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

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 380

RIN 3064–AD89

Mutual Insurance Holding Company Treated as Insurance Company

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is issuing a final rule (''Final Rule'') that treats a mutual insurance holding company as an insurance company for purposes of Section 203(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act''). The Final Rule clarifies that the liquidation and rehabilitation of a covered financial company that is a mutual insurance holding company will be conducted in the same manner as an insurance company. The Final Rule harmonizes the treatment of mutual insurance holding companies under Section 203(e) of the Dodd-Frank Act with the treatment of such companies under state insurance company insolvency laws.

DATES: The effective date of the Final Rule is May 30, 2012.

FOR FURTHER INFORMATION CONTACT: R. Penfield Starke, Assistant General Counsel, Legal Division, (703) 562–2422; Mark A. Thompson, Counsel (703) 562–2529; Elizabeth Falloon, Counsel (703) 562–6148; Timothy F. Danello, Counsel (703) 562–6338, Legal Division; or Hashim Hamandi, Section Chief Policy Section, Office of Complex Financial Institutions, (202) 898–6884.

SUPPLEMENTARY INFORMATION:

I. Background

Title II of the Dodd-Frank Act provides for the appointment of the FDIC as receiver of a nonviable financial company that poses significant risk to the financial stability of the United States (a ''covered financial company''), outlines the process for the orderly liquidation of a covered financial company following the FDIC's appointment as receiver and provides for additional implementation of the orderly liquidation authority by rulemaking. The Final Rule is promulgated pursuant to Section 209 [1] of the Dodd-Frank Act, which authorizes the FDIC, in consultation with the Financial Stability Oversight Council, to prescribe such rules and regulations as the FDIC considers necessary or appropriate to implement Title II. Section 209 of the Dodd-Frank Act further provides that, to the extent possible, the FDIC should seek to harmonize rules and regulations promulgated under Section 209 with the insolvency laws that would otherwise apply to a covered financial company.

On December 13, 2011, the FDIC published a Notice of Proposed Rulemaking (''NPR'') in the **Federal Register** [2] setting forth the conditions under which a mutual insurance holding company would be resolved as an insurance company under Section 203(e) of the Dodd-Frank Act. The comment period for the NPR closed on February 13, 2012, and the FDIC received four comment letters. Additionally, the FDIC held a conference call with representatives of the National Association of Insurance Commissioners on January 17, 2012 and received their comments on the NPR.

In light of the comments received and pursuant to the authority granted to it by Section 209 of the Dodd-Frank Act, the FDIC is issuing the Final Rule.

History of Mutual Insurance Holding Company

The mutual insurance industry traces its roots back to England, where, in 1696, the first mutual fire insurer was established. The first American mutual insurance company, the Philadelphia Contributionship for the Insurance of Houses from Loss by Fire, was founded in 1752.[3]

Mutual insurance companies have no equity interests. Membership rights are held by their policyholders. Policyholders are entitled to vote for members of the company's board of directors and may receive special dividends in the form of capital distributions or reductions of policy premiums.

The mutual insurance holding company structure was first created in Iowa in 1995.[4] A mutual insurance holding company is created through the restructuring of a mutual insurance company into two entities, a mutual insurance holding company and a stock insurance company that is converted from the original mutual insurance company. In a variation of this restructuring, a third entity may be formed, an intermediate insurance stock holding company. In this three-entity structure, in most instances, the mutual insurance holding company initially owns 100% of the intermediate insurance stock holding company, and the intermediate insurance stock holding company initially owns 100% of the stock of the converted mutual insurance company. The purpose of the restructuring is to preserve the benefits of a mutual form of organization while allowing the converted mutual insurance company access to capital markets either through sale of its stock or, in a three-entity structure, the sale of the stock of the intermediate insurance stock holding company.

Consistent with the mutual insurance company, a mutual insurance holding company also has no equity interests. Membership rights are held by the policyholders of the converted mutual insurance company who have rights similar to those they had as policyholders of the mutual insurance company before conversion. Policyholders of the converted mutual insurance company are entitled to vote for members of the mutual insurance holding company's board of directors, and may receive special dividends in the form of capital distributions or reductions of policy premiums.

A majority of the states have adopted statutes providing for the formation of mutual insurance holding companies. Those statutes generally (a) provide for the regulation of a mutual insurance holding company at the holding company level by the insurance commissioner of the domiciliary state; (b) require that the mutual insurance

[1] 12 U.S.C. 5389.

[2] 76 FR 77442 (December 13, 2011).

[3] The Philadelphia Contributionship, History, *http://www.contributionship.com/history/index.html.*

[4] Iowa Code Ann. (West) § 521A.14.

holding company maintain voting control over the converted mutual insurance company; and (c) specifically subject a mutual insurance holding company to liquidation or rehabilitation under the state regime if the converted mutual insurance company is placed in liquidation or rehabilitation. In addition, either by statute, rule or regulation, in the liquidation of a converted mutual insurance company, the assets of the mutual insurance holding company generally are included in the estate of the converted mutual insurance company being liquidated.[5]

Treatment of an Insurance Company Under Section 203(e) of the Dodd-Frank Act

In providing for the orderly liquidation of a covered financial company under Title II of the Dodd-Frank Act, Congress recognized that insurance companies historically had been liquidated and rehabilitated pursuant to a state insolvency framework. As a result, Congress provided that ''if an insurance company is a covered financial company or a subsidiary or affiliate of a covered financial company, the liquidation or rehabilitation of such insurance company, and any subsidiary or affiliate of such company that is [an insurance company], shall be conducted as provided under applicable State law.'' [6]

The term ''insurance company'' is defined in Section 201(a)(13) of the Dodd-Frank Act to mean ''any entity that is—(A) engaged in the business of insurance; (B) subject to regulation by a State insurance regulator; and (C) covered by a State law that is designed to specifically deal with the rehabilitation, liquidation, or insolvency of an insurance company.'' [7] The identical definition is found in Section 380.1 of Title 12 of the Code of Federal Regulations. Concerns have been raised with respect to the application of this definition to mutual insurance holding companies because, under applicable state laws, a mutual insurance holding company generally is prohibited from selling policies of insurance. Thus, a mutual insurance holding company arguably does not fit squarely within a literal reading of the statutory definition of insurance company under the Dodd-Frank Act.

The treatment of a mutual insurance holding company, under certain circumstances, as an insurance company for purposes of Section 203(e) is consistent with the legislative intent of the Dodd-Frank Act.[8] This treatment is appropriate given the legal structure that forms a mutual insurance holding company from a converted mutual insurance company and the continuing interest of the policyholders of the converted mutual insurance company in both the converted mutual insurance company, as its customers, and the mutual insurance holding company, as holders of its membership interests. From a regulatory policy perspective, the extensive regulation of the mutual insurance holding company by the insurance commissioner of its domiciliary state and the inclusion of the mutual insurance holding company and its assets in the liquidation of the converted mutual insurance company also support this treatment.

II. Notice of Proposed Rulemaking: Summary of Comments

On December 13, 2011, the FDIC invited public comment on a Notice of Proposed Rulemaking: Mutual Insurance Holding Company Treated as Insurance Company (the ''Proposed Rule'').[9] The comment period ended on February 13, 2012. The FDIC received four comment letters from several industry and trade organizations representing the insurance industry and one individual. In addition, the FDIC met with representatives of the National Association of Insurance Commissioners to discuss the Proposed Rule.

The Proposed Rule clarified that a mutual insurance holding company would be treated in the same manner applicable to insurance companies under Section 203(e) of the Dodd-Frank Act, which provides that ''if an insurance company is a covered financial company or a subsidiary or affiliate of a covered financial company, the liquidation or rehabilitation of such insurance company, and any subsidiary or affiliate of such company that is [an insurance company], shall be conducted as provided under applicable State law.'' [10] This proposed treatment was limited to mutual insurance holding companies whose largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter) is an insurance company or an intermediate insurance stock holding company, and whose investments are limited to the securities of an intermediate insurance stock holding company, the securities of the converted mutual insurance company and other assets and securities of the type authorized for holding and investment by an insurance company domiciled in its state of incorporation. The Proposed Rule also provided that this treatment apply only to mutual insurance holding companies that are regulated by and are subject to the insurance company insolvency laws of their states of domicile, and that are not subject to bankruptcy proceedings.

The public comments supported the Proposed Rule's objective of treating a mutual insurance holding company as an insurance company for purposes of Section 203(e) of the Dodd-Frank Act.[11] The comments focused on two elements of the Proposed Rule: The definitions of mutual insurance holding company and intermediate insurance stock holding company and the conditions imposed in order for a mutual insurance holding company to qualify as an insurance company under Section 203(e) of the Dodd-Frank Act.

Most of the commenters suggested that the definition of mutual insurance holding company be modified with respect to the requirement that the mutual insurance holding company ''hold either (i) At least 51% of the issued and outstanding voting stock of the intermediate insurance stock holding company, if any, or (ii) if there is no intermediate insurance stock holding company, at least 51% of the issued and outstanding voting stock of the converted mutual insurance company.'' Several commenters noted that many state laws only require the mutual insurance holding company to own a majority of the voting stock of the intermediate insurance stock holding company, if any, or, if there is no intermediate insurance stock holding company, a majority of the voting stock of the converted mutual insurance company. One commenter recommended substituting ''a majority of the voting stock'' for ''51% of the issued and outstanding voting stock'' where the phrase appears within the definition of mutual insurance holding company. Another commenter recommended substituting ''a majority of the voting power in the election of directors'' for ''51% of the issued and outstanding voting stock'' where the phrase appears within the definition of mutual insurance holding company.

[5] *E.g.,* Iowa Code Ann. (West) 521A.14(4), 215 Ill. Comp. Stat. Ann. (West) 5/59.2(1)(f)(v), and Neb. Rev. Stat. § 44–6125(6)(g).

[6] 12 U.S.C. 5383(e)(1).

[7] 12 U.S.C. 5381(a)(13).

[8] There is support in the legislative history of the Dodd-Frank Act for interpreting the term ''insurance company'' under Section 201(a)(13) to include a mutual insurance holding company. *See* statement of Rep. Barney Frank, 111 Cong. Rec. H5216 (daily ed. June 30, 2010) and statement of Sen. Christopher Dodd, 111 Cong. Rec. S5903 (daily ed. July 15, 2010).

[9] 76 FR 77442 (December 13, 2011).

[10] 12 U.S.C. 5383(e)(1).

[11] 12 U.S.C. 5383(e).

Several commenters suggested that the definition of intermediate insurance stock holding company be modified with respect to the requirement that the intermediate insurance stock holding company ''hold all of the issued and outstanding voting stock of the converted mutual insurance company.'' One commenter suggested that the word ''all'' be changed to ''a majority'' to be more consistent with the requirements of state law. Another commenter suggested retaining the concept of ''all of the issued and outstanding voting stock'' but allow the ownership to be ''directly or indirectly.''

One commenter suggested that the definition of intermediate insurance stock holding company be modified to clarify that an intermediate insurance stock holding company can be formed either at the time of or at any time after the conversion of the mutual insurance company into a stock insurance company. Another commenter suggested deleting the phrase ''For purposes of this subpart'' from the definition of intermediate insurance stock holding company to be consistent with other definitions in § 380.1.

Several commenters suggested that the definition of mutual insurance company be modified. One commenter suggested that the word ''association'' should be changed to ''corporation'' because a mutual insurance company is a non-stock corporation and not an association. The same commenter suggested changing the words ''in which equity and voting rights are vested in the policyholders'' to ''in which rights in surplus and membership interests are vested in the policyholders'' because a mutual insurance company has ''surplus'' not ''equity'' and the interests of the members may be broader than just voting rights. Another commenter suggested changing the words ''in which equity and voting rights are vested in the policyholders'' to ''in which equity, voting rights and control are vested in the policyholders'' to emphasize that ''policyholders actually exercise effective control, rather than have that power merely conferred by charter or otherwise.'' One commenter suggested deleting the word ''domestic'' in the phrase ''a domestic insurance company organized under the laws of a State'' because it was redundant.

With respect to the conditions that must exist for a mutual insurance holding company to be treated as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act as set forth in § 380.11, several commenters suggested modifying one or more of the conditions. One commenter suggested removing the condition that the company is not subject to bankruptcy proceedings under Title 11 of the United States Code, i.e., the U.S. Bankruptcy Code. The commenter noted that the issue of whether a mutual insurance holding company is excluded from coverage under the U.S. Bankruptcy Code is unsettled. Thus, in the commenter's view, imposing the condition in § 380.11 introduced uncertainty about whether a mutual insurance holding company would be treated as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act.

Several commenters suggested modifying the requirement in § 380.11 that the mutual insurance holding company limit its assets and investments to the securities of an intermediate insurance stock holding company, the securities of the converted mutual insurance company ''and other assets and securities of the type authorized for holding and investment by an insurance company domiciled in its state of incorporation.'' The commenters noted that the requirement is not mandated by state law although some states do limit a mutual insurance holding company's investment in non-insurance assets. One of those commenters suggested that the mutual insurance holding company be allowed to make any investment ''permitted under applicable State law.''

The FDIC has carefully considered the comments and made appropriate revisions to the Final Rule as described below.

III. Description of Final Rule

A. Overview

The Final Rule modifies Part 380 of Title 12 of the Code of Federal Regulations, and provides generally that a mutual insurance holding company that meets the requirements of the Final Rule will be treated as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act.

B. Section-by-Section Analysis of the Final Rule

The Final Rule adds three definitions to Section 380.1 of Title 12 of the Code of Federal Regulations: Intermediate insurance stock holding company; mutual insurance company; and mutual insurance holding company. The definition of mutual insurance holding company has been modified in the Final Rule to provide that the company could own a ''majority'' of the stock of the intermediate insurance stock holding company and the converted mutual insurance company instead of the specific threshold of ''at least 51%'' included in the Proposed Rule. The definition of the intermediate insurance stock holding company was also modified in the Final Rule to delete an unnecessary introductory phrase ''For purposes of this subpart'' and to indicate that such company could be organized either at the time of or after the organization of the mutual insurance holding company and could hold ''a majority'' rather than ''all'' of the stock of the converted mutual insurance company. In addition, the definition of the mutual insurance company was amended to reflect that it is organized as a non-stock mutual corporation, not an association, and that its policyholders hold the surplus, not ''equity'' in this company. The Final Rule does not include any additional changes suggested by the public comments to permit the mutual insurance holding company to hold the voting stock of the intermediate insurance stock holding company directly or indirectly or to permit the intermediate insurance stock holding company to hold the voting stock of the converted mutual insurance company directly or indirectly. These changes appear inconsistent with the existing mutual insurance holding company structure. Likewise, the Final Rule does not remove the term ''voting rights'' and substitute the term ''membership interests'' since voting rights remain essential to defining the control of the mutual insurance company and the intermediate insurance stock holding company.

The Final Rule adds Section 380.11 to provide that a mutual insurance holding company shall be treated as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act, 12 U.S.C. 5383(e); provided that: (a) It is subject to the insurance laws of the state of its domicile, including specifically and without limitation, a statutory regime for the rehabilitation or liquidation of insurance companies that are in default or in danger of default; (b) it is not subject to bankruptcy proceedings under Title 11 of the United States Code; (c) its largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter) is an insurance company or an intermediate insurance stock holding company; and (d) its investments are limited to the securities of an intermediate insurance stock holding company, the securities of the converted mutual insurance company and other assets and securities of the type authorized for holding and investment by an insurance company domiciled in its state of incorporation.

The first proviso requires that the mutual insurance holding company be subject to the insurance laws of the state of its domicile, including specifically and without limitation, a statutory regime for the rehabilitation or liquidation of insurance companies that are in default or in danger of default and is included in the Final Rule to be consistent with two of the three prongs of the definition of ''insurance company'' set forth in Section 201(a)(13) of the Dodd-Frank Act. The reference to companies that are ''in default or in danger of default'' ensures that the state resolution process will be applicable in a time and manner comparable to the Title II orderly liquidation process, which applies to financial companies that are in default or in danger of default under Section 203(b)(1) of the Dodd-Frank Act.

The second proviso requires that the mutual insurance holding company is not subject to bankruptcy proceedings under Title 11 of the United States Code and is included to make clear that the mutual insurance holding company must not only be subject to the applicable state insurance law but must also be resolved under the applicable state insurance law. Thus, the Final Rule does not delete this requirement as some public comments suggested, but rather retains it to ensure that there is no ambiguity or conflict with respect to the determination of which insolvency regime is applicable to a mutual insurance holding company. To the extent that any such ambiguity or conflict exists, it is the intent of the Final Rule that the ambiguity be resolved in favor of allowing resolution under Title II of the Dodd-Frank Act even if the mutual insurance holding company may be an eligible debtor under Title 11 of the United States Code.

The third proviso, which requires that the mutual insurance holding company's largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter) is an insurance company or an intermediate insurance stock holding company, is included to ensure that, if a mutual insurance holding company covered by the Final Rule is placed in orderly liquidation under Title II of the Dodd-Frank Act, the Director of the Federal Insurance Office would participate in making the recommendation to take such action in accordance with the provisions of Section 203(a)(1)(C) of the Dodd-Frank Act. In addition, this requirement is intended to make clear that an insurance company subsidiary of the mutual insurance holding company must be its most significant subsidiary by asset size.

