manufacturer should select one category that it deems to most accurately describe the nature of the payment or transfer of value. Each of the following terms has its dictionary definition:

(i) Consulting fee.

(ii) Compensation for services other than consulting.

(iii) Honoraria.

(iv) Gift.

(v) Entertainment.

(vi) Food and beverage.

(vii) Travel and lodging.

(viii) Education.

(ix) Research.

(x) Charitable contribution.

(xii) Royalty or license.

(xiii) Current or prospective ownership or investment interests.

(xiv) Direct compensation for serving as a faculty or as a speaker for a medical education program.

(xv) Grant.

(xvi) Other.

(e) *Special rules for research payments.* (1) Applicable manufacturers must designate each research payment or transfer of value as direct research or indirect research.

(i) Direct research, is a payment or other transfer of value provided to a covered entity directly by an applicable manufacturer or through a contract research organization (or similar entity).

(ii) Indirect research, is a payment or other transfer of value provided by an applicable manufacturer (including through a contract research organization or similar entity) to a clinic, hospital, or other institution conducting the research, and that clinic, hospital, or

other institution conducting the research in turn pays the physician covered recipient (or multiple physician covered recipients) serving as the principal investigator(s).

(2) All payments or other transfers of value designated as research (direct or indirect) must be subject to a written agreement and research protocol. Direct or indirect research payments (whether made directly by an applicable manufacturer or through a clinical research organization or similar entity) must be reported as follows:

(i) For indirect research, individually under the name(s) and NPI(s) (if applicable) of the physician covered recipient principal investigator(s). The total amount paid to the clinic, hospital or other institution conducting the research, must be reported for each principal investigator.

(ii) For direct research, individually under the name(s) and NPI(s) (if applicable) of the covered recipient. The total must indicate the amount the covered recipient received.

(3) If payment is made to a teaching hospital, the payment to the teaching hospital must be reported as follows:

(i) Direct research under the name of the teaching hospital.

(ii) Indirect research under the name(s) and NPI(s) (if applicable) of the physician covered recipient serving as principal investigator(s).

(4) For direct or indirect payments provided to physician covered recipients, CMS reports the total payment amount separately from other payments or transfers of value.

(f) *Exclusions from reporting.* The following types of payments or other transfers of value are excluded from the reporting requirements specified in this section:

(1) Transfers of value made indirectly to a covered recipient through a third party in cases when the applicable manufacturer is unaware of the identity of the covered recipient. An applicable manufacturer is unaware of the identity of a covered recipient if the applicable manufacturer does not know (as defined in § 403.902) the identity of the covered recipient.

(2)(i) For CY 2012, transfers of value less than $10, unless the aggregate amount transferred to, requested by, or designated on behalf of the covered recipient exceeds $100 in a calendar year.

(ii) For CY 2013 and subsequent calendar years, to determine if transfers of value are excluded under this section, the dollar amounts specified in paragraph (f)(2)(i) of this paragraph must be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) for the 12-month period ending with June of the previous year.

(3) Product samples that are not intended to be sold and are intended for patient use.

(4) Educational materials that directly benefit patients or are intended for patient use.

(5) The loan of a covered device for a short-term trial period, not to exceed 90 days, to permit evaluation of the covered device by the covered recipient.

(6) Items or services provided under a contractual warranty, including the replacement of a covered device, where the terms of the warranty are set forth in the purchase or lease agreement for the covered device.

(7) A transfer of anything of value to a covered recipient when the covered recipient is a patient and not acting in the professional capacity of a covered recipient.

(8) Discounts, including rebates.

(9) In-kind items used for the provision of charity care.

(10) A dividend or other profit distribution from, or ownership or investment interest in, a publicly traded security or mutual fund.

(11) In the case of an applicable manufacturer who offers a self-insured plan, payments for the provision of health care to employees under the plan.

(12) In the case of a covered recipient who is a licensed non-medical professional, a transfer of anything of value to the covered recipient if the transfer is payment solely for the non-medical professional services of the licensed non-medical professional.

(13) In the case of a covered recipient who is a physician, a transfer of anything of value to the covered recipient if the transfer is payment solely for the services of the covered recipient with respect to a civil or criminal action or an administrative proceeding.

§ 403.906 Reports of physician ownership and investment interests.

(a) *General rule.* Each applicable manufacturer and applicable group purchasing organization must report to CMS on an annual basis all ownership or investment interests in the applicable manufacturer or applicable group purchasing organization that were held by a physician or an immediate family member of a physician during the preceding year.

(b) *Identifying information.* Reports on physician ownership or investment interests must include the following identifying information:

(1) Name of the physician, and whether the ownership or investment interest is held by an immediate family member of the physician.

(2) Business address of physician, including street address, suite or office number (if applicable), city, State, and ZIP code.

(3) The physician owner's specialty and NPI (if applicable). If the ownership or investment interest is held by the immediate family member of a physician, the physician's specialty and National Provider Identifier must be reported.

(4) Dollar amount invested by each physician or immediate family member of the physician.

(5) Value and terms of each ownership or investment interest.

(6) For any payment or other transfer of value provided to a physician holding an ownership or investment interest (or to an entity or individual at the request of, or designated on behalf of, a physician holding such an ownership or investment interest), an applicable manufacturer or applicable group purchasing organization must report the information requested in § 403.904(b). The same exclusions from reporting in § 403.904(f) apply to payments or other transfers of value made by applicable manufacturers and applicable group purchasing organizations to physician owners or investors under this section.

§ 403.908 Procedures for electronic submission of reports.

(a) *File format.* Reports required under this subpart must be electronically submitted as comma separated value (CSV) files to CMS by March 31, 2013, and by the 90th day of each subsequent calendar year.

(b) *General rules.* (1) If an applicable manufacturer made no reportable payments or transfers of value in the previous calendar year, nor had any reportable ownership or investment interests held by a physician or a physician's immediate family member (as defined in § 403.902) during the previous calendar year, the applicable manufacturer is not required to file a report.

(2) If an applicable group purchasing organization had no reportable ownership or investment interests held by a physician or physician's immediate family member during the previous calendar year, the applicable group purchasing organization is not required to file a report.

(c) *Registration.* Any applicable manufacturer or applicable group purchasing organization that is required to report under this subpart must register with CMS before March 31,

2013. During registration, applicable manufacturers and applicable group purchasing organizations must name a point of contact with appropriate contact information.

(d) *Other rules.* (1) An applicable manufacturer under paragraph (1) of the definition of ''applicable manufacturer'' in § 403.902 and an entity (or entities) under common ownership with the applicable manufacturer under paragraph (2) of the definition of ''applicable manufacturer'' may, but are not required to, file a consolidated report of payments or other transfers of value to covered recipients, and physician ownership or investment interests.

(2) If an applicable manufacturer and an entity (or entities) under common ownership choose to file a consolidated report, the report must provide the names of each applicable manufacturer and entity (or entities) under common ownership that the report covers. It is up to the discretion of the applicable manufacturer and entity (or entities) under common ownership whether or not specific payments need to be identified to the entity that provided the payment.

(3) If a payment or other transfer of value is provided in accordance with a joint venture or other cooperative agreement between two or more applicable manufacturers, the payment or other transfer of value must be reported—

(i) In the name of the applicable manufacturer that actually furnished the payment or other transfer of value to the covered recipient, unless the terms of a written agreement between the applicable manufacturers specifically require otherwise, so long as the agreement requires that all payments or other transfers of value in accordance with the arrangement are reported by one of the applicable manufacturers; and

(ii) Only once by one applicable manufacturer.

(e) *Errors or omissions.* If an applicable manufacturer or applicable group purchasing organization discovers an error or omission in its annual report, it must submit corrected information to CMS immediately upon discovery of the error or omission.

(f) *Attestation.* Each report, including any subsequent corrections to a filed report, must include a certification by the Chief Executive Officer, Chief Financial Officer, or Chief Compliance Officer of the applicable manufacturer or applicable group purchasing organization that the information submitted is true, correct, and complete to the best of his or her knowledge and belief.

(g) *45-day review period for review and error correction*—(1) *General rule.* Applicable manufacturers, applicable group purchasing organizations, covered recipients, and physician owners or investors must have an opportunity to review and submit corrections to the information submitted for a period of not less than 45-days before CMS makes the information available to the public. In no case may this 45-day period for review and submission of corrections prevent the information from being made available to the public.

(2) *Notification.* CMS notifies the applicable manufacturers, applicable group purchasing organizations, covered recipients, and physician owners or investors when the reported information is ready for review.

(i) Applicable manufacturers and applicable group purchasing organizations are notified through the point of contact the applicable manufacturer or applicable group purchasing organization identified during registration.

(ii) Physicians and teaching hospitals—

(A) Are notified using a CMS' list serve and through a posting.

(B) May also register with CMS to receive notification about the review processes.

(iii) The 45-day review period begins on the date of this notification, but in no case may the 45-day review period begin later than August 16, 2013, or May 16 of any subsequent year.

(3) *Process.* (i) An applicable manufacturer, applicable group purchasing organization, covered recipient, and a physician owner or investor may log into a secure Web site where each applicable manufacturer, applicable group purchasing organization, covered recipient, and physician owner is able to view the information reported specific to it.

(ii) If the applicable manufacturer, applicable group purchasing organization, covered recipient, or physician owner or investor agrees with the information reported, the applicable manufacturer, applicable group purchasing organization, covered recipient, or physician owner or investor may electronically certify that the information reported is accurate.

(4) *Data disputes.* (i) Upon request by a covered recipient, physician owner or investor, CMS provides the point of contact information for the applicable manufacturer or applicable group purchasing organization in the event that the covered recipient or physician owner disputes the reported data.

(ii) The covered recipient or physician owner or investor must directly contact the applicable manufacturer or applicable group purchasing organization to attempt to resolve any dispute regarding a reported payment or other transfer of value or an ownership or investment interest.

(iii) At the discretion of the parties involved, one entity must notify CMS that a specific payment or other transfer of value, or ownership or investment interest is disputed and the outcome of the dispute at the end of the 45-day review period.

(iv) If the dispute is not resolved by the end of the 45-day review period, CMS publicly reports both the applicable manufacturer's or applicable group purchasing organization's version of the payment or other transfer of value, or ownership or investment interest data, as well as the covered recipient's or physician owner's version of the payment or other transfer of value, or ownership or investment interest data.

§ 403.910 Delayed publication for payments made under product research or development agreements and clinical investigations.

(a) *General rule.* In the case of payments or other transfers of value made to a covered recipient by an applicable manufacturer under a product research or development agreement, or in connection with a clinical investigation, payments may be delayed from publication on the Web site. Publication of a payment or other transfer of value is delayed when made in connection with the following instances:

(1) Research on or development of a new drug, device, biological, or medical supply or a new application of an existing drug, device, biological, or medical supply.

(2) Clinical investigations regarding a new drug, device, biological, or medical supply.

(b) *Research or development agreement.* The research or development agreement must include a written agreement and research protocol between the applicable manufacturer and covered recipient.

(c) *Date of publication.* Payments must be reported to CMS on the first reporting date following the year in which they occur, but CMS does not publicly post the payment until the first annual publication date after the earlier of the following:

(1) The date of the approval, licensure or clearance of the covered drug, device, biological, or medical supply by the Food and Drug Administration.

(2) Four calendar years after the date the payment or other transfer of value was made.

(d) *Notification of delayed publication.* It is the responsibility of the applicable manufacturer to notify CMS during subsequent annual submissions, if the new drug, device, biological or medical supply, with which the payment is associated, is approved by the FDA.

(1) An applicable manufacturer must indicate on its report to CMS whether a payment or other transfer of value is eligible for a delay in publication. The absence of this indication in the report results in CMS posting all payments publicly in the first year of public reporting.

(2) An applicable manufacturer must continue to indicate annually in its report that FDA approval of the new drug, device, biological or medical supply, with which the payment is associated, is pending.

(3) Failure to notify CMS when FDA approval occurs may be considered failure to report, and the applicable manufacturer may be subject to civil monetary penalties.

(4) If, after 4 years from the date of a payment first appearing in a report to CMS, there is an indication in a report that the payment is subject to delayed reporting, it is reported regardless of the indication.

§ 403.912 Penalties for failure to report.

(a) *Failure to report.* (1) Any applicable manufacturer or applicable group purchasing organization that fails to accurately and completely submit the information required in accordance with the rules established under this subpart in a timely manner is subject to a civil monetary penalty of not less than $1,000, but not more than $10,000, for each payment or other transfer of value or ownership or investment interest not reported.

(2) The total amount of civil monetary penalties imposed on an applicable manufacturer or applicable group purchasing organization under this subpart with respect to each annual submission of information will not exceed $150,000.

(b) *Knowing failure to report.* (1) Any applicable manufacturer or applicable group purchasing organization that knowingly fails to accurately and completely submit the information required in accordance with the rules established under this subpart in a timely manner is subject to a civil monetary penalty of not less than $10,000, but not more than $100,000, for each payment or other transfer of value or ownership or investment interest not reported.

(2) The total amount of civil monetary penalties imposed on an applicable manufacturer or group purchasing organization for knowing failure to report under this subpart with respect to each annual submission of information will not exceed $1,000,000.

(c) *Determinations regarding the amount of civil monetary penalties.* In determining the amount of the civil monetary penalty, factors to be considered include, but are not limited to, the following:

(1) The length of time the applicable manufacturer or applicable group purchasing organization failed to report, including the length of time the applicable manufacturer and applicable GPO knew of the payment or other transfer of value, or ownership or investment interest.

(2) Amount of the payment the applicable manufacturer or applicable group purchasing organization failed to report.

(3) Level of culpability.

(4) Nature and amount of information reported in error.

(5) Degree of diligence exercised in correcting information reported in error.

(d) *Record retention and audits*— (1) *Maintenance of records.* (i) Applicable manufacturers and applicable group purchasing organizations must maintain all books, contracts, records, documents, and other evidence sufficient to enable the audit, evaluation, and inspection of the applicable manufacturer's or applicable group purchasing organization's compliance with the requirement to accurately and completely submit information in a timely manner in accordance with the rules established under this subpart.

(ii) The items described in paragraph (d)(1)(i) of this section must be maintained for a period of at least 5 years from the date the payment or other transfer of value, or ownership or investment interest is published publicly on the Web site.

(2) *Audit.* HHS, CMS, OIG or their designees may audit, inspect, and evaluate any books, contracts, records, documents, and other evidence of applicable manufacturers and applicable group purchasing organizations that pertain to their compliance with the requirement to accurately and completely submit information in a timely manner in accordance with the rules established under this subpart.

(3) The record retention and audit requirements in this subpart are in addition to, and do not limit, any other applicable requirements that may obligate applicable manufacturers or applicable group purchasing organizations to retain and allow access to records.

§ 403.914 Preemption of State laws.

(a) *General rule.* In the case of a payment or other transfer of value provided by an applicable manufacturer to a covered recipient, this subpart preempts any statute or regulation of a State or political subdivision of a State that requires an applicable manufacturer to disclose or report, in any format, the type of information regarding the payment or other transfer of value required to be reported under this subpart.

(b) *Information collected for public health purposes.* (1) Information required to be reported to a Federal, State, or local governmental agency for public health surveillance, investigation, or other public health purposes or health oversight purposes must still be reported to appropriate Federal, State, or local governmental agencies, regardless of whether the same information is required to be reported under this subpart.

(2) Governmental agencies include, but are not limited to, the following:

(i) Agencies that are charged with preventing or controlling disease, injury, disability.

(ii) Agencies that conduct oversight activities authorized by law, including audits, investigations, inspections, licensure or disciplinary actions, or other activities necessary for oversight of the health care system.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program; Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: November 9, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: December 13, 2011.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

BILLING CODE 4120–01–P

This Addendum will not appear in the Code of Federal Regulations.

ADDENDUM: SAMPLE REPORTING TEMPLATE
TABLE A: PAYMENT OR OTHER TRANSFER OF VALUE TEMPLATE

Notes:

This is a sample template for illustrative purposes, and is subject to changes.

Please submit this template as a Comma Separated Value (CSV) file

Recipient = Covered Recipient or Physician Owner or Investor
Form of payment must be 1) cash or cash equivalent, 2) in-kind items or services, 3) stock, a stock option, or any other ownership interest, dividend, profit, or other return on investment.

Nature of payment must be 1) Consulting fee, 2) Compensation for services other than consulting, 3) Honoraria, 4) Gift, 5) Entertainment, 6) Food and beverage, 7) Travel and lodging, 8) Education, 9) Direct Research, 10) Indirect Research, 11) Charitable contribution, 12)Royalty or license, 13) Current or prospective ownership of investment interests, 14) Direct compensation for serving as a faculty or as a speaker for a medical education program, 15) Grant, or 16) Other.

Reporting Entity	Recipient Name	Recipient Business street address	Recipient Specialty *physician only	Recipient National Provider Identifier (NPI) *physician only	Amount of Payment (US dollars)	Date of Payment	Form of Payment	Nature of Payment	Name of Associated Drug, Device, Biological, or Medical Supply *if necessary	Entity Paid Name	Physician Owner or Investor (y/n)	Delayed Publication (y/n)

TABLE B: SAMPLE PHYSICIAN OWNERSHIP OR INVESTMENT INTEREST TEMPLATE

Notes:

This is a sample template for illustrative purposes, and is subject to changes.

Please submit this template as a Comma Separated Value (CSV) file.

Owner = Physician Owner or Investor.

All payments or other transfers of value provided to physician owners or investors must be reported on the Payment & Transfer of Value tab and designated as that to a physician owner or investor.

Reporting Entity	Recipient Name	Recipient Business street address	Recipient Specialty *physician only	Recipient National Provider Identifier (NPI) *physician only	Interest Held by Immediate Family Member (y/n)	Dollar Amount Invested	Value of Interest	Terms of Interest

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Part III

Commodity Futures Trading Commission

17 CFR Parts 1 and 30

Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1 and 30

RIN 3038–AC79

Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is amending its regulations regarding the investment of customer segregated funds subject to Commission Regulation 1.25 (Regulation 1.25) and funds held in an account subject to Commission Regulation 30.7 (Regulation 30.7, and funds subject thereto, 30.7 funds). Certain amendments reflect the implementation of new statutory provisions enacted under Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The amendments address: certain changes to the list of permitted investments (including the elimination of in-house transactions), a clarification of the liquidity requirement, the removal of rating requirements, and an expansion of concentration limits including asset-based, issuer-based, and counterparty concentration restrictions. They also address revisions to the acknowledgment letter requirement for investment in a money market mutual fund (MMMF), revisions to the list of exceptions to the next-day redemption requirement for MMMFs, the elimination of repurchase and reverse repurchase agreements with affiliates, the application of customer segregated funds investment limitations to 30.7 funds, the removal of ratings requirements for depositories of 30.7 funds, the elimination of the option to designate a depository for 30.7 funds, and certain technical changes.

DATES: This rule is effective February 17, 2012. All persons shall be in compliance with this rule not later than June 18, 2012.

FOR FURTHER INFORMATION CONTACT: Ananda K. Radhakrishnan, Director, (202) 418–5188, *aradhakrishnan@cftc.gov*, or Jon DeBord, Special Counsel, (202) 418–5478, *jdebord@cftc.gov*, Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW., Washington, DC 20581.

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I. Background

A. Regulation 1.25

Under Section 4d [1] of the Commodity Exchange Act (Act),[2] customer segregated funds may be invested in obligations of the United States and obligations fully guaranteed as to principal and interest by the United States (U.S. government securities) and general obligations of any State or of any political subdivision thereof (municipal securities). Pursuant to authority under Section 4(c) of the Act,[3] the Commission substantially expanded the list of permitted investments by amending Regulation 1.25 [4] in December 2000 to permit investments in general obligations issued by any enterprise sponsored by the United States (government sponsored enterprise or GSE debt securities), bank certificates of deposit (CDs), commercial paper, corporate notes,[5] general obligations of a sovereign nation, and interests in MMMFs.[6] In connection with that expansion, the Commission included several provisions intended to control exposure to credit, liquidity, and market risks associated with the additional investments, *e.g.,* requirements that the investments satisfy specified rating standards and concentration limits, and be readily marketable and subject to prompt liquidation.[7]

The Commission further modified Regulation 1.25 in 2004 and 2005. In February 2004, the Commission adopted amendments regarding repurchase agreements using customer-deposited securities and time-to-maturity requirements for securities deposited in connection with certain collateral management programs of derivatives clearing organizations (DCOs).[8] In May 2005, the Commission adopted amendments related to standards for investing in instruments with embedded derivatives, requirements for adjustable rate securities, concentration limits on reverse repurchase agreements, transactions by futures commission merchants (FCMs) that are also registered as securities brokers or dealers (in-house transactions), rating standards and registration requirements for MMMFs, an auditability standard for investment records, and certain technical changes.[9]

The Commission has been, and continues to be, mindful that customer segregated funds must be invested in a manner that minimizes their exposure to credit, liquidity, and market risks both to preserve their availability to customers and DCOs and to enable investments to be quickly converted to cash at a predictable value in order to avoid systemic risk. Toward these ends, Regulation 1.25 establishes a general prudential standard by requiring that all permitted investments be ''consistent with the objectives of preserving principal and maintaining liquidity.'' [10]

In 2007, the Commission's Division of Clearing and Intermediary Oversight (Division) launched a review of the nature and extent of investments of Regulation 1.25 funds and 30.7 funds

[1] 7 U.S.C. 6d.

[2] 7 U.S.C. 1 *et seq.* (2006), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

[3] 7 U.S.C. 6(c).

[4] 17 CFR 1.25. Commission regulations may be accessed through the Commission's Web site, *http://www.cftc.gov.*

[5] This category of permitted investment was later amended to read ''corporate notes or bonds.'' *See* 70 FR 28190, 28197 (May 17, 2005).

[6] *See* 65 FR 77993 (Dec. 13, 2000) (publishing final rules); and 65 FR 82270 (Dec. 28, 2000) (making technical corrections and accelerating effective date of final rules from February 12, 2001 to December 28, 2000).