The final proviso requires the mutual insurance holding company to limit its investments to the securities of the intermediate insurance stock holding company, the securities of the converted mutual insurance company and other assets and securities of the type authorized for holding and investment by an insurance company domiciled in its state of incorporation. The FDIC rejected a public comment to alter these investment requirements because the FDIC believes that this proviso ensures that the mutual insurance holding company is operating purely as a holding company and is not itself actively engaged in operating non-insurance businesses.[12]

IV. Regulatory Analysis and Procedure

A. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) (''PRA''), the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The Final Rule would not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information will be submitted to the Office of Management and Budget for review.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act 5 U.S.C. 601 *et seq.* (RFA) requires each federal agency to prepare a final regulatory flexibility analysis in connection with the promulgation of a final rule, or certify that the final rule will not have a significant economic impact on a substantial number of small entities.[13] Pursuant to Section 605(b) of the Regulatory Flexibility Act, the FDIC certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

Under regulations issued by the Small Business Administration (''SBA''), a ''small entity'' includes those firms within the ''Finance and Insurance'' sector with asset sizes that vary from $7 million or less in assets to $175 million or less in assets.[14] The Final Rule clarifies that a mutual insurance holding company that is a covered financial company will be treated as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act. The Final Rule provides internal guidance to FDIC personnel in such an event and will address an uncertainty in the financial system as to how such a company would be treated for purposes of Section 203(e) of the Dodd-Frank Act. For a mutual insurance holding company to be determined to be a covered financial company under Section 203(b) of the Dodd-Frank Act, its failure must have serious adverse effects on the financial stability of the United States. The Final Rule would apply to a mutual insurance holding company regardless of such company's size. Although the asset size of a company may not be the determinative factor of whether such company may pose a systemic risk to the financial stability of the United States, it is an important consideration. It is unlikely that the failure of a mutual insurance holding company that is at or below the $175 million asset threshold, or the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities, would pose a threat to the financial stability of the United States. As such, the Final Rule will not have a significant economic impact on small entities.

C. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the Final Rule is not a ''major rule'' within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA'') (5 U.S.C. 801 *et seq.).* As required by SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the Final Rule may be reviewed.

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

The FDIC has determined that the Final Rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338, 1471), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The

[12] The investments of the intermediate insurance stock holding company, however, are not restricted in this manner because, under the Final Rule, the intermediate insurance stock holding company is not treated as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act.

[13] See 5 U.S.C. 603, 604 and 605.

[14] 13 CFR 121.201.

FDIC has sought to present the Final Rule in a simple and straightforward manner.

List of Subjects in 12 CFR Part 380

Holding companies, Insurance companies, Mutual insurance holding companies.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation amends part 380 of title 12 of the Code of Federal Regulations as follows:

PART 380—ORDERLY LIQUIDATION AUTHORITY

■ 1. The authority citation for part 380 is revised to read as follows:

Authority: 12 U.S.C. 5383(e); 12 U.S.C. 5389; 12 U.S.C. 5390(s)(3); 12 U.S.C. 5390(b)(1)(C); 12 U.S.C. 5390(a)(7)(D).

■ 2. The heading for subpart A is revised to read as follows:

Subpart A—General and Miscellaneous Provisions

■ 3. Amend § 380.1 by adding definitions of *Intermediate insurance stock holding company, Mutual insurance company,* and *Mutual insurance holding company* in alphabetical order to read as follows:

§ 380.1 Definitions.

* * * * *

Intermediate insurance stock holding company. The term ''*intermediate insurance stock holding company*'' means a corporation organized either at the time of, or at any time after, the organization of the mutual insurance holding company that:

(1) Is a subsidiary of a mutual insurance holding company;

(2) Holds a majority of the issued and outstanding voting stock of the converted mutual insurance company created at the time of formation of the mutual insurance holding company; and

(3) Holds, as its largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter), an insurance company.

Mutual insurance company. The term ''*mutual insurance company''* means an insurance company organized under the laws of a State that provides for the formation of such an entity as a non-stock mutual corporation in which the surplus and voting rights are vested in the policyholders.

Mutual insurance holding company. The term ''*mutual insurance holding company*'' means a corporation that:

(1) Is lawfully organized under state law authorizing its formation in connection with the reorganization of a mutual insurance company that converts the mutual insurance company to a stock insurance company, and—

(2) Holds either:

(i) A majority of the issued and outstanding voting stock of the intermediate insurance stock holding company, if any, or

(ii) If there is no intermediate insurance stock holding company, a majority of the issued and outstanding voting stock of the converted mutual insurance company.

* * * * *

■ 4. Add § 380.11 to read as follows:

§ 380.11 Treatment of mutual insurance holding companies.

A mutual insurance holding company shall be treated as an insurance company for the purpose of section 203(e) of the Dodd-Frank Act, 12 U.S.C. 5383(e); provided that—

(a) The company is subject to the insurance laws of the state of its domicile, including, specifically and without limitation, a statutory regime for the rehabilitation or liquidation of insurance companies that are in default or in danger of default;

(b) The company is not subject to bankruptcy proceedings under Title 11 of the United States Code;

(c) The largest United States subsidiary of the company (as measured by total assets as of the end of the previous calendar quarter) is an insurance company or an intermediate insurance stock holding company; and

(d) The assets and investments of the company are limited to the securities of an intermediate insurance stock holding company, the securities of the converted mutual insurance company and other assets and securities of the type authorized for holding and investment by an insurance company domiciled in its state of incorporation.

Dated at Washington, DC, this 23rd day of April 2012.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2012–10146 Filed 4–27–12; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 16, 312, 511, and 812

[Docket No. FDA–2011–N–0079]

RIN 0910–AG49

Disqualification of a Clinical Investigator

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the regulations to expand the scope of clinical investigator disqualification. Under this rulemaking, when the Commissioner of Food and Drugs (the Commissioner) determines that an investigator is ineligible to receive one kind of test article (drugs, devices or new animal drugs), the investigator also will be ineligible to conduct any clinical investigation that supports an application for a research or marketing permit for other kinds of products regulated by FDA. This final rule is based in part upon recommendations from the Government Accountability Office (GAO), and is intended to help ensure adequate protection of research subjects and the quality and integrity of data submitted to FDA. FDA also is amending the list of regulatory provisions under which an informal regulatory hearing is available by changing the scope of certain provisions and adding regulatory provisions that were inadvertently omitted.

DATES: This rule is effective May 30, 2012.

FOR FURTHER INFORMATION CONTACT: Kathleen E. Pfaender, Office of Good Clinical Practice, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5129, Silver Spring, MD 20993, 301–796–8340.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of April 13, 2011 (76 FR 20575), FDA proposed to amend its regulations to expand the scope of clinical investigator disqualification (the April 2011 proposed rule). As discussed in greater detail in the preamble to the proposed rule (76 FR 20575 at 20576 to 20585), when disqualified by a Commissioner's decision under one part of the former regulations a clinical investigator continued to be eligible to receive other types of test articles and conduct

clinical investigations studying those other test articles.

The GAO, in its September 2009 final report on FDA's oversight of clinical investigators (Ref. 1), recognized FDA's regulatory limitations regarding clinical investigator disqualification. In its September 2009 final report, the GAO recommended, among other things, that FDA extend disqualification by a Commissioner's decision to include ineligibility to receive unapproved drugs, biologics, and medical devices. The GAO concluded that it is ''critical for FDA to take action—and to have the authority to take action—to prevent clinical investigators * * * who engaged in serious misconduct from doing so again, whether in research that involves drugs, biologics, or devices'' (Ref. 1, at page 42). Among other amended provisions, this final rule responds to that GAO report and prevents clinical investigators who are disqualified by a Commissioner's decision (whether related to drugs, biologics, devices, or animal drugs) from conducting any clinical investigations that support an application for a research or marketing permit for products regulated by FDA. The other amended provisions in this final rule provide for clarity and harmonization of the clinical investigator disqualification regulations and the addition of inadvertently omitted regulatory provisions under which a part 16 (21 CFR part 16) regulatory hearing is available.

II. Overview of the Final Rule

This final rule amends part 312 (21 CFR part 312) in § 312.70, part 511 (21 CFR part 511) in § 511.1(c), and part 812 (21 CFR part 812) in § 812.119) to provide that when the Commissioner determines that a clinical investigator is ineligible to receive the test article under that part (e.g., new animal drugs in part 511 or drugs in part 312), the clinical investigator also is ineligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA, including drugs, biologics, devices, new animal drugs, foods, including dietary supplements, that bear a nutrient content claim or a health claim, infant formulas, food and color additives, and tobacco products.

Other amendments in this final rule, as explained in the preamble to the proposed rule, help to clarify and harmonize the clinical investigator disqualification regulations in parts 312, 511, and 812 (21 CFR part 812). Also, this final rule amends certain provisions in part 16 (21 CFR part 16) by:

- Adding to § 16.1(b)(2) an entry for § 812.119;
- Revising the entries for §§ 312.70 and 511.1(c)(1); and
- Adding to the list of regulatory provisions under which a part 16 regulatory hearing is available, provisions for:
  - § 58.204(b) (21 CFR 58.204(b)), relating to disqualifying a testing facility, and
  - § 822.7(a)(3) (21 CFR 822.7(a)(3)), relating to an order to conduct postmarket surveillance of a medical device under section 522 of the Federal Food Drug and Cosmetic Act (FD&C Act) (21 U.S.C. 3601).

On its own initiative, FDA modified the codified language published in the April 2011 proposed rule (76 FR 20575), to remove ''pursuit of'' from the proposed provisions in §§ 312.70(a), 511.1(c)(1), and 812.119(a). FDA made this change to clarify the rule and eliminate unnecessary language. In this final rule, therefore, the relevant language is ''If an explanation is offered and accepted by the applicable Center, the Center will discontinue the disqualification proceeding'' (see in this document codified §§ 312.70(a), 511.1(c)(1), and 812.119(a)).

This final rule helps to protect the rights and safety of subjects involved in FDA-regulated investigations, and helps to ensure the reliability and integrity of the data used to support marketing of products regulated by FDA.

III. Comments on the Proposed Rule

FDA received two comments on the proposed rule: One from a healthcare professional and the other from regulated industry. Both submissions supported the proposal to help ensure adequate protection of research subjects and the quality and integrity of data submitted to FDA. The healthcare professional supported the proposal and had no other comment. The following comments and responses summarize and address the issues found in the submission from regulated industry:

(Comment 1) The comment suggests that FDA either clarify or define the terms ''repeatedly or deliberately'' or alternatively consider removing the language from § 812.119(a). The comment further asks that FDA consider how much data or what frequency constitutes ''repeatedly''; and for ''deliberately'', how FDA proposes to determine deliberate actions. The comment requests examples.

(Response) The interpretations of the terms ''repeatedly'' and ''deliberately'' in FDA's regulations governing disqualification of clinical investigators are well established. The term ''repeatedly'' means, simply, more than once.[1] A violation occurs ''repeatedly'' if it happens more than once.[2]

FDA may consider disqualification if a clinical investigator commits a regulatory violation more than one time within a single study (e.g., enrolling in a single study two study subjects who were ineligible because of concomitant illnesses that put those subjects at greater risk) or one time in each of two studies (e.g., enrolling in each of two studies, a study subject who was ineligible because of a concomitant illness putting the subject at greater risk). The Commissioner, in past decisions, has determined that multiple violations within a single study constitute repeated violations sufficient to support disqualification from receipt of test articles.[3]

The term ''deliberately'' includes conduct that is ''willful'' as well as conduct demonstrating reckless disregard.[4] Accordingly, when a clinical investigator knowingly fails to comply with FDA's regulations, the clinical investigator may be found to have deliberately violated the regulations. FDA could pursue the disqualification of a clinical investigator, for example, if the investigator changed a study's results by altering a data field on a case report form to include false data. Likewise, an investigator who shows a

[1] See, e.g., Commissioner's Decision, In the Matter of William H Ziering, M.D. (2008), at page 7. ''The term 'repeatedly,' as it is used in 21 CFR 312.70(b), is given its plain meaning, such that a clinical investigator may be found to have acted 'repeatedly' if he or she engages in proscribed conduct 'more than once.' '' (*http://www.fda.gov/downloads/RegulatoryInformation/FOI/ElectronicReadingRoom/UCM144019.pdf*).

[2] See, In The Matter of James A. Halikas, Jr., M.D., Commissioner's Decision (January 17, 2001); In The Matter of Huibert M Vriesendorp, M.D., Commissioner's Decision (December 31, 2001). See also, Commissioner's Decision, In the Matter of William H Ziering, M.D. (2008). (*http://www.fda.gov/RegulatoryInformation/FOI/ElectronicReadingRoom/ucm143242.htm*).

[3] See, e.g., Commissioner's Decision, In the Matter of James A. Halikas (2001), at page 23 (''[T]o interpret repeatedly to mean transgressions in more than one study would permit an investigator to commit as many violations of the regulations as he/she wished without possibility of disqualification as long as that investigator limited his/her violations to one study. Such a result * * * would be absurd.'') (*http://www.fda.gov/RegulatoryInformation/FOI/ElectronicReadingRoom/ucm143242.htm*). See also Commissioner's Decision, In the Matter of Layne O. Gentry (2008), at page 23. (*http://www.fda.gov/downloads/RegulatoryInformation/FOI/ElectronicReadingRoom/UCM143906.pdf*).

[4] In The Matter of James A. Halikas, Jr., M.D., Commissioner's Decision (January 17, 2001); In The Matter of Huibert M. Vriesendorp, M.D., Commissioner's Decision (December 31, 2001); In The Matter of Layne O. Gentry, M.D., Presiding Officer Report (September 12, 2001). (See *http://www.fda.gov/RegulatoryInformation/FOI/ElectronicReadingRoom/ucm143242.htm*).

reckless disregard for whether his or her conduct may result in a regulatory violation may be found to have deliberately violated the regulations.

Decisionmakers in part 16 proceedings have interpreted the term ''deliberately'' in § 312.70(b) as roughly synonymous with the ''deliberate indifference'' or ''willful'' standard of intent.[5] This standard does not require specific knowledge that behavior, such as submission of false data to a study sponsor, violates the law, but reckless disregard for what the regulations require. The Commissioner's decision In the Matter of Layne O. Gentry[6] provides a useful discussion of the standard for ''deliberate'' behavior in a disqualification proceeding:[7]

> * * * the term ''deliberate,'' when used to describe a category of violations that might lead to legal consequences, does not necessarily require a showing of subjective intent on the part of the person in question. * * * the purpose of [disqualification] is to protect the safety of patients and to preserve the integrity of the data needed to assess the safety and effectiveness of drugs before being sold to the general public through disqualifying investigators who do not fulfill the responsibilities imposed on them.
>
> In the context of such a remedial, as opposed to punitive, scheme, an objective standard for ''deliberate'' or ''deliberately'' is a better fit because the inquiry should focus on preventing risk rather than imposing punishment for culpable conduct. Even if the investigator did not intend for the violations to occur, conduct demonstrating a reckless disregard for the regulatory requirements calls into question the investigator's fitness for conducting clinical trials. * * *

Therefore, to sustain a finding of repeated or deliberate submission of false information, FDA must show that the clinical investigator repeatedly submitted to the sponsor or to FDA false information, whether in a single study or in multiple studies, or submitted false information to the sponsor or FDA knowingly or willfully or with reckless disregard for the truthfulness of the data submitted.

(Comment 2) The comment asks how far back FDA will investigate FDA-approved products with a disqualified investigator's data; and requests an explanation of how FDA handles products that have been on the market for a longer period of time without significant safety concerns.

(Response) FDA uses its best efforts to identify each application and submission to FDA that may include data from a disqualified clinical investigator. FDA does not place limits on how far back FDA will investigate to find those applications and submissions that may be affected by a disqualified investigator who conducted trials with FDA-regulated test articles.

Each application or submission identified as containing data reported by a disqualified investigator is subject to examination to determine whether the investigator has submitted unreliable data that are essential to the approval of a marketing application or essential to the continued marketing of an FDA-regulated product. (See §§ 312.70(c), 511.1(c)(3), and 812.119(c)). This examination may be undertaken by FDA or the study sponsor. If the Commissioner determines, after the unreliable data submitted by the investigator are eliminated from consideration, that the continued approval of the product for which the data were submitted cannot be justified, the Commissioner will proceed to rescind clearance or withdraw approval of the product in accordance with the applicable provisions of the relevant statutes. (See §§ 812.119(e), 511.1(c)(5), and 312.70(e)).

Often, there may be sufficient data from sources other than the disqualified investigator's data to support the continued approval of the product. Those products that have been on the market for a longer period of time without significant safety concerns, even though a disqualified investigator contributed to the data relied on for approval, would probably remain on the market if sufficient reliable product-approval data support the continued approval of the product.

(Comment 3) The comment asks that FDA promptly inform affected sponsors of an investigator's disqualification.

(Response) FDA agrees that sponsors should be informed promptly about the disqualification of a clinical investigator. Indeed, FDA informs sponsors at several stages of the disqualification process. When FDA initiates a disqualification action, FDA sends to the clinical investigator a notice of initiation of disqualification proceedings and opportunity to explain (NIDPOE) letter. Following confirmed receipt of the NIDPOE letter by the clinical investigator, FDA provides a redacted copy of the letter to the study sponsor and reviewing institutional review boards (IRBs) (see Ref. 2, section II.C., at page 8), and posts the redacted NIDPOE letter on FDA's Web site.[8] The posted NIDPOE letter is intended to inform sponsors and others who may have an interest that FDA is initiating an administrative proceeding to determine whether the clinical investigator should be disqualified from receiving test articles.

If the investigator's explanation is not accepted by FDA or if the investigator fails to respond to the NIDPOE letter within the specified time period, FDA offers the investigator an opportunity for an informal regulatory hearing under part 16 to determine whether the investigator should remain eligible to receive test articles. FDA initiates a part 16 hearing by sending to the investigator a Notice of Opportunity for Hearing (NOOH). The NOOH specifies the facts and other relevant information that are the subject of the part 16 hearing (see Ref. 2, *id.*). FDA posts on its Web site[9] the names of clinical investigators who have been issued a NOOH concerning a disqualification proceeding along with the redacted NOOH.

If the investigator is disqualified, after receiving confirmation that the investigator has been notified of his or her disqualification, FDA promptly posts on its Web site[10] the investigator's name and the date of the disqualification action. In addition, FDA notifies the study sponsor and reviewing IRBs, in writing, about the disqualification action (Ref. 2, *id.*). This notification provides a statement of the basis for the Commissioner's disqualification determination (see §§ 312.70(b), 511.1(c)(2), and 812.119(b)).

FDA recommends that sponsors routinely check FDA's compliance and enforcement Web sites[11] for information about investigator disqualification proceedings that might affect the sponsor's studies. Further, in compliance with a sponsor's responsibilities (see, e.g., §§ 312.53(a), 511.1(b)(7)(i), and 812.43(a)), a sponsor must select only investigators qualified by training and experience as appropriate experts to investigate the study. A sponsor therefore must perform

[5] See, e.g., Commissioner's Decision, In the Matter of William H Ziering, M.D. (2008), at page 8 (''A clinical investigator may be found to have acted 'deliberately' * * * if he or she knowingly or willfully engaged in conduct that violates FDA's regulations or if the investigator engaged in conduct that demonstrated a reckless disregard for compliance with FDA's regulations.'') See *http://www.fda.gov/downloads/RegulatoryInformation/FOI/ElectronicReadingRoom/UCM144019.pdf.*

[6] On June 18, 2008, Dr. Gentry was determined ineligible to receive investigational drugs. See *http://www.fda.gov/downloads/RegulatoryInformation/FOI/ElectronicReadingRoom/UCM143906.pdf.*

[7] *Id.* at pages 20–21.

[8] See *http://www.fda.gov/RegulatoryInformation/FOI/ElectronicReadingRoom/ucm092185.htm.*

[9] See *http://www.fda.gov/RegulatoryInformation/FOI/ElectronicReadingRoom/ucm143240.htm.*

[10] See *http://www.fda.gov/ICECI/EnforcementActions/DisqualifiedRestrictedAssuranceList/ucm131681.htm.*

[11] See *http://www.fda.gov/ScienceResearch/SpecialTopics/RunningClinicalTrials/ComplianceEnforcement/default.htm.*

due diligence to ensure that an investigator is eligible to receive the test article. FDA considers checking FDA's Web site for investigator disqualification to be part of a sponsor's due diligence effort before selecting a clinical investigator to conduct a sponsor's study.

(Comment 4) The comment recommends that FDA consider the impact of investigator disqualification on the submission of results from failed investigations to ClinicalTrials.gov.

(Response) The comment is beyond the scope of this rulemaking as the National Institutes of Health (NIH) has the statutory responsibility for implementing the provisions under the Public Health Service Act, section 402(j), 42 U.S.C. 282(j)—Expanded Clinical Trial Registry Data Bank. The NIH proposes to issue new regulations [12] that will prescribe procedures for registering and reporting the results of clinical trials at ClinicalTrials.gov in accordance with section 801 of the Food and Drug Administration Amendments Act of 2007 (FDAAA, Pub. L. 110–85, September 27, 2007).

(Comment 5) The comment recommends that FDA seek input from affected sponsors regarding the impact of a clinical investigator's disqualification on the validity of clinical trial or marketed product data.

(Response) As discussed in response to Comment 2 in this document, upon disqualification of a clinical investigator, each application or submission to FDA containing data reported by a disqualified investigator is subject to examination (see §§ 312.70(c), 511.1(c)(3), and 812.119(c)). We agree that FDA may seek input from an affected study sponsor; for example, FDA may request from the study sponsor statistical analyses of study results after eliminating from the database the disqualified investigator's data.

(Comment 6) The comment asks FDA to clarify whether the rule applies to ''all sponsors for whom the investigator did work, or only those that were subject to the problem that caused the disqualification.''

(Response) This final rule applies to all sponsors who selected the clinical investigator to conduct their studies. FDA will assess the reliability of any data developed by a disqualified clinical investigator.

(Comment 7) The comment recommends that, because clinical investigator disqualification by a Commissioner's decision is a lengthy proceeding, FDA consider instituting a process similar to a clinical hold ''to prevent these individuals from continuing to conduct clinical trials while the disqualification process is underway.''

(Response) FDA agrees that the use of a clinical hold following clinical investigator misconduct may be appropriate in some situations and has issued a guidance document indicating this (see Ref. 3). For example, FDA may impose a clinical hold on studies where the hold is necessary to protect human subjects in the study from an unreasonable and significant risk of illness or injury. In such a case, FDA may impose a clinical hold based on credible evidence that a clinical investigator conducting the study has committed serious violations of FDA regulations on clinical trials of human drugs and biologics, including parts 312, 50, and 56 (21 CFR parts 50 and 56), or has submitted false information to FDA or the sponsor in any required report. Such a clinical hold may be imposed on the study in which the misconduct occurred or on other studies of drugs or biological products in which the clinical investigator is directly involved or proposed to be involved if FDA determines that the investigator's misconduct poses an ongoing threat to the safety and welfare of such subjects. (See §§ 312.42(b)(1)(i), 312.42(b)(2)(i), 312.42(b)(3)(iii), and 312.42(b)(4)(i)) (Ref. 3).

For medical devices, § 812.30(b) allows for withdrawal of approval of an application for an investigational device exemption (IDE). Under this provision, FDA may withdraw approval of an application if FDA determines that continuation of testing under an IDE will result in an unreasonable risk to subjects.

(Comment 8) The comment recommends that FDA issue guidance on how a disqualified investigator's data in applications and submissions to FDA is to be handled, segregated, analyzed, and reported.

(Response) Because each situation is different, FDA evaluates on a case-by-case basis the best course of action for handling a disqualified clinical investigator's data in applications and submissions. For this reason, FDA does not intend to issue guidance to address how a disqualified investigator's data should be handled.

(Comment 9) The comment recommends that FDA state explicitly in the rule that when an investigator is disqualified by FDA from studies of veterinary drugs the investigator should also be ineligible to participate in studies of veterinary biologics regulated by the U.S. Department of Agriculture (USDA) under Title 9 of the Code of Federal Regulations; and, likewise, that ''USDA should codify a companion rule to state that investigators disqualified from participation in studies of goods regulated by FDA will also be disqualified from investigations of veterinary biologics.''

(Response) As stated in the preamble to the proposed rule, FDA may refer pertinent matters to another Federal, State, or local government agency for any action determined appropriate by that agency. Although FDA agrees that affected agencies should be aware of judicial proceedings and regulatory actions taken involving clinical investigators, FDA does not have authority to draft a companion rule to be administered by USDA.

(Comment 10) The comment recommends that FDA notify sponsors when a disqualified clinical investigator has been reinstated.

(Response) We agree that FDA should notify interested parties when a clinical investigator is reinstated as eligible to receive FDA-regulated test articles. Because FDA has no way of knowing who, in particular, may be interested in the reinstatement of a certain investigator, FDA lists on its Web site those investigators who have been reinstated.[13]

IV. 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.

V. Legal Authority

The purpose of disqualifying investigators who violate the regulations is to preserve the integrity of data needed to assess the safety and effectiveness of an FDA-regulated product before the product is made available to the public, and to protect the safety of study subjects during the conduct of a clinical investigation and patient safety after the approval or clearance of a marketing application.

Although the concept of disqualification is not explicitly mentioned in the FD&C Act, FDA has

[12] See the Fall 2011 Unified Agenda, Expanded Registration and Results Reporting at ClinicalTrials.gov (RIN 0925–AA55), at *http://reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=0925-AA55.*

[13] See *http://www.fda.gov/ICECI/EnforcementActions/DisqualifiedRestrictedAssuranceList/ucm131681.htm.*

the authority to disqualify clinical investigators who violate FDA's regulations. The Supreme Court in *Weinberger* v. *Bentex Pharmaceuticals, Inc.,* 412 U.S. 645, 653 (1973) has recognized that FDA has authority that ''is implicit in the regulatory scheme, not spelled out in *haec verba''* in the statute. As stated in *Morrow* v. *Clayton,* 326 F.2d 36, 44 (10th Cir. 1963): ''[I]t is a fundamental principle of administrative law that the powers of an administrative agency are not limited to those expressly granted by the statutes, but include, also, all of the powers that may fairly be implied therefrom.''

See *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356 (1973), and *National Petroleum Refiners Association* v. *FTC,* 482 F.2d 672 (DC Cir. 1973). See also *Weinberger* v. *Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609 (1973); *National Nutritional Foods Association* v. *Weinberger,* 512 F.2d 688, *cert denied,* 423 U.S. 827 (1975); *United States* v. *Nova Scotia Food Products Corp.,* 568 F.2d 240, 246–248 (2d Cir. 1977); *American Frozen Food Institute* v. *Mathews* 413 F.Supp. 548 (D.D.C. 1976) *aff'd per curiam,* 555 F.2d 1059 (DC Cir. 1977); *National Confectioners Association* v. *Califano,* 569 F.2d 690 (DCCir. 1978); and *National Association of Pharmaceutical Manufacturers* v. *FDA,* 637 F.2d 877 (2d Cir. 1981).

''[R]egulatory acts should be given a practical construction, and one which will enable the agency to perform the duties required of it by Congress.'' *Federal Deposit Ins. Corp.* v. *Sumner Fin. Corp.,* 451 F.2d 898, 904 (5th Cir. 1971). Congressional inaction on proposed legislation that would state expressly an agency's authority to act does not support an inference that the agency lacks implicit authority to act under existing legislation. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381–382 n. 11 (1969). See also *Leist* v. *Simplot,* 638 F.2d 283, 318 (2d Cir. 1980), *affirmed sub nom. Merrill Lynch, Pierce, Fenner & Smith* v. *Curran,* 456 U.S. 353 (1982). The Supreme Court has often recognized ''the construction of a statute by those charged with its administration is entitled to substantial deference.'' *United States* v. *Rutherford,* 442 U.S. 544 (1979). *Board of Governors of FRS* v. *First Lincolnwood,* 439 U.S. 234, 248 (1978) (the Court's conclusion ''is influenced by the principle that courts should defer to an agency's construction of its own statutory mandate, *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. at 381; *Commissioner* v. *Sternberger's Estate,* 348 U.S. 187, 199 (1955), particularly when that construction accords with well established congressional goals.'' 439 U.S. at 251); *Bayside Enterprises, Inc.* v. *NLRB,* 429 U.S. 298, 304 (1977); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

Under section 701(a) of the FD&C Act (21 U.S.C. 371(a)), the Commissioner is empowered to issue regulations for the efficient enforcement of the FD&C Act. Regulations issued by the Commissioner under section 701(a) of the FD&C Act for determining whether a clinical investigation of a drug intended for human use, among other things, was scientifically reliable and valid to support approval of a new drug, have been upheld by the Supreme Court (*Weinberger* v. *Hynson, Westcott & Dunning, Inc.*); see also *Upjohn Co.* v. *Finch,* 422 F.2d 944 (6th Cir. 1970); and *Pharmaceutical Manufacturers Association* v. *Richardson,* 318 F.Supp. 301 (D.Del. 1970)).

Furthermore, sections 505(i), 512(j) and 520(g) of the FD&C Act (21 U.S.C. 355(i), 360b(j), and 360j(g)) regarding clinical investigations that require prior FDA authorization direct the Commissioner to issue regulations to protect the public health in the course of those investigations. Also, sections 505(i)(1), 512(j), and 520(g)(2)(A) of the FD&C Act require that investigations be conducted by ''experts qualified by scientific training and experience.'' An investigator who repeatedly or deliberately violates the regulations or who repeatedly or deliberately submits false information would not be considered a qualified expert with the experience required to conduct investigations of FDA-regulated articles. Among other stated objectives, the final rulemaking is intended to fulfill those mandates.

The Commissioner therefore concludes that legal authority to issue those regulations regarding clinical investigators exists under sections 505(i), 512(j), 520(g) and 701(a) of the FD&C Act, as essential to protection of the public health and safety and to enforcement of the Agency's responsibilities under sections 409, 502, 503, 505, 506, 510, 512, 513, 514, 515, 518, 519, 520 and 801 of the FD&C Act (21 U.S.C. 348, 352, 353, 355, 356, 360, 360b, 360c, 360d, 360e, 360h, 360i, 360j and 381), as well as the responsibilities of FDA under section 351 of the Public Health Service Act (42 U.S.C. 262).

VI. Analysis of Impacts

FDA has examined the impacts of the 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). In accordance with Executive Order 12866, FDA has previously analyzed the potential economic effects of this final rule. As announced in the proposal, the Agency has determined that the rule is not a significant regulatory action as defined by Executive Order 12866. The Agency has not received any new information or comments that would alter its previous determination.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this final rule does not impose new requirements on any entity and therefore has no associated compliance costs, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

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 final rule to result in any 1-year expenditure that would meet or exceed this amount.

Synopsis

This rule expands the scope of FDA's disqualification actions so that a disqualified clinical investigator is ineligible to receive any FDA-regulated test article and ineligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA. We estimate that there is an average of about one matter per year in which clinical investigators are ultimately disqualified via a Commissioner's decision, and we do not expect that this final rule will impose additional costs. Non-quantifiable benefits of this final rule would include helping to reduce the risk of additional violations in other FDA-regulated investigations and helping to ensure the integrity of

clinical trial data. This final rule will help to reduce the risk to human subjects who participate in FDA-regulated investigations, and may lead to improved public confidence in the clinical data supporting FDA decisions. The full analysis of impacts is presented in Ref. 4 of this document.

VII. Paperwork Reduction Act of 1995

This final rule contains no new collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

The information collection in § 312.70 pertaining to the disqualification of a clinical investigator and an investigator's opportunity to respond to FDA is approved under the investigational new drug regulations, OMB Control No. 0910–0014; expiration date February 28, 2013.[14] The notification of IRBs in § 312.70 is approved under OMB Control No. 0910–0130—Protection of Human Subjects; Recordkeeping Requirements for Institutional Review Boards (IRBs); expiration date April 30, 2014.[15] The information collection in § 511.1(c) pertaining to the disqualification of a clinical investigator and an investigator's opportunity to respond to FDA is approved under the new animal drugs for investigational use regulations OMB Control No. 0910–0117; expiration date August 31, 2011 (renewal pending at OMB).[16] The information collection in § 812.119 pertaining to the disqualification of a clinical investigator and an investigator's opportunity to respond to FDA is approved under the investigational device exemptions reports and records in 21 CFR part 812, OMB Control No. 0910–0078; expiration date February 28, 2013.[17] In addition, INDs and new drug applications are approved under OMB control number 0910–0416; animal drug applications, 21 CFR part 514, are approved under OMB control number 0910–0032; premarket notification submissions 510(k), subpart E, are approved under OMB control number 0910–0120; and premarket approvals of medical devices, 21 CFR part 814, are approved under OMB control number 0910–0231.

[14] See *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200905-0910-005* (accessed on March 30, 2012).

[15] See *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200711-0910-003* (accessed on March 30, 2012).

[16] See *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200806-0910-005* (accessed on March 30, 2012).

[17] See *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201001-0910-010* (accessed on March 30, 2012).

VIII. Federalism

FDA has analyzed this 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.

IX. 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. (FDA has verified the Web site addresses, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

1. GAO Report to Congressional Requesters—Oversight of Clinical Investigators, Action Needed to Improve Timeliness and Enhance Scope of FDA's Debarment and Disqualification Processes for Medical Product Investigators; GAO–09–807. See *http://www.gao.gov/new.items/d09807.pdf.*
2. See ''Information Sheet Guidance for Institutional Review Boards, Clinical Investigators, and Sponsors: Clinical Investigator Administrative Actions—Disqualification,'' May 2010, at *http://www.fda.gov/downloads/RegulatoryInformation/Guidances/UCM214008.pdf.*
3. See ''Guidance for Industry and Clinical Investigators: The Use of Clinical Holds Following Clinical Investigator Misconduct,'' September 2004, at *http://www.fda.gov/downloads/RegulatoryInformation/Guidances/UCM126997.pdf.*
4. Full Analysis of Impacts of Final Rule.

List of Subjects

21 CFR Part 16

Administrative practice and procedure.

21 CFR Part 312

Drugs, Exports, Imports, Investigations, Labeling, Medical research, Reporting and recordkeeping requirements, Safety.

21 CFR Part 511

Animal drugs, Medical research, Reporting and recordkeeping requirements.

21 CFR Part 812

Health records, Medical devices, Medical research, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 16, 312, 511, and 812 are amended as follows:

PART 16—REGULATORY HEARING BEFORE THE FOOD AND DRUG ADMINISTRATION

■ 1. The authority citation for 21 CFR part 16 continues to read as follows:

Authority: 15 U.S.C. 1451–1461; 21 U.S.C. 141–149, 321–394, 467f, 679, 821, 1034; 28 U.S.C. 2112; 42 U.S.C. 201–262, 263b, 364.

■ 2. Section 16.1 is amended in paragraph (b)(2) by numerically adding entries for ''§ 58.204(b)'', ''§ 812.119'', and ''§ 822.7(a)(3)'', and by revising the entries for ''§ 312.70'' and ''§ 511.1(c)(1)'' to read as follows:

§ 16.1 Scope.

* * * * *

(b) * * *

(2) * * *

* * * * *

§ 58.204(b), relating to disqualifying a testing facility.

* * * * *

§ 312.70, relating to whether an investigator is eligible to receive test articles under part 312 of this chapter and eligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA, including drugs, biologics, devices, new animal drugs, foods, including dietary supplements, that bear a nutrient content claim or a health claim, infant formulas, food and color additives, and tobacco products.

* * * * *

§ 511.1(c)(1), relating to whether an investigator is eligible to receive test articles under part 511 of this chapter and eligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA including drugs, biologics, devices, new animal drugs, foods, including dietary supplements, that bear a nutrient content claim or a health claim, infant formulas, food and color additives, and tobacco products.

* * * * *

§ 812.119, relating to whether an investigator is eligible to receive test articles under part 812 of this chapter and eligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA including drugs, biologics, devices, new animal drugs, foods, including dietary supplements, that bear a nutrient content claim or a health claim, infant formulas, food and color additives, and tobacco products.

* * * * *

§ 822.7(a)(3), relating to an order to conduct postmarket surveillance of a medical device under section 522 of the act.

* * * * *

PART 312—INVESTIGATIONAL NEW DRUG APPLICATION

■ 3. The authority citation for 21 CFR part 312 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360bbb, 371; 42 U.S.C. 262.