[7] *Id.*

[8] 69 FR 6140 (Feb. 10, 2004).

[9] 70 FR 28190.

[10] 17 CFR 1.25(b).

(2007 Review) in order to further its understanding of investment strategies and practices and to assess whether any changes to the Commission's regulations would be appropriate. As part of this review, all registered DCOs and FCMs carrying customer accounts provided responses to a series of questions. As the Division was conducting follow-up interviews with respondents, the market events of September 2008 occurred and changed the financial landscape such that much of the data previously gathered no longer reflected current market conditions. However, that data remains useful as an indication of how Regulation 1.25 was implemented in a more stable financial environment. Additionally, recent events in the economy have underscored the importance of conducting periodic reassessments and, as necessary, revising regulatory policies to strengthen safeguards designed to minimize risk, while retaining an appropriate degree of investment flexibility and opportunities for capital efficiency for DCOs and FCMs investing customer segregated funds.

B. Regulation 30.7

Regulation 30.7 [11] governs an FCM's treatment of customer money, securities, and property associated with positions in foreign futures and foreign options. Regulation 30.7 was issued pursuant to the Commission's plenary authority under Section 4(b) of the Act.[12] Because Congress did not expressly apply the limitations of Section 4d of the Act to 30.7 funds, the Commission historically has not subjected those funds to the investment limitations applicable to customer segregated funds.

The investment guidelines for 30.7 funds are general in nature.[13] Although Regulation 1.25 investments offer a safe harbor, the Commission does not currently limit investments of 30.7 funds to permitted investments under Regulation 1.25. Appropriate depositories for 30.7 funds currently include certain financial institutions in the United States, financial institutions in a foreign jurisdiction meeting certain capital and credit rating requirements, and any institution not otherwise meeting the foregoing criteria, but which is designated as a depository upon the request of a customer and the approval of the Commission.

C. Advance Notice of Proposed Rulemaking

In May 2009, the Commission issued an advance notice of proposed rulemaking (ANPR) [14] to solicit public comment prior to proposing amendments to Regulations 1.25 and 30.7. The Commission stated that it was considering significantly revising the scope and character of permitted investments for customer segregated funds and 30.7 funds. In this regard, the Commission sought comments, information, research, and data regarding regulatory requirements that might better safeguard customer segregated funds. It also sought comments, information, research, and data regarding the impact of applying the requirements of Regulation 1.25 to investments of 30.7 funds.

The Commission received twelve comment letters in response to the ANPR, and it considered those comments in formulating its proposal.[15] Eleven of the 12 letters supported maintaining the current list of permitted investments and/or specifically ensuring that MMMFs remain a permitted investment. Five of the letters were dedicated solely to the topic of MMMFs, providing detailed discussions of their usefulness to FCMs. Several letters addressed issues regarding ratings, liquidity, concentration, and portfolio weighted average time to maturity. The alignment of Regulation 30.7 with Regulation 1.25 was viewed as non-controversial.

The FIA's comment letter expressed its view that ''all of the permitted investments described in Rule 1.25(a) are compatible with the Commission's objectives of preserving principal and maintaining liquidity.'' This opinion was echoed by MF Global, Newedge and FC Stone. CME asserted that only ''a small subset of the complete list of Regulation 1.25 permitted investments are actually used by the industry.'' NFA also wrote that investments in instruments other than U.S. government securities and MMMFs are ''negligible,'' and recommended that the Commission eliminate asset classes not ''utilized to any material extent.''

D. The Dodd-Frank Act

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[16] Title IX of the Dodd-Frank Act [17] was enacted in order to increase investor protection, promote transparency and improve disclosure.

Section 939A of the Dodd-Frank Act obligates federal agencies to review their respective regulations and make appropriate amendments in order to decrease reliance on credit ratings. The Dodd-Frank Act requires the Commission to conduct this review within one year after the date of enactment.[18] Included in these rule amendments are changes to Regulations 1.25 and 30.7 that remove provisions setting forth credit rating requirements. Separate rulemakings addressed the removal of credit ratings from Commission Regulations 1.49 and 4.24 [19] and the removal of Appendix A to Part 40 (which contains a reference to credit ratings).[20]

E. The Notice of Proposed Rulemaking

A Notice of Proposed Rulemaking (NPRM) was issued by the Commission on October 26, 2010, having been considered in conjunction with the Dodd-Frank rulemaking regarding credit ratings. The NPRM was published in the **Federal Register** on November 3, 2010, and the comment period closed on December 3, 2010.[21]

The Commission invited comments related to topics covered by Regulations 1.25 and 30.7, including the scope of permitted investments, liquidity, marketability, ratings, concentration limits, portfolio weighted average maturity requirements, and the applicability of Regulation 1.25 standards to foreign futures accounts. The Commission received 32 comment letters.[22]

[11] 17 CFR 30.7.

[12] 7 U.S.C. 6(b).

[13] *See* Commission Form 1–FR–FCM Instructions at 12–9 (Mar. 2010) (''In investing funds required to be maintained in separate section 30.7 account(s), FCMs are bound by their fiduciary obligations to customers and the requirement that the secured amount required to be set aside be at all times liquid and sufficient to cover all obligations to such customers. Regulation 1.25 investments would be appropriate, as would investments in any other readily marketable securities.'').

[14] 74 FR 23962 (May 22, 2009).

[15] The Commission received comment letters from CME Group Inc. (CME), Crane Data LLC, The Dreyfus Corporation (Dreyfus), FCStone Group Inc. (FCStone), Federated Investors, Inc. (Federated), Futures Industry Association (FIA), Investment Company Institute (ICI), MF Global Inc. (MF Global), National Futures Association (NFA), Newedge USA, LLC (Newedge), and Treasury Strategies, Inc.. Two letters were received from Federated: a July 10, 2009 letter and an August 24, 2009 letter.

[16] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[17] Pursuant to Section 901 of the Dodd-Frank Act, Title IX may be cited as the ''Investor Protection and Securities Reform Act of 2010.''

[18] *See* Section 939A(a) of the Dodd-Frank Act.

[19] *See* 76 FR 44262 (July 25, 2011).

[20] *See* 75 76 FR 44776 (July 27, 2011).

[21] *See* 75 FR 67642 (Nov. 3, 2010); *see also* 76 FR 25274 (May 4, 2011) (reopening the comment period for certain NPRMs until June 3, 2011).

[22] Comment letters were received from ADM Investor Services, Inc. (ADM), Bank of New York Mellon (BNYM), BlackRock, Inc. (BlackRock), Brown Brothers Harriman & Co. (BBH), Business

Continued

II. Discussion of the Final Rules

A. Permitted Investments—Regulation 1.25

In finalizing amendments to Regulation 1.25, the Commission seeks to impose requirements on the investment of customer segregated funds with the goal of enhancing the preservation of principal and maintenance of liquidity consistent with Section 4d of the Act. The Commission has endeavored to tailor its amendments to achieve these goals, while retaining an appropriate degree of investment flexibility and opportunities for attaining capital efficiency for DCOs and FCMs investing customer segregated funds.

In issuing these final rules, the Commission is narrowing the scope of investment choices in order to eliminate the potential use of portfolios of instruments that may pose an unacceptable level of risk to customer funds. The Commission seeks to increase the safety of Regulation 1.25 investments by promoting diversification.

Below, the Commission details its decisions regarding the proposals in the NPRM. The Commission has decided to:

- Retain investments in U.S. agency obligations, including implicitly backed GSE debt securities, and impose limitations on investments in debt issued by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac);
- Remove corporate debt obligations not guaranteed by the United States from the list of permitted investments;
- Eliminate foreign sovereign debt as a permitted investment; and
- Eliminate in-house and affiliate transactions.

1. Government Sponsored Enterprise Securities

In the NPRM, the Commission proposed to amend Regulation 1.25(a)(1)(iii) to expressly add U.S. government corporation obligations [23] to GSE debt securities [24] (together, U.S. agency obligations) and to add the requirement that the U.S. agency obligations must be fully guaranteed as to principal and interest by the United States. As proposed, all current GSE debt securities, including that of Fannie Mae and Freddie Mac, would have been impermissible as Regulation 1.25 investments since no GSE debt securities have the explicit guarantee of the U.S. government. The Commission received 14 comment letters discussing GSEs. Thirteen of those 14 comment letters opposed the proposal.

Generally, the arguments focused on the safety of GSEs, GSEs' performance during the financial crisis, and the detrimental, unintended consequences of the proposal. In addition, there were several letters from organizations related to the Farm Credit System GSE (Farm Credit System) and FHLB System GSE (FHLB System) supporting, at a minimum, the inclusion of their GSE debt as a permitted Regulation 1.25 investment.

In terms of safety, commenters expressed the view that GSE debt securities are sufficiently liquid and that the U.S. government would not allow a GSE to fail.[25] FFCB remarked that the Securities and Exchange Commission (SEC) has retained GSE debt securities as investments appropriate under SEC Rule 2a–7 [26] (which governs MMMFs).[27] In addition to GSEs being safe, BlackRock noted that ''any changes in the viability of such entities should be telegraphed well in advance resulting in minimal disruption to the credit markets.'' [28]

With respect to Fannie Mae and Freddie Mac, the FHFA's support of those GSEs effectively amounts to a federal guarantee, according to two commenters.[29] As long as the federal government holds exposure of greater than 50 percent in Fannie Mae and Freddie Mac, RJO wrote that it believes that the quality of these issuances is better than those of any bank or corporation.[30]

Commenters averred that the safety of GSEs is further proven by their stability during the financial crisis. MF Global/Newedge, BlackRock and ADM noted that non-Fannie Mae/Freddie Mac GSEs performed well during the financial crisis.[31]

Limiting investments to only those agency obligations backed by the full faith and credit of the U.S. government would be a mistake because ''none'' satisfy the requirement, according to the NFA, or ''only GNMAs'' satisfy the requirement, according to ADM.[32] The FHFA wrote that specific criteria for eligible investments is preferable to speculation on the actions of third parties (such as whether the federal government will or will not bail out a GSE).[33]

Several commenters were concerned that the Commission's proposal would have the unintended consequence of harming the broader market for GSEs, as investors would question the safety of such investments.[34] The Farm Credit Council wrote that ''[u]ntil and unless Congress signals its intention to erode the federal government's support of GSEs, we respectfully request that the CFTC not amend Regulation 1.25 with respect to investments in GSEs.'' [35]

Most commenters recommended that GSE debt securities, including those not explicitly guaranteed by the U.S. government, remain permitted investments to varying extents. There were a range of recommendations regarding the debt of Fannie Mae and Freddie Mac. MF Global/Newedge suggested that GSEs with implicit guarantees should have a 50 percent asset-based concentration limit along

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Law Society of the University of Mississippi (BLS), CME, Committee on the Investment of Employee Benefit Assets (CIEBA), Dreyfus, Farm Credit Administration (FCA), Farm Credit Council (Farm Credit Council), Farr Financial Inc. (Farr Financial), Federal Farm Credit Banks Funding Corporation (FFCB), Federal Housing Finance Authority (FHFA), Federated, Futures and Options Association (FOA), FIA and International Swaps and Derivatives Association, Inc. (FIA/ISDA), International Assets Holding Corporation and FCStone (INTL/FCStone), ICI, Joint Audit Committee (JAC), J.P. Morgan Futures Inc. (J.P. Morgan), LCH.Clearnet Group (LCH), MF Global and Newedge (MF Global/Newedge), MorganStanley & Co. (MorganStanley), NFA, Natural Gas Exchange, Inc. (NGX), Office of Finance of the Federal Home Loan Banks (FHLB), R.J. O'Brien and Associates (RJO), and UBS Global Asset Management (Americas) Inc. (UBS). Federated sent multiple letters. Federated's November 30, 2010 letter will be referred to as ''Federated I,'' its December 2, 2010 letter will be referred to as ''Federated II,'' and Arnold & Porter LLP's post-comment period letter on behalf of Federated, dated March 21, 2011, will be referred to as ''Federated III.'' Federated also sent a letter dated November 8, 2010 and a post-comment period letter dated February 28, 2011. The letters from BLS and NGX were received during the reopened comment period, on May 12, 2011 and May 31, 2011, respectively.

[23] *See* 31 U.S.C. 9101 (defining ''government corporation'').

[24] GSEs are chartered by Congress but are privately owned and operated. Securities issued by GSEs do not have an explicit federal guarantee, although they are considered by some to have an ''implicit'' guarantee due to their federal affiliation. Obligations of U.S. government corporations, such as the Government National Mortgage Association (known as GNMA or Ginnie Mae), are explicitly backed by the full faith and credit of the United States. Although the Commission is not aware of any GSE securities that have an explicit federal guarantee, in the NPRM the Commission concluded that GSE securities should remain on the list of permitted investments in the event this status changes in the future.

[25] MF Global/Newedge letter at 4.

[26] 17 CFR 270.2a–7.

[27] FFCB letter at 3.

[28] BlackRock letter at 6.

[29] FIA/ISDA letter at 5, J.P. Morgan letter at 1.

[30] RJO letter at 5.

[31] MF Global/Newedge letter at 5, BlackRock letter at 6, ADM letter at 3. MF Global cited the Student Loan Marketing Association, FFCB Federal Home Loan Banks and Federal Agricultural Mortgage Corporation as examples of GSEs that performed well during the financial crisis.

[32] NFA letter at 2, ADM letter at 3.

[33] FHFA letter at 1.

[34] FCA at 2, Farm Credit Council letter at 3, RJO letter at 4, FFCB letter at 3.

[35] Farm Credit Council letter at 1–2.

with a 10 percent issuer-based limit, or, alternatively, that GSEs meeting specific outstanding float standards should be allowed. MF Global/Newedge stated that, at a minimum, the Commission should allow FCMs to invest in GSEs other than Fannie Mae and Freddie Mac.[36] CME wrote that highly liquid GSEs, including those of Fannie Mae and Freddie Mac, should remain as permitted investments and should have a 25 percent asset-based concentration limit.[37] RJO recommended that all GSE securities be permitted, and that, at the very least, the Commission should permit investments in Fannie Mae and Freddie Mac until December 31, 2012, when the government guarantee expires.[38] FIA/ISDA recommended that investments in GSE securities be permitted subject to the conditions that (i) with the exception of ''agency discount notes,'' the size of the issuance is at least $1 billion, (ii) trading in the securities of such agency remains highly liquid, (iii) the prices at which the securities may be traded are publicly available (through, for example, Bloomberg or Trace), and (iv) investments in GSEs are subject to a maximum of 50 percent asset-based and 15 percent issuer-based concentration limits.[39] BlackRock recommended a 30 percent issuer limitation on GSEs.[40]

The Farm Credit Council, FHLB, the FCA, the FFCB and RJO all wrote letters supporting one or both of the FHLB System[41] and Farm Credit System debt securities.[42] FHLB stated that the prohibition on GSEs not explicitly backed by the full faith and credit of the federal government is overly broad. In particular, FHLB noted that FHLB debt securities performed well throughout the financial crisis. FHLB stated that it maintained funding capabilities even during the most severe periods of market stress, due to investors' favorable views of its debt securities.[43] Similarly, the Farm Credit Council wrote that Farm Credit debt securities remained safe during the recent period of market volatility, and the Farm Credit System was able to supply much-needed financial support to farmers, rangers, harvesters of aquatic products, agricultural cooperatives, and rural residents and businesses.[44] Farm Credit discount notes, among other Farm Credit debt securities, ''have been a staple in risk-averse investor portfolios since the [Farm Credit System's] inception in 1916 and have proven their creditworthiness across a range of market environments.''[45] During the recent crisis, the Farm Credit System was able to issue and redeem over $400 billion in discount notes annually, while issuing over $100 billion per year in longer-maturity debt securities.[46] RJO concurred regarding both GSEs, noting that the FHLB System and Farm Credit System experienced minimal, if any, problems during the crisis.[47]

CIEBA, which represents 100 of the country's largest pension funds, was the only commenter that backed the proposal.[48]

After reviewing the comments, the Commission has concluded that U.S. agency obligations should remain permitted investments. The Commission acknowledges the fact, mentioned by several commenters, that most GSE debt performed well during the most recent financial crisis.

The Commission believes it appropriate to include a limitation for debt issued by Fannie Mae and Freddie Mac, two GSEs which did not perform well during the recent financial crisis. Both entities failed and, as a result, have been operating under the conservatorship of the FHFA since September of 2008. As conservator of Fannie Mae and Freddie Mac, FHFA has assumed all powers formerly held by each entity's officers, directors, and shareholders. In addition, FHFA, as conservator, is authorized to take such actions as may be necessary to restore each entity to a sound and solvent condition and that are appropriate to preserve and conserve the assets and property of each entity.[49]

In consideration of the above comments, the Commission is amending Regulation 1.25(a)(1)(iii) by permitting investments in U.S. agency obligations. The Commission is adding new paragraph (a)(3) to include the limitation that debt issued by Fannie Mae and Freddie Mac are permitted as long as these entities are operating under the conservatorship or receivership of FHFA.

2. Commercial Paper and Corporate Notes or Bonds

In order to simplify Regulation 1.25 by eliminating rarely-used instruments, and in light of the credit, liquidity, and market risks posed by corporate debt securities, the Commission proposed amending Regulation 1.25(a)(1)(v)–(vi) to limit investments in ''commercial paper''[50] and ''corporate notes or bonds''[51] to commercial paper and corporate notes or bonds that are federally guaranteed as to principal and interest under the Temporary Liquidity Guarantee Program (TLGP) and meet certain other prudential standards.[52]

The NPRM supported this proposal by noting the credit, liquidity and market risks associated with corporate notes or bonds and referenced that information obtained during the 2007 Review indicated that commercial paper and corporate notes or bonds were not widely used by FCMs or DCOs.[53] Second, the NPRM provided background on the TLGP and explained that TLGP debt would be permissible if: (1) The size of the issuance is greater than $1 billion; (2) the debt security is denominated in U.S. dollars; and (3) the debt security is guaranteed for its entire term.[54]

Seven comment letters discussed commercial paper and corporate notes

[36] MF Global/Newedge letter at 5.

[37] CME letter at 3.

[38] RJO letter at 5.

[39] FIA/ISDA letter at 5.

[40] BlackRock at 6.

[41] The FHLB System, which is regulated by the FHFA, comprises an ''Office of Finance'' and 12 independently-chartered, regional cooperative Federal Home Loan Banks created by Congress to provide support for housing finance and community development through member financial institutions. The 12 Federal Home Loan Banks issue debt securities (FHLB debt securities), the proceeds from which are used to provide liquidity to the 7,900 FHLB member banks through collateralized loans. *See* FHLB letter at 1–3.

[42] The Farm Credit System comprises five banks and 87 associations which provide credit and financial services to farmers, ranchers, and similar agricultural enterprises by issuing debt (Farm Credit debt securities) through the FFCB.

[43] FHLB letter at 1–3.

[44] Farm Credit Council letter at 1. Farm Credit debt securities are regulated by the FCA and insured by an independent U.S. government-controlled corporation which maintains an insurance fund of roughly 2 percent of the outstanding loans. The total outstanding loan amount was over $3 billion as of the end of 2009. *See* Farm Credit Council letter at 2.

[45] FFCB letter at 1.

[46] *Id.*

[47] RJO letter at 4.

[48] CIEBA letter at 3.

[49] *See* 12 U.S.C. 4617(b)(2)(D). The primary goals of the conservatorships are to help restore confidence in the entities, enhance their capacity to fulfill their mission, mitigate the systemic risk that contributed directly to instability in financial markets, and maintain Fannie Mae and Freddie Mac's secondary mortgage market role until their future is determined through legislation. To these ends, FHFA's conservatorship of Fannie Mae and Freddie Mac is directed toward minimizing losses, limiting risk exposure, and ensuring that Fannie Mae and Freddie Mac price their services to adequately address their costs and risk.

[50] 17 CFR 1.25(a)(1)(v).

[51] 17 CFR 1.25(a)(1)(vi).

[52] Commercial paper would remain available as a direct investment for MMMFs and corporate notes or bonds would remain available as indirect investments for MMMFs by means of a repurchase agreement.

[53] The 2007 Review indicated that out of 87 FCM respondents, only nine held commercial paper and seven held corporate notes/bonds as direct investments during the November 30, 2006—December 1, 2007 period.

[54] Debra Kokal, Joint Audit Committee, CFTC Staff Letter 10–01 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,514 (Jan. 15. 2010) (TLGP Letter).

or bonds in a substantive manner. Six of the comment letters weighed in favor of retaining commercial paper and corporate notes or bonds to some degree. Comments included statements as to the effects of the proposal, the safety of these instruments, and the lack of reliability of the 2007 Commission review of customer funds investments.