■ 4. Section 312.70 is revised to read as follows:

§ 312.70 Disqualification of a clinical investigator.

(a) If FDA has information indicating that an investigator (including a sponsor-investigator) has repeatedly or deliberately failed to comply with the requirements of this part, part 50 or part 56 of this chapter, or has repeatedly or deliberately submitted to FDA or to the sponsor false information in any required report, the Center for Drug Evaluation and Research or the Center for Biologics Evaluation and Research will furnish the investigator written notice of the matter complained of and offer the investigator an opportunity to explain the matter in writing, or, at the option of the investigator, in an informal conference. If an explanation is offered and accepted by the applicable Center, the Center will discontinue the disqualification proceeding. If an explanation is offered but not accepted by the applicable Center, the investigator will be given an opportunity for a regulatory hearing under part 16 of this chapter on the question of whether the investigator is eligible to receive test articles under this part and eligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA.

(b) After evaluating all available information, including any explanation presented by the investigator, if the Commissioner determines that the investigator has repeatedly or deliberately failed to comply with the requirements of this part, part 50 or part 56 of this chapter, or has repeatedly or deliberately submitted to FDA or to the sponsor false information in any required report, the Commissioner will notify the investigator, the sponsor of any investigation in which the investigator has been named as a participant, and the reviewing institutional review boards (IRBs) that the investigator is not eligible to receive test articles under this part. The notification to the investigator, sponsor, and IRBs will provide a statement of the basis for such determination. The notification also will explain that an investigator determined to be ineligible to receive test articles under this part will be ineligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA, including drugs, biologics, devices, new animal drugs, foods, including dietary supplements, that bear a nutrient content claim or a health claim, infant formulas, food and color additives, and tobacco products.

(c) Each application or submission to FDA under the provisions of this chapter containing data reported by an investigator who has been determined to be ineligible to receive FDA-regulated test articles is subject to examination to determine whether the investigator has submitted unreliable data that are essential to the continuation of an investigation or essential to the approval of a marketing application, or essential to the continued marketing of an FDA-regulated product.

(d) If the Commissioner determines, after the unreliable data submitted by the investigator are eliminated from consideration, that the data remaining are inadequate to support a conclusion that it is reasonably safe to continue the investigation, the Commissioner will notify the sponsor, who shall have an opportunity for a regulatory hearing under part 16 of this chapter. If a danger to the public health exists, however, the Commissioner shall terminate the IND immediately and notify the sponsor and the reviewing IRBs of the termination. In such case, the sponsor shall have an opportunity for a regulatory hearing before FDA under part 16 on the question of whether the IND should be reinstated. The determination that an investigation may not be considered in support of a research or marketing application or a notification or petition submission does not, however, relieve the sponsor of any obligation under any other applicable regulation to submit to FDA the results of the investigation.

(e) If the Commissioner determines, after the unreliable data submitted by the investigator are eliminated from consideration, that the continued approval of the product for which the data were submitted cannot be justified, the Commissioner will proceed to withdraw approval of the product in accordance with the applicable provisions of the relevant statutes.

(f) An investigator who has been determined to be ineligible under paragraph (b) of this section may be reinstated as eligible when the Commissioner determines that the investigator has presented adequate assurances that the investigator will employ all test articles, and will conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA, solely in compliance with the applicable provisions of this chapter.

PART 511—NEW ANIMAL DRUGS FOR INVESTIGATIONAL USE

■ 5. The authority citation for 21 CFR part 511 continues to read as follows:

Authority: 21 U.S.C. 321, 351, 352, 353, 360b, 371.

■ 6. Section 511.1 is amended by:

■ a. Removing ''the Food and Drug Administration'' and adding in its place ''FDA'' in paragraph (b)(4) introductory text, and paragraphs (b)(5)(iii), (b)(6), (b)(8)(ii), (b)(9)(i), (d)(2), and (f)(1).

■ b. Revising paragraph (c).

The revisions read as follows:

§ 511.1 New animal drugs for investigational use exempt from section 512(a) of the act.

* * * * *

(c) *Disqualification of a clinical investigator.* (1) If FDA has information indicating that an investigator (including a sponsor-investigator) has repeatedly or deliberately failed to comply with the conditions of these exempting regulations or has repeatedly or deliberately submitted to FDA or to the sponsor false information in any required report, the Center for Veterinary Medicine will furnish the investigator written notice of the matter complained of and offer the investigator an opportunity to explain the matter in writing, or, at the option of the investigator, in an informal conference. If an explanation is offered and accepted by the Center for Veterinary Medicine, the Center will discontinue the disqualification proceeding. If an explanation is offered but not accepted by the Center for Veterinary Medicine, the investigator will be given an opportunity for a regulatory hearing under part 16 of this chapter on the

question of whether the investigator is eligible to receive test articles under this part and eligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA.

(2) After evaluating all available information, including any explanation presented by the investigator, if the Commissioner determines that the investigator has repeatedly or deliberately failed to comply with the conditions of the exempting regulations in this subchapter, or has repeatedly or deliberately submitted to FDA or to the sponsor false information in any required report, the Commissioner will notify the investigator and the sponsor of any investigation in which the investigator has been named as a participant that the investigator is not eligible to receive test articles under this part. The notification to the investigator and sponsor will provide a statement of the basis for such determination. The notification also will explain that an investigator determined to be ineligible to receive test articles under this part will be ineligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA, including drugs, biologics, devices, new animal drugs, foods, including dietary supplements, that bear a nutrient content claim or a health claim, infant formulas, food and color additives, and tobacco products.

(3) Each application or submission to FDA under the provisions of this chapter containing data reported by an investigator who has been determined to be ineligible to receive FDA-regulated test articles is subject to examination to determine whether the investigator has submitted unreliable data that are essential to the continuation of an investigation or essential to the approval of a marketing application, or essential to the continued marketing of an FDA-regulated product.

(4) If the Commissioner determines, after the unreliable data submitted by the investigator are eliminated from consideration, that the data remaining are inadequate to support a conclusion that it is reasonably safe to continue the investigation, the Commissioner will notify the sponsor, who shall have an opportunity for a regulatory hearing under part 16 of this chapter. If a danger to the public health exists, however, the Commissioner shall terminate the exemption immediately and notify the sponsor of the termination. In such case, the sponsor shall have an opportunity for a regulatory hearing before FDA under part 16 on the question of whether the exemption should be reinstated. The determination that an investigation may not be considered in support of a research or marketing application or a notification or petition submission does not, however, relieve the sponsor of any obligation under any other applicable regulation to submit to FDA the results of the investigation.

(5) If the Commissioner determines, after the unreliable data submitted by the investigator are eliminated from consideration, that the continued approval of the product for which the data were submitted cannot be justified, the Commissioner will proceed to withdraw approval of the product in accordance with the applicable provisions of the relevant statutes.

(6) An investigator who has been determined to be ineligible under paragraph (c)(2) of this section may be reinstated as eligible when the Commissioner determines that the investigator has presented adequate assurances that the investigator will employ all test articles, and will conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA, solely in compliance with the applicable provisions of this chapter.

* * * * *

■ 7. Section 511.3 is added to read as follows:

§ 511.3 Definitions.

As used in this part:

Contract research organization means a person that assumes, as an independent contractor with the sponsor, one or more of the obligations of a sponsor, e.g., design of a protocol, selection or monitoring of investigations, evaluation of reports, and preparation of materials to be submitted to the Food and Drug Administration.

Investigator means an individual who actually conducts a clinical investigation (i.e., under whose immediate direction the drug is administered or dispensed to a subject). In the event an investigation is conducted by a team of individuals, the investigator is the responsible leader of the team. ''Subinvestigator'' includes any other individual member of that team.

Sponsor means a person who takes responsibility for and initiates a clinical investigation. The sponsor may be an individual or pharmaceutical company, governmental agency, academic institution, private organization, or other organization. The sponsor does not actually conduct the investigation unless the sponsor is a sponsor-investigator. A person other than an individual that uses one or more of its own employees to conduct an investigation that it has initiated is a sponsor, not a sponsor-investigator, and the employees are investigators.

Sponsor-Investigator means an individual who both initiates and conducts an investigation, and under whose immediate direction the investigational drug is administered or dispensed. The term does not include any person other than an individual. The requirements applicable to a sponsor-investigator under this part include both those applicable to an investigator and a sponsor.

PART 812—INVESTIGATIONAL DEVICE EXEMPTIONS

■ 8. The authority citation for 21 CFR part 812 continues to read as follows:

Authority: 21 U.S.C. 331, 351, 352, 353, 355, 360, 360c–360f, 360h–360j, 371, 372, 374, 379e, 381, 382, 383; 42 U.S.C. 216, 241, 262, 263b–263n.

■ 9. Section 812.119 is revised to read as follows:

§ 812.119 Disqualification of a clinical investigator.

(a) If FDA has information indicating that an investigator (including a sponsor-investigator) has repeatedly or deliberately failed to comply with the requirements of this part, part 50, or part 56 of this chapter, or has repeatedly or deliberately submitted to FDA or to the sponsor false information in any required report, the Center for Devices and Radiological Health, the Center for Biologics Evaluation and Research, or the Center for Drug Evaluation and Research will furnish the investigator written notice of the matter complained of and offer the investigator an opportunity to explain the matter in writing, or, at the option of the investigator, in an informal conference. If an explanation is offered and accepted by the applicable Center, the Center will discontinue the disqualification proceeding. If an explanation is offered but not accepted by the applicable Center, the investigator will be given an opportunity for a regulatory hearing under part 16 of this chapter on the question of whether the investigator is eligible to receive test articles under this part and eligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA.

(b) After evaluating all available information, including any explanation presented by the investigator, if the Commissioner determines that the investigator has repeatedly or deliberately failed to comply with the

requirements of this part, part 50, or part 56 of this chapter, or has repeatedly or deliberately submitted to FDA or to the sponsor false information in any required report, the Commissioner will notify the investigator, the sponsor of any investigation in which the investigator has been named as a participant, and the reviewing investigational review boards (IRBs) that the investigator is not eligible to receive test articles under this part. The notification to the investigator, sponsor and IRBs will provide a statement of the basis for such determination. The notification also will explain that an investigator determined to be ineligible to receive test articles under this part will be ineligible to conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA, including drugs, biologics, devices, new animal drugs, foods, including dietary supplements, that bear a nutrient content claim or a health claim, infant formulas, food and color additives, and tobacco products.

(c) Each application or submission to FDA under the provisions of this chapter containing data reported by an investigator who has been determined to be ineligible to receive FDA-regulated test articles is subject to examination to determine whether the investigator has submitted unreliable data that are essential to the continuation of an investigation or essential to the clearance or approval of a marketing application, or essential to the continued marketing of an FDA-regulated product.

(d) If the Commissioner determines, after the unreliable data submitted by the investigator are eliminated from consideration, that the data remaining are inadequate to support a conclusion that it is reasonably safe to continue the investigation, the Commissioner will notify the sponsor, who shall have an opportunity for a regulatory hearing under part 16 of this chapter. If a danger to the public health exists, however, the Commissioner shall terminate the investigational device exemption (IDE) immediately and notify the sponsor and the reviewing IRBs of the termination. In such case, the sponsor shall have an opportunity for a regulatory hearing before FDA under part 16 of this chapter on the question of whether the IDE should be reinstated. The determination that an investigation may not be considered in support of a research or marketing application or a notification or petition submission does not, however, relieve the sponsor of any obligation under any other applicable regulation to submit to FDA the results of the investigation.

(e) If the Commissioner determines, after the unreliable data submitted by the investigator are eliminated from consideration, that the continued clearance or approval of the product for which the data were submitted cannot be justified, the Commissioner will proceed to rescind clearance or withdraw approval of the product in accordance with the applicable provisions of the relevant statutes.

(f) An investigator who has been determined to be ineligible under paragraph (b) of this section may be reinstated as eligible when the Commissioner determines that the investigator has presented adequate assurances that the investigator will employ all test articles, and will conduct any clinical investigation that supports an application for a research or marketing permit for products regulated by FDA, solely in compliance with the applicable provisions of this chapter.

Dated: April 24, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–10292 Filed 4–27–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0199]

RIN 1625–AA00

Safety Zone; Chicago Harbor, Navy Pier Southeast, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Navy Pier Southeast Safety Zone in Chicago Harbor during various periods from July 4, 2012 through July 28, 2012. This action is necessary and intended to ensure safety of life on the navigable waters of the United States immediately prior to, during, and immediately after fireworks events. Enforcement of this safety zone will establish restrictions upon, and control movement of, vessels in a specified area immediately prior to, during, and immediately after various fireworks events. During the enforcement period, no person or vessel may enter the safety zones without permission of the Captain of the Port, Sector Lake Michigan.

DATES: The regulations in 33 CFR 165.931 will be enforced at various times between 9:00 p.m. on July 4, 2012 through 10:30 p.m. on July 28, 2012.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email MST2 Rebecca Stone, Prevention Department, Coast Guard Sector Lake Michigan, Milwaukee, WI at 414–747–7154, email *Rebecca.R.Stone@uscg.mil*.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Safety Zone; Chicago Harbor, Navy Pier Southeast, Chicago, IL listed in 33 CFR 165.931 for the following events:

(1) *Navy Pier Fireworks;* on July 4, 2012 from 9:00 p.m. through 11:00 p.m.; on July 7, 2012 from 10:00 p.m. through 10:30 p.m.; on July 11, 2012 from 9:15 p.m. through 9:45 p.m.; on July 14, 2012 from 10:00 p.m. through 10:30 p.m.; on July 18, 2012 from 9:15 p.m. through 9:45 p.m.; on July 21, 2012 from 10:00 p.m. through 10:30 p.m.; on July 25, 2012 from 9:15 p.m. through 9:45 p.m.; and on July 28, 2012 from 10 through 10:30.

All vessels must obtain permission from the Captain of the Port, Sector Lake Michigan, or his or her on-scene representative to enter, move within or exit the safety zone. Vessels and persons granted permission to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port, Sector Lake Michigan, or his or her on-scene representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice is issued under authority of 33 CFR 165.931 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of these enforcement periods via broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port, Sector Lake Michigan, will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone established by this section is suspended. If the Captain of the Port, Sector Lake Michigan, determines that the safety zone need not be enforced for the full duration stated in this notice, he or she may use a Broadcast Notice to Mariners to grant general permission to enter the safety zone. The Captain of the Port, Sector Lake Michigan, or his or her on-scene representative may be contacted via VHF Channel 16.

Dated: April 9, 2012.

C.W. Tenney,

Commander, U.S. Coast Guard, Captain of the Port, Lake Michigan, Acting.

[FR Doc. 2012–10316 Filed 4–27–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2012–0008; A–1–FRL–9664–8]

Approval and Promulgation of Air Quality Implementation Plans; Massachusetts; Determination of Attainment of the One-Hour Ozone Standard for the Springfield Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is making two separate and independent determinations. First, EPA is determining that the Springfield (Western Massachusetts) serious one-hour ozone nonattainment area did not meet the applicable deadline of December 31, 2003, for attaining the one-hour National Ambient Air Quality Standard (NAAQS) for ozone. This final determination is based upon complete, quality-assured, certified ambient air monitoring data that show the area had an expected ozone exceedance rate above the level of the now revoked one-hour ozone NAAQS for the 2001–2003 monitoring period. Second, EPA is determining that the Springfield (Western Massachusetts) serious one-hour ozone nonattainment area currently attains the now revoked one-hour NAAQS for ozone, based upon complete, quality-assured, certified ambient air monitoring data for 2009-2011. The area first attained the one-hour NAAQS during the 2007–2009 monitoring period, and continued in attainment during the 2008–2010, and 2009–2011 monitoring periods.

DATES: *Effective Date:* This rule is effective on May 30, 2012.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2012–0008. All documents in the docket are listed on the *www.regulations.gov* web site. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Richard P. Burkhart, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, telephone number (617) 918–1664, fax number (617) 918–0664, email *Burkhart.Richard@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

I. What actions is EPA taking?
II. What is the effect of these actions?
III. Final Actions
IV. Statutory and Executive Order Reviews

I. What Actions is EPA Taking?

EPA is making two separate and independent final determinations for the Springfield (Western Massachusetts) one-hour ozone serious nonattainment area (hereafter, ''the Western Massachusetts area'').

A. Determination of Failure To Attain by Applicable Attainment Date

EPA is determining that the Western Massachusetts area did not attain the one-hour ozone National Ambient Air Quality Standard (NAAQS) by the applicable attainment date, December 31, 2003. This determination is based upon complete, quality-assured and certified air quality monitoring data for the 2001 through 2003 ozone seasons.

B. Determination of Current Attainment

In addition, EPA is determining that the Western Massachusetts area is currently attaining the one-hour ozone NAAQS based upon complete, quality-assured and certified ambient air monitoring data for 2009–2011 showing the area has attained the one-hour ozone NAAQS, and that it has done so continuously since the 2007–2009 monitoring period.

Additional information related to these determinations and the rationale for them are set forth in the Notice of Proposed Rulemaking (NPR) published on January 24, 2012 (77 FR 3417) and will not be restated here. EPA received no comments on the NPR.

II. What is the Effect of These Actions?

After revocation of the one-hour ozone standard, EPA must continue to provide a mechanism to give effect to one-hour ozone anti-backsliding requirements. See *SCAQMD* v. *EPA,* 472 F.3d 882, at 903 (DC Cir. 2006). In keeping with this responsibility, EPA has determined that the Western Massachusetts area failed to attain the one-hour ozone standard by its applicable attainment date. Consistent with 40 CFR 51.905(e)(2), and the South Coast decision, upon revocation of the one-hour ozone NAAQS for an area, EPA is no longer obligated to determine whether an area has attained the one-hour NAAQS, except insofar as it relates to effectuating the anti-backsliding requirements that are specifically retained. EPA's determination here is linked solely to required one-hour anti-backsliding, contingency measures. A final determination of failure to attain will not result in reclassification of the area under the revoked one-hour standard, nor is EPA identifying or determining any new one-hour reclassification for the area. EPA is no longer required to reclassify an area to a higher classification for the one-hour ozone NAAQS based upon a determination that the area failed to attain that NAAQS by its attainment date. See 40 CFR 51.905(e)(2)(i)(B). Moreover, EPA has previously approved the one-hour ozone attainment demonstration and Reasonable Further Progress (ROP) plans for this area, and in doing so noted that although there were no state implementation plan contingency measure reductions applicable to the Western Massachusetts area for failure to attain, there were federal measures the state had not accounted for in its attainment demonstration that provided more reductions than necessary to serve the purpose of contingency measures for this area. See 66 FR 666, January 3, 2001. In addition, EPA has also determined that the Western Massachusetts area attained the one-hour ozone standard in 2009, and continues to attain this standard. In this context, EPA has also determined that there are not any additional obligations, including those relating to one-hour ozone contingency measures, for the Western Massachusetts area under the one-hour ozone standard.