According to three commenters, limiting commercial paper and corporate notes or bonds to just those backed by the TLGP is essentially eliminating the asset class altogether.[55] BlackRock, ADM and RJO asserted that TLGP debt is not liquid due to the lack of available supply and therefore might not be a viable option for investment.[56]

There was general support for maintaining corporate notes or bonds as Regulation 1.25 permitted investments. FIA/ISDA wrote that as long as trading in the relevant security remains highly liquid, such securities should continue to be eligible investments under Regulation 1.25.[57] RJO noted that commercial paper and corporate notes and bonds (i) have many high quality names, (ii) have a mature and liquid secondary market, and (iii) provide greater diversification than merely ''financial sector'' bank CDs.[58] Further, RJO averred that high quality corporate notes or bonds are no different than those used by prime MMMFs.[59] MF Global/Newedge stated that they were unaware of any instances of an FCM unable to meet its obligations under Regulation 1.25 as a result of investment losses it suffered involving corporate notes or commercial paper. They believe that commercial paper and corporate notes or bonds should continue to be permitted; however, to the extent that there are limitations, they suggest (a) permitting FCMs to invest only in corporate notes or commercial paper issued by entities with a certain minimum capital level or which meet a certain float size, or (b) limiting FCM investments in such instruments to 25 percent of their portfolio and 5 percent with any one issuer. BlackRock supports a 25–50 percent asset-based concentration limit for TLGP debt, but also notes that a lack of creditworthy supply may prevent an FCM from reaching that limit.[60]

Commenters rejected the Commission's contention that the lack of investment in commercial paper and corporate notes or bonds illustrated in its 2007 Review was dispositive. MF Global/Newedge suggested that the investment review is outdated and is inadequate to justify removing an important source of revenue for FCMs.[61] RJO noted that commercial paper and corporate notes likely appear to be used minimally during the relevant period because investments in such instruments were not as safe during that time frame.[62]

The Commission does not find the arguments in favor of retaining corporate notes and bonds to be persuasive. While the Commission encourages FCMs and DCOs to increase or decrease their holdings of certain permitted instruments depending on market conditions, the Commission is following the language of the statute and its goal of eliminating instruments that may, during tumultuous markets, tie up or threaten customer principal. The Commission recognizes that certain high-quality paper and notes may be sufficiently safe. As discussed in Section I.B.4.(a) of this rulemaking, an FCM or DCO may invest up to 50 percent of its funds in prime MMMFs, which may invest in high-quality paper and notes meeting certain standards. To the extent that commenters suggested that the 2007 Report does not accurately reflect the volume of investment of customer segregated funds in commercial paper and corporate notes or bonds, the Commission believes that the 2007 Report contains sufficiently accurate information reflective of the circumstances at that time.[63] Further, notwithstanding the relative paucity of investment in such instruments, the Commission believes that the investment of customer funds in such instruments runs counter to the overarching objective of preserving principal and maintaining liquidity of customer funds.

Although the TLGP expires in 2012, the Commission believes it is useful to include commercial paper and corporate notes or bonds that are fully guaranteed as to principal and interest by the United States as permitted investments. This would permit continuing investment in TLGP debt securities, even though the Commission has otherwise eliminated commercial paper and corporate notes or bonds from the list of permitted investments. Therefore, the Commission is adopting the proposed amendments to Regulation 1.25(a) and (b) that limit the commercial paper and corporate notes or bonds that can qualify as permitted investments to only those guaranteed as to principal and interest under the TLGP and that meet the criteria set forth in the Division's interpretation.[64] The Commission is amending Regulation 1.25 by (1) amending paragraphs (a)(1)(v) and (a)(1)(vi) to specify that commercial paper and corporate notes or bonds must be federally backed and (2) inserting new paragraph (b)(2)(vi) that describes the criteria for federally backed commercial paper and corporate notes or bonds.[65]

3. Foreign Sovereign Debt

Currently, an FCM or DCO may invest in the sovereign debt of a foreign country to the extent it has balances in segregated accounts owed to its customers (or, in the case of a DCO, to its clearing member FCMs) denominated in that country's currency.[66] In the NPRM, the Commission proposed to remove foreign sovereign debt as a permitted investment in the interests of both simplifying the regulation and safeguarding customer funds in light of

[55] BlackRock letter at 6, RJO letter at 6, ADM letter at 3.

[56] By contrast, the Commission found that TLGP debt that (1) has an issuance size of greater than $1 billion, (2) is denominated in U.S. dollars and (3) is guaranteed for its entire term, is sufficiently safe and liquid for use as a Regulation 1.25 investment. *See* TLGP Letter.

[57] FIA/ISDA letter at 5.

[58] RJO letter at 6.

[59] RJO letter at 5.

[60] BlackRock letter at 6.

[61] MF Global/Newedge at 8.

[62] RJO letter at 5.

[63] While the Commission does not have similar data reflecting Regulation 1.25 investments from more recent years, the Commission believes that investment in commercial paper and corporate notes or bonds remains minimal. This belief is supported by a July 21, 2009 letter from NFA, in response to the ANPR, which averred that segregated funds were primarily invested in government securities and MMMFs, while investments in other instruments were ''negligible.'' Moreover, the Commission has received no evidence to contradict its position.

[64] See TLGP Letter; 75 FR 67642, 67645 (Nov. 3, 2010).

[65] In the NPRM, the Commission proposed removing paragraph (b)(3)(iv) (as amended in this rulemaking, paragraph (b)(2)(iv)) which permits adjustable rate securities as limited under that paragraph. As proposed, Regulation 1.25 would have only permitted corporate and U.S. agency obligations that had explicit U.S. government guarantees. However, since the Commission is, for the most part, retaining the current treatment of U.S. agency obligations, as described in more detail in section II.A.1 of this rulemaking, the Commission has decided not to adopt the proposed removal of paragraph (b)(3)(iv) (now paragraph (b)(2)(iv)).

[66] The inclusion of foreign sovereign debt as a permitted investment can be traced to an August 7, 2000 comment letter from the Federal Reserve Bank of Chicago requesting that the Commission allow FCMs and DCOs to invest non-dollar customer funds in the foreign sovereign debt of the currency so denominated. The Commission agreed in its final rule, explaining that an FCM investing deposits of foreign currencies would be required to convert the foreign currencies to a U.S. dollar denominated asset, and that such conversion would ''increase its exposure to foreign currency fluctuation risk, unless it incurred the additional expense of hedging.'' *See* 65 FR 78003 (Dec. 13, 2000).

recent crises experienced by a number of foreign sovereigns. The Commission requested comment on whether foreign sovereign debt should remain, to any extent, as a permitted investment and, if so, what requirements or limitations might be imposed in order to minimize sovereign risk.

Thirteen comment letters discussed foreign sovereign debt. Twelve of the 13 suggested retaining foreign sovereign debt to varying degrees. One comment letter supported the Commission's proposal. As discussed in more detail below, both the importance of hedging against foreign currency exposure as well as the unintended consequences of the proposal were cited frequently by commenters as reasons to retain foreign sovereign debt as a permitted investment.

Six commenters discussed the need to mitigate the risks associated with foreign currency exposure. FIA/ISDA, MF Global/Newedge, J.P. Morgan, LCH, NFA and FOA each noted that when a DCO requires margin deposited in a foreign currency, an FCM will face a foreign currency exposure in order to meet that margin requirement. The FCM is able to mitigate this exposure by investing customer funds in foreign sovereign debt securities denominated in the relevant currency.[67]

The benefits of increased diversification and liquidity were mentioned by three commenters. FOA and ADM noted that outside investment in sovereign debt played a key role, during the recent financial crisis, in maintaining liquidity and demand in such instruments, which, in turn, had a beneficial impact on pricing and spreads.[68] BlackRock wrote that, notwithstanding the current limited investment in foreign sovereign debt, there are opportunities to add diversification and liquidity by allowing such investments.[69] FIA/ISDA, FOA and BlackRock suggested that lack of use should not disqualify an investment as long as permitting it would still serve to preserve principal and maintain liquidity.[70]

Several commenters predicted harmful unintended consequences if the proposal to remove foreign sovereign debt as a permitted investment becomes the final rule. CME suggested that the implementation of the Dodd-Frank Act will result in an increase in the amount of customer funds held by FCMs and an increase in the number of foreign customers and foreign-domiciled clearing members.[71] Removing foreign sovereign debt would limit diversification, would undermine the role of non-US sovereign debt, and would have the unintended consequence of increasing market volatility, according to FOA.[72] LCH and FOA predicted that retaliatory action from foreign jurisdictions also could occur.[73]

Most commenters supported retaining foreign sovereign debt to some degree. CME and FIA/ISDA suggested that foreign sovereign debt be retained as a permitted investment, adding that all investments must be highly liquid under the terms of Regulation 1.25, so risky foreign sovereign debt would not be permitted.[74] LCH recommended that foreign sovereign debt remain permitted as an investment, or, at a minimum, that investments be limited to only high quality sovereign issuers.[75] LCH also noted that DCOs have conservative investment policies in place already.[76] RJO suggested limiting foreign sovereign debt to only G–7 issuers, with limits based upon the margin requirement for all client positions.[77] NGX suggested that DCOs domiciled outside of the U.S., in G–7 countries, be permitted to invest in their country's sovereign debt, adding that not allowing such investments may be a ''hardship'' on such DCOs.[78] ADM suggested that G–7 countries serve as a ''safe harbor'' for Regulation 1.25 foreign sovereign debt investments.[79] One commenter, CIEBA, backed the Commission's proposal without further explanation.[80]

The Commission has considered the comments and has decided to adopt the proposed amendment, thereby eliminating foreign sovereign debt from the list of permitted investments. As discussed in more detail below, the Commission believes that, in many cases, the potential volatility of foreign sovereign debt in the current economic environment and the varying degrees of financial stability of different issuers make foreign sovereign debt inappropriate for hedging foreign currency risk. The Commission also is not persuaded that foreign sovereign debt is used with sufficient frequency to justify the commenters' claims that foreign sovereign debt assists with diversification of customer fund investments, and it is not persuaded that the specter of backlash from other jurisdictions or increased market volatility requires a different outcome.

First, while it appreciates the risks of foreign currency exposure, the Commission does not believe that foreign sovereign debt is, in all situations, a sufficiently safe means for hedging such risk. Recent global and regional financial crises have illustrated that circumstances may quickly change, negatively impacting the safety of sovereign debt held by an FCM or DCO. An FCM or DCO holding troubled sovereign debt may then be unable to liquidate such instruments in a timely manner—and, when it does, it may be only after a significant mark-down. Given the choice between an FCM holding devalued currency, which can be exchanged for a portion of the customers' margin and returned to the customer immediately, and an FCM holding illiquid foreign sovereign debt, which might not be able to be exchanged for any currency in a timely manner, the Commission believes that the former is in the customers' best interests. The Commission notes that FCMs can avoid foreign currency risk by not accepting collateral that is not accepted at the DCO or foreign board of trade, or by providing in its customer agreement that the customer will bear any currency exposure.[81]

Second, the Commission is not persuaded by commenters' assertions that investment in foreign sovereign debt has increased the diversification of customer funds in any meaningful way. The Commission has noted that investment in foreign sovereign debt was minimal in the 2007 Review.[82] The Commission has received no data or evidence from any commenter suggesting that investment in foreign sovereign debt has materially increased since the 2007 Review.

Third, the Commission does not believe that eliminating foreign sovereign debt as a permitted investment of customer funds will cause the market or jurisdictional problems claimed by commenters. As discussed above, no commenter has demonstrated that foreign sovereign debt is widely used, so its elimination should not

[67] FIA/ISDA letter at 6, MF Global/Newedge letter at 5, J.P. Morgan letter at 1, LCH letter at 2, NFA letter at 3, FOA letter at 4.

[68] FOA letter at 2, ADM letter at 2.

[69] BlackRock letter at 6.

[70] FIA/ISDA letter at 6, FOA letter at 3, BlackRock letter at 6.

[71] CME letter at 3.

[72] FOA letter at 3.

[73] LCH letter at 2, FOA letter at 2–3.

[74] CME letter at 3, FIA/ISDA letter at 6.

[75] LCH letter at 2.

[76] *Id.*

[77] RJO letter at 6.

[78] NGX letter at 3.

[79] ADM letter at 2.

[80] CIEBA letter at 3.

[81] Additionally, the Commission believes that it is appropriate to note that Regulation 1.25 does not dictate the collateral that may be accepted by FCMs from customers or by DCOs from clearing member FCMs. If FCMs and DCOs so allow, customers and clearing member FCMs, respectively, may continue to post foreign currency or foreign sovereign debt as collateral.

[82] 75 FR 67642, 67645.

undermine foreign sovereign debt nor cause a disruption in the market.

The foregoing points notwithstanding, the Commission is aware that FCMs and DCOs have varying collateral management needs and investment policies. The Commission also recognizes that the safety of sovereign debt issuances of one country may vary greatly from those of another, and that investment in certain sovereign debt might be consistent with the objectives of preserving principal and maintaining liquidity, as required by Regulation 1.25.

Therefore, the Commission is amenable to considering applications for exemptions with respect to investment in foreign sovereign debt by FCMs or DCOs upon a demonstration that the investment in the sovereign debt of one or more countries is appropriate in light of the objectives of Regulation 1.25 and that the issuance of an exemption satisfies the criteria set forth in Section 4(c) of the Act.[83] Accordingly, the Commission invites FCMs and DCOs that seek to invest customer funds in foreign sovereign debt to petition the Commission pursuant to Section 4(c). The Commission will consider permitting investments (1) to the extent that the FCM or DCO has balances in segregated accounts owed to its customers (or clearing member FCMs, as the case may be) in that country's currency and (2) to the extent that such sovereign debt serves to preserve principal and maintain liquidity of customer funds as required for all other investments of customer funds under Regulation 1.25.

Finally, in response to NGX, the Commission does not agree that foreign domiciled FCMs and DCOs should be able to invest in the sovereign debt of their domicile nation. A compelling argument has not been presented as to why this constitutes a ''hardship'' to DCOs domiciled outside of the United States.

4. In-house Transactions

The Commission allowed in-house transactions as a permitted investment for the first time in 2005.[84] At that time, the Commission stated that in-house transactions ''provide the economic equivalent of repos and reverse repos,'' and, like repurchase agreements with third parties, preserve the ''integrity of the customer segregated account.''[85] The Commission further wrote that in-house transactions should not disrupt FCMs and DCOs from maintaining ''sufficient value in the account at all times.''[86] In the May 2009 ANPR, the Commission noted that the recent events in the economy underscored the importance of conducting periodic reassessments and refocused its review of permitted investments, including in-house transactions.[87]

In the NPRM, the Commission proposed to eliminate in-house transactions permitted under paragraph (a)(3) and subject to the requirements of paragraph (e) of Regulation 1.25. The Commission noted that ''[r]ecent market events have * * * increased concerns about the concentration of credit risk within the FCM/broker-dealer corporate entity in connection with in-house transactions.''[88] The Commission requested comment on the impact of this proposal on the business practices of FCMs and DCOs. Specifically, the Commission requested that commenters present scenarios in which a repurchase or reverse repurchase agreement with a third party could not be satisfactorily substituted for an in-house transaction.

Six commenters discussed in-house transactions. Four requested that in-house transactions be retained to some extent, while two supported the Commission's proposal to eliminate in-house transactions.

FIA/ISDA, CME, MF Global/Newedge and MorganStanley recommended that the Commission allow FCMs to engage in in-house transactions. FIA/ISDA and CME suggested that the current terms of Regulation 1.25(e) should be more than sufficient to assure that the customer segregated account and the foreign futures and foreign options secured amount are protected in the event of an FCM bankruptcy.[89] MorganStanley wrote that FCM efficiency relies heavily on in-house transactions, particularly when customer margin is not appropriate for DCO margin. It further stated that relying entirely on third party repurchase agreements will materially increase operational risk in an area where it is negligible today.[90] According to MorganStanley,

> Because the in-house transaction can be effected and recorded through book entries on the FCM/broker-dealer's general ledger, it can be accomplished through automated internal processes that are subject to a high level of control. The same is not routinely true of third-party repurchase arrangements, which often involve greater time lags than do in-house transactions between execution and settlement and also typically require more manual processing than their in-house counterparts.[91]

MorganStanley further noted that, as with the FCM of Lehman Brothers Holdings Inc. (Lehman Brothers) in 2008, a third party custodial arrangement is not without risk.[92] MF Global/Newedge wrote that removing in-house transactions would not reduce FCM risk, ''since FCMs would be unable to enter into and execute such transactions with and through entities and personnel with whom they have created an effective, efficient and liquid settlement framework.''[93]

However, RJO stated that in-house transactions currently do not provide ''protection to the capital base of the FCM arm of a dually registered entity.''[94] Without ''ring fencing the capital associated with the separately regulated business lines,'' RJO does not consider in-house transactions to be satisfactory substitutes for separately capitalized affiliates or third parties.[95]

CME and FIA/ISDA support retaining in-house transactions as they currently are permitted under Regulation 1.25. MorganStanley suggested retaining in-house transactions subject to a concentration limit of 25 percent of total assets held in segregation or secured amount; or if the Commission is determined to eliminate in-house transactions, raising the proposed concentration limit for reverse repurchase agreements to 25 percent of total assets held in segregation or secured amount.[96] RJO, for the reasons noted above, and CIEBA, without explanation, both support the proposal to remove in-house transactions from the list of permitted investments.[97]

Many commenters to the NPRM similarly suggest that the benefits of repurchase and reverse repurchase agreements can also be realized by in-house transactions, without any decrease in safety to customer funds. The Commission rejects this position. The Commission believes that in-house transactions are fundamentally different than repurchase or reverse repurchase agreements with third parties. In the case of a reverse repurchase agreement, the transaction is similar to a collateralized loan whereby customer cash is exchanged for unencumbered collateral, both of which are housed in legally separate entities. The agreement is transacted at arms-length (often by

[83] *See* 7 U.S.C. 6(c).

[84] 70 FR 28190, 28193.

[85] 70 FR 28193. See also 70 FR 5577, 5581 (February 3, 2005).

[86] 70 FR 28190, 28193.

[87] 74 FR 23963, 23964.

[88] 75 FR 67642, 67646.

[89] CME letter at 3, FIA/ISDA letter at 12.

[90] MorganStanley letter at 2–3.

[91] Morgan Stanley letter at 2.

[92] MorganStanley letter at 3–4.

[93] MF Global/Newedge letter at 7.

[94] RJO letter at 3.

[95] *Id.*

[96] MorganStanley letter at 4.

[97] RJO letter at 3, CIEBA letter at 3.

means of a tri-party repo mechanism), on a delivery versus payment basis, and is memorialized by a legally binding contract. By contrast, in an in-house transaction, cash and securities are under common control of the same legal entity, which presents the potential for conflicts of interest in the handling of customer funds that may be tested in times of crisis. Unlike a repurchase or reverse repurchase agreement, there is no mechanism to ensure that an in-house transaction is done on a delivery versus payment basis. Furthermore, an in-house transaction, by its nature, is transacted within a single entity and therefore cannot be legally documented, since an entity cannot contract with itself (the most one could do to document such a transaction would be to make an entry on a ledger or sub-ledger).

Other advocates of in-house transactions explained that in-house transactions help them better manage their balance sheets. For example, if a firm entered into a repurchase or reverse repurchase transaction with an unaffiliated third party, the accounting of that transaction may cause the consolidated balance sheet of the firm to appear larger than if the transaction occurred in-house. In 2005, the Commission wrote that in-house transactions could ''assist an FCM both in achieving greater capital efficiency and in accomplishing important risk management goals, including internal diversification targets.'' [98] However, the purpose of Regulation 1.25 is not to assist FCMs and DCOs with their balance sheet maintenance. The purpose of Regulation 1.25 is to permit FCMs and DCOs to invest customer funds in a manner that preserves principal and maintains liquidity.

The Commission reiterates that customer segregation is the foundation of customer protection in the commodity, futures and swaps markets. Segregation must be maintained at all times, pursuant to Section 4d of the Act and Commission Regulation 1.20,[99] and customer segregated funds must be invested in a manner which preserves principal and maintains liquidity in accordance with Regulation 1.25. As such, the Commission must be vigilant in narrowing the scope of Regulation 1.25 if transactions that were once considered sufficiently safe later prove to be unacceptably risky. Based on the concerns outlined above, the Commission now believes that in-house transactions present an unacceptable risk to customer segregated funds under Regulation 1.25. The final regulation deletes paragraph (a)(3), as proposed.[100]

For the removal of doubt, the Commission wishes to distinguish in-house transactions from in-house sales of permitted investments. An in-house transaction is an exchange of cash or permitted instruments, held by a dually registered FCM/broker dealer, for customer funds. An in-house sale is the legal purchase of a permitted investment, which may be owned by a dually registered FCM/broker-dealer, with customer funds. Such in-house sales of permitted investments at fair market prices are acceptable and are unaffected by the elimination of in-house transactions.

In addition, the Commission wishes to distinguish in-house transactions from collateral exchanges for the benefit of the customer. As described above, a dually registered FCM/broker-dealer may not engage in in-house transactions, which are exchanges made at the discretion of the dually registered entity. However, a dually registered FCM/broker-dealer receiving customer collateral not acceptable at the DCO or foreign board of trade may exchange that collateral for acceptable collateral held by its dually registered broker-dealer to the extent necessary to meet margin requirements.[101]

B. General Terms and Conditions

FCMs and DCOs may invest customer funds only in enumerated permitted investments ''consistent with the objectives of preserving principal and maintaining liquidity.''[102] In furtherance of this general standard, paragraph (b) of Regulation 1.25 establishes various specific requirements designed to minimize credit, market, and liquidity risk. Among them are requirements that the investment be ''readily marketable'' (a concept borrowed from SEC regulations), that it meet specified rating requirements, and that it not exceed specified issuer concentration limits. The Commission proposed and has decided to amend these standards to facilitate the preservation of principal and maintenance of liquidity by establishing clear, prudential standards that further investment quality and portfolio diversification and to remove references to credit ratings. The Commission notes that an investment that meets the technical requirements of Regulation 1.25, but does not meet the overarching prudential standard, cannot qualify as a permitted investment.

1. Marketability

Regulation 1.25(b)(1) states that ''[e]xcept for interests in money market mutual funds, investments must be 'readily marketable' as defined in § 240.15c3–1 of this title.'' [103] In the NPRM, the Commission proposed to remove the ''readily marketable'' requirement from paragraph (b)(1) of Regulation 1.25 and substitute in its place a ''highly liquid'' standard. The Commission proposed to define ''highly liquid'' as having the ability to be converted into cash within one business day, without a material discount in value. As an alternative, the Commission offered a calculable standard, in which an instrument would be considered highly liquid if there was a reasonable basis to conclude that, under stable financial conditions, the instrument has the ability to be converted into cash within one business day, without greater than a one percent haircut off of its book value.

The Commission requested comment on whether the proposed definition of ''highly liquid'' accurately reflected the industry's understanding of that term, and whether the term ''material'' might be replaced with a more precise or, perhaps, even calculable standard. The Commission welcomed comment on the ease or difficulty in applying the proposed or alternative ''highly liquid'' standards.

Six commenters mentioned the ''highly liquid'' definition. All six supported the proposed, but not the alternative, standard.[104] Several noted that under the alternative standard, even some Treasuries would likely fall outside of the scope of permitted investments. No commenters provided more precise language than ''material'' or any calculable option.