III. Final Actions

EPA is determining that the Western Massachusetts one-hour ozone nonattainment area did not meet its applicable one-hour ozone attainment date of December 31, 2003, based on 2001–2003 complete, quality-assured ozone monitoring data. Separate from and independent of this determination, EPA is also determining that the Western Massachusetts one-hour ozone nonattainment area is currently attaining the one-hour ozone standard, based on the most recent three years (2009–2011) of complete, quality-assured ozone monitoring data at all monitoring sites in the area. EPA's review of the data shows that the area began attaining the one-hour ozone standard in the 2007–2009 period, and has continued to attain this standard through the 2008–2010 and 2009–2011 monitoring periods.

IV. Statutory and Executive Order Reviews

These actions make determinations of attainment based on air quality, result in the suspension of certain Federal requirements, and/or would not impose additional requirements beyond those imposed by state law. For that reason, these actions:

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

In addition, these actions do 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 these actions 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 June 29, 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, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 17, 2012.

H. Curtis Spalding,

Regional Administrator, EPA New England.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

Authority: 42 U.S.C. 7401.

Subpart W—Massachusetts

■ 2. Section 52.1129 is amended by adding paragraph (e) to read as follows:

§ 52.1129 Control strategy: Ozone.

* * * * *

(e) Determination of Attainment for the One-Hour Ozone Standard. Effective May 30, 2012, EPA is determining that the Springfield (Western Massachusetts) one-hour ozone nonattainment area did not meet its applicable one-hour ozone attainment date of December 31, 2003, based on 2001–2003 complete, quality-assured ozone monitoring data. Separate from and independent of this determination, EPA is determining that the Springfield (Western Massachusetts) one-hour ozone nonattainment area met the one-hour ozone standard, based on 2007–2009 complete, quality-assured ozone monitoring data at all monitoring sites in the area. EPA's review of the ozone data shows that the area began attaining the one-hour ozone standard during the 2007–2009 monitoring period, and has continued attaining the one-hour standard through the 2008–2010 and 2009–2011 monitoring periods.

[FR Doc. 2012–10198 Filed 4–27–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2012–0053; FRL–9666–2]

Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; Missouri and Illinois; St. Louis; Determination of Attainment by Applicable Attainment Date for the 1997 Ozone National Ambient Air Quality Standard (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to determine, pursuant to the Clean Air Act (CAA), that the bi-state St. Louis (MO-IL) ozone nonattainment area (''St. Louis area'') attained the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS) by the applicable attainment date of June 15, 2010. This determination is based upon complete, quality-assured, and certified ambient air quality data from the 2007–2009 monitoring period which show that the St. Louis area has monitored attainment of the 1997 8-hour ozone NAAQS as of the applicable date.

DATES: *Effective Date:* This final rule will be effective May 30, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2012–0053. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:00 to 4:30 excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lachala Kemp, Air Planning and Development Branch, U.S. Environmental Protection Agency Region 7, 901 N. 5th Street, Kansas City, Kansas 66101, at (913) 551–7214 or by email at *kemp.lachala@epa.gov*. In Region 5 contact Edward Doty, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), 77 West Jackson Boulevard, Chicago, Illinois, 60604, at (312) 886–6057 or by e-mail at *doty.edward@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' or ''our'' refer to EPA. This section provides additional information by addressing the following questions:

Table of Contents

I. What final action is EPA taking in this final rule?
II. What is the background for this final action?
III. What was the air quality in the St. Louis area for the 1997 8-hour ozone NAAQS for the 2007–2009 monitoring period?
IV. EPA's Final Action
V. Statutory and Executive Order Reviews

I. What final action is EPA taking in this final rule?

Pursuant to section 181(b)(2) of the CAA, EPA is taking final action to determine that the St. Louis area attained the 1997 8-hour ozone NAAQS by its applicable attainment date of June 15, 2010. The St. Louis area is composed of Jefferson County, Franklin County, St. Louis County, St. Louis City, and St. Charles County in Missouri, and Madison, Monroe, Jersey, and St. Clair Counties in Illinois. This determination is based upon complete, quality-assured and certified ambient air monitoring data from 2007–2009 which show that the St. Louis area monitored attainment of the 1997 8-hour ozone NAAQS as of its applicable attainment date.

On February 2, 2012, EPA published in the **Federal Register** a proposed rulemaking to determine that the St. Louis area attained the 1997 8-hour ozone NAAQS by its applicable attainment date of June 15, 2010 (see 77 FR 5210). EPA did not receive any public comments on this proposal.

II. What is the background for this action?

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million (ppm). On April 30, 2004 (69 FR 23858), EPA published a final rule designating and classifying areas under the 8-hour ozone NAAQS. These designations and classifications became effective June 15, 2004. EPA designated as nonattainment any area that was violating the 8-hour ozone NAAQS based on the three most recent years of air quality data, 2001–2003. Under EPA's implementation rule for the 1997 8-hour ozone standard (69 FR 23951, April 30, 2004), an area was classified under subpart 2 of the CAA based on its 8-hour ozone design value (i.e. the three-year average annual fourth-highest daily maximum 8-hour average ozone concentration), if it had a 1-hour design value at the time of designation at or above 0.121 ppm. *See* 40 CFR 51.902(a). All other nonattainment areas were covered under subpart 1, based upon their 8-hour design values (69 FR 23958). The St. Louis area was classified as a subpart 2, 8-hour ozone moderate nonattainment area by EPA on April 30, 2004 (69 FR 23858, 23898 and 23915), based on the three most recent years of monitoring data (2001–2003), consistent with 40 CFR 51.903(a).

As a moderate nonattainment area for the 1997 8-hour ozone NAAQS, the St. Louis (MO-IL) area had an applicable attainment date of June 15, 2010, as required by 40 CFR 51.903(a) Table 1. Pursuant to section 181(b)(2) of the CAA, EPA is required to make a determination as to whether the St. Louis area attained the standard as of its applicable attainment date. This final action is based on the area's design value as of the attainment date, which in turn is based on the three most recent years of air quality data (2007–2009) prior to the attainment date.

III. What was the air quality in the St. Louis area for the 1997 8-hour ozone NAAQS for the 2007–2009 monitoring period?

Today's rulemaking assesses whether the St. Louis area attained the 1997 8-hour ozone NAAQS by its applicable attainment date of June 15, 2010. Under EPA regulations at 40 CFR 50.15, the 1997 8-hour primary and secondary ozone ambient air quality standards are met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm, as determined in accordance with 40 CFR part 50, Appendix I. Based on the rounding convention set forth in section 2.3 of Appendix I, the smallest value that is greater than 0.08 ppm is 0.085 ppm.

EPA has reviewed the ambient air monitoring data for the St. Louis area for the 1997 8-hour ozone NAAQS, consistent with requirements contained at 40 CFR Part 50. EPA's review focused primarily on data recorded in the EPA Air Quality System (AQS) database for the St. Louis area for 2007–2009.

More detailed discussion of EPA's evaluation of the available monitoring data for the St. Louis area during the 2007–2009 monitoring period can be found in the proposal for this rulemaking (*see* 77 FR at 5211). Based on its evaluation of complete quality assured and certified data from the relevant monitoring sites for the 2007–2009 monitoring period, EPA has determined that the St. Louis area attained the 1997 8-hour ozone NAAQS by the June 15, 2010 attainment date. EPA did not receive any comments on the proposed determination during the public comment period on the proposal.

Table 1 shows the 2007–2009 and 2008–2010 ozone design values for the St. Louis area monitors with complete, quality-assured and certified data for that period. All data values are expressed in ppm. As shown in Table 1, all of these monitors recorded ozone

design values less than 0.085 ppm for 2007–2009 and 2008–2010, with the highest value at any monitor in the area, 0.078 ppm, recorded at the West Alton monitor.

TABLE 1—ANNUAL FOURTH-HIGHEST DAILY MAXIMUM 8-HOUR OZONE CONCENTRATIONS AND 3-YEAR AVERAGES IN PPM FOR THE ST. LOUIS AREA MONITORS WITH COMPLETE DATA

[(2007–2009) and (2008–2010)]

State	County	Monitor	2007 4th High (ppm)	2008 4th High (ppm)	2009 4th High (ppm)	2010 4th High (ppm)	2007–2009 Design Value (ppm)	2008–2010 Design Value (ppm)*
Illinois	Jersey	Jerseyville 17–083–1001	0.075	0.069	0.068	0.072	0.070	0.069
	Madison	Alton 17–119–0008	0.081	0.068	0.067	0.080	0.072	0.071
		Maryville 17–119–1009	0.087	0.070	0.074	0.074	0.077	0.072
		Wood River 17–119–3007	0.086	0.067	0.066	0.070	0.073	0.067
	St. Clair	East St. Louis 17–163–0010	0.077	0.064	0.069	0.072	0.070	0.068
Missouri	St. Charles	West Alton 29–183–1002	0.089	0.076	0.071	0.084	0.078	0.077
		Orchard Farm 29–183–1004	0.083	0.072	0.073	0.077	0.076	0.074
	St. Louis	Maryland Heights 29–189–0014	0.094	0.069	0.070	0.076	0.077	0.071
		Pacific 29–189–0005	0.085	0.064	0.064	0.069	0.071	0.065
	St. Louis City	Blair Street 29–510–0085	0.087	0.073	0.065	0.071	0.075	0.069

*Although the determination here is whether the area attained the 1997 8-hour ozone NAAQS based on 2007–2009 data, the 2010 data shows that all monitors in the St. Louis area continued to attain the NAAQS in 2008–2010.

Based on its evaluation of complete quality assured and certified data from the relevant monitoring sites for the 2007–2009 monitoring period, EPA has determined that the St. Louis area attained the 1997 8-hour ozone NAAQS by the June 15, 2010 attainment date.

IV. EPA's Final Action

In today's rulemaking, pursuant to CAA section 181(b)(2), EPA is taking final action to determine that the St. Louis area has attained the 1997 8-hour ozone NAAQS by its applicable attainment date of June 15, 2010.

V. Statutory and Executive Order Reviews

This final action merely makes a determination of the St. Louis area's attainment of the 1997 8-hour ozone NAAQS based upon complete, quality-assured, and certified ambient air quality data, pursuant to statutory mandate, and does not impose additional requirements beyond those imposed by state law. This final action makes a non-discretionary determination of the St. Louis area's attainment of the 1997 8-hour ozone NAAQS based solely upon complete, quality-assured, and certified ambient air quality data, as mandated by CAA section 181(b)(2)(A). For that reason, this final action:

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

In addition, this final action does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the determination only affects the St. Louis area—which does not include Indian country—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 June 29, 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, Reporting and recordkeeping requirements.

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

Dated: April 4, 2012.

Mark J. Hague,

Acting Regional Administrator, Region 7.

Dated: April 18, 2012.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart O—Illinois

■ 2. In § 52.726, paragraph (kk) is added to read as follows:

§ 52.726 Control Strategy: Ozone.

* * * * *

(kk) *Determination of attainment.* EPA has determined, as of June 9, 2011, that the St. Louis (MO-IL) metropolitan 1997 8-hour ozone nonattainment area has attained the 1997 8-hour ozone NAAQS. This determination, in accordance with 40 CFR 51.918, suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, reasonable further progress, contingency measures, and other plan elements related to attainment of the standards for as long as the area continues to meet the 1997 Ozone NAAQS. In addition, based upon EPA's review of the air quality data for the 3-year period 2007 to 2009, the St. Louis (MO-IL) ozone nonattainment area has attained the 1997 8-hour ozone NAAQS by the applicable attainment date of June 15, 2010.

Subpart AA—Missouri

■ 3. In § 52.1342, paragraph (a) is revised to read as follows:

§ 52.1342 Control strategy: Ozone.

(a) Determination of attainment. EPA has determined, as of June 9, 2011, that the St. Louis (MO-IL) metropolitan 1997 8-hour ozone nonattainment area has attained the 1997 8-hour ozone NAAQS. This determination, in accordance with 40 CFR 51.918, suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, reasonable further progress, contingency measures, and other plan elements related to attainment of the standards for as long as the area continues to meet the 1997 Ozone NAAQS. In addition, based upon EPA's review of the air quality data for the 3-year period 2007 to 2009, the St. Louis (MO-IL) ozone nonattainment area has attained the 1997 8-hour ozone NAAQS by the applicable attainment date of June 15, 2010.

* * * * *

[FR Doc. 2012–10207 Filed 4–27–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 282

[EPA–R10–UST–2011–0097; FRL–9615–4]

Underground Storage Tank Program: Approved State Program for the State of Oregon

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Resource Conservation and Recovery Act of 1976 (RCRA), as amended, authorizes the United States Environmental Protection Agency (EPA) to grant approval to any State to operate its underground storage tank program in the State in lieu of the federal program. The regulation codifies EPA's decision to approve State programs and incorporates by reference those provisions of the State statutes and regulations that will be subject to EPA's inspection and enforcement authorities under sections 9005 and 9006 of RCRA subtitle I and other applicable statutory and regulatory provisions. This rule codifies the prior approval of Oregon's underground storage tank program and incorporates by reference appropriate provisions of state statutes and regulations.

DATES: This regulation is effective June 29, 2012, unless EPA publishes a prior **Federal Register** document withdrawing this direct final rule. All comments on the codification of Oregon's underground storage tank program must be received by the close of business May 30, 2012. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register, as of June 29, 2012, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

ADDRESSES: Comments may be submitted, identified by Docket ID No. EPA–R10–UST–2011–0097, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: griffith.katherine@epa.gov.*
- *Mail:* Katherine Griffith, U. S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop: OCE–082, Seattle, WA 98101.
- Comments received by EPA may be inspected in the public docket online and in the EPA Region 10 Library, 1200 Sixth Avenue, Seattle, WA 98101, from 9 a.m. to 12 p.m. and 1 p.m. to 4 p.m., Monday through Friday, excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R10–UST–2011–0097. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identify or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any

disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy.

FOR FURTHER INFORMATION CONTACT:

Katherine Griffith, U. S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop: OCE–082, Seattle, WA 98101, phone number: (206) 553–2901, email: *griffith.katherine@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

Section 9004 of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6991c, authorizes the United States Environmental Protection Agency (EPA) to approve a State to operate its underground storage tank program in the State in lieu of the federal underground storage tank program. EPA published a **Federal Register** document announcing its decision to grant approval to Oregon on September 16, 2011, and approval was effective on September 16, 2011 (76 FR 57659).

EPA codifies its approval of State programs in 40 CFR part 282 and incorporates by reference therein those provisions of the State statutes and regulations that are subject to EPA's inspection and enforcement authorities under sections 9005 and 9006 of subtitle I of RCRA, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions. Today's rulemaking codifies EPA's approval of Oregon's underground storage tank program. This codification reflects the State program in effect at the time EPA grants Oregon approval under section 9004, 42 U.S.C. 6991c, for its underground storage tank program. Notice and opportunity for comment were provided earlier on the Agency's decision to approve the Oregon program, and EPA is not now reopening that decision nor requesting comment on it.

This effort provides clear notice to the public of the scope of the approved program in each state. By codifying the approved Oregon program and by amending the Code of Federal Regulations (CFR) whenever a new or different set of requirements is approved in Oregon, the status of federally-approved requirements of the Oregon program will be readily discernible. Only those provisions of the Oregon underground storage tank program EPA has approved will be incorporated by reference for enforcement purposes.

To codify EPA's approval of Oregon's underground storage tank program, EPA has added § 282.87 to Title 40 of the CFR. Section 282.87(d)(1)(i) incorporates by reference for enforcement purposes the State's statutes and regulations. Section 282.87 also references the Attorney General's Statement, Demonstration of Adequate Enforcement Procedures, the Program Description, and the Memorandum of Agreement, which are approved as part of the underground storage tank program under subtitle I of RCRA.

EPA retains the authority under sections 9003(h), 9005 and 9006 of subtitle I of RCRA, 42 U.S.C. 6991b(h), 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake corrective actions, inspections and enforcement in approved States. With respect to such actions, EPA will rely on federal sanctions, federal inspection authorities, and federal procedures rather than the State authorized analogues to these provisions. Therefore, the approved Oregon enforcement authorities will not be incorporated by reference. Section 282.87 lists those approved Oregon authorities that would fall into this category.

The public also needs to be aware that some provisions of the State's underground storage tank program are not part of the federally-approved State program, because such provisions are ''broader in scope'' than subtitle I of RCRA. See 40 CFR 281.12(a)(3)(ii). As a result, State provisions which are ''broader in scope'' than the federal program are not incorporated by reference for purposes of enforcement in Part 282. Section 282.87 of the codification simply lists for reference and clarity the Oregon statutory and regulatory provisions which are ''broader in scope'' than the federal program and which are not, therefore, part of the approved program being codified today. ''Broader in scope'' provisions cannot be enforced by EPA; the State, however, will continue to implement and enforce such provisions.

B. Statutory and Executive Order Review

This final rule only applies to Oregon's UST Program requirements pursuant to RCRA Section 9004 and imposes no requirements other than those imposed by State law. It complies with applicable EOs and statutory provisions as follows:

1. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this rule from its review under Executive Order 12866.

2. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* because this rule does not establish or modify any information or recordkeeping requirements for the regulated community and only seeks to authorize the pre-existing requirements under State law and imposes no additional requirements beyond those imposed by State law.

3. Regulatory Flexibility Act

After considering the economic impacts of today's rule on small entities under the Regulatory Flexibility Act, I certify that this rule will not have a significant economic impact on a substantial number of small entities because the rule will only have the effect of authorizing pre-existing requirements under State law and imposes no additional requirements beyond those imposed by State law.

4. Unfunded Mandates Reform Act

Because today's rulemaking codifies pre-existing requirements under Oregon state law and does not impose any additional enforceable duty beyond that required by Oregon state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act.

5. Executive Order 13132: Federalism

Executive Order 13132 does not apply to this rule because this final rule does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government.

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

Executive Order 13175 does not apply because this rule does not have tribal implications (i.e., substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes). EPA retains its authority in Indian Country.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it will codify a state program.

8. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 because it is not a ''significant regulatory action'' as defined under Executive Order 12866.

9. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), (15 U.S.C. 272), directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards. Therefore, the NTTAA does not apply.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. This rule does not affect the level of protection provided to human health or the environment because this rule codifies pre-existing State rules which are no less stringent than existing Federal requirements.

11. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 282

Environmental protection, Hazardous substances, Incorporation by reference, Intergovernmental relations, State program approval, Underground storage tanks and Water pollution control.

Authority: This document is issued under the authority of Section 9004 of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6991c.

Dated: April 10, 2012.

Dennis J. McLerran,

Regional Administrator, Region 10.

For the reasons set forth in the preamble, 40 CFR part 282 is amended as follows:

PART 282—APPROVED UNDERGROUND STORAGE TANK PROGRAMS

■ 1. The authority citation for part 282 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

Subpart B—Approved State Programs

■ 2. Add § 282.87 to subpart B to read as follows:

§ 282.87 Oregon State-Administered Program.

(a) The State of Oregon is approved to administer and enforce an underground storage tank program in lieu of the federal program under subtitle I of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6991 *et seq.* The State's program, as administered by the Oregon Department of Environmental Quality, was approved by EPA pursuant to 42 U.S.C. 6991c and Part 281 of this Chapter. EPA published the notice of final determination approving the Oregon underground storage tank program on September 16, 2011, and it became effective on that date.

(b) Oregon has primary responsibility for enforcing its underground storage tank program. However, EPA retains the authority to exercise its corrective action, inspection and enforcement authorities under sections 9003(h), 9005 and 9006 of subtitle I of RCRA, 42 U.S.C. 6991b(h), 6991d and 6991e, as well as its authority under other statutory and regulatory provisions.

(c) To retain program approval, Oregon must revise its approved program to adopt new changes to the federal subtitle I program which make it more stringent, in accordance with section 9004 of RCRA, 42 U.S.C. 6991c, and 40 CFR part 281, subpart E. If Oregon obtains approval for the revised requirements pursuant to section 9004 of RCRA, 42 U.S.C. 6991c, the newly approved statutory and regulatory provisions will be added to this subpart and notice of any change will be published in the **Federal Register**.

(d) Oregon has final approval for the following elements submitted to EPA in its program application as of September 16, 2011.

(1) *State statutes and regulations.* (i) The provisions cited in this paragraph are incorporated by reference as part of the underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq.* with the approval of the Director of the **Federal Register** under 5 U.S.C. 552(a) and 1 CFR Part 51. To enforce any edition other than that specified in this section, the Environmental Protection Agency must publish notice of change in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of the material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. Copies of Oregon's program application may be obtained from the Underground Storage Tank Program, Oregon Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon, 97204.

(A) Oregon Statutory Requirements Applicable to the Underground Storage Tank Program, 2009.

(B) Oregon Regulatory Requirements Applicable to the Underground Storage Tank Program, 2009.

(ii) EPA considered the following statutes and regulations in evaluating the State program, but did not incorporate them by reference.

(A) The statutory provisions include:

(*1*) Oregon Revised Statutes, Chapter 183, Administrative Procedures Act, 2009, insofar as the provisions and procedures apply to the underground storage tank program.

(*2*) Chapter 465, Hazardous Waste and Hazardous Materials I (Removal or Remedial Action: Sections 465.200–465.482 and 465.900), insofar as these provisions apply to matters involving an ''underground storage tank'' as that term is defined in ORS 466.706(21), as limited by the exclusions listed in ORS 466.710, except that the term does not include a tank used for storing heating oil for consumptive use on the premises where stored. The following Sections are part of the approved state program, although not incorporated by reference herein for enforcement purposes: Sections 465.205 through 465.250, 465.257 through 465.300, 465.310 through 465.335, 465.400 through 465.435, 465.445 through 465.455 and 465.900.

(*3*) Chapter 466, Hazardous Waste and Hazardous Materials II (Oil Storage Tanks: Sections 466.706–466.920 and Sections 466.990–466.995), insofar as these provisions apply to matters involving an ''underground storage tank'' as that term is defined in ORS 466.706(21), as limited by the exclusions listed in ORS 466.710, except that the term does not include a tank used for storing heating oil for consumptive use on the premises where stored. The following Sections are part of the approved state program, although not incorporated by reference herein for enforcement purposes: Sections 466.715 through 466.735, 466.746, 466.760, 466.775 through 466.780, 466.791 through 466.810, 466.820, 466.830 through 466.845, 466.901 through 466.920 and 466.994 through 466.995.

(*4*) Chapter 468 Environmental Quality Generally, insofar as these provisions apply to matters involving an ''underground storage tank'' as that term is defined in ORS 466.706(21), as limited by the exclusions listed in ORS 466.710, except that the term does not include a tank used for storing heating oil for consumptive use on the premises where stored. The following Sections are part of the approved state program, although not incorporated by reference herein for enforcement purposes: Sections 468.005 through 468.050, 468.090 through 468.140 and 468.963.

(B) The regulatory provisions include:

(*1*) Oregon Administrative Rules, Chapter 340, Division 11: Section 340–11–0545

(*2*) Oregon Administrative Rules, Chapter 340, Division 12: Sections 340–012–0026 through 340–012–0053, 340–012–0067 (with the exception of subparagraphs (1) (k) and (l) and (2) (g) through (j)), 340–012–0074 (with the exception of subparagraph (1) (g)) and 340–012–0170 insofar as this applies to violations involving an underground storage tank.

(*3*) Oregon Administrative Rules, Chapter 340, Division 122: Sections 340–122–0074 through 340–122–0079 and 340–122–0130 through 340–122–0140.

(*4*) Oregon Administrative Rules, Chapter 340, Division 142: Section 340–142–0120.

(*5*) Oregon Administrative Rules, Chapter 340, Division 150: Sections 340–150–0150 through 340–150–0152, 340–150–0250, 340–150–0600 through 340–150–0620.

(*6*) Oregon Code of Civil Procedure 33C

(*7*) Oregon Administrative Rules, Chapter 690, Division 240, insofar as these provisions apply to matters involving an ''underground storage tank'' as that term is defined in ORS 466.706(21), as limited by the exclusions listed in ORS 466.710, except that the term does not include a tank used for storing heating oil for consumptive use on the premises where stored. The following Sections are part of the approved state program, although not incorporated by reference herein for enforcement purposes: Sections 690–240–0015, 690–240–0020, 690–240–0055 through 690–240–0340 and 690–240–0560 through 690–240–0640.

(iii) The following specifically identified sections and rules applicable to the Oregon underground storage tank program that are broader in scope than the federal program, are not part of the approved program, and are not incorporated by reference herein for enforcement purposes.

(A) The statutory provisions include:

(*1*) Chapter 465, Hazardous Waste and Hazardous Materials I (Removal or Remedial Action): Sections 465.305; 465.340 through 465.391; 465.440; and 465.475 through 465.482.

(*2*) Chapter 466, Hazardous Waste and Hazardous Materials II (Oil Storage Tanks): Sections 466.750; 466.783 through 466.787; 466.858 through 466.882; and 466.990 through 466.992):

(*3*) Chapter 468, Environmental Quality Generally: Sections 468.055 through 468.089:

(B) The regulatory provisions include:

(*1*) Oregon Administrative Rules, Chapter 340: Divisions 160, 162, 163, 170, 177 and 178.

(*2*) Oregon Administrative Rules, Chapter 837, Division 40.

(2) Statement of legal authority. The Attorney General Statement, a letter signed on June 21, 2010, though not incorporated by reference, is referenced as part of the approved underground storage tank program under subtitle I of RCRA,
42 U.S.C. 6991 et seq.

(3) Demonstration of procedures for adequate enforcement. The ''Demonstration of Procedures for Adequate Enforcement'' submitted as part of the application for approval on July 19, 2010, though not incorporated by reference, is referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(4) *Program Description.* The program description and any other material submitted as part of the application on July 19, 2010, though not incorporated by reference, are referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(5) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region 10 and the Oregon Department of Environmental Quality, signed by the EPA, Regional Administrator on July 11, 2011, though not incorporated by reference, is referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

■ 3. Appendix A to Part 282 is amended by adding in alphabetical order ''Oregon'' and its listing.

Appendix A to Part 282—State Requirements Incorporated by Reference in Part 282 of the Code of Federal Regulations

* * * * *

Oregon

(a) The statutory provisions include:

(1) Chapter 465, Hazardous Waste and Hazardous Materials I (Removal or Remedial Action Sections 465.200 through 465.482 and 465.900.):

465.200 Definitions for ORS 465.200 to 465.545 (except for Sections 465.200(5) through (11) and (17) defining terms contained in the dry cleaning requirements; (13) ''facility'' insofar as it applies to a facility that is not an underground storage tank; (16) ''hazardous substance'' insofar as it applies to hazardous wastes and any substance that is not otherwise defined as a hazardous substance pursuant to section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act or that is not oil; (28) ''underground storage tank'' insofar as it includes any tank or piping that is excluded under ORS 466.710 and also any tank used to store heating oil for consumptive use on the premises where stored.)

465.255 Strict liability for remedial action costs for injury or destruction of natural

resource; limited exclusions (except insofar as this includes a person who is not an owner or operator of an underground storage tank and except insofar as the exclusions would exclude persons who would be liable under Section 9003(h)(6) of RCRA).

(2) Chapter 466, Hazardous Waste and Hazardous Materials II (Oil Storage Tanks):

466.706 Definitions for ORS 466.706 to 466.882 and 466.994 (except for the following definitions: Section 466.706(17) ''regulated substance'' insofar as it would include substances designated by the commission under subsection (c) that are not included under subsections (a) and (b) of this definition; (21) ''underground storage tank'' insofar as it includes any tank or piping that is excluded under ORS 466.710, and any tank used to store heating oil for consumptive use on the premises where stored.)

466.710 Application of ORS 466.706 to 466.882 and 466.994
466.740 Noncomplying installation prohibited
466.743 Training on operation, maintenance and testing; rules
466.765 Duty of owner or permittee of underground storage tank
466.770 Corrective action required on contaminated site
466.815 Financial responsibility of owner or permittee; rules; legislative review
466.825 Strict liability of owner or permittee

(b) The regulatory provisions include:

(1) Oregon Administrative Rules, Chapter 340, Division 122 insofar as the following rules apply to a release from an underground storage tank, excluding tanks used to store heating oil for consumptive use on the premises where stored.

340–122–0010 Purpose
340–122–0030 Scope and Applicability
340–122–0040 Standards
340–122–0047 Generic remedies
340–122–0050 Activities
340–122–0070 Removal
340–122–0071 Site Evaluation
340–122–0072 Preliminary Assessments
340–122–0073 Confirmation of Release
340–122–0080 Remedial Investigation
340–122–0084 Risk Assessment
340–122–0085 Feasibility Study
340–122–0090 Selection or Approval of the Remedial Action
340–122–0100 Public Notice and Participation
340–122–0110 Administrative Record
340–122–0115 Definitions insofar as the definition applies to an underground storage tank, excluding tanks used to store heating oil for consumptive use on the premises where stored
340–122–0120 Security Interest Exemption
340–122–0205 Purpose
340–122–0210 Definitions except insofar as the definition of ''responsible person'' includes a person who does not own or operate an underground storage tank
340–122–0215 Scope and Applicability
340–122–0217 Requirements and Remediation Options
340–122–0218 Sampling and Analysis
340–122–0220 Initial Response
340–122–0225 Initial Abatement Measures and Site Check
340–122–0230 Initial Site Characterization
340–122–0235 Free Product Removal
340–122–0240 Investigation for Magnitude and Extent of Contamination
340–122–0243 Low-Impact Sites
340–122–0244 Risk-Based Concentrations
340–122–0250 Corrective Action Plan
340–122–0252 Generic Remedies
340–122–0260 Public Participation
340–122–0320 Soil Matrix Cleanup Options
340–122–0325 Evaluation of Matrix Cleanup Level
340–122–0330 Evaluation Parameters
340–122–0335 Numeric Soil Cleanup Standards
340–122–0340 Sample Number and Location
340–122–0345 Sample Collection Methods
340–122–0355 Evaluation of Analytical Results
340–122–0360 Reporting Requirements
Grid for OAR 340–122–0330(5)(c) and Table for OAR 340–122–0335(2)

(2) Oregon Administrative Rules, Chapter 340, Division 142 insofar as the following rules apply to a release from an underground storage tank, excluding tanks used to store heating oil for consumptive use on the premises where stored.

340–142–0001 Purpose and Scope
340–142–0005 Definitions as Used in This Division Unless Otherwise Specified
340–142–0030 Emergency Action
340–142–0040 Required Reporting
340–142–0050 Reportable Quantities
340–142–0060 Cleanup Standards
340–142–0070 Approval Required for Use of Chemicals
340–142–0080 Disposal of Recovered Spill Materials
340–142–0090 Cleanup Report
340–142–0100 Sampling/Testing Procedures
340–142–0130 Incident Management and Emergency Operations

(3) Oregon Administrative Rules, Chapter 340, Division 150.

340–150–0001 Purpose
340–150–0006 Applicability and General Requirements
340–150–0008 Exemptions and Deferrals
340–150–0010 Definitions
340–150–0020 UST General Permit Registration Certificate Required except insofar as this provision applies to a person who does not own or operate an underground storage tank and except insofar as the payment of fees is required
340–150–0021 Termination of Temporary Permits
340–150–0052 Modification of Registration Certificates for Changes in Ownership and Permittee except insofar as the payment of fees is required
340–150–0080 Denial, Suspension or Revocation of General Permit Registration Certificates except insofar as this provision applies to a person who does not own or operate an underground storage tank
340–150–0102 Termination of Registration Certificates
340–150–0110 UST General Permit Registration, Annual Compliance and Other Fees except insofar as the payment of fees is required
340–150–0135 General Requirements for Owners and Permittees
340–150–0140 Requirements for Sellers of USTs
340–150–0156 Performance of UST Services by Owners or Permittees
340–150–0160 General Permit Requirements for Installing an UST System except insofar as this provision applies to a person who does not own or operate an underground storage tank
340–150–0163 General Permit Requirements for Operating an UST System except insofar as the payment of fees is required
340–150–0166 General Permit Requirements for Closure of an UST System by Change-in-Service except insofar as the payment of fees is required
340–150–0167 General Permit Requirements for Temporary Closure of an UST System except insofar as the payment of fees is required
340–150–0168 General Permit Requirements for Decommissioning an UST System by Permanent Closure except insofar as this provision applies to a person who does not own or operate an underground storage tank and except insofar as the payment of fees is required
340–150–0180 Site Assessment Requirements for Permanent Closure or Change-in-Service
340–150–0200 Training Requirements for UST System Operators and Emergency Response Information
340–150–0210 Training Requirements for UST Operators
340–150–0300 Installation of USTs and Piping
340–150–0302 Installation of Used USTs
340–150–0310 Spill and Overfill Prevention Equipment and Requirements
340–150–0320 Corrosion Protection Performance Standards for USTs and Piping
340–150–0325 Operation and Maintenance of Corrosion Protection
340–150–0350 UST System Repairs
340–150–0352 UST System Modifications and Additions
340–150–0354 UST System Replacements
340–150–0360 Requirements for Internally Lined USTs
340–150–0400 General Release Detection Requirements for Petroleum UST Systems
340–150–0410 Release Detection Requirements and Methods for Underground Piping
340–150–0420 Release Detection Requirements for Hazardous Substance UST Systems
340–150–0430 Inventory Control Method of Release Detection
340–150–0435 Statistical Inventory Reconciliation Method of Release Detection
340–150–0440 Manual Tank Gauging Release Detection Method
340–150–0445 Tank Tightness Testing for Release Detection and Investigation
340–150–0450 Automatic Tank Gauging Release Detection Method
340–150–0455 Vapor Monitoring Release Detection Method

340–150–0460 Groundwater Monitoring Release Detection Method
340–150–0465 Interstitial Monitoring Release Detection Method
340–150–0470 Other Methods of Release Detection
340–150–0500 Reporting Suspected Releases
340–150–0510 Suspected Release Investigation and Confirmation Steps
340–150–0520 Investigation Due to Off Site Impacts
340–150–0540 Applicability to Previously Closed UST Systems
340–150–0550 Definitions for OAR 340–150–0555 and 340–150–0560
340–150–0555 Compliance Dates for USTs and Piping
340–150–0560 Upgrading Requirements for Existing UST Systems
APPENDIX A Installation of USTs and Piping
APPENDIX B Installation of USTs and Piping
APPENDIX C Spill and Overfill Prevention Equipment and Requirements
APPENDIX D1 USTs Corrosion Protection Performance Standards for USTs and Piping
APPENDIX D2 Piping Corrosion Protection Performance Standards for USTs and Piping
APPENDIX E1 USTs Corrosion Protection Performance Standards for USTs and Piping
APPENDIX E2 Piping Corrosion Protection Performance Standards for USTs and Piping
APPENDIX F Corrosion Protection Performance Standards for USTs and Piping
APPENDIX G Operation and Maintenance of Corrosion Protection
APPENDIX H UST System Repairs & UST System Modifications and Additions
APPENDIX I General Release Detection Requirements for All UST Systems
APPENDIX J General Guidance Documents for UST Owners and Permittees
APPENDIX K Site Assessment Requirements for Permanent Closure or Change-in-Service
APPENDIX L Training Elements

(4) Oregon Administrative Rules, Chapter 340, Division 151

340–151–0001 Purpose
340–151–0010 Scope and Applicability
340–151–0015 Adoption and Applicability of United States Environmental Protection Agency Regulations
340–151–0020 Definitions
340–151–0025 Oregon-Specific Financial Responsibility Requirements

(5) Oregon Administrative Rules, Chapter 690, Division 240, insofar as it pertains to underground storage tanks, excluding tanks used to store heating oil for consumptive use on the premises where stored.

690–240–0005 Introduction
690–240–0006 Special Standards
690–240–0007 Special Area Standards
690–240–0010 Definitions
690–240–0011 Organic Materials
690–240–0012 Public Safety
690–240–0013 Wells Cannot Be Used for Disposal of Contaminants
690–240–0014 Water Used Must Be Potable
690–240–0016 Unattended Wells
690–240–0024 Well Identification Label
690–240–0026 Well Identification Label Maintenance
690–240–0030 Other Holes; General Performance and Responsibility Requirements
690–240–0035 Geotechnical Holes: General Performance and Responsibility Requirements
690–240–0355 Monitoring Well Drilling Machines
690–240–0375 Monitoring Well Construction Notice Required (Start Card)
690–240–0385 Start Card Reporting Requirements
690–240–0395 Monitoring Well Report Required (Monitoring Well Log)
690–240–0410 Monitoring Well Construction: General
690–240–0420 Well Protection
690–240–0430 Casing
690–240–0440 Additional Standards for Artesian Monitoring Wells
690–240–0450 Cleaning
690–240–0460 Monitoring Well Screen, Filter Pack, and Filter Pack Seal
690–240–0475 Well Seals
690–240–0485 Monitoring Well Development
690–240–0500 Completion of Monitoring Wells
690–240–0510 Abandonment of Monitoring Wells
690–240–0525 Piezometers
690–240–0540 Direct Push Monitoring Wells and Piezometers
690–240–0550 Evidence of Failure

[FR Doc. 2012–9931 Filed 4–27–12; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 375

[Docket No. FMCSA–2012–0101]

RIN 2126–AB51

Transportation of Household Goods in Interstate Commerce; Consumer Protection Regulations: Released Rates of Motor Carriers of Household Goods

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: FMCSA harmonizes its regulations with a recent Surface Transportation Board (STB) order that requires certain information about household goods motor carrier liability to appear on the estimates and bills of lading that carriers must provide to individual shippers.

DATES: This final rule is effective May 15, 2012.

ADDRESSES: Documents mentioned in this rule are available for inspection or copying in the docket, Docket No. FMCSA–2012–0101 available at *www.regulations.gov,* and at the Docket Management Facility, U.S. Department of Transportation, Ground floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Brodie Mack, FMCSA Household Goods Enforcement and Compliance Team Leader, (202) 385–2400, email: *Brodie.Mack@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Legal Basis for the Rulemaking

The Secretary of Transportation's (Secretary) general jurisdiction to establish regulations over transportation of property by motor carrier is found at 49 U.S.C. 13501. Household goods motor carriers are a subset of all property motor carriers and are required by 49 U.S.C. 13902 to register with FMCSA as household goods motor carriers.

The ICC Termination Act of 1995 (Pub. L. 104–88, 109 Stat. 803, Dec. 29, 1995) abolished the Interstate Commerce Commission (ICC), which previously had jurisdiction over the commercial activities of household goods motor carriers. Its functions relating to household goods carriers were split between the STB and the Secretary. The STB was given jurisdiction over most tariff issues, while the Secretary was given jurisdiction over consumer protection matters.

The Secretary has delegated these authorities to the FMCSA Administrator (49 CFR 1.73(a)). This rulemaking applies only to household goods motor carriers that provide for-hire transportation in interstate or foreign commerce.

FMCSA implements this final rule without notice and comment pursuant to 5 U.S.C. 553(b)(B). While the Administrative Procedure Act (APA) normally requires issuance of a notice of proposed rulemaking and an opportunity for public comment, the APA provides an exception when an agency ''for good cause finds * * * that notice and public procedure * * * are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B). This final rule updates 49 CFR part 375 to reflect recent changes the STB made to its requirements after engaging in notice and comment

rulemaking. *See Released Rates of Motor Common Carriers of Household Goods,* Surface Transportation Board, Docket No. RR 999 (Amendment No. 5), Order, Jan. 10, 2012 (*Released Rates Order*). These changes fall within the STB's jurisdiction and FMCSA does not have authority to exercise discretion in implementing them. Therefore, FMCSA finds that the opportunity for notice and public comment is unnecessary and contrary to the public interest under the APA.

II. Background

STB is charged with the oversight of household goods motor carriers' tariffs. Tariffs include the rates and terms under which household goods carriers may provide transportation services. In accordance with 49 U.S.C. 14706(f)(3), the Board authorizes household goods carriers to set ''released rates,'' which are lower rates for transportation services when the shipper agrees to release the carrier from full liability for potential loss and damage to the shipper's cargo. There are currently two generally applicable liability options for interstate household goods moves. The first reimburses the shipper for the replacement value of his or her goods, referred to as the full value option. The second reimburses the shipper at a lower rate, currently 60 cents per pound, and is referred to as the released rate option. The Board's rules provide that any rate a carrier charges for transportation services, whether under the full liability option or the released rate option, must be published in the carrier's tariff.

In a decision served January 21, 2011, the STB implemented a congressional directive to enhance consumer protection in cases of loss or damage that occur during interstate moves. *See* Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA–LU), § 4215, Public Law 109–59, 119 Stat. 1144, 1760 (2005). That decision required household goods motor carriers to provide certain information concerning the two available cargo liability options to shippers on written estimates for household goods transportation. On January 12, 2012, STB served another decision clarifying and modifying certain aspects of the January 2011 decision. STB modified the order to require household goods movers to place the following liability election notice on the estimates they provide to prospective shippers:

WARNING: If a moving company loses or damages your goods, there are 2 different standards for the company's liability based on the types of rates you pay. BY FEDERAL LAW, THIS FORM MUST CONTAIN A FILLED-IN ESTIMATE OF THE COST OF A MOVE FOR WHICH THE MOVING COMPANY IS LIABLE FOR THE FULL (REPLACEMENT) VALUE OF YOUR GOODS in the event of loss of, or damage to, the goods. This form may also contain an estimate of the cost of a move in which the moving company is liable for FAR LESS than the replacement value of your goods, typically at a lower cost to you. You will select the liability level later, on the bill of lading (contract) for your move. Before selecting a liability level, please read ''Your Rights and Responsibilities When You Move,'' provided by the moving company, and seek further information at the government Web site *www.protectyourmove.gov.*

Released Rates Order, Appendix 1.

That decision also directed household goods motor carriers to provide the STB's required valuation statement on the shipper's bill of lading. The valuation statement includes specific language that requires the consumer either to choose the replacement value option and declare a total value for the shipment, or choose the released rate option. This statement is much lengthier than the notice carriers must include in the estimate and contains specific information about the cost to the shipper. *Released Rates Order,* Appendix 2. These requirements go into effect May 15, 2012. *See Released Rates of Motor Common Carriers of Household Goods,* Surface Transportation Board, Docket No. RR 999 (Amendment No. 5), Order, Mar. 8, 2012 (extending compliance date) (77 FR 15187).

FMCSA is charged with overseeing consumer protection matters related to the transportation of household goods. In this capacity, FMCSA administers regulations requiring household goods motor carriers to provide estimates and certain shipping documents to individual shippers and establishes the terms and conditions under which those documents must be provided.

STB's January 2012 order affects FMCSA's regulations because it mandates that specific language regarding carriers' rates and liability be placed on the estimates and bills of lading that FMCSA requires carriers to provide to prospective shippers. As a result, FMCSA amends its regulations governing those documents to reflect the STB's new requirements.

III. Discussion of the Rule

FMCSA amends 49 CFR 375.401 and 375.505 to eliminate inconsistencies resulting from the STB's recent publication of its Released Rates Order. These changes incorporate the STB's new requirements into FMCSA's regulations governing estimates and bills of lading.

FMCSA amends § 375.401 by adding a new paragraph (g) which states that household goods motor carriers must include STB's liability election notice on all written estimates. This notice is a brief statement advising prospective shippers that they will have to select one of two options that govern the extent of the carrier's liability for damage to their cargo. New paragraph (g) directs household goods motor carriers to use the language set forth in the STB Released Rates Order. FMCSA redesignates old paragraphs (g) and (h) as new paragraphs (h) and (i) respectively.

FMCSA also amends § 375.505 to make it clear that the STB's valuation statement, a lengthier statement which requires shippers to select one of the two levels of liability, must appear on the shipper's bill of lading. Previously, § 375.505(e) permitted carriers to provide the valuation statement on either the bill of lading or the order for service. FMCSA removes paragraph (e) and revises subparagraph (b)(12) to make conforming changes to remove any ambiguity about where the valuation statement must appear.

IV. Regulatory Analyses

A. Regulatory Planning and Review

FMCSA has determined that this action does not meet the criteria for a ''significant regulatory action,'' either as specified in Executive Order 12866 as supplemented by Executive Order 13563 (76 FR 3821, January 18, 2011), or within the meaning of the DOT regulatory policies and procedures (44 FR 1103, February 26, 1979). The estimated economic costs of the rule do not exceed the $100 million annual threshold and the Agency does not expect the rule to have substantial congressional or public interest. Therefore, this rule has not been formally reviewed by the Office of Management and Budget.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), FMCSA is not required to prepare a final regulatory flexibility analysis under 5 U.S.C. 604(a) for this final rule because the Agency has not issued a notice of proposed rulemaking prior to this action.

C. Federalism (Executive Order 13132)

A rule has federalism implications if the rule has a substantial direct effect on State or local governments and would either preempt State law or impose a

substantial direct cost of compliance on the States. FMCSA analyzed this rule under E.O. 13132 and has determined that it does not have federalism implications.

D. Unfunded Mandates Reform Act of 1995

This final rule does not impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532 *et seq.*), that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $143.1 million (which is the value of $100 million in 2010 after adjusting for inflation) or more in any 1 year.

E. Executive Order 12988 (Civil Justice Reform)

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

F. Executive Order 13045 (Protection of Children)

FMCSA analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The Agency determined that this rule will not create an environmental risk to health or safety that may disproportionately affect children.

G. Executive Order 12630 (Taking of Private Property)

FMCSA reviewed this final rule in accordance with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and has determined it will not affect a taking of private property or otherwise have taking implications.

H. Privacy Impact Assessment

Section 522 of title I of division H of the Consolidated Appropriations Act, 2005, enacted December 8, 2004 (Pub. L. 108–447, 118 Stat. 2809, 3268, 5 U.S.C. 552a note), requires the Agency to conduct a privacy impact assessment (PIA) of a regulation that will affect the privacy of individuals. This rule does not require the collection of any personally identifiable information.

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency which receives records contained in a system of records from a Federal agency for use in a matching program. FMCSA has determined this rule will not result in a new or revised Privacy Act System of Records for FMCSA.

I. Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

J. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The changes in this rule are mandated by the STB, exercising its authority over household goods motor carriers' tariffs. Any change to the paperwork burden associated with these requirements is required to be accounted for by the STB in connection with its *Released Rates Order.* As this rule merely incorporates the STB's requirements, FMCSA does not conduct, sponsor or require any additional information collection through this rule.

K. National Environmental Policy Act and Clean Air Act

FMCSA analyzed this rule in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). The Agency has determined under its environmental procedures Order 5610.1, published in the **Federal Register** March 1, 2004 (69 FR 9680), that this action is categorically excluded from further environmental documentation under Appendix 2, Paragraph 6(b) of the Order (69 FR 9702). This categorical exclusion (CE) relates to regulations that are editorial in nature making technical corrections and minor amendments, which applies to this rule as FMCSA is simply aligning its regulations with the STB's regulations. Environmental impacts, if any, would have been analyzed during the rulemaking by STB. In addition, the Agency believes this rule presents no extraordinary circumstances that will have any effect on the quality of the environment. Thus, the action does not require an environmental assessment or an environmental impact statement.

FMCSA also analyzed this rule under the Clean Air Act, as amended (CAA), section 176(c) (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it does not affect direct or indirect emissions of criteria pollutants.

L. Executive Order 13211 (Energy Effects)

FMCSA has analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use. The Agency has determined that it is not a ''significant energy action'' under that Executive Order because it is not economically significant and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 49 CFR Part 375

Advertising, Arbitration, Consumer protection, Freight, Highways and roads, Insurance, Motor carriers, Moving of household goods, Reporting and recordkeeping requirements.

V. The Final Rule

For the reasons stated in the preamble, FMCSA amends 49 CFR part 375 in title 49, Code of Federal Regulations, chapter III, subchapter B, as follows:

PART 375—TRANSPORTATION OF HOUSEHOLD GOODS IN INTERSTATE COMMERCE; CONSUMER PROTECTION REGULATIONS

■ 1. The authority citation for part 375 is revised to read as follows:

Authority: 5 U.S.C. 553; 49 U.S.C. 13102, 13301, 13501, 13704, 13707, 13902, 14104, 14706, 14708; subtitle B, title IV of Pub. L. 109–59; and 49 CFR 1.73.

■ 2. In § 375.401, redesignate paragraphs (g) and (h) as paragraphs (h) and (i), and add new paragraph (g) to read as follows:

§ 375.401 Must I estimate charges?

* * * * *

(g) You must include as a part of your estimate the liability election notice provided in the Surface Transportation Board's released rates order. Contact the STB for a copy of the Released Rates of Motor Carrier Shipments of Household Goods.

* * * * *

■ 3. In § 375.505, revise paragraph (b)(12) and remove paragraph (e) to read as follows:

§ 375.505 Must I write up a bill of lading?

* * * * *

(b)(12) The valuation statement provided in the Surface Transportation Board's released rates order requires individual shippers either to choose Full Value Protection for your liability or waive the Full Value Protection in favor of the STB's released rates. The released rates may be increased

annually by the motor carrier based on the U.S. Department of Commerce's Cost of Living Adjustment. Contact the STB for a copy of the Released Rates of Motor Carrier Shipments of Household Goods. If the individual shipper waives your Full Value Protection in writing on the STB's valuation statement, you must include the charges, if any, for optional valuation coverage (other than Full Value Protection).

Issued on: April 17, 2012.

Anne S. Ferro,

Administrator.

[FR Doc. 2012–9865 Filed 4–27–12; 8:45 am]

BILLING CODE 4910–EX–P

Proposed Rules

Federal Register
Vol. 77, No. 83
Monday, April 30, 2012

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

7 CFR Part 810

RIN 0580–AB12

United States Standards for Wheat

Correction

PART 810 [CORRECTED]

In proposed rule document 2012–9182 appearing on page 23420 in the issue of Thursday, April 19, 2012, make the following correction:

On page 23420, in § 810.2240(a), the table is corrected to read as set forth below:

Grades and Grade Requirements

* * * * *

	Maximum percent limits of:				
Defects:					
Damaged kernels					
Heat (part of total)	0.2	0.2	0.5	1.0	.3.0
Total	2.0	4.0	7.0	10.0	15.0
Foreign material	0.4	0.7	1.3	3.0	5.0
Shrunken and broken kernels	2.0	4.0	8.0	12.0	20.0
Total [1]	3.0	5.0	8.0	12.0	20.0
Wheat of other classes: [2]					
Contrasting classes	1.0	2.0	3.0	10.0	10.0
Total [3]	3.0	5.0	10.0	10.0	10.0
Stones	0.1	0.1	0.1	0.1	0.1

[FR Doc. C1–2012–9182 Filed 4–27–12; 8:45 am]
BILLING CODE 1505–01–D

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50 and 52

[PRM–50–104; NRC–2012–0046]

Emergency Planning Zone

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; notice of receipt and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is publishing for public comment a notice of receipt for a petition for rulemaking (PRM), dated February 15, 2012, which was filed with the NRC by Mr. Michael Mariotte on behalf of the Nuclear Information and Resource Service (NIRS or the petitioner) and 37 co-petitioners. The petition was docketed by the NRC on February 17, 2012, and assigned Docket No. PRM–50–104. The petitioner requests that the NRC amend its regulations to expand the Emergency Planning Zones (EPZs) for nuclear power plants.

DATES: Submit comments by July 16, 2012. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may access information and comment submissions related to this petition for rulemaking, which the NRC possesses and is publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0046. You may submit comments by the following methods:

- *Federal rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0046. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.
- *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301–415–1677.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–492–3667, email: *Cindy.Bladey@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0046 when contacting the NRC about the availability of information for this petition for rulemaking. You may access information related to this petition for rulemaking, which the NRC possesses and is publicly available, by the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0046.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. The PRM is available in ADAMS under Accession No. ML12048B004.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0046 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed. The NRC posts all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS, and the NRC does not edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information in their comment submissions that they do not want to be publicly disclosed. Your request should state that the NRC will not edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. The Petitioner and the 37 Co-Petitioners

The PRM describes the petitioner and the 37 co-petitioners as ''environmental and civic organizations with members who live within 100 miles of U.S. nuclear power plants and who are concerned that current NRC emergency planning requirements are not adequate to protect their health and safety in the event of an accident at the plant.''

The NIRS is a non-profit organization founded in 1978, which serves as a ''national information and networking center for people concerned about nuclear power, radioactive waste, radiation and sustainable energy issues.'' In addition, the NIRS is described as an organization that provides public education on issues such as deregulation of radioactive materials, new reactor licensing, transportation of radioactive waste, and nuclear reactor safety.