Certain commenters requested additional clarification. FIA/ISDA wrote

[98] 70 FR 28193; *see also* 70 FR 5581.

[99] 17 CFR 1.20.

[100] Conversely, transactions that at one point in time are considered to be unacceptably risky may later prove to be sufficiently safe. Should any person, in the future, believe that circumstances warrant reconsideration of the deletion of paragraph (a)(3) regarding in-house transactions, such person may petition the Commission for an amendment in accordance with the procedures set forth in Regulation 13.2, 17 CFR 13.2. Such a petition may include proposed conditions to the listing of in-house transactions as permitted investments in order to address the concerns (*e.g.,* concentration of credit risk within the FCM/broker-dealer corporate entity, potential for conflicts of interest in handling customer funds, *etc.*) that are the basis for the Commission's determination to eliminate in-house transactions as permitted investments at this time.

[101] FCMs, whether or not dually registered as broker-dealers, may also engage in collateral exchanges for the benefit of customers with affiliates or third parties.

[102] 17 CFR 1.25(b).

[103] *See* 17 CFR 240.15c3–1(c)(11)(i) (SEC regulation defining ''ready market'').

[104] CME letter at 7, JAC letter at 1–2, FIA/ISDA letter at 3, Farr Financial letter at 3, RJO letter at 7, BlackRock letter at 6.

that some liquid securities do not trade every day and requested that the Commission confirm that, in determining whether a security is highly liquid, an FCM may use, as a reference, securities that are directly comparable, particularly for those issuers with many classes of securities outstanding.[105] FIA/ISDA also asked the Commission to confirm that FCMs may rely on publicly available prices as well as third party pricing vendors such as Bloomberg, TradeWeb, TRACE, IDCG and MSRB.[106] Additionally, JAC requested assurance that the highly liquid standard will not be substituted for ''ready market'' in other places in Commission regulations, in the Form 1–FR–FCM instructions, or for offsets to debit/deficits on 30.7 statements.[107]

The Commission has considered the comments received and concludes that the ''readily marketable'' standard is no longer appropriate and should be removed as it creates an overlapping and confusing standard when applied in the context of the express objective of ''maintaining liquidity.'' While ''liquidity'' and ''ready market'' appear to be interchangeable concepts, they have distinctly different origins and uses. The objective of ''maintaining liquidity'' is to ensure that investments can be promptly liquidated in order to meet a margin call, pay variation settlement, or return funds to the customer upon demand. Meanwhile, the SEC's ''ready market'' standard is intended for a different purpose (which is to set appropriate haircuts in order to calculate capital) and is easier to apply to exchange-traded equity securities than debt securities. The Commission is therefore adopting the proposal and amending the text of Regulation 1.25(b)(1) to delete ''readily marketable'' and replace it with ''highly liquid,'' defined as having the ability to be converted into cash within one business day, without a material discount in value.

In response to FIA/ISDA's request for clarification, when determining whether a security which does not trade every day is sufficiently liquid, the Commission believes that an FCM may use any data that reasonably provides evidence of liquidity. However, it is the Commission's position that theoretical pricing data is not enough, on its own, to establish that a security is highly liquid. FCMs seeking pricing information should be able to use publicly-available as well as third party pricing vendors. Finally, in response to JAC, the Commission confirms that the ''highly liquid'' standard is for Regulation 1.25 purposes only. This standard will not be substituted for ''ready market'' elsewhere in Commission regulations at the present time.

2. Ratings

Consistent with Section 939A of the Dodd-Frank Act, the Commission is amending Regulation 1.25, as proposed, by removing all references to ratings requirements.[108] Only one commenter discussed ratings. BlackRock cautioned that complete removal of ratings criteria as a risk filter may place undue responsibility on an FCM or DCO to complete a thorough risk assessment of an issuer's financial strength.[109]

The Commission notes that the removal of references to ratings does not prohibit a DCO or FCM from taking into account credit ratings as one of many factors to be considered in making an investment decision. Rather, the presence of high ratings is not required and would not provide a safe harbor for investments that do not satisfy the objectives of preserving principal and maintaining liquidity.

3. Restrictions on Instrument Features

In the NPRM, the Commission proposed to amend Regulation 1.25(b)(3)(v) (as amended, Regulation 1.25(b)(2)(v)) by restricting CDs to only those instruments which can be redeemed at the issuing bank within one business day, with any penalty for early withdrawal limited to accrued interest earned according to its written terms. Five commenters discussed restrictions on the instrument features of CDs. Four suggested that CDs be retained to varying degrees. One suggested that CDs be removed from the list of permitted investments entirely.

On the subject of safety, MF Global/Newedge asserted that brokered CDs are preferable to non-brokered CDs. In support of this conclusion, MF Global/Newedge pointed out that brokered CDs receive price quotes, are marked-to-market every day and have numerous buyers, while non-brokered CDs have only one buyer, ''which creates significant counterparty risk for FCMs purchasing such products.''[110]

ADM and RJO discussed the liquidity of the market for CDs. ADM suggested that brokered CDs are liquid despite an inactive secondary market.[111] RJO averred that non-negotiable CDs were not intended for institutional size transactions. RJO also predicted that this proposal could severely limit the quantity and quality of banks willing to accept the proposed stringent limitation on breakage fees.[112]

MF Global/Newedge recommended that brokered CDs remain permitted; however, if limits are to be imposed, they recommended (a) that issuers of brokered CDs meet certain capital criteria or the CDs meet certain float size thresholds, or (b) that FCMs be allowed to invest in brokered CDs up to 50 percent of their portfolio and/or 10 percent with any one issuer.[113] MF Global/Newedge also suggested that the Commission consider allowing brokered CDs with puts. Such an instrument may be traded in the secondary market, but also may be put back to the issuer.[114] Rather than restricting negotiable CDs, ADM suggested that the Commission restrict the allowable issuers of CDs using guidelines that the Commission sees fit.[115] Farr Financial recommended that brokered CDs be allowed as long as they generally meet the criteria of ''highly liquid.''[116] Farr Financial also suggested that the portion of the proposed rule limiting penalties for early withdrawal to ''any accrued interest earned'' be modified to account for the standard practices of CD penalties. For example, Farr Financial stated that CDs with a term of one year or less have an early withdrawal penalty of up to 90 days of simple interest earned. For CDs with a term of more than one year, typically the early withdrawal penalty is up to 180 days of simple interest. CIEBA recommended eliminating investments in both brokered and non-brokered CDs, without further explanation.[117]

The Commission is adopting the proposed amendment to Regulation 1.25(b)(3)(v) (as amended, Regulation 1.25(b)(2)(v)) by restricting CDs to only

[105] FIA/ISDA letter at 3.

[106] *Id.*

[107] JAC letter at 2.

[108] Section 939A(a) directs each Federal agency to review their regulations for references to or requirements of credit ratings and assessments of credit-worthiness. Section 939A(b) states, in part, that ''each such agency shall modify such regulation * * * to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulation such standard of credit-worthiness as each respective agency shall determine as appropriate for such regulations.'' *See* 75 FR 67254 (Nov. 2, 2010).

[109] BlackRock letter at 2.

[110] MF Global/Newedge letter at 7–8.

[111] ADM letter at 2. According to ADM, the inactivity of the secondary market for CDs is due to the fact that most buyers hold CDs to maturity. *Id.*

[112] RJO letter at 6. However it should be noted that this proposal does not alter Regulation 1.25 with regard to penalties; therefore the Commission views this concern as unwarranted.

[113] MF Global/Newedge letter at 8.

[114] *Id.*

[115] ADM letter at 2.

[116] Farr Financial letter at 3.

[117] CIEBA letter at 3.

those instruments which can be redeemed at the issuing bank within one business day, with any penalty for early withdrawal limited to accrued interest earned according to its written terms. The preservation of customer principal and the maintenance of liquidity are the two overriding determining factors in the permissibility of a CD for purposes of Regulation 1.25.

Customer principal can be threatened by market fluctuations and early redemption penalties. Unlike a non-brokered CD, the purchaser of a brokered CD cannot, in most instances, redeem its interest from the issuing bank. Rather, an investor seeking redemption prior to a CD's maturity date must liquidate the CD in the secondary market. Depending on the brokered CD terms (interest rate and duration) and the current economic conditions, the market for a given CD can be illiquid and can result in a significant loss of principal. Penalties for early redemption may cut into customer principal unless such penalties are limited, as they are in paragraph (b)(2)(v) of Regulation 1.25, to accrued interest.[118]

The ability of a CD purchaser to redeem a CD at the issuing bank within one day is the second key factor in determining whether a CD is acceptable as a Regulation 1.25 investment. As noted above, the purchaser of a brokered CD cannot, in most instances, redeem its interest from the issuing bank. If the secondary market for a brokered CD is illiquid, it can prevent FCMs and DCOs from retrieving customer funds for the purpose of making margin calls.

In response to MF Global/Newedge's request for clarification, the Commission notes that a brokered CD with a put option back to the issuing bank is an acceptable investment, assuming that the issuing bank obligates itself to redeem within one business day and that the strike price for the put is not less than the original principal amount of the CD.

4. Concentration Limits

Regulation 1.25(b)(4) currently sets forth issuer-based concentration limits for direct investments, other than MMMFs, and securities subject to repurchase or reverse repurchase agreements and in-house transactions. In the NPRM, the Commission proposed to adopt asset-based concentration limits for direct investments and a counterparty concentration limit for reverse repurchase agreements in addition to amending its issuer-based concentration limits and rescinding concentration limits applied to in-house transactions.

(a) Asset-Based Concentration Limits

The Commission's proposed asset-based concentration limits would restrict the amount of customer funds an FCM or DCO could hold in any one class of investments, expressed as a percentage of total assets held in segregation.

In the NPRM, the Commission proposed the following asset-based limits: No concentration limit (100 percent) for U.S. government securities; a 50 percent concentration limit for U.S. agency obligations fully guaranteed as to principal and interest by the United States; a 25 percent concentration limit for TLGP guaranteed commercial paper and corporate notes or bonds; a 25 percent concentration limit for non-negotiable CDs; a 10 percent concentration limit for municipal securities; and a 10 percent concentration limit for interests in MMMFs.

The Commission requested comment on whether asset-based concentration limits are an effective means for facilitating investment portfolio diversification and whether there are other methods that should be considered. The Commission, in particular, sought opinions on what alternative asset-based concentration limit might be appropriate for MMMFs and, if such asset-based concentration limit is higher than 10 percent, what corresponding issuer-based concentration limit should be adopted. The Commission also solicited comment on whether MMMFs should be eliminated as a permitted investment.[119] In discussing whether MMMF investments satisfy the overall objective of preserving principal and maintaining liquidity, the Commission specifically requested comment on whether changes in the settlement mechanisms for the tri-party repo market might impact an MMMF's ability to meet the requirements of Regulation 1.25.[120] The Commission requested comment on whether MMMF investments should be limited to Treasury MMMFs, or to those MMMFs that have portfolios consisting only of permitted investments under Regulation 1.25.[121]

Eighteen comment letters discussed MMMFs. The overwhelming majority of comments focused on the proposed limitations on MMMFs, which many in the industry believed to be ''arbitrary and unduly severe.'' [122] According to Federated, the Dodd-Frank Act ''represents the collective effort of Congress and the executive branch to prevent a repetition of the activities largely confined to the financial services sector that precipitated the domino effect of the failure of a large systemically risky company, such as Lehman Brothers, that led to the events at the Reserve Primary Fund.'' [123] Federated further asserted that unless the Commission does not believe that Congress' ''efforts were successful, the proposed limitations on [MMMFs] are unduly restrictive and unwarranted.'' [124] Commenters discussed a variety of topics including the safety of MMMFs, the recent enhancements to SEC Rule 2a–7, a comparison of the safety of MMMFs to other permitted investments, the appropriate concentration limits for MMMFs, and potential problems that would arise as a result of a 10 percent concentration limit, among other comments.

First, commenters stressed that MMMFs are safe, liquid investments, comprising roughly $3–4 trillion in assets [125] and representing approximately 25 percent of the total assets in registered investment companies in the United States. Commenters noted that only two funds in the 40-year history of MMMFs have failed to return $1 per share to investors (and those funds returned more than 99 cents and 96 cents on the dollar, respectively).[126]

According to many of the comment letters, the recent enhancements to SEC Rule 2a–7 have made MMMFs even safer and more prepared to withstand heavy redemption requests during a crisis. In this regard, heightened credit quality and shortened maturity limits increase liquidity, [127] as does a requirement that 10 percent of assets be in cash, Treasuries or securities that

[118] 17 CFR 1.25(b)(2)(v).

[119] Comment request appears in section II.A of the NPRM. *See* 75 FR at 67646.

[120] *Id.*

[121] Comment request appears in section II.C of the NPRM. *See* 75 FR at 67649.

[122] ICI letter at 2.

[123] Federated I letter at 6. The Commission notes that the Reserve Primary Fund (Reserve Primary) was an MMMF that satisfied the enumerated requirements of Regulation 1.25 and at one point was a $63 billion fund. Reserve Primary's ''breaking the buck,'' in September 2008, called attention to the risk to principal and potential lack of sufficient liquidity of any MMMF investment.

[124] Federate I letter at 6.

[125] Federated estimated $2.8 trillion. Federated I letter at 2. UBS noted a figure of $3.8 trillion as of May 2009. UBS letter at 6.

[126] Federated I letter at 1, CME letter at 4–5, J.P. Morgan letter at 1–2, Farr Financial letter at 1, UBS letter at 2.

[127] ICI letter at 4. ICI noted that the weighted average maturity (WAM) for MMMFs has been reduced from 90 to 60 days. As a result 60 percent of MMMFs have a WAM of 45 days or less. In contrast, more than half of all MMMFs had a WAM of greater than 45 days prior to the SEC's amendments to its Rule 2a–7.

convert into cash within one day. The SEC has increased the transparency of MMMFs by requiring that MMMFs provide portfolio information, updated monthly, on their Web sites. In addition, MMMFs are now required to conduct periodic stress tests, which examine an MMMF's ability to maintain a stable net asset value under hypothetical market conditions.[128]

Second, many commenters compared the safety of MMMFs to that of one or more other permitted investments. Six commenters averred that MMMFs are safer than Treasuries.[129] One commenter argued that municipal bonds are less liquid than MMMFs.[130] Two commenters argued that MMMFs were better investments than TLGP debt.[131] Five commenters wrote that MMMFs compared favorably with CDs.[132]

Third, many commenters suggested that a 10 percent MMMF limitation would cause some inconsonant and unintended results. CME stated that, in theory, Regulation 1.25 as proposed would permit over 50 percent of a customer funds portfolio to be invested in TLGP securities, municipal securities and non-negotiable CDs. In practice, however, FCMs' use of these investment categories is limited.[133] ICI wrote that an incongruity exists where an FCM may invest all of its assets in a self-managed portfolio of Treasuries, but may only invest 10 percent of its assets in an MMMF consisting of the same securities.[134] Federated expressed views similar to those of ICI, writing that investments in government funds should not be subject to any concentration limits. Federated also recommended that the Commission require that MMMFs maintain certain minimum financial thresholds in order to qualify as a Regulation 1.25 investment. Federated suggested, as thresholds, that an MMMF should manage assets of at least $10 billion and that the MMMF's management company should manage assets of at least $50 billion.[135] Dreyfus noted that, under the proposal, an FCM may construct a pool of individual securities outside the constraints of SEC Rule 2a–7 which would have maturities of longer than those required of MMMFs. Therefore, greater interest rate risk might be associated with a self-managed portfolio than with the portfolio in an MMMF.[136] The decrease in MMMF investment might lead more funds to be held in cash in banks (with only $250,000 FDIC insurance).[137] According to Farr Financial, another possible result of a 10 percent limitation on MMMFs is that FCMs and DCOs would hold a large amount of Treasuries, and, in the event that an FCM or DCO would need to liquidate such Treasuries, would experience potential loss in the secondary market.[138] BlackRock wrote that an overreliance on Treasuries and government securities would place portfolios in greater danger due to changes to interest rates. For example, a sudden rise in interest rates may negatively impact the principal valuation of Treasuries.[139] If liquidation is required during such a circumstance, FCMs may experience a loss in principal.[140]

Fourth, several commenters highlighted other potential difficulties that could result from the proposed 10 percent concentration limit, including issues of diversification, self-management and liquidity. The NFA warned that by limiting investment in MMMFs and other instruments, the Commission risks decreasing diversification rather than increasing it.[141] Along similar lines, ICI stated that the average MMMF is more diversified than the portfolio of bank CDs or municipal securities that FCMs or DCOs would be permitted to hold under the proposed amendments.[142]

Three commenters discussed the problems that arise from self-managed accounts. ICI, Dreyfus and BNYM suggest that by limiting MMMFs to 10 percent, the Commission would be forcing FCMs and DCOs to manage 90 percent of their portfolios themselves. Investments in TLGP debt, CDs and municipals require asset management skills that FCMs and DCOs might not have without hiring an investment adviser. While some FCMs and DCOs may be large enough to do this, many are not—and requiring FCMs to ''go it alone'' will cause customer funds to be at greater risk.[143] ADM wrote that because intraday settlements from clearing organizations are not known until 12 noon CST or later, it would be difficult to maintain sufficient liquid assets without the use of MMMFs.[144]

In response to the Commission's request for comment on the proposed changes in the tri-party repo market, which have not been fully implemented, ICI wrote that the changes would allow sellers in tri-party repurchase agreements to repurchase the underlying securities later in the afternoon. Previously, such sellers would repurchase securities in the morning using funds borrowed from their clearing banks. The proposed changes should not, according to ICI, adversely affect an MMMF's ability to pay redemptions by the end of each day. Because the repurchases would occur while the Fedwire system is open, MMMFs can transfer the proceeds to their transfer agents to cover daily redemptions.[145]

The NPRM also requested comment on whether, or to what extent, MMMFs ought to be limited to Treasury funds. Dreyfus stated that it would not support such a limitation, as it believes that Government, prime, and municipal MMMFs are subject to sufficient risk-limiting constraints that merit their availability to FCMs and DCOs.[146] Treasury funds are traditionally smaller in size and less liquid than prime MMMFs, according to FIA/ISDA.[147] RJO wrote that because Treasury funds lag interest rate movements for significant periods of time, they are likely not viable options for FCMs in upward interest rate environments or over long periods of time.[148] Taking a different position, BlackRock suggested that Treasury MMMFs should be exempt from any asset-based limitations instituted by the Commission.[149] In addition, BlackRock recommended that the Commission require investment decision-makers at FCMs to perform periodic assessments of their MMMF providers.[150]

CIEBA would support limiting MMMFs to only those funds which invest in securities that would be permitted investments under Regulation 1.25.[151] CIEBA did not include further discussion or explanation.

[128] CME letter at 4–5, Federated I letter at 1, FIA/ISDA letter at 6–8, MF Global/Newedge letter at 6, J.P. Morgan letter at 1–2, UBS letter at 2–4, Dreyfus letter at 2, RJO letter at 7–8, INTL/FCStone letter at 2, BlackRock letter at 2–4, ADM letter at 1, BNYM letter at 2–3, BLS letter at 2.

[129] CME letter at 6, Farr Financial letter at 2, ICI letter at 7, Dreyfus letter at 4, ADM letter at 3, Federated II letter (Bilson essay at 8).

[130] Dreyfus letter at 4.

[131] UBS letter at 6, Dreyfus letter at 4.

[132] Federated I letter at 1, CME letter at 4–5, MF Global/Newedge letter at 6, UBS letter at 5, 7, Dreyfus letter at 4.

[133] CME letter at 6.

[134] ICI letter at 8.

[135] Federated III letter at 2–3.

[136] Dreyfus letter at 2.

[137] As pointed out by Farr Financial, FDIC insurance passes through to an FCM's customers. *See* Farr Financial letter at 2–3.

[138] Farr Financial letter at 2.

[139] BlackRock letter at 2, 5.

[140] *Id.*

[141] NFA letter at 2.

[142] ICI letter at 10.

[143] ICI letter at 6–8, Dreyfus letter at 4, BNYM letter at 2–3.

[144] ADM letter at 1.

[145] ICI letter at 12.

[146] Dreyfus letter at 2.

[147] FIA/ISDA letter at 8.

[148] RJO letter at 8.

[149] BlackRock letter at 4.

[150] BlackRock letter at 2, 5.

[151] CIEBA letter at 3.

As noted above, the Commission proposed a 10 percent asset-based concentration limit for investments in MMMFs. In response to comments, the Commission has decided to revise the rule language that was proposed. Specifically, the Commission will impose different concentration limits for investments in Treasury-only funds than for investments in all other MMMFs. The Commission also will distinguish between funds that do not have both $1 billion in assets and a management company that has at least $25 billion in MMMF assets under management (small MMMFs) and those that do (large MMMFs). Federated, as noted above, recommended that asset thresholds for MMMFs be set at $10 billion and $50 billion, respectively. However, the Commission believes, at this time, that such thresholds may needlessly constrain the pool of MMMFs available for investment and result in an unsafe concentration of customer funds in a limited number of MMMFs. The modifications to the proposed rule text discussed below reflect the Commission's consideration of the comments received on the proposed concentration limit for investments in MMMFs, in light of the overarching objective of preserving principal and maintaining liquidity of customer funds.

First, an FCM or DCO may invest all of its customer segregated funds in Treasury-only MMMFs, subject to the limitation on investment in small MMMFs discussed below. The Commission agrees with commenters that since an FCM or DCO may invest all of its funds in Treasuries directly, an FCM or DCO therefore should be able to make the same investment indirectly via an MMMF.

Second, for all other MMMFs, the Commission believes that a 50 percent asset-based concentration limit is appropriate, subject to the limitation on investment in small MMMFs discussed below. After considering the views presented by market participants, Commission staff and other regulators, the Commission has determined that a 50 percent asset-based concentration limit strikes the right balance between providing FCMs and DCOs with sufficient Regulation 1.25 investment options and, at the same time, encouraging adequate portfolio diversification.

MMMFs' portfolio diversification, administrative ease, and the heightened prudential standards recently imposed by the SEC, continue to make them an attractive investment option. However, their volatility during the 2008 financial crisis, which culminated in one fund ''breaking the buck'' and many more funds requiring infusions of capital, underscores the fact that investments in MMMFs are not without risk. The Commission is persuaded to increase the proposed asset-based concentration limit for MMMFs, other than Treasury-only MMMFs, from 10 percent to 50 percent in part by commenters who noted that MMMFs are safe and liquid relative to other permitted investments.[152] Commenters were persistent in reminding the Commission that, aside from Reserve Primary, no MMMFs had ''broken the buck'' during the 2008 financial crisis and aftermath. The Commission is also cognizant that decreasing the number of investment options might have the unintended consequence of over-concentrating customer funds into a small universe of viable investments. Further, these concentration limits provide FCMs and DCOs with the ability to delegate investment decisions for their entire portfolio of customer segregated funds to MMMFs, should the FCMs and DCOs not wish to make such decisions on their own.

To the extent that an FCM or DCO invests customer segregated funds in an MMMF, subject to the asset-based concentration limits outlined above, the FCM or DCO may only invest up to 10 percent of its segregated funds in small MMMFs. The Commission believes that distinguishing between small MMMFs and large MMMFs is a necessary corollary to increasing the concentration limits proposed in the NPRM, since large MMMFs have capital bases better capable of handling a high volume of redemption requests in the event of a market event. To the extent that an FCM or DCO invests customer segregated funds in small MMMFs, the 10 percent asset-based concentration limit in the final rule is unchanged from the concentration limit set forth in the NPRM. However, having considered the comments received on this issue, the Commission has determined it appropriate to elevate the asset-based concentration limits from what had been proposed—both for Treasury-only MMMFs and for all other MMMFs—to the extent that an FCM or DCO invests in large MMMFs.

Accordingly, the Commission is amending Regulation 1.25 by adding new paragraphs (b)(3)(i)(E)–(G), which implement the changes described above. The addition of these paragraphs enables the Commission to increase the concentration limits originally proposed without undermining the protection of customer funds and reduction of systemic risk, while addressing the concerns specifically raised in the comments.

The Commission has concluded that all other asset-based concentration limits remain as proposed in the NPRM. The 50 percent asset-based limitation on U.S. agency obligations [153] and the 25 percent asset-based limitation on each of TLGP corporate notes or bonds and TLGP commercial paper,[154] are consistent with commenter recommendations. Therefore, the Commission is amending Regulation 1.25(b)(3)(i), as proposed, to reflect the asset-based concentration limits described above.

With respect to the calculation of concentration limits, ADM wrote that concentration limits should be calculated by aggregating Regulation 1.25 funds and 30.7 funds.[155] ADM explained, by way of example, that if there is a 50 percent concentration limit for investment X, along with $5 billion in the segregated account and $1 billion in the 30.7 account, that the maximum amount that could be invested in X would be $3 billion. From this comment, the Commission concludes that ADM would like the choice of investing up to 60 percent of its segregated account funds in investment X, as long as that amount, when combined with the size of the 30.7 account, does not exceed 50 percent of the cumulative size of the segregated and 30.7 account. However, the Commission has determined that concentration limits are to be calculated on a fund-by-fund basis. In the example above, the maximum amount of segregated funds that could be invested in X would be $2.5 billion, and the maximum amount of 30.7 funds that could be invested in X would be $0.5 billion. ADM presented no compelling argument as to why the aggregation of

[152] Although MMMFs allow FCMs and DCOs to indirectly invest in instruments which would not be permitted under Regulation 1.25 as direct investments, the Commission believes that the credit quality, maturity limitations and liquidity required by the SEC make prime MMMFs acceptable investments, subject to the concentration limits imposed by paragraph (b)(3).

[153] *See* Section II.A.1. CME recommended 25 percent, BlackRock recommended 30 percent, and FIA/ISDA and MF Global/Newedge both recommended 50 percent.

[154] *See* Section II.A.2. MF Global/Newedge recommended 25 percent and BlackRock recommended 25 percent–50 percent. The Commission is aware that MF Global/Newedge's recommendation was for all corporate notes or bonds and commercial paper—not merely those which are TLGP debt. Regardless, such a recommendation is helpful in establishing a percentage that will allow for ample investment in instrument categories while still promoting diversification.

[155] ADM letter at 2.

funds held in Regulation 1.25 and 30.7 accounts should be permitted.

(b) Issuer-Based Concentration Limits

The Commission proposed to amend its issuer-based limits for direct investments to include a 2 percent limit for an MMMF family of funds, expressed as a percentage of total assets held in segregation. Currently, there is no concentration limit applied to MMMFs. Under the NPRM, the 25 percent issuer-based limitation for GSEs (now proposed to be encompassed within the term ''U.S. agency obligations'') and the 5 percent issuer-based limitation for municipal securities, commercial paper, corporate notes or bonds, and CDs would remain in place.

Commenters expressed doubts over whether issuer-based concentration limits, on individual or families of MMMFs, would have a meaningful, positive effect on the safety of customer funds. Adverse market conditions would probably affect all funds, according to ICI, and therefore issuer concentration limits would do little to mitigate these risks.[156]

BlackRock, ICI and Dreyfus suggested that limits on family of funds may not achieve increased safety of customer funds as each MMMF in a family is managed on an individual basis and will not necessarily share risks with other MMMFs managed by the same adviser. Dreyfus wrote that it sees ''no benefit * * * to requiring FCMs to have to potentially invest in a [prime MMMF] with one provider and a [government or Treasury MMMF] with another provider, on the basis that such an arrangement is safer than if the FCM invested in each of these types of funds with a single provider.'' [157] BlackRock also noted that MMMF complexes do not typically aggregate and publish consolidated family data on a daily basis.[158]

Commenters also questioned the effectiveness of issuer-based limitations on individual funds. Dreyfus asserted that the operations and results of one fund do not impact the operation and results of another fund.[159] ICI propounded that similar types of MMMFs often have common holdings. Thus, according to ICI, limiting investments in individual funds will have a marginal effect on the diversification of underlying credit risks.[160]

Taken as a whole, these arguments, that concentration limits will not increase the safety of customer funds, are untenable. The commenters assert that neither family-of-funds limits nor issuer-based limits will increase the diversification and safety of customer funds. If believed, this leads to the conclusion that it would be safer and more diverse (or at least as safe and diverse) for an FCM, investing the maximum amount in MMMFs, to invest all customer cash in one fund than it would be for that FCM to invest that customer cash among five funds in three families. As such, the Commission is not persuaded by the arguments.[161]

The Commission has considered the comments received on this issue, and is mindful of the comments and Commission analysis of the asset-based concentration limits discussed in the preceding section. Having considered the arguments raised, the Commission has decided to revise the rule language that was proposed. Specifically, the Commission has determined that there will be no family-of-funds or issuer-based concentration limit for MMMFs that consist entirely of Treasuries, and a 25 percent family of funds issuer-based limitation as well as a 10 percent individual fund issuer-based limitation for all other MMMFs. Investments in Treasury-only funds are not to be combined with investments in other MMMFs for purposes of calculating either family-of-funds or issuer-based concentration limits. The increase in the family of funds issuer-based concentration limit is related to the increase in the asset-based concentration limit and addresses the recommendations of commenters. The introduction of the 10 percent individual fund issuer-based concentration limit serves to add an additional layer of diversification and also aligns with recommendations of commenters.

(c) Counterparty Concentration Limits

In the NPRM, the Commission proposed a counterparty concentration limit of 5 percent of total assets held in segregation for securities subject to reverse repurchase agreements. Seven commenters discussed counterparty concentration limits. All expressed their belief that the 5 percent concentration limit was too low and that such a limit would greatly increase administrative risks and costs. Most commenters favored a 25 percent concentration limit, in the event that a concentration limit was imposed.

FIA/ISDA, LCH, MF Global/Newedge, J.P. Morgan and RJO expressed similar views that a 5 percent concentration limit might actually decrease liquidity and increase operational and systemic risk. LCH and MF Global/Newedge wrote that a counterparty concentration limit would unnecessarily restrict a very liquid and secure investment that has provided flexibility and reasonable returns to FCMs and their customers.[162] According to FIA/ISDA, because clearing members are often required to execute and unwind reverse repurchase agreements intraday and within a brief period of time, and because DCOs strictly define the securities they will accept as collateral, an FCM must review the securities received under reverse repurchase transactions to ensure that they are both eligible for delivery to the DCO and in compliance with applicable concentration limits.[163] Several commenters observed that requiring an FCM to effect reverse repurchase transactions with multiple counterparties under tight time frames will substantially increase an FCM's operational risk and invite errors.[164] By way of example, INTL/FCStone noted that it currently has one counterparty and would potentially need to open 20 reverse repurchase accounts were the proposed rule enacted.[165] Further, two commenters wrote that a critical factor to consider is that, in the event of a counterparty's default, all amounts are collateralized with permitted investments under Regulation 1.25.[166]

INTL/FCStone [167] and FIA/ISDA [168] recommended a 25 percent counterparty concentration limit. RJO wrote that limits are unnecessary—however if a limit were imposed, RJO recommended 25 percent.[169] LCH suggested a 10 percent–20 percent limitation.[170] MF Global/Newedge recommended having no counterparty limits; however to the extent that there must be, it recommended (a) limiting FCM repurchase and reverse repurchase transactions to those external counterparties maintaining a certain level of capital (such as $50 or $100

[156] ICI letter at 11.

[157] Dreyfus letter at 5. *See also* ICI letter at 10.

[158] BlackRock letter at 4.

[159] Dreyfus letter at 5.

[160] ICI letter at 10–11.

[161] In response to Dreyfus and ICI's comment regarding limits on family of funds, the Commission believes that a failure of, or a run on, an individual fund would likely cause a run on other funds in the family due to investors' reputational concerns.

[162] LCH letter at 3, MF Global/Newedge letter at 6.

[163] FIA/ISDA letter at 9–10.

[164] FIA/ISDA letter at 9–10, MF Global/Newedge letter at 7, J.P. Morgan letter at 2, LCH letter at 3, RJO letter at 3.

[165] INTL/FCStone at 2.

[166] LCH letter at 3, MF Global/Newedge letter at 7.

[167] INTL/FCStone at 2.

[168] FIA/ISDA letter at 10.

[169] RJO letter at 3.

[170] LCH letter at 3.

million) or (b) setting counterparty concentration limits at 25 percent.[171] ADM wrote that it does not believe any concentration limit is necessary due to the collateralized nature of the loans.[172] However, ADM stated that it would support only allowing certain collateral, such as Treasuries and GSEs, in repurchase transactions.[173]

As noted above, the Commission proposed a 5 percent counterparty concentration limit in the NPRM. Having considered the comments submitted in response to the proposal, the Commission has determined that a 25 percent counterparty concentration limit is appropriate.

The Commission continues to believe that counterparty concentration limits are necessary for safeguarding customer funds. Under current rules, an FCM or DCO could have 100 percent of its segregated funds subject to one reverse repurchase agreement. The obvious concern in such a scenario is the credit risk of the counterparty. This credit risk, while concentrated, is significantly mitigated by the fact that in exchange for cash, the FCM or DCO is holding Regulation 1.25-permitted securities of equivalent or greater value. However, a default by the counterparty would put pressure on the FCM or DCO to convert such securities into cash immediately and would exacerbate the market risk to the FCM or DCO, given that a decrease in the value of the security or an increase in interest rates could result in the FCM or DCO realizing a loss. Even though the market risk would be mitigated by asset-based and issuer-based concentration limits, a situation of this type could seriously jeopardize an FCM or DCO's overall ability to preserve principal and maintain liquidity with respect to customer funds.

The Commission is persuaded to increase the limit, from the proposed level of 5 percent in the NPRM to 25 percent, primarily due to comments expressing concern about the administrative costs and burdens of a low counterparty concentration limit. Whereas a 5 percent limitation would require an FCM reverse-repurchasing all of its customer cash to have 20 counterparties, a 25 percent limitation decreases the number of counterparties to four. Further, 25 percent is in line with commenter recommendations, which ranged from 10 to 25 percent.[174]

C. Money Market Mutual Funds

The Commission has decided to make two technical amendments to paragraph (c) of Regulation 1.25. First, the Commission is clarifying the acknowledgment letter requirement under paragraph (c)(3); and second, the Commission is revising and clarifying the exceptions to the next-day redemption requirement under paragraph (c)(5)(ii).

1. Acknowledgment Letters

In the NPRM, the Commission sought to clarify that the intent of Regulation 1.25(c)(3) is to require that an FCM or DCO obtain an acknowledgment letter from a party that has substantial control over a fund's assets and has the knowledge and authority to facilitate redemption and payment or transfer of the customer segregated funds invested in shares of the MMMF. The Commission concluded that in many circumstances, the fund sponsor, the investment adviser, or fund manager would satisfy this requirement. The Commission also proposed to remove the current language in Regulation 1.25(c)(3) relating to the issuer of the acknowledgment letter when the shares of the fund are held by the fund's shareholder servicing agent. This revision was designed to eliminate any confusion as to whether the acknowledgment letter requirement is applied differently based on the presence or absence of a shareholder servicing agent.

The Commission requested comment on whether the proposed standard for entities that may sign an acknowledgment letter is appropriate and whether there are other entities that could serve as examples. The Commission requested comment on whether removal of the ''shareholder servicing agent'' language helps clarify the intent of Regulation 1.25(c)(3).

Three commenters discussed this proposal. CME, BBH and FIA/ISDA support the proposal, and FIA/ISDA and BBH had additional comments and suggested changes as well.[175]

BBH and FIA/ISDA requested that the Commission confirm that, in those circumstances in which an FCM deposits customer funds with a bank or other depository and thereafter instructs the bank to invest such customer funds in an MMMF, the bank is the appropriate entity from which the FCM should obtain the acknowledgment letter.[176] BBH explained that such settlement banks are ''universally recognized, both by regulation and standard contractual terms, as an entity that exercises legitimate control and authority over assets deposited both directly with it or held in an account at a third party depository or fund.''[177]

The Commission is amending Regulation 1.25(c)(3) to reflect that an FCM or DCO must obtain an acknowledgment letter from a party that has substantial control over MMMF shares purchased with customer segregated funds and has the knowledge and authority to facilitate redemption and payment or transfer of the customer segregated funds invested in shares of the MMMF and is removing the current language in Regulation 1.25(c)(3) relating to the issuer of the acknowledgment letter when the shares of the fund are held by the fund's shareholder servicing agent. In response to FIA/ISDA and BBH, the Commission agrees that when an FCM deposits customer funds in a bank or other depository and thereafter instructs the depository to invest such customer funds in an MMMF, the acknowledgment letter may come from the depository if it is acting as a custodian for the fund shares owned by the FCM or DCO. The Commission therefore clarifies in the rule text that a ''depository acting as custodian for fund shares'' is an appropriate entity to issue an acknowledgment letter.

2. Next-Day Redemption Requirement

Regulation 1.25(c) requires that ''[a] fund shall be legally obligated to redeem an interest and to make payment in satisfaction thereof by the business day following a redemption request.''[178] This ''next-day redemption'' requirement is a significant feature of Regulation 1.25 and is meant to ensure adequate liquidity.[179] Regulation 1.25(c)(5)(ii) lists four exceptions to the next-day redemption requirement, and incorporates by reference the emergency conditions listed in Section 22(e) of the Investment Company Act (Section 22(e)).[180] The Commission has, on occasion, fielded questions from FCMs regarding Regulation 1.25(c)(5), particularly because the exceptions listed in paragraph (c)(5)(ii) overlap with some of those appearing in Section 22(e).

[171] MF Global/Newedge letter at 7.

[172] ADM letter at 2.

[173] *Id.*

[174] As noted above, certain commenters wished to have no counterparty concentration limits, a position with which the Commission does not agree.

[175] CME letter at 7, FIA/ISDA letter at 13, BBH letter at 2.

[176] BBH letter at 2, FIA/ISDA letter at 13.

[177] BBH letter at 2.

[178] 17 CFR 1.25(c)(5)(i).

[179] *See* 70 FR 5585 (noting that ''[t]he Commission believes the one-day liquidity requirement for investments in MMMFs is necessary to ensure that the funding requirements of FCMs will not be impeded by a long liquidity time frame'').

[180] 15 U.S.C. 80a–22(e).

In order to expressly incorporate SEC Rule 22e–3 into the permitted exceptions for purposes of clarity, and to otherwise clarify the existing exceptions to the next-day redemption requirement, the Commission proposed to amend paragraph (c)(5)(ii) of Regulation 1.25 by more closely aligning the language of that paragraph with the language in Section 22(e) and specifically including a reference to Rule 22e–3. The Commission proposed to include, as an appendix to the rule text (Regulation 1.25 Appendix), safe harbor language that could be used by MMMFs to ensure that their prospectuses comply with Regulation 1.25(c)(5).

The Commission requested comment on all aspects of its proposed amendments to the provisions regarding MMMFs in paragraph (c) of Regulation 1.25. The Commission sought comment specifically on any proposed regulatory language that commenters believe requires further clarification. In addition, commenters were invited to submit views on the usefulness and substance of the proposed safe harbor language contained in the proposed Regulation 1.25 Appendix.

Only one commenter, ICI, mentioned this aspect of the NPRM. ICI supported this proposal to clarify exemptions from next-day redemption and to include safe harbor language.[181] Therefore, the Commission amends paragraph (c)(5)(ii) of Regulation 1.25 by more closely aligning the language of that paragraph with the language in Section 22(e) and specifically including a reference to Rule 22e–3. The Commission is also adding the Regulation 1.25 Appendix to the rule text, in order to provide MMMFs with safe harbor language to ensure that their prospectuses comply with Regulation 1.25(c)(5).

D. Repurchase and Reverse Repurchase Agreements

The Commission proposed specifically eliminating repurchase and reverse repurchase transactions with affiliate counterparties. Repurchase and reverse repurchase transactions are functionally similar to collateralized loans, whereby cash is exchanged for unencumbered collateral. In the NPRM, the Commission explained its view that the concentration of credit risk increases the likelihood that the default of one party could exacerbate financial strains and lead to the default of its affiliate. The Commission used the example of Bear Stearns Companies, Inc. (Bear Stearns) in 2008 [182] to illustrate that even possession and control of liquid securities may be insufficient to alleviate concerns relating to transactions with financially troubled affiliated counterparties.

The Commission received four comment letters discussing this topic. CME and FIA/ISDA both suggested that FCMs have much greater certainty and are exposed to substantially less counterparty risk to the extent that they enter into transactions with affiliates.[183] FIA/ISDA stated that funds held in affiliate accounts are at no greater risk in the event of a default than they would be in the event of a default of a non-affiliate. In both cases, the requirements of Regulation 1.25(d) are the same. Further, FIA/ISDA wrote that the Bear Stearns example used by the Commission in the NPRM relates to Bear Stearns' abilities to enter into agreements with third parties, not its affiliates.[184] RJO noted that affiliates should be judged as acceptable if the affiliate meets or exceeds the capital base or some other methodology deemed satisfactory for adding an arms-length counterparty.[185] MF Global/Newedge wrote that removing repurchase agreements with affiliates would not reduce FCM risk, ''since FCMs would be unable to enter into and execute such transactions with and through entities and personnel with whom they have created an effective, efficient and liquid settlement framework.'' [186]

The Commission is not persuaded by these comments. In particular, while the Commission acknowledges that affiliates have a legal status that may distinguish such transactions from in-house transactions, the concentration of credit risk and the potential for conflicts of interest during times of crisis remain significant concerns. Indeed, the Commission's reference to Bear Stearns in the preamble was intended to serve as an illustration of how an elevated concentration of credit risk may produce broad, unforeseen consequences.

Further, as discussed in the NPRM, the interest of consistency of the regulation weighs in favor of disallowing repurchase agreements between affiliates. The Commission finds it incongruous that an investment in the debt instrument of an affiliate (effectively a collateralized loan between affiliates) could be prohibited by paragraph (b)(6) while a repurchase agreement between affiliates (which is the functional equivalent of a short-term collateralized loan between affiliates) could be allowed.

Finally, the Commission believes that firms engage in repurchase agreements with affiliates for purposes of balance sheet maintenance. Repurchase agreements with affiliates may cause a consolidated balance sheet to appear smaller than it would if the same transaction occurred with an unaffiliated third party because such transactions, while they may appear on sub-ledgers, are typically eliminated on the consolidated balance sheet. While FCMs and DCOs may prefer to use such transactions to manage their balance sheets, as mentioned in the context of in-house transactions in Section II.A.4 of this release, the purpose of Regulation 1.25 is not to assist FCMs and DCOs with managing their balance sheets. Rather, the purpose of Regulation 1.25 is to permit FCMs and DCOs to invest customer funds in a manner that preserves principal and maintains liquidity. Because of the concerns expressed above, particularly with respect to the potential for conflicts of interest, the Commission believes that the interests of protecting customer funds are best served by eliminating repurchase agreements with affiliates. Therefore, the Commission is amending paragraph (d) as proposed.[187]

E. Regulation 30.7

1. Harmonization

In the NPRM, the Commission proposed to harmonize Regulation 30.7 with the investment limitations of Regulation 1.25 by adding new paragraph (g) to Regulation 30.7. As noted above, the Commission had not previously restricted investments of 30.7 funds to the permitted investments under Regulation 1.25, although Regulation 1.25 limitations can be used as a safe harbor for such investments.[188]

[181] ICI letter at 11.

[182] *See* SEC Press Release No. 2008–46, ''Answers to Frequently Asked Investor Questions Regarding the Bear Stearns Companies, Inc.'' (Mar. 18, 2008), *available at http://www.sec.gov/news/press/2008/2008-46.htm* (noting that rumors of liquidity problems at Bear Stearns caused their counterparties to become concerned, creating a ''crisis of confidence'' which led to the counterparties' ''unwilling[ness] to make secured funding available to Bear Stearns on customary terms'').

[183] CME letter at 3, FIA/ISDA letter at 9–11.

[184] FIA/ISDA letter at 10–11.

[185] RJO letter at 4.

[186] MF Global/Newedge letter at 7.

[187] *See* supra n. 100 (discussing petition procedures set forth in Regulation 13.2, 17 CFR 13.2).

[188] *See* Commission Form 1–FR–FCM Instructions at 12–9 (Mar. 2010) (''In investing funds required to be maintained in separate section 30.7 account(s), FCMs are bound by their fiduciary obligations to customers and the requirement that the secured amount required to be set aside be at

The Commission now believes that it is appropriate to align the investment standards of Regulation 30.7 with those of Regulation 1.25 because many of the same prudential concerns arise with respect to both segregated customer funds and 30.7 funds. Such a limitation should increase the safety of 30.7 funds and provide clarity for the FCMs, DCOs, and designated self-regulatory organizations. Two comment letters, from JAC and FIA/ISDA discussed this subject and both supported the amendment.

2. Ratings

In the NPRM, the Commission proposed to remove all rating requirements from Regulation 30.7. This amendment is required by Section 939A of the Dodd-Frank Act and further reflects the Commission's views on the unreliability of ratings as currently administered and its interest in aligning Regulation 30.7 with Regulation 1.25.[189] The Commission requested comment on this proposal including whether there existed any sound alternatives to credit ratings.

One comment letter, from FIA/ISDA, discussed the topic and supported the proposal. No comments provided an alternative to credit ratings. As proposed, the Commission is removing paragraph (c)(1)(ii)(B) of Regulation 30.7 as it views a nationally recognized statistical rating organization (NRSRO) rating as unreliable to gauge the safety of a depository institution for 30.7 funds. This change also serves to align Regulation 30.7 with Regulation 1.25 on the topic of NRSROs.

3. Designation as a Depository for 30.7 Funds

As proposed, the Commission will no longer allow a customer to request that a bank or trust company located outside the United States be designated as a depository for 30.7 funds. Previously, under Regulation 30.7(c)(1)(ii)(C), a bank or trust company that did not otherwise meet the requirements of paragraph (c)(1)(ii) could still be designated as an acceptable depository by request of its customer and with the approval of the Commission. However, the Commission never allowed a bank or trust company located outside the United States to be a depository through these means, and has decided that it is appropriate to require that all depositories meet the regulatory capital requirement under paragraph (c)(1)(ii)(A).

FIA/ISDA and ADM both supported this amendment in their comment letters. Based on the foregoing, the Commission is amending Regulation 30.7, as proposed, by deleting paragraph (c)(1)(ii)(C).

4. Technical Amendments

JAC recommended reinserting ''foreign board of trade'' in Regulation 30.7(c)(1), believing it was inadvertently omitted in February of 2003.[190] The Commission agrees that the February 2003 **Federal Register** final rule notice contained a clear administrative error, and to address that administrative error, the Commission is reinserting ''[t]he clearing organization of any foreign board of trade'' in the rule text as new paragraph (c)(1)(v) and renumbering subsequent paragraphs accordingly.[191]

F. Implementation.

RJO, FIA/ISDA, CME, JAC and NFA suggest a phased implementation period of 180 days.[192] The Commission has determined to allow an implementation period of 180 days following the publication of the final rules.

III. Cost Benefit Considerations

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its action before promulgating a regulation.[193] In particular, costs and benefits must be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas, depending upon the nature of the regulatory action.

Section 4d of the Act[194] limits the investment of customer segregated funds to obligations of the United States and obligations fully guaranteed as to principal and interest by the United States (U.S. government securities), and general obligations of any State or of any political subdivision thereof (municipal securities). The Commission has exercised its authority to grant exempt relief under Section 4(c) of the Act to permit additional investments beyond those prescribed in Section 4d. Regulation 1.25 sets out the list of permissible investments, which the Commission has expanded substantially over the years.[195] As detailed in the discussion above, the final rules narrow the scope of investment choices in order to reduce risk and to increase the safety of Regulation 1.25 investments, consistent with the statute. Further, certain changes to the rule relating to the elimination of credit ratings are mandated by Section 939A of the Dodd-Frank Act.

FCMs currently hold over $170 billion in segregated customer funds and $40 billion in funds held subject to Regulation 30.7.[196] The funds are held as performance bond for the purpose of meeting margin calls and Commission regulations allow these funds to be invested by the FCMs and DCOs in enumerated investments subject to various restrictions. Through this rulemaking, the Commission has determined that certain investments are no longer permitted as they may not adequately meet the statute's paramount goal of protecting customer funds.

The Commission recognizes that restricting the type and form of permitted investments could result in certain FCMs and DCOs earning less income from their investments of customer funds. The Commission is unable to determine the magnitude of such income reduction, if any, because information was not provided to allow the Commission to estimate any such income reduction. No commenter provided information about the composition of the portfolio in which customer segregated funds are invested.

all times liquid and sufficient to cover all obligations to such customers. Regulation 1.25 investments would be appropriate, as would investments in any other readily marketable securities.'').

[189] *See supra* Section II.B.2 regarding the Commission's policy decision to remove references to credit ratings from Regulation 1.25 and other regulations.

[190] JAC letter at 2.

[191] Prior to 2003, Regulation 30.7(c) permitted an FCM to maintain 30.7 funds in, among other depositories, ''[t]he clearing organization of any foreign board of trade.'' ''Foreign Futures and Foreign Options Transactions,'' 52 FR 28980, 29000 (Aug. 5, 1987). In 2002, the Commission requested comment, in an NPRM, on whether the list of depositories enumerated in Regulation 30.7(c) should be expanded. ''Denomination of Customer Funds and Location of Depositories,'' 67 FR 52641, 52645 (Aug. 13, 2002). The Commission determined it appropriate to expand the list; however, in publishing the final rule, the Commission inadvertently failed to include ''[t]he clearing organization of any foreign board of trade'' on the list. *See* ''Denomination of Customer Funds and Location of Depositories,'' 68 FR 5545, 5550 (Feb. 4, 2003) (''Rule 30.7 will be amended to provide that the funds of foreign futures or options customers may, *in addition to those depositories already enumerated* * * *.'' (emphasis added)). The technical amendment set forth in this notice corrects that administrative error.

[192] CME letter at 7, JAC letter at 3, FIA/ISDA letter at 13, NFA letter at 3, RJO letter at 3.

[193] 7 U.S.C. 19(a).

[194] 7 U.S.C. 6(d).

[195] 7 U.S.C. 6(c).

[196] Based on CFTC data as of April 30, 2011. See CFTC Web site, Market Reports, Financial Data for FCMs at *http://www.cftc.gov/MarketReports/FinancialDataforFCMs/index.htm.*

As noted above, the list of permitted investments under the rules, notwithstanding the restrictions instituted herein, still represent a significantly wider selection of investment options than those permitted by the Act. Further, in most cases, the amended rules allow for investment in many of the same instruments as previously permitted, subject to asset-based and issuer-based concentration limits.

In issuing these final rules, the Commission has considered the costs and benefits of each aspect of the rules, as well as alternatives to them. In addition, the Commission has evaluated comments received regarding costs and benefits in response to its proposal.[197] Where quantification has not been reasonably estimable due to lack of necessary underlying information, the Commission has considered the costs and benefits of the final rules in qualitative terms.[198] Generally, as discussed more specifically below with respect to the CEA section 15(a) factors, the Commission believes that the restrictions on segregated customer funds and Regulation 30.7 fund investments promote important benefits. These include greater security for customer funds and enhanced stability for the financial system as a whole.

A discussion of the costs and benefits of this rule and the relevant comments is set out immediately below. The remainder of this Section III considers the costs and benefits of this rule under Section 15(a) of the CEA, organized by (i) impact on each class of permitted investment, (ii) certain other limitations on permitted investments, and (iii) Regulation 30.7.

Municipal Securities

Municipal securities are permitted investments pursuant to the Act. For the reasons discussed above, the final rule restricts the percentage of total customer segregated funds that may be held by an FCM or DCO in municipal securities to 10 percent. This is in addition to the 5 percent limitation of total customer segregated funds that previously existed for the investment in the municipal securities of any individual issuer.

The Commission has determined that the overall benefits of the concentration limitations for municipal securities and the resultant portfolio risk reductions—as compared to those without such limitations—are compelling, notwithstanding any related costs.

(1) Protection of Market Participants and the Public

The public has a strong interest in the stability of the nation's financial system, a goal of the Dodd-Frank Act. The new asset-based concentration limitation for municipal securities will protect market participants and the public by limiting losses to customer segregated funds in the event of a crisis in the municipal bond markets.

The Commission believes that such restrictions are appropriate and will benefit the public and market participants by safeguarding customer funds.

(2) Efficiency, Competitiveness and Financial Integrity of the Markets

The Commission believes that this rule promotes market efficiency, competitiveness and financial integrity in an important way. Imposing portfolio concentration limits lowers the risk of FCMs and DCOs suffering losses and/or being unable to liquidate assets to meet margin calls. This type of liquidity loss may operate to undermine market integrity and public confidence in the absence of this rule. While there may be some potential for ''forced sale'' losses for FCMs and DCOs on investments that may now be subject to restrictions, the Commission cannot gauge the magnitude and believes that it has taken measures appropriate to the circumstances to mitigate any potential costs. More specifically, the Commission is not in a position to know, with any precision, the portfolio holdings of FCMs and DCOs with respect to municipal securities, nor can the Commission predict the prevailing market conditions if FCMs and DCOs must sell municipal securities. Consequently, the Commission cannot quantify this cost. Further, as mentioned above, the Commission does not believe that FCMs or DCOs invest heavily in municipal securities, so ''forced sales,'' if necessary, should be of little impact. However, to reduce any potential impact, slight though it may be, the rules allow for a 180 day phase-in period, giving FCMs and DCOs ample time to adjust their portfolios to the extent necessary to comply with the regulations. Since municipal securities remain eligible investments for FCMs and DCOs and may be held either directly or indirectly through MMMFs,[199] the Commission believes that any potential impact on municipal securities markets generally also should be mitigated. Accordingly, the Commission believes that the significant benefits of having portfolios less concentrated in municipal securities justify any cost, as mitigated under the rules.

(3) Price Discovery

The Commission has considered the restrictions on municipal securities and has determined that the final rules should not have an impact on price discovery.

(4) Sound Risk Management Practices

As previously noted, the rules enhance risk management practices by reducing vulnerability to municipal securities defaults by the introduction of additional investment restrictions in the

[197] The commenters cost/benefit concerns fall in two categories, summarized below with the Commission's corresponding response.

• *Potentially reduced investment income may cause increases in customer fee.* Some public commenters suggested that a loss of investment income on customer segregated funds and those funds held pursuant to Regulation 30.7 potentially attributable to the rules' investment choice limitations, might incentivize FCMs and DCOs to raise customer fees to make up for reduced investment income. No objective evidence was provided to predict the likelihood of this speculated outcome. The Commission believes that the corresponding benefit—*i.e.,* substantially reduced risk and greater protection of customer segregated funds—justifies this speculative cost, particularly given that the purpose of the segregated funds is not investment income, but customer fund protection. Moreover, as discussed herein, two factors mitigate the magnitude of concern for the significance of any such a potential income reduction. First, under the final rules, most asset classes are still available to managers and are only subject to concentration limits. All other types of investments remain permitted, including Treasuries, municipals, other U.S. agency obligations, foreign sovereign debt and MMMFs. Second, the comment letters do not specify how extensively FCMs and DCOs actually directly invest in those assets classes the rules will exclude. Rather, comments expressing that limitations on direct investments in MMMFs would occasion extra cost and additional investment expertise, suggest that FCMs and DCOs have eschewed investment in these products, at least to some degree.

• *Potentially increased portfolio management costs.* Multiple commenters focused on the additional expense FCMs and DCOs might incur to acquire additional investment staff and expertise needed to manage portfolios under the new rules. Particular areas of concern related to the investment process in light of the removal of credit ratings from that process and portfolio management subject to the percentage limitations with regard to asset-type, issuer, and counterparty. Removal of credit ratings is not within Commission discretion. Moreover, the Commission believes the burden of on-boarding and risk managing additional counterparties, as well as the tracking of investments across more issuers, are offset by the benefit of increased portfolio diversification and more limited exposure to large credit and counterparty risk profiles.

[198] In the NPRM, the Commission invited the public ''to submit any data or other information that may have quantifying or qualifying the costs and benefits of the Proposal with their comment letters.'' The Commission received no such quantitative data or information with respect to these rules.

[199] These investments, of course, remain subject to the ''highly liquid'' requirement in these rules. To be a permitted investment, a municipal security must have the ability to be converted into cash within one business day, without a material discount in value.

form of asset-based concentration limits. However, given that the list of permitted investments remains relatively unchanged and that there is believed to be little investment in municipal securities at this time, there should be little or no additional resources required to comply with the final rule and the existing risk management strategies and systems should be largely unaffected.

(5) Other Public Interest Considerations

The greatest potential impact of this rule on public interest considerations stem from the increased stability of the financial system as a whole. The inclusion of asset-based concentration limits for municipal securities contributes to financial stability by encouraging sound investment strategies for customer segregated funds. For FCMs and DCOs, the expenses associated with managing within these limitations and the potential for reduced investment return opportunities are costs. As discussed above, municipal securities are not a widely used investment, however. Further, as a general matter, FCMs and DCOs still have a great deal of flexibility and the Commission believes that any added expense associated with a more active management of the investment portfolios should be minor relative to the benefits fostered.

U.S. Agency Obligations

U.S. agency obligations will continue to be permitted investments pursuant to the Commission's authority under Section 4(c), subject to certain restrictions under the rules. In addition to the existing 25 percent limitation on the securities of any single U.S. agency being held with customer segregated funds, the new rules limit this asset class in aggregate to 50 percent of the total customer segregated funds held by the FCM or DCO. The rules also condition investment in debt issued by Fannie Mae and Freddie Mac only while these entities are operating under the conservatorship or receivership of the FHFA.

(1) Protection of Market Participants and the Public

In response to concerns regarding the safety of GSE debt securities, highlighted by the 2008 failures of both Fannie Mae and Freddie Mac, these additional restrictions are designed to protect market participants and the public from the excessive risk that concentrated investment in these assets might present. The reduction of credit risk and the portfolio diversification requirements set forth by the amendment will provide greater security for customer funds, and ultimately to the FCMs and DCOs that rely on those funds.

(2) Efficiency, Competitiveness and Financial Integrity of the Markets

The Commission believes that this rule promotes market efficiency, competitiveness and financial integrity in an important way. Imposing portfolio concentration limits lowers the risk the risk of FCMs and DCOs suffering losses and/or being unable to liquidate assets to meet margin calls. This type of liquidity loss may operate to undermine market integrity and public confidence in the absence of this rule.

While there may be some potential for ''forced sale'' losses for FCMs and DCOs on investments that may now be subject to restrictions, the Commission cannot gauge the magnitude and believes that it has taken measures appropriate to the circumstances to mitigate any potential costs. More specifically, the Commission is not in a position to know, with any precision, the portfolio holdings of FCMs and DCOs with respect to U.S. agency obligations, nor can the Commission predict the prevailing market conditions if FCMs and DCOs must sell U.S. agency obligations. Consequently, the Commission cannot quantify this cost. However, to reduce any potential cost, the rules contemplate a 180 day implementation period, giving FCMs and DCOs ample time to liquidate portfolios to the extent necessary to comply with the regulations. Since investments in U.S. agency obligations remain available for indirect investment through MMMFs, the Commission believes any impact on the markets for U.S. agency obligations generally also should be mitigated. Accordingly, the Commission believes that the significant potential benefits of having portfolios less concentrated in U.S. agency obligations justify any cost, as mitigated under the rules.

(3) Price Discovery

The Commission has considered the restrictions on U.S. agency obligations and has determined that the final rules should not have an impact on price discovery.

(4) Sound Risk Management Procedures

The greatest costs relative to sound risk management procedures have been mentioned previously. The introduction of additional investment restrictions for U.S. agency obligations in the form of asset-based and issuer-based concentration limits may require FCMs and DCOs to enhance their investment management and portfolio monitoring resources. However, given that investments in U.S. agency obligations—including GSE debt securities—are currently permitted, the risk management strategies and systems should largely be in place already.

The Commission continues to believe that the overall benefits of the restrictions and concentration limits on U.S. agency obligations, as compared to those based on a regulatory standard without such limitations, are compelling, notwithstanding attendant costs of the restrictions and concentration limits. By limiting the concentration of an FCM's or DCO's investment in U.S. agency obligations, the Commission is encouraging a diverse portfolio that is more likely to withstand a crisis in the GSE debt securities market or a failure of one or more GSEs.

(5) Other Public Interest Considerations

The greatest potential effect of this rule on public interest considerations stem from the implications of these rules on the overall stability of the financial system. The inclusion of asset-based and issuer-based limits on U.S. agency obligations contributes to financial stability by reducing concentration risk for funds held in customer segregated accounts. For FCMs and DCOs, the expenses associated with administration and the potential for lost upside investment opportunities are costs. However, as discussed above, notwithstanding the limitations on U.S. agency obligations, FCMs and DCOs still have a great deal of flexibility to invest in such instruments and the added expense associated with a more active management of the investment portfolios should be minor relative to the benefits fostered.

Certificates of Deposit

CDs will continue to be permitted investments pursuant to the Commission's authority under Section 4(c), subject to certain restrictions under the rules. In addition to the current issuer-based limitation of 5 percent, the new rules impose a 25 percent asset-based limitation. The rules also condition investment in CDs to those that are redeemable at the issuing bank within one day, or are brokered CDs that have embedded put options.

(1) Protection of Market Participants and the Public

This rulemaking continues to allow CDs as a permitted investment for FCMs and DCOs while ensuring that such instruments adequately preserve the customers' principal and maintain liquidity. The costs of this rulemaking

include the administrative costs of moving from non-permitted CDs to permitted CDs (or other permitted investments) and potential lost upside investment opportunities from the inability to invest in non-permitted CDs. The Commission is unable to determine the reduction in income, if any, because it does not know the composition of the portfolio in which customer segregated funds are invested. The Commission believes that there is a strong benefit in creating a framework for CDs in which such instruments must be able to be redeemed, within one business day, at the issuing bank, however. The Commission believes that any cost brought about by this amendment is justified by a more diversified risk structure as a result of concentration limits. Further, given the availability of indirect investment in CDs generally through MMMFs, any income loss resulting from these limitations should be minor.

Like other asset types, FCMs and DCOs may need additional resources and expertise, and incur the related expense, to manage a portfolio subject to the percentage limitations of the rules with regard to asset-type and issuer. With sizeable allowances for MMMFs, FCMs and DCOs will be able to continue to leverage the expertise of fund managers and access indirect investment in otherwise restricted asset types.

(2) Efficiency, Competitiveness and Financial Integrity of the Markets

The Commission believes that this rule promotes financial integrity in an important way. Imposing portfolio concentration limits lowers the risk of FCMs and DCOs suffering losses and/or being unable to liquidate assets to meet margin calls. This type of liquidity loss may operate to undermine market integrity and public confidence in the absence of this rule.

While there may be some potential for ''forced sale'' losses for FCMs and DCOs on CDs now subject to restrictions, the Commission cannot gauge the magnitude and believes that it has taken measures appropriate to the circumstances to mitigate any potential costs. More specifically, the Commission is not in a position to know, with any precision, the portfolio holdings of FCMs and DCOs with respect to CDs, nor can the Commission predict the prevailing market conditions if FCMs and DCOs must sell CDs. Consequently, the Commission cannot quantify this cost. However, to reduce any potential cost, the rules contemplate a 180 day implementation period, giving FCMs and DCOs ample time to liquidate portfolios to the extent necessary to comply with the regulations. Since CDs remain eligible investments for FCMs and DCOs and may be held either directly or indirectly through MMMFs, the Commission believes that any potential impact on CD markets generally also should be mitigated. Accordingly, the Commission believes that the significant potential benefits of having portfolios less concentrated in CDs justify any cost, as mitigated under the rules.

(3) Price Discovery

The Commission has reviewed the restrictions on CDs and determined that the final rules should not have an impact on price discovery.

(4) Sound Risk Management Procedures

The greatest costs relative to sound risk management procedures have been mentioned previously. The introduction of additional investment restrictions to CDs in the form of asset-based concentration limits may require FCMs and DCOs to enhance their investment management and portfolio monitoring resources. However, the risk management strategies and systems should largely be in place already.

The Commission believes that the overall benefits of the concentration limitations and other restrictions on CDs and the resultant reductions in risk to portfolios, as compared to those based on a regulatory framework without such limitations, mitigate the costs.

(5) Other Public Interest Considerations

The greatest potential impact of this rule on public interest considerations stem from the implications of these rules on the stability of the financial system as a whole. The inclusion of asset-based limitations on CDs, as well as the restriction that all CDs must be redeemable at the issuing bank, contributes to financial stability by reducing concentration risk for funds held in customer segregated accounts. For FCMs and DCOs, the expenses associated with managing to these limitations on CDs and the potential for reduced upside investment return on CD investments are costs. However, as discussed above, notwithstanding these limitations, FCMs and DCOs may still invest directly in CDs and may invest indirectly through MMMFs. The added expense associated with a more active management of the investment portfolios should be minor relative to the benefits fostered.

Commercial Paper and Corporate Debt

Some commercial paper and corporate notes or bonds will continue to be permitted investments pursuant to the Commission's authority under Section 4(c), subject to certain restrictions under the rules. In addition to the existing 5 percent limitation on the securities of any single issuer of such instruments being held with customer segregated funds, the new rules limit these asset classes in aggregate to 25 percent, respectively, of the total customer segregated assets held by the FCM or DCO. The rules also restrict investment in commercial paper and corporate notes or bonds to those that are federally guaranteed as to principal and interest under the TLGP.

(1) Protection of Market Participants and the Public

The lack of liquidity that impacted these markets during the recent financial crisis, and which necessitated the federal guarantee under TLGP, highlights the concerns of permitting FCMs and DCOs unrestricted investment of customer funds in these assets. The limits imposed by this rule will protect customer funds from being invested in concentrated pools of unrated commercial paper and corporate notes or bonds. While the requirement that these instruments be guaranteed by TLGP may, in effect, severely limit investment in these instruments by FCMs and DCOs, the actual costs of this limitation for FCMs and DCOs are unclear, given that there is little data evidencing the extent of their use as an investment option, and the fact that indirect investment is still permitted through the use of MMMFs.

Like other asset types, FCMs and DCOs may need additional resources and expertise, and incur the related expense, to manage a portfolio of TLGP corporate notes or bonds and/or commercial paper subject to the percentage limitations of the rules and the TLGP restrictions. With sizeable allowances for MMMFs, FCMs and DCOs will be able to continue to leverage the expertise of fund managers and access indirect investment in otherwise restricted asset types.

(2) Efficiency, Competitiveness and Financial Integrity of the Markets

The Commission believes that this rule promotes financial integrity in an important way. Imposing portfolio concentration limits lowers the risk of FCMs and DCOs suffering losses and/or being unable to liquidate assets to meet margin calls. This type of liquidity loss may operate to undermine market integrity and public confidence in the absence of this rule.

While there may be some potential for ''forced sale'' losses for FCMs and DCOs

on commercial paper and corporate debt now subject to restrictions, the Commission cannot gauge the magnitude and believes that it has taken measures appropriate to the circumstances to mitigate any potential costs. More specifically, the Commission is not in a position to know, with any precision, the portfolio holdings of FCMs and DCOs with respect to commercial paper and corporate debt, nor can the Commission predict the prevailing market conditions if FCMs and DCOs must sell commercial paper and corporate debt. Consequently, the Commission cannot quantify this cost. However, to reduce any potential cost, the rules contemplate a 180 day implementation period, giving FCMs and DCOs ample time to liquidate portfolios to the extent necessary to comply with the regulations. Since investments in commercial paper and corporate debt remain available for indirect investment through MMMFs, the Commission believes any impact on commercial paper and corporate debt markets also should be mitigated. Accordingly, the Commission believes that the significant potential benefits of having portfolios less concentrated in commercial paper and corporate debt justify any cost, as mitigated under the rule.

(3) Price Discovery

The Commission has reviewed the restrictions on commercial paper and corporate notes or bonds and determined that the final rules should not have an impact on price discovery.

(4) Sound Risk Management Procedures

The greatest costs relative to sound risk management procedures have been mentioned previously. The introduction of additional investment restrictions in the form of asset-based concentration limits and the TLGP restriction may require FCMs and DCOs to enhance their investment management and portfolio monitoring resources. However, the risk management strategies and systems should largely be in place already.

The Commission believes that the overall benefits of the concentration limits and TLGP restrictions on commercial paper and corporate notes or bonds, and the resultant reductions in risk to portfolios, as compared to those based on a regulatory framework without such limitations, are compelling, notwithstanding attendant costs of the restrictions and concentration limits. By adding restrictions and increasing diversification through concentration limits, customer segregated funds should be better protected in the event of a crisis in the broader financial market.

(5) Other Public Interest Considerations

The greatest potential impact of this rule on public interest considerations stem from the implications of these rules for the stability of the financial system as a whole. The inclusion of asset-based limits on commercial paper and corporate notes or bonds, as well as the exclusion of corporate instruments that are not guaranteed by the TLGP, will contribute to financial stability by increasing the safety of funds in customer segregated accounts. For FCMs and DCOs, the expenses associated with managing these limitations and the potential for reduced upside investment opportunities are costs. However, as discussed above, notwithstanding the limitations on commercial paper and corporate notes or bonds, FCMs and DCOs still have a great deal of flexibility and the added expense associated with a more active management of the investment portfolios should be minor relative to the benefits fostered.

Foreign Sovereign Debt

Foreign sovereign debt is eliminated as a permitted investment in this rulemaking. However, the Commission invites FCMs or DCOs to request an exemption pursuant to the Commission's authority under Section 4(c), allowing them to invest in foreign sovereign debt: (1) To the extent that the FCM or DCO has balances in segregated accounts owed to its customers (or clearing member FCMs, as the case may be) in that country's currency; and (2) to the extent that investment in such foreign sovereign debt would serve to preserve principal and maintain liquidity of customer funds, as required by Regulation 1.25. Upon an appropriate demonstration, the Commission has noted that it may be amenable to granting such an exemption.

(1) Protection of Market Participants and the Public

The recent sovereign debt crises highlight the concerns of permitting FCMs and DCOs to invest customer funds in foreign sovereign debt. The restriction of this investment class will protect customer funds from being invested in risky or illiquid foreign sovereign debt. While this rule eliminates investment in these instruments by FCMs and DCOs, the actual costs of this restriction on FCMs and DCOs are unquantifiable, in large part because the extent to which DCOs invest in foreign sovereign debt is uncertain.

Certain commenters argued that investment in foreign sovereign debt is necessary to hedge currency risk, and a prohibition on doing so may be costly. While the Commission recognizes that the restriction may impose costs, such costs are mitigated by the ability of an entity to seek an exemption from the Commission. Further, in a scenario where a market event has caused a currency devaluation and/or the illiquidity of a country's sovereign debt, the Commission believes that customers' best interests are served by an FCM holding a devalued currency, which (albeit devalued) can be delivered immediately to the customer as opposed to an illiquid foreign sovereign debt issuance, which may not be able to be exchanged for any currency in a reasonably short timeframe.

(2) Efficiency, Competitiveness and Financial Integrity of the Markets

The Commission believes that this rule promotes financial integrity in an important way. Eliminating unpredictable and potentially risky instruments lowers the risk of FCMs and DCOs suffering losses and/or being unable to liquidate assets to meet margin calls. This type of liquidity loss may operate to undermine market integrity and public confidence in the absence of this rule.

While there may be some potential for ''forced sale'' losses for FCMs and DCOs on foreign sovereign debt now prohibited, the Commission cannot quantify any such losses and believes that through the exemption process under Section 4(c), it has mitigated any such potential costs. Moreover, the Commission is not in a position to know, with any precision, the portfolio holdings of FCMs and DCOs with respect to foreign sovereign debt, nor can the Commission predict the prevailing market conditions if FCMs and DCOs must sell such instruments. Consequently, the Commission cannot quantify this cost. However, to mitigate any such potential cost, the rules contemplate a 180-day implementation period, giving FCMs and DCOs ample time to liquidate portfolios to the extent necessary to comply with the regulations and/or allowing FCMs and DCOs the opportunity to request an exemption.

(3) Price Discovery

The Commission does not believe that the restrictions on foreign sovereign debt will have an impact on price discovery.

(4) Sound Risk Management Procedures

The restriction on foreign sovereign debt is intended to require an FCM or DCO to protect against currency exposure in a way that fosters sound risk management, particularly the protection of customer funds.

(5) Other Public Interest Considerations

The prohibition on investment in foreign sovereign debt will contribute to financial stability by increasing the safety of funds in customer segregated accounts. For FCMs and DCOs, any expense associated with the elimination of foreign sovereign debt is a cost. However, as discussed above, notwithstanding the elimination of this investment class, the Commission believes that the benefits to the public and market participants of this provision of the rule are significant.

Money Market Mutual Funds

MMMF investments will continue to be permitted pursuant to the Commission's authority under Section 4(c), albeit with some restrictions. First, an FCM or DCO may invest all of its customer segregated funds in Treasury-only MMMFs, but for all other MMMFs, as discussed below, the Commission believes that a 50 percent asset-based concentration is appropriate. In addition, an FCM or DCO may invest up to 10 percent of its assets in segregation in funds that do not have both $1 billion in assets and a management company that has at least $25 billion in MMMF assets under management (small MMMFs), while, subject to the caveats described above, an FCM or DCO may invest up to 50 percent of its assets in segregation in funds that do (large MMMFs).

In arriving at these concentration limits, in addition to its own staff research, the Commission took into consideration information presented in meetings with the market participants, comment letters and discussions with other regulators. The Commission decided to allow investment without asset- or issuer-based limitations for Treasury-only MMMFs due to the fact that Regulation 1.25 allows direct investments entirely in Treasuries. Indirect investment in Treasuries via a Treasury-only MMMF is essentially the risk equivalent of a direct investment in Treasuries, while allowing an FCM or DCO the administrative ease of delegating the management of its portfolio to a MMMF. The Commission decided upon a 50 percent asset-based concentration limit for large prime MMMFs, as it remains concerned that, in another crisis, a run on a prime MMMF may threaten both the liquidity and principal of customer segregated funds. After weighing the information described above, the Commission determined that a 50 percent asset-based limitation struck the right balance between providing FCMs and DCOs with sufficient Regulation 1.25 investment options and, at the same time, encouraging adequate portfolio diversification. The issuer-based limitation reflects the view that the Commission seeks to protect FCMs and DCOs from runs on particular funds and families of funds. As a necessary corollary for increasing the asset-based concentration limits, the Commission decided to implement the fund and fund family size requirements in order to ensure that MMMFs invested in heavily by FCMs and DCOs were large enough to handle a high volume of redemption requests while still allowing for limited investment in small MMMFs.

Finally, the Commission notes that these restrictions are such that an FCM could invest all of its customer funds in MMMFs, by, as examples, investing entirely in a large Treasury-only MMMF or by investing 50 percent of its funds in large prime MMMFs (spread out among five individual funds and three fund families) and 50 percent in a large Treasury-only MMMF. The Commission believes that this should alleviate the concerns of FCMs that expressed, in their comment letters, a reluctance to manage their own portfolios and instead wished to delegate those responsibilities entirely to fund managers.

(1) Protection of Market Participants and the Public

The recent financial crisis exposed the risks attendant to MMMFs—in particular, their susceptibility to runs. Though only one fund broke the buck, many others were supported by their sponsors and/or affiliates during the crisis. In response, the SEC has made a number of changes to Rule 2a–7 to address the risks inherent in MMMFs. The changes are aimed at reducing the perceived credit and liquidity risks of the MMMFs' underlying portfolios. However, as the President's Working Group on Financial Markets has noted, systemic risks remain in the MMMF market, notwithstanding the SEC's recent reforms.[200] Absent further changes in the way MMMF shares are valued, redeemed and/or supported through private or public sector guarantees, future runs on MMMFs cannot be ruled out.

The minimum $1 billion asset requirement for individual fund and $25 billion asset requirement for family of funds of large MMMFs are designed to ensure that customer funds are typically invested in sufficiently large funds with diversified portfolios of holdings that are better positioned to withstand unexpected redemptions requests. Limited investment in small MMMFs was retained from the NPRM in order to provide flexibility for FCMs and DCOs and to promote diversification. The new asset-based concentration limitations for non-Treasury MMMFs in aggregate, by family and by individual fund will provide additional protection for customer segregated funds in the event of both runs on MMMFs generally, and more targeted runs that may affect a specific family of funds or an individual fund. The portfolio diversification requirements set forth by the amendment will provide greater security for customer funds, and ultimately to the FCMs and DCOs that rely on those funds.

Individual FCMs and DCOs may need additional resources and expertise, and incur the related expense, to manage a portfolio subject to the percentage limitations of the rules with regard to asset-type, issuer and size. However, with sizeable allowances for MMMFs, FCMs and DCOs will be able to continue to leverage the expertise of fund managers. The Commission notes that under this rule, an FCM or DCO is able to invest all of their customer segregated funds in one or more MMMFs. Therefore, FCMs or DCOs not wishing to manage their portfolios may delegate entirely to MMMF managers.

(2) Efficiency, Competitiveness and Financial Integrity of the Markets

The Commission believes that this rule promotes financial integrity in an important way. Imposing portfolio concentration limits lowers the risk of FCMs and DCOs suffering losses and/or being unable to liquidate assets to meet margin calls. This type of liquidity loss may operate to undermine market integrity and public confidence in the absence of this rule.

While there may be some potential for ''forced sale'' losses for FCMs and DCOs on MMMFs that are above the concentration limits or not meet the asset requirements, the Commission cannot gauge the magnitude and believes that it has taken measures appropriate to the circumstances to mitigate any potential costs. More specifically, the Commission is not in a

[200] President's Working Group on Financial Markets, Money Market Fund Reform Options, at 16–18 (2010). The full report may be accessed at *http://www.treasury.gov/press-center/press-releases/Documents/10.21%20PWG%20Report%20Final.pdf.*

position to know, with any precision, the portfolio holdings of FCMs and DCOs with respect to MMMFs, nor can the Commission predict the prevailing market conditions if FCMs and DCOs must sell MMMFs. Consequently, the Commission cannot quantify this cost. However, to reduce any potential cost, the rules contemplate a 180 day implementation period, giving FCMs and DCOs ample time to liquidate portfolios to the extent necessary to comply with the regulations. Since investments in MMMFs remain available, the Commission believes any impact on MMMF markets generally also should be mitigated. Accordingly, the Commission believes that the significant potential benefits of having portfolios less concentrated in a small number of MMMFs justify any cost, as mitigated under the rules.

(3) Price Discovery

The final rules should not have an impact on price discovery.

(4) Sound Risk Management Procedures

The greatest costs relative to sound risk management procedures have been mentioned previously. The introduction of additional investment restrictions on MMMFs in the form of asset-based and issuer-based concentration limits may require FCMs and DCOs to enhance their investment management and portfolio monitoring resources. However, to the extent that FCMs and DCOs had invested in MMMFs previously, the risk management strategies and systems should largely be in place already.

(5) Other Public Interest Considerations

The greatest potential benefit of this rule on public interest considerations stem from the implications of these rules on the stability of the financial system as a whole. The inclusion of asset-based concentration limitations on non-Treasury MMMFs, placing limitations on families of funds and on individual funds, and allowing only limited investment in funds not meeting certain asset limits contributes to financial stability by promoting the diversification of investment for funds held in customer segregated accounts. For FCMs and DCOs, the expenses associated with managing their MMMF investments and the potential for lost upside investment opportunities are costs. However, as discussed above, notwithstanding the limitations on the permitted investments, FCMs and DCOs may still invest all customer segregated funds in a portfolio of MMMFs, and the added expense associated with a more active management of the MMMF portfolio should be minor.

Other Investment Limitations

The final rules also include other limitations and restrictions on those investments that are permitted for customer segregated funds by FCMs and DCOs, including the elimination of in-house transactions and repurchase agreements with affiliates as well as a 25 percent counterparty concentration limit on repurchase agreements.

(1) Protection of Market Participants and the Public

As stated above, the guiding investment principle for customer funds is that investments are liquid and preserve principal. The lessons of the recent financial crisis highlighted the contagion that can occur in the financial markets from a single failure or default. As such, the new rules are designed to broadly spread counterparty risk, such that customer funds are protected and may be liquidated quickly, notwithstanding select failures in the marketplace. In-house transactions and repurchase agreements with affiliates have been eliminated due to the conflicts of interest that can arise during periods of crisis, the concentration risk associated with engaging in such transactions within an FCM-broker dealer entity (in the case of an in-house transaction) and within an affiliate structure (in the case of a repurchase agreements with affiliates), among other reasons. The 25 percent counterparty-concentration limit has been introduced to ensure that an FCM or DCO does not have all of its customer funds subject to the risk profile of a single counterparty.

(2) Efficiency, Competitiveness and Financial Integrity of the Markets

The Commission believes that these additional limitations promote financial integrity in an important way. By broadly spreading counterparty risk and enhancing customer fund protections and liquidity, the risk of FCMs and DCOs suffering losses and/or being unable to liquidate assets to meet margin calls is decreased. This type of liquidity loss may operate to undermine market integrity and public confidence in the absence of this rule.

Moreover, to the extent there are potential costs noted below, offsetting benefits justify them. Any decrease in efficiency resulting from the elimination of in-house transactions and repurchase agreements with affiliates need be considered in light of the benefits of the increased certainty of arms-length transactions between two legally distinct, unaffiliated parties. And, a crucial benefit offsets the administrative costs associated with having five counterparties rather than one: Reduced counterparty risk.

(3) Price Discovery

The final rules should not have an impact on price discovery.

(4) Sound Risk Management Procedures

There may be additional expense associated with the on-boarding and risk managing additional counterparties, but the scale of this additional burden does not appear large and is justified by the benefits of improved counterparty concentration limits.

(5) Other Public Interest Considerations

The greatest potential impact of this rule on public interest considerations stem from the increased stability of the financial system as a whole. The inclusion of counterparty concentration limits, in particular, contributes to financial stability by reducing risk for funds held in customer segregated accounts.

Regulation 30.7

The Commission has decided to harmonize Regulation 30.7 with the investment limitations of Regulation 1.25. The Commission had not previously restricted investments of 30.7 funds to the permitted investments under Regulation 1.25. The Commission now believes that it is appropriate to align the investment standards given the similar prudential concerns that arise with respect to both segregated customer funds and 30.7 funds. The Commission has also removed the credit ratings requirements for depositories of 30.7 funds and eliminated the option of customers to designate, with the permission of the Commission, a depository not otherwise meeting the standards to be a depository of 30.7 funds.

(1) Protection of Market Participants and the Public

The public has a strong interest in the stability of the nation's financial system, a goal of the Dodd-Frank Act. Applying Regulation 1.25 standards to 30.7 funds will better insulate them against the negative shocks of future financial crises, thereby enhancing protection to market participants and the public. Also, no benefit justifies applying a different standard for 30.7 funds than for segregated customer funds. FCMs and DCOs traditionally have used Regulation 1.25 as a safe harbor for 30.7 funds; accordingly, there is no basis to anticipate material additional expense

as a result of extending these requirements to 30.7 funds.

The removal of credit ratings from Regulation 30.7 was necessitated by Section 939A of the Dodd-Frank Act and is in line with the Commission's removal of credit ratings under Regulation 1.25. The removal of the designation option for depositories stemmed from the fact that the Commission had never entertained such a request and from the belief that a depository should meet the capital requirements for depositories in order to hold 30.7 funds.

(2) Efficiency, Competitiveness and Financial Integrity of the Markets

The investments made with 30.7 funds generally have been similar to those made under Regulation 1.25. Accordingly, the Commission believes that harmonization of Regulation 30.7 with Regulation 1.25 promotes financial integrity in the same important ways and relative to less significant cost as discussed in the above. Specifically, imposition of the restrictions discussed above with respect to Regulation 1.25 asset classes lowers the risk of FCMs and DCOs suffering losses and/or being unable to liquidate assets to meet margin calls. This type of liquidity loss may operate to undermine market integrity and public confidence in the absence of this rule.

The Commission does not expect the removal of credit ratings to have a significant impact on choice of depositories for 30.7 funds. The Commission expects the elimination of the designation option to have no impact, since it has never been used.

(3) Price Discovery

The final rules regarding Regulation 30.7 should not have an impact on price discovery.

(4) Sound Risk Management Procedures

As mentioned above, most FCMs and DCOs have used Regulation 1.25 as a safe harbor for 30.7 funds. As such, the incremental costs associated with applying the additional investment restrictions in the form of asset-based and issuer-based concentration limits should not be substantial. The risk management strategies and systems should largely be in place already, and will now be applied to 30.7 funds.

The Commission believes that the overall benefits of applying Regulation 1.25 standards to 30.7 funds, as compared to those based on a regulatory framework without such limitations, justify the less significant costs. By adding restrictions and increasing diversification through concentration limits, 30.7 funds should be better protected in the event of a crisis in the broader financial market. The removal of credit ratings for depositories and the removal of the designation option should not have a significant impact on risk management practices because depositories must still meet the capital requirements in order to qualify under Regulation 30.7 and, as mentioned, no depositories have ever qualified through designation. The only cost associated with the former would be the administrative cost of moving funds from one depository to another, in the event that a previously qualifying depository now no longer qualifies.

(5) Other Public Interest Considerations

The greatest potential impact of this rule on public interest considerations stem from the implications of these rules for the stability of the financial system as a whole. The application of Regulation 1.25 standards to 30.7 funds will contribute to financial stability by reducing concentration risk for 30.7 funds. For FCMs and DCOs, the expenses associated with managing these limitations and the potential for lost upside investment opportunities are costs. However, as discussed above, the added expense associated with a more active management of the investment portfolios should be minor.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [201] requires federal agencies, in promulgating rules, to consider the impact of those rules on small businesses. The rule amendments contained herein will affect FCMs and DCOs. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on small entities in accordance with the RFA.[202] The Commission has previously determined that registered FCMs [203] and DCOs [204] are not small entities for the purpose of the RFA. Accordingly, pursuant to 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies that the final rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The final rules do not require a new collection of information on the part of any entities subject to the rule amendments. Accordingly, for purposes of the PRA, the Commission certifies that these rule amendments, promulgated in final form, do not impose any new reporting or recordkeeping requirements.

Lists of Subjects

17 CFR Part 1

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

17 CFR Part 30

Commodity futures, Consumer protection, Currency, Reporting and recordkeeping requirements.

In consideration of the foregoing and pursuant to the authority contained in the Commodity Exchange Act, in particular, Sections 4d, 4(c), and 8a(5) thereof, 7 U.S.C. 6d, 6(c) and 12a(5), respectively, 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 the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 2. Section 1.25 is revised to read as follows:

§ 1.25 Investment of customer funds.

(a) *Permitted investments.* (1) Subject to the terms and conditions set forth in this section, a futures commission merchant or a derivatives clearing organization may invest customer money in the following instruments (permitted investments):

(i) Obligations of the United States and obligations fully guaranteed as to principal and interest by the United States (U.S. government securities);

(ii) General obligations of any State or of any political subdivision thereof (municipal securities);

(iii) Obligations of any United States government corporation or enterprise sponsored by the United States government (U.S. agency obligations);

(iv) Certificates of deposit issued by a bank (certificates of deposit) as defined

[201] 5 U.S.C. 601 *et seq.*

[202] 47 FR 18618 (Apr. 30, 1982).

[203] *Id.* at 18619.

[204] 66 FR 45604, 45609 (Aug. 29, 2001).

in section 3(a)(6) of the Securities Exchange Act of 1934, or a domestic branch of a foreign bank that carries deposits insured by the Federal Deposit Insurance Corporation;

(v) Commercial paper fully guaranteed as to principal and interest by the United States under the Temporary Liquidity Guarantee Program as administered by the Federal Deposit Insurance Corporation (commercial paper);

(vi) Corporate notes or bonds fully guaranteed as to principal and interest by the United States under the Temporary Liquidity Guarantee Program as administered by the Federal Deposit Insurance Corporation (corporate notes or bonds); and

(vii) Interests in money market mutual funds.

(2)(i) In addition, a futures commission merchant or derivatives clearing organization may buy and sell the permitted investments listed in paragraphs (a)(1)(i) through (vii) of this section pursuant to agreements for resale or repurchase of the instruments, in accordance with the provisions of paragraph (d) of this section.

(ii) A futures commission merchant or a derivatives clearing organization may sell securities deposited by customers as margin pursuant to agreements to repurchase subject to the following:

(A) Securities subject to such repurchase agreements must be ''highly liquid'' as defined in paragraph (b)(1) of this section.

(B) Securities subject to such repurchase agreements must not be ''specifically identifiable property'' as defined in § 190.01(kk) of this chapter.

(C) The terms and conditions of such an agreement to repurchase must be in accordance with the provisions of paragraph (d) of this section.

(D) Upon the default by a counterparty to a repurchase agreement, the futures commission merchant or derivatives clearing organization shall act promptly to ensure that the default does not result in any direct or indirect cost or expense to the customer.

(3) Obligations issued by the Federal National Mortgage Association or the Federal Home Loan Mortgage Association are permitted while these entities operate under the conservatorship or receivership of the Federal Housing Finance Authority with capital support from the United States.

(b) *General terms and conditions.* A futures commission merchant or a derivatives clearing organization is required to manage the permitted investments consistent with the objectives of preserving principal and maintaining liquidity and according to the following specific requirements:

(1) *Liquidity.* Investments must be ''highly liquid'' such that they have the ability to be converted into cash within one business day without material discount in value.

(2) *Restrictions on instrument features.* (i) With the exception of money market mutual funds, no permitted investment may contain an embedded derivative of any kind, except as follows:

(A) The issuer of an instrument otherwise permitted by this section may have an option to call, in whole or in part, at par, the principal amount of the instrument before its stated maturity date; or

(B) An instrument that meets the requirements of paragraph (b)(2)(iv) of this section may provide for a cap, floor, or collar on the interest paid; *provided, however,* that the terms of such instrument obligate the issuer to repay the principal amount of the instrument at not less than par value upon maturity.

(ii) No instrument may contain interest-only payment features.

(iii) No instrument may provide payments linked to a commodity, currency, reference instrument, index, or benchmark except as provided in paragraph (b)(2)(iv) of this section, and it may not otherwise constitute a derivative instrument.

(iv)(A) Adjustable rate securities are permitted, subject to the following requirements:

(*1*) The interest payments on variable rate securities must correlate closely and on an unleveraged basis to a benchmark of either the Federal Funds target or effective rate, the prime rate, the three-month Treasury Bill rate, the one-month or three-month LIBOR rate, or the interest rate of any fixed rate instrument that is a permitted investment listed in paragraph (a)(1) of this section;

(*2*) The interest payment, in any period, on floating rate securities must be determined solely by reference, on an unleveraged basis, to a benchmark of either the Federal Funds target or effective rate, the prime rate, the three-month Treasury Bill rate, the one-month or three-month LIBOR rate, or the interest rate of any fixed rate instrument that is a permitted investment listed in paragraph (a)(1) of this section;

(*3*) Benchmark rates must be expressed in the same currency as the adjustable rate securities that reference them; and

(*4*) No interest payment on an adjustable rate security, in any period, can be a negative amount.

(B) For purposes of this paragraph, the following definitions shall apply:

(*1*) The term *adjustable rate security* means, a floating rate security, a variable rate security, or both.

(*2*) The term *floating rate security* means a security, the terms of which provide for the adjustment of its interest rate whenever a specified interest rate changes and that, at any time until the final maturity of the instrument or the period remaining until the principal amount can be recovered through demand, can reasonably be expected to have market value that approximates its amortized cost.

(*3*) The term *variable rate security* means a security, the terms of which provide for the adjustment of its interest rate on set dates (such as the last day of a month or calendar quarter) and that, upon each adjustment until the final maturity of the instrument or the period remaining until the principal amount can be recovered through demand, can reasonably be expected to have a market value that approximates its amortized cost.

(v) Certificates of deposit must be redeemable at the issuing bank within one business day, with any penalty for early withdrawal limited to any accrued interest earned according to its written terms.

(vi) Commercial paper and corporate notes or bonds must meet the following criteria:

(A) The size of the issuance must be greater than $1 billion;

(B) The instrument must be denominated in U.S. dollars; and

(C) The instrument must be fully guaranteed as to principal and interest by the United States for its entire term.

(3) *Concentration*—(i) *Asset-based concentration limits for direct investments.* (A) Investments in U.S. government securities shall not be subject to a concentration limit.

(B) Investments in U.S. agency obligations may not exceed 50 percent of the total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(C) Investments in each of commercial paper, corporate notes or bonds and certificates of deposit may not exceed 25 percent of the total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(D) Investments in municipal securities may not exceed 10 percent of the total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(E) Subject to paragraph (b)(3)(i)(G) of this section, investments in money market mutual funds comprising only

U.S. government securities shall not be subject to a concentration limit.

(F) Subject to paragraph (b)(3)(i)(G) of this section, investments in money market mutual funds, other than those described in paragraph (b)(3)(i)(E) of this section, may not exceed 50 percent of the total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(G) Investments in money market mutual funds comprising less than $1 billion in assets and/or which have a management company comprising less than $25 billion in assets, may not exceed 10 percent of the total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(ii) *Issuer-based concentration limits for direct investments.* (A) Securities of any single issuer of U.S. agency obligations held by a futures commission merchant or derivatives clearing organization may not exceed 25 percent of total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(B) Securities of any single issuer of municipal securities, certificates of deposit, commercial paper, or corporate notes or bonds held by a futures commission merchant or derivatives clearing organization may not exceed 5 percent of total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(C) Interests in any single family of money market mutual funds described in paragraph (b)(3)(i)(F) of this section may not exceed 25 percent of total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(D) Interests in any individual money market mutual fund described in paragraph (b)(3)(i)(F) of this section may not exceed 10 percent of total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(E) For purposes of determining compliance with the issuer-based concentration limits set forth in this section, securities issued by entities that are affiliated, as defined in paragraph (b)(5) of this section, shall be aggregated and deemed the securities of a single issuer. An interest in a permitted money market mutual fund is not deemed to be a security issued by its sponsoring entity.

(iii) *Concentration limits for agreements to repurchase*—(A) *Repurchase agreements.* For purposes of determining compliance with the asset-based and issuer-based concentration limits set forth in this section, securities sold by a futures commission merchant or derivatives clearing organization subject to agreements to repurchase shall be combined with securities held by the futures commission merchant or derivatives clearing organization as direct investments.

(B) *Reverse repurchase agreements.* For purposes of determining compliance with the asset-based and issuer-based concentration limits set forth in this section, securities purchased by a futures commission merchant or derivatives clearing organization subject to agreements to resell shall be combined with securities held by the futures commission merchant or derivatives clearing organization as direct investments.

(iv) *Treatment of customer-owned securities.* For purposes of determining compliance with the asset-based and issuer-based concentration limits set forth in this section, securities owned by the customers of a futures commission merchant and posted as margin collateral are not included in total assets held in segregation by the futures commission merchant, and securities posted by a futures commission merchant with a derivatives clearing organization are not included in total assets held in segregation by the derivatives clearing organization.

(v) *Counterparty concentration limits.* Securities purchased by a futures commission merchant or derivatives clearing organization from a single counterparty, subject to an agreement to resell to that counterparty, shall not exceed 25 percent of total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(4) *Time-to-maturity.* (i) Except for investments in money market mutual funds, the dollar-weighted average of the time-to-maturity of the portfolio, as that average is computed pursuant to § 270.2a–7 of this title, may not exceed 24 months.

(ii) For purposes of determining the time-to-maturity of the portfolio, an instrument that is set forth in paragraphs (a)(1)(i) through (vii) of this section may be treated as having a one-day time-to-maturity if the following terms and conditions are satisfied:

(A) The instrument is deposited solely on an overnight basis with a derivatives clearing organization pursuant to the terms and conditions of a collateral management program that has become effective in accordance with § 39.4 of this chapter;

(B) The instrument is one that the futures commission merchant owns or has an unqualified right to pledge, is not subject to any lien, and is deposited by the futures commission merchant into a segregated account at a derivatives clearing organization;

(C) The derivatives clearing organization prices the instrument each day based on the current mark-to-market value; and

(D) The derivatives clearing organization reduces the assigned value of the instrument each day by a haircut of at least 2 percent.

(5) *Investments in instruments issued by affiliates.* (i) A futures commission merchant shall not invest customer funds in obligations of an entity affiliated with the futures commission merchant, and a derivatives clearing organization shall not invest customer funds in obligations of an entity affiliated with the derivatives clearing organization. An affiliate includes parent companies, including all entities through the ultimate holding company, subsidiaries to the lowest level, and companies under common ownership of such parent company or affiliates.

(ii) A futures commission merchant or derivatives clearing organization may invest customer funds in a fund affiliated with that futures commission merchant or derivatives clearing organization.

(6) *Recordkeeping.* A futures commission merchant and a derivatives clearing organization shall prepare and maintain a record that will show for each business day with respect to each type of investment made pursuant to this section, the following information:

(i) The type of instruments in which customer funds have been invested;

(ii) The original cost of the instruments; and

(iii) The current market value of the instruments.

(c) *Money market mutual funds.* The following provisions will apply to the investment of customer funds in money market mutual funds (the fund).

(1) The fund must be an investment company that is registered under the Investment Company Act of 1940 with the Securities and Exchange Commission and that holds itself out to investors as a money market fund, in accordance with § 270.2a–7 of this title.

(2) The fund must be sponsored by a federally-regulated financial institution, a bank as defined in section 3(a)(6) of the Securities Exchange Act of 1934, an investment adviser registered under the Investment Advisers Act of 1940, or a domestic branch of a foreign bank insured by the Federal Deposit Insurance Corporation.

(3) A futures commission merchant or derivatives clearing organization shall maintain the confirmation relating to

the purchase in its records in accordance with § 1.31 and note the ownership of fund shares (by book-entry or otherwise) in a custody account of the futures commission merchant or derivatives clearing organization in accordance with § 1.26. The futures commission merchant or the derivatives clearing organization shall obtain the acknowledgment letter required by § 1.26 from an entity that has substantial control over the fund shares purchased with customer segregated funds and has the knowledge and authority to facilitate redemption and payment or transfer of the customer segregated funds. Such entity may include the fund sponsor or depository acting as custodian for fund shares.

(4) The net asset value of the fund must be computed by 9 a.m. of the business day following each business day and made available to the futures commission merchant or derivatives clearing organization by that time.

(5)(i) General requirement for redemption of interests. A fund shall be legally obligated to redeem an interest and to make payment in satisfaction thereof by the business day following a redemption request, and the futures commission merchant or derivatives clearing organization shall retain documentation demonstrating compliance with this requirement.

(ii) Exception. A fund may provide for the postponement of redemption and payment due to any of the following circumstances:

(A) For any period during which there is a non-routine closure of the Fedwire or applicable Federal Reserve Banks;

(B) For any period:

(*1*) During which the New York Stock Exchange is closed other than customary week-end and holiday closings; or

(*2*) During which trading on the New York Stock Exchange is restricted;

(C) For any period during which an emergency exists as a result of which:

(*1*) Disposal by the company of securities owned by it is not reasonably practicable; or

(*2*) It is not reasonably practicable for such company fairly to determine the value of its net assets;

(D) For any period as the Securities and Exchange Commission may by order permit for the protection of security holders of the company;

(E) For any period during which the Securities and Exchange Commission has, by rule or regulation, deemed that:

(*1*) Trading shall be restricted; or

(*2*) An emergency exists; or

(F) For any period during which each of the conditions of § 270.22e–3(a)(1) through (3) of this title are met.

(6) The agreement pursuant to which the futures commission merchant or derivatives clearing organization has acquired and is holding its interest in a fund must contain no provision that would prevent the pledging or transferring of shares.

(7) The Appendix to this section sets forth language that will satisfy the requirements of paragraph (c)(5) of this section.

(d) *Repurchase and reverse repurchase agreements.* A futures commission merchant or derivatives clearing organization may buy and sell the permitted investments listed in paragraphs (a)(1)(i) through (vii) of this section pursuant to agreements for resale or repurchase of the securities (agreements to repurchase or resell), provided the agreements to repurchase or resell conform to the following requirements:

(1) The securities are specifically identified by coupon rate, par amount, market value, maturity date, and CUSIP or ISIN number.

(2) Permitted counterparties are limited to a bank as defined in section 3(a)(6) of the Securities Exchange Act of 1934, a domestic branch of a foreign bank insured by the Federal Deposit Insurance Corporation, a securities broker or dealer, or a government securities broker or government securities dealer registered with the Securities and Exchange Commission or which has filed notice pursuant to section 15C(a) of the Government Securities Act of 1986.

(3) A futures commission merchant or derivatives clearing organization shall not enter into an agreement to repurchase or resell with a counterparty that is an affiliate of the futures commission merchant or derivatives clearing organization, respectively. An affiliate includes parent companies, including all entities through the ultimate holding company, subsidiaries to the lowest level, and companies under common ownership of such parent company or affiliates.

(4) The transaction is executed in compliance with the concentration limit requirements applicable to the securities transferred to the customer segregated custodial account in connection with the agreements to repurchase referred to in paragraphs (b)(3)(iii)(A) and (B) of this section.

(5) The transaction is made pursuant to a written agreement signed by the parties to the agreement, which is consistent with the conditions set forth in paragraphs (d)(1) through (13) of this section and which states that the parties thereto intend the transaction to be treated as a purchase and sale of securities.

(6) The term of the agreement is no more than one business day, or reversal of the transaction is possible on demand.

(7) Securities transferred to the futures commission merchant or derivatives clearing organization under the agreement are held in a safekeeping account with a bank as referred to in paragraph (d)(2) of this section, a derivatives clearing organization, or the Depository Trust Company in an account that complies with the requirements of § 1.26.

(8) The futures commission merchant or the derivatives clearing organization may not use securities received under the agreement in another similar transaction and may not otherwise hypothecate or pledge such securities, except securities may be pledged on behalf of customers at another futures commission merchant or derivatives clearing organization. Substitution of securities is allowed, *provided, however,* that:

(i) The qualifying securities being substituted and original securities are specifically identified by date of substitution, market values substituted, coupon rates, par amounts, maturity dates and CUSIP or ISIN numbers;

(ii) Substitution is made on a ''delivery versus delivery'' basis; and

(iii) The market value of the substituted securities is at least equal to that of the original securities.

(9) The transfer of securities to the customer segregated custodial account is made on a delivery versus payment basis in immediately available funds. The transfer of funds to the customer segregated cash account is made on a payment versus delivery basis. The transfer is not recognized as accomplished until the funds and/or securities are actually received by the custodian of the futures commission merchant's or derivatives clearing organization's customer funds or securities purchased on behalf of customers. The transfer or credit of securities covered by the agreement to the futures commission merchant's or derivatives clearing organization's customer segregated custodial account is made simultaneously with the disbursement of funds from the futures commission merchant's or derivatives clearing organization's customer segregated cash account at the custodian bank. On the sale or resale of securities, the futures commission merchant's or derivatives clearing organization's customer segregated cash account at the custodian bank must receive same-day funds credited to such segregated

account simultaneously with the delivery or transfer of securities from the customer segregated custodial account.

(10) A written confirmation to the futures commission merchant or derivatives clearing organization specifying the terms of the agreement and a safekeeping receipt are issued immediately upon entering into the transaction and a confirmation to the futures commission merchant or derivatives clearing organization is issued once the transaction is reversed.

(11) The transactions effecting the agreement are recorded in the record required to be maintained under § 1.27 of investments of customer funds, and the securities subject to such transactions are specifically identified in such record as described in paragraph (d)(1) of this section and further identified in such record as being subject to repurchase and reverse repurchase agreements.

(12) An actual transfer of securities to the customer segregated custodial account by book entry is made consistent with Federal or State commercial law, as applicable. At all times, securities received subject to an agreement are reflected as ''customer property.''

(13) The agreement makes clear that, in the event of the bankruptcy of the futures commission merchant or derivatives clearing organization, any securities purchased with customer funds that are subject to an agreement may be immediately transferred. The agreement also makes clear that, in the event of a futures commission merchant or derivatives clearing organization bankruptcy, the counterparty has no right to compel liquidation of securities subject to an agreement or to make a priority claim for the difference between current market value of the securities and the price agreed upon for resale of the securities to the counterparty, if the former exceeds the latter.

(e) *Deposit of firm-owned securities into segregation.* A futures commission merchant shall not be prohibited from directly depositing unencumbered securities of the type specified in this section, which it owns for its own account, into a segregated safekeeping account or from transferring any such securities from a segregated account to its own account, up to the extent of its residual financial interest in customers' segregated funds; *provided, however,* that such investments, transfers of securities, and disposition of proceeds from the sale or maturity of such securities are recorded in the record of investments required to be maintained by § 1.27. All such securities may be segregated in safekeeping only with a bank, trust company, derivatives clearing organization, or other registered futures commission merchant. Furthermore, for purposes of §§ 1.25, 1.26, 1.27, 1.28, and 1.29, investments permitted by § 1.25 that are owned by the futures commission merchant and deposited into such a segregated account shall be considered customer funds until such investments are withdrawn from segregation.

Appendix to § 1.25—Money Market Mutual Fund Prospectus Provisions Acceptable for Compliance With Section 1.25(c)(5)

Upon receipt of a proper redemption request submitted in a timely manner and otherwise in accordance with the redemption procedures set forth in this prospectus, the [Name of Fund] will redeem the requested shares and make a payment to you in satisfaction thereof no later than the business day following the redemption request. The [Name of Fund] may postpone and/or suspend redemption and payment beyond one business day only as follows:

a. For any period during which there is a non-routine closure of the Fedwire or applicable Federal Reserve Banks;

b. For any period (1) during which the New York Stock Exchange is closed other than customary week-end and holiday closings or (2) during which trading on the New York Stock Exchange is restricted;

c. For any period during which an emergency exists as a result of which (1) disposal of securities owned by the [Name of Fund] is not reasonably practicable or (2) it is not reasonably practicable for the [Name of Fund] to fairly determine the net asset value of shares of the [Name of Fund];

d. For any period during which the Securities and Exchange Commission has, by rule or regulation, deemed that (1) trading shall be restricted or (2) an emergency exists;

e. For any period that the Securities and Exchange Commission, may by order permit for your protection; or

f. For any period during which the [Name of Fund,] as part of a necessary liquidation of the fund, has properly postponed and/or suspended redemption of shares and payment in accordance with federal securities laws.

PART 30—FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

■ 3. The authority citation for part 30 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6c, and 12a, unless otherwise noted.

■ 4. In § 30.7, revise paragraph (c) and add paragraph (g) to read as follows:

§ 30.7 Treatment of foreign futures or foreign options secured amount.

* * * * *

(c)(1) The separate account or accounts referred to in paragraph (a) of this section must be maintained under an account name that clearly identifies them as such, with any of the following depositories:

(i) A bank or trust company located in the United States;

(ii) A bank or trust company located outside the United States that has in excess of $1 billion of regulatory capital;

(iii) A futures commission merchant registered as such with the Commission;

(iv) A derivatives clearing organization;

(v) The clearing organization of any foreign board of trade;

(vi) A member of any foreign board of trade; or

(vii) Such member or clearing organization's designated depositories.

(2) Each futures commission merchant must obtain and retain in its files for the period provided in § 1.31 of this chapter an acknowledgment from such depository that it was informed that such money, securities or property are held for or on behalf of foreign futures and foreign options customers and are being held in accordance with the provisions of these regulations.

* * * * *

(g) Each futures commission merchant that invests customer funds held in the account or accounts referred to in paragraph (a) of this section must invest such funds pursuant to the requirements of § 1.25 of this chapter.

Issued in Washington, DC, on December 5, 2011 by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions—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, Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rule to enhance customer protections regarding where derivatives clearing organizations (DCOs) and futures commission merchants (FCMs) can invest customer funds. I believe that this rule is critical for the safeguarding of customer money.

The Commodity Exchange Act in section 4d(a)(2) prescribes that customer funds can only be placed in a set list of permitted investments. From 2000 to 2005, the

Commission granted exemptions to this list, loosening the rules for the investment of customer funds. These exemptions allowed FCMs to invest customer funds in AAA-rated sovereign debt, as well as to lend customer money to another side of the firm through repurchase agreements.

This rule prevents such in-house lending through repurchase agreements. I believe there is an inherent conflict of interest between parts of a firm doing these transactions. The rule also would limit an FCM's ability to invest customer money in foreign sovereign debt.

In addition, this rule fulfills a Dodd-Frank requirement that the CFTC remove all reliance on credit ratings from its regulations.

[FR Doc. 2011–31689 Filed 12–16–11; 8:45 am]

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H.R. 2192/P.L. 112–64

National Guard and Reservist Debt Relief Extension Act of 2011 (Dec. 13, 2011; 125 Stat. 766)

S. 1541/P.L. 112–65

To revise the Federal charter for the Blue Star Mothers of America, Inc. to reflect a change in eligibility requirements for membership. (Dec. 13, 2011; 125 Stat. 767)

S. 1639/P.L. 112–66

To amend title 36, United States Code, to authorize the American Legion under its Federal charter to provide guidance and leadership to the individual departments and posts of the American Legion, and for other purposes. (Dec. 13, 2011; 125 Stat. 768)

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