III. The Petition

The petitioner requests that the NRC amend Title 10 of the Code of Federal Regulations (10 CFR) 50.47, ''Emergency Plans,'' and Appendix E to 10 CFR Part 50, ''Emergency Planning and Preparedness for Production and Utilization Facilities,'' and include the modifications in 10 CFR Part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' Specifically, the petitioner requests that (1) the Plume Exposure Pathway EPZ radius be expanded from a 10-mile radius to a 25-mile radius, (2) a new 50-mile radius Emergency Response Zone, with more limited requirements than the Plume Exposure Pathway EPZ, be established, (3) the Ingestion Pathway EPZ radius be expanded from a 50-mile radius to a 100-mile radius, and (4) the ''emergency plans are tested to encompass initiating and/or concurrent natural disasters that may affect both accident progression and evacuation conduct.'' The petitioner asserts that ''the requested amendments are essential for the protection of public health and safety in light of the real-world experience of the Chernobyl and Fukushima disasters, which were more severe and affected a much larger geographical area than provided for in NRC regulations.''

The petitioner states that ''[t]he NRC should amend 10 CFR 50.47(c)(2) to create a three-tiered emergency planning zone * * *.'' The petitioner's three-tiered EPZ includes a 25 mile Plume Exposure Pathway EPZ, 50 mile Emergency Response Zone, and 100 mile Ingestion Exposure Pathway Zone. The following paragraphs provide a summary of the petitioner's proposed revisions to 10 CFR 50.47(c)(2).

25 Mile Plume Exposure Pathway EPZ

The petitioner proposes the following revision to 10 CFR 50.47(c)(2) with regards to the plume exposure pathway EPZ:

> A Plume Exposure Pathway zone shall consist of an area about 25 miles (40 km) in radius. Within this zone, detailed plans must be developed to provide prompt and effective evacuation and other appropriate protective measures, including conducting of biannual full-scale emergency evacuation drills. Sirens will be installed within this zone to alert the population of the need for evacuation. Transportation for elderly, prison and school populations shall be provided within this zone. Emergency shelters shall be located outside of the 25-mile zone.

The petitioner asserts that the expansion of the plume exposure pathway EPZ from a 10 mile radius to a 25 mile radius ''would provide no new requirements other than expansion of the EPZ.''

50 Mile Emergency Response Zone

The petitioner proposes the following revision to 10 CFR 50.47(c)(2) with regards to an Emergency Response Zone:

> The [emergency response zone] shall be about 50 miles in radius. Within this 50 mile zone, the licensee must identify evacuation routes for all residents within this zone and annually provide information to all residents within this zone about these routes and which they are supposed to take in the event of an emergency. The licensee must make basic pre-arrangements for potential transport of disabled/hospital/prison populations. Emergency centers for the public currently located less than 25 miles out shall be relocated to 25 miles or further out. Information shall be made available to the public within this zone through television, internet and radio alerts, text message notices, and other appropriate means of public communication.

The petitioner notes that this revision ''would require measures be carried out between the new 25 mile Plume Exposure Pathway EPZ and a new Emergency Response Zone of about a 50 mile radius.'' The petitioner states that the Plume Exposure Pathway EPZ

emergency evacuation requirements and biannual exercises are not required in the Emergency Response Zone. The petitioner further states ''this new zone would provide a modest level of pre-planning that would enable rapid expansion of the 25 mile zone when necessary. Information regarding evacuation such as identification of evacuation routes and locations of emergency shelters in the event of a large scale disaster would be identified and would be provided to members of the public annually, and a limited number of other pre-arrangements would be made.''

100 Mile Ingestion Exposure Pathway Zone

The petitioner proposes the following revision to 10 CFR 50.47(c)(2) with regards to the ingestion pathway EPZ:

> The ingestion pathway EPZ shall be about 100 miles in radius. In the event of a radioactive release, the deposition of radionuclides on crops, other vegetation, bodies of surface water and ground surfaces can occur. Measures will be implemented to protect the public from eating and drinking food and water that may be contaminated. Information shall be made available to the public within this zone through television and radio alerts, text message notices, and other appropriate means of public communication.

The petitioner states that ''[t]he current Ingestion Exposure Pathway Zone exists to protect food, water and anything intended for human consumption within 50 miles of a nuclear power plant.'' The petitioner further states ''[g]iven that radiation can, and does, have far-reaching effects on food on a large radius, the Ingestion Pathway EPZ should be expanded.''

Drills and Exercises

The petitioner proposes amending 10 CFR 50.47(b)(14) with regards to drills and exercises by adding:

> Within the emergency evacuation zone full scale drills and exercises will be conducted on a biannual basis. Every other exercise and drill shall include a scenario involving an initiating or concurrent regionally-appropriate natural disaster.

IV. The Petitioner's Bases

The petitioner states, ''[w]ith the exception of a 2011 rule requiring licensees to use current U.S. census data to prepare evacuation time estimates (ETEs) and update them every 10 years, the NRC has made few significant improvements to its offsite emergency response regulations since they were promulgated in 1980.'' The petitioner notes that ''the NRC denied a set of petitions [submitted by the Citizens Task Force of Chapel Hill, et al.] to increase the size of the plume exposure pathway EPZ and the ingestion pathway EPZ'' in 1990. The petitioner asserts that ''[t]he Commission declined to revisit the assumptions about severe reactor accident risks that underlie its emergency planning regulations, concluding that the existing size of the EPZs was adequate to achieve 'reasonable and feasible dose reduction' under the circumstances of each individual reactor site.'' The petitioner's bases for the petition are further presented in the following paragraphs.

Chernobyl, September 11, and Fukushima Experiences

The petitioner cites reports and findings regarding the Chernobyl and Fukushima Dai-ichi accidents, and the September 11, 2001, terrorist attacks to support the petition. The petitioner asserts that ''[t]he accident at Fukushima, added to the experience of the Chernobyl disaster, demonstrates that the 10 mile plume exposure pathway EPZ and the 50 mile ingestion pathway EPZ are inadequate to protect the public health and safety, both because severe accidents are clearly more likely than any government previously has estimated and because their effects are far more widespread.'' The petitioner specifically cites the ''Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident'' (Fukushima Task Force Report, ADAMS Accession No. ML111861807), dated July 12, 2011. The petitioner notes that the Task Force formed to examine the Fukushima disaster ''addressed the issues of protecting against accidents resulting from natural phenomena, mitigating the consequences of such accidents, and ensuring emergency preparedness'' in the Fukushima Task Force Report. The petitioner also notes that the Task Force ''made several recommendations, including strengthening and integrating onsite emergency response capabilities such as emergency operating procedures, severe accident management guidelines, and extensive damage mitigation guidelines.'' The petitioner asserts that ''the task force failed to make any recommendations on improving emergency response capabilities or expanding EPZ size, despite the Task Force's acknowledgement that it was necessary to evacuate Japanese residents up to and beyond a 20-kilometer (12-mile) area around Fukushima.'' As the petitioner notes, the NRC is evaluating several Task Force recommendations related to emergency preparedness. More information about these activities is available through the NRC's public Web site at *http://www.nrc.gov/japan/japan-info.html.*

Real-World Experience and Improved Understanding of Severe Accident Risks at Nuclear Reactors

The petitioner states that ''[t]he NRC's existing emergency planning regulations (and the NRC's decision in Citizens Task Force of Chapel Hill) are based primarily on experience gained by the Three Mile Island accident and on NRC reactor safety studies conducted from the 1950s through the 1970s (for example, WASH–1400 and NUREG–1150) and are encapsulated in NUREG–0396.'' The petitioner notes that in 2006, ''the NRC began the State-of-the-Art Reactor Consequence Analyses (SOARCA) project to re-evaluate the 'realistic consequences of a severe reactor accident.' '' The petitioner cites an October 2010 draft of the SOARCA report to support the petition. The petitioner asserts that ''real-world experience at Fukushima trumps the computer modeling of SOARCA in any case and has presented the world—and the NRC—with an actual accident that exceeds postulated scenarios.'' The petitioner continues by stating ''[c]omputer models, simulations, evaluations of projected scenarios—all can be useful tools in evaluating the relative risks of complex systems like nuclear reactors. They can even be useful—in the absence of real-world information—in establishing regulations. But they exist primarily to generate postulated data in the absence of actual data—they are not a substitute for actual, real-world experience.''

Real-World Experience and Improved Understanding of Severe Accident Risks at [Spent] Fuel Pools

The petitioner states that ''[spent] fuel pools pose a serious and dangerous threat to the populations surrounding nuclear plants. Accidents could cause widespread contamination of highly radioactive materials.'' The petitioner asserts that ''[r]adiation exposure would be significantly worse if there were to be [a spent] fuel pool accident in addition to a reactor accident.'' The petitioner makes the following statement regarding spent fuel pools: ''In theory, this form of storage is meant to be temporary. But, because offsite storage of irradiated fuel is currently unavailable, high density storage of this material has been permitted to occur.'' The petitioner also states, ''Aside from concerns associated with the dense packing of a pool, the pools themselves are located outside of

the primary containment which is designed to keep radiation which is released during an emergency event from escaping in to the environment. Because they are outside of the primary containment structure, they are more vulnerable than the core to natural disasters and terrorist attacks.''

Improved Understanding of Health Effects of Radiation

The petitioner states ''[t]here is no 'safe' dose of radiation, and as such the consideration of the effects of release of radiation should be given greater consideration.'' The petitioner cites the 2006 National Research Council of the National Academy of Sciences Biological Effects of Ionizing Radiation (BEIR) VII Report and asserts the report confirms that ''any exposure to radiation—including background radiation—increases a person's risk of developing cancer.'' The petitioner states that ''the NRC and licensees must recognize that their emergency response programs must be designed to protect not only against radiation levels that would cause acute effects, but also radiation levels that would exceed annual exposure limits * * *.'' The petitioner asserts that ''a government policy that implicitly states, as do NRC's existing emergency planning regulations, that radiation exposure levels higher than normally allowable—by orders of magnitude—are acceptable under emergency conditions, is a government policy that is unsupportable and without basis in reality.''

Particular Problems Associated With Pressure Suppression Containments

The petitioner asserts that ''[t]he failure of a pressure suppression containment can result in widespread radioactive contamination of areas surrounding nuclear plants.'' The petitioner states, ''In Japan, hydrogen explosions occurred at (at least) three GE Mark I reactors using a pressure suppression system.'' The petitioner also states, ''There are 23 GE Mark I nuclear reactors—about one-quarter of the nation's reactors—essentially identical to the reactors that were destroyed at Fukushima, that are operational in the United States.'' The petitioner makes the following statement: ''Not only can the NRC no longer dismiss such accidents in the U.S., the NRC must instead assume that such accidents can occur in the U.S. and even, given the history of the nuclear age that large nuclear accidents are occurring at a much greater frequency than previously postulated, the NRC—at least for emergency planning purposes if nothing else—must assume that such accidents *will* occur in the U.S.''

Natural Disasters and Emergency Response Planning

The petitioner states that ''[n]atural disasters have become increasingly prevalent in recent years causing concerns for nuclear reactors that are susceptible to various weather phenomena and disasters.'' The petitioner asserts that ''[c]urrent NRC emergency planning regulations do not reflect that natural disasters can both cause nuclear accidents and/or may occur concurrently with nuclear accidents.'' The petitioner requests the following:

> Emergency response planning for nuclear facilities must incorporate regionally-relevant initiating and concurrent natural disasters as a regular part of emergency exercises, to assure the most effective possible emergency response in the event of a nuclear accident triggered by or complicated by a natural disaster. For this reason, we propose that every other emergency exercise include a scenario that includes a regionally-relevant initiating and concurrent natural disaster. By ''regionally relevant'' we mean that plans should be made and exercises undertaken for the type of natural disaster most likely to affect a given licensee site * * *. However, for areas that may be affected by more than one type of natural disaster * * * each exercise should include a different regionally relevant scenario.

Dated at Rockville, Maryland, this *24th* day of April 2012.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2012–10314 Filed 4–27–12; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–119632–11]

RIN 1545–BK87

Regulations Pertaining to the Disclosure of Return Information To Carry Out Eligibility Requirements for Health Insurance Affordability Programs

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations relating to the disclosure of return information under section 6103(l)(21) of the Internal Revenue Code, as enacted by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. The regulations define certain terms and prescribe certain items of return information in addition to those items prescribed by statute that will be disclosed, upon written request, under section 6103(l)(21) of the Internal Revenue Code.

DATES: Written (including electronic) comments must be received by July 30, 2012. Outlines of topics to be discussed at the public hearing scheduled for Friday, August 31, 2012, must be received by July 30, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–119632–11), Room 5203, 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–119632–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–119632–11). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Steven Karon, (202) 622–4570; concerning the submission of comments, the public hearing, and to be placed on the building access list to attend the public hearing, Olumafunmilayo Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Beginning in 2014, under the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029 (2010)) (collectively, the Affordable Care Act), Affordable Insurance Exchanges (Exchanges) will provide competitive marketplaces for individuals and small employers to directly compare available private health insurance options (qualified health plans, or QHPs) on the basis of price, quality, and other factors, and to purchase such coverage. A Federally-facilitated Exchange will operate on behalf of States electing not to pursue a State-based Exchange. In general, a QHP is a health plan offered by a health insurance issuer that meets minimum standards in the law and set by an Exchange.

Qualified individuals and small employers will be able to purchase private health insurance through Exchanges. Certain individuals who choose to obtain coverage through an Exchange will be eligible to qualify for a new premium tax credit and/or cost-sharing reductions established to help make the purchase of insurance more affordable.

Section 1401 of the Affordable Care Act amended the Internal Revenue Code to add section 36B, providing for the premium tax credit to help eligible individuals and families afford health insurance coverage. Section 1402 of the Affordable Care Act provides reduced cost-sharing for certain individuals enrolled in qualified health plans through the Exchange, decreasing the individual's out-of-pocket limits, deductibles, co-insurance, and co-payments in certain situations.

Section 1411(a) of the Affordable Care Act directs the Secretary of the Department of Health and Human Services (HHS) to establish a program under which Exchanges will determine whether individuals are eligible to enroll in QHPs through the Exchange, and whether they are eligible for advance payments of the premium tax credit and cost-sharing reductions. Section 1412 of the Affordable Care Act directs the Secretary of HHS to establish a program for determining eligibility for advance payments of the premium tax credit and cost-sharing reductions that may be paid directly to an insurance company on behalf of a taxpayer. Eligibility for advance payments, like eligibility for the premium tax credit itself, is based in part on the household income of the individual who will claim the credit. Household income is defined in section 36B(d)(2) as the total of the modified adjusted gross incomes (MAGI) of the taxpayer claiming the premium tax credit and those other individuals for whom the taxpayer was allowed a deduction under section 151 and who were required to file a tax return.

Section 1413(a) of the Affordable Care Act directs the Secretary of HHS to establish a system under which an individual may submit a single, streamlined application to apply for specified insurance affordability programs (that is, the premium tax credit under section 36B, cost-sharing reductions under section 1402 of the Affordable Care Act, Medicaid, the Children's Health Insurance Program (CHIP), and a State's basic health program, if applicable, under section 1331 of the Affordable Care Act). The system must be compatible with the processes set up to determine eligibility for advance payments of the premium tax credit and cost-sharing reductions. Where an individual seeking eligibility for any of these insurance affordability programs is found to be eligible for Medicaid or CHIP, the individual is enrolled in that program. If an individual is not eligible for one of these programs, the Exchange will make the determination (or provide for HHS to make the determination) as to the individual's eligibility for advance payments of the premium tax credit under section 36B and for cost-sharing reductions, and the amount of any advance payments. Under section 1412(c)(2) of the Affordable Care Act, advance payments are made monthly (or on another periodic basis as HHS may provide) directly to the issuer of the qualified health plan in which the individual enrolls.

Section 1411(b)(3) of the Affordable Care Act requires that individuals seeking an eligibility determination for advance payments of the premium tax credit or for cost-sharing reductions provide the Exchange with information regarding their household income and family size to demonstrate that they meet the income-based eligibility requirements. However, section 1411(c)(4)(B) of the Affordable Care Act grants the Secretary of HHS authority to modify the methods used for the verification of information if the Secretary of HHS determines those modifications would reduce the administrative costs and burdens on individuals seeking coverage through an Exchange. The section explicitly gives the Secretary of HHS authority to change the manner in which Exchanges determine eligibility for advance payments of the premium tax credit or for cost-sharing reductions, so long as any applicable requirements under section 6103 of the Internal Revenue Code with respect to the confidentiality, disclosure, maintenance and use of return information would still be met. Section 1411(g) of the Affordable Care Act further provides that individuals will be required to provide only the minimum amount of information needed to authenticate an individual's identity and to determine the individual's eligibility for, and amount of, advance payments of the premium tax credit or cost-sharing reductions.

In proposing regulations in the **Federal Register** on August 17, 2011, the Secretary of HHS concluded that a less burdensome and more reasonable eligibility process would not require an individual to provide an Exchange with specific income-related information, such as the individual's MAGI (76 FR 51202 at 51214). Accordingly, the Secretary of HHS promulgated final regulations published in the **Federal Register** on March 27, 2012 (77 FR 18310), limiting the information an individual needs to provide to an Exchange for purposes of income verification and allowing the Exchange to solicit information from the IRS through HHS with respect to the individual and his family members whose names and social security numbers, or adoption taxpayer identification numbers, are provided. The regulations also provide guidance on the eligibility determination process for enrollment in a QHP, advance payments of the premium tax credit and cost-sharing reductions, and other insurance affordability programs. Additionally, the Secretary of HHS promulgated final regulations published in the **Federal Register** on March 23, 2012 (77 FR 17144) that provide revised eligibility rules for Medicaid. The Treasury Department and the IRS proposed regulations in the **Federal Register** on August 17, 2011 (76 FR 51202) to implement the new premium tax credit.

Section 6103(l)(21) permits the disclosure of return information to assist Exchanges in performing certain functions set forth in section 1311 of the Affordable Care Act for which income verification is required (including determinations of eligibility for the insurance affordability programs described in the Affordable Care Act), as well as to assist State agencies administering a State Medicaid program under title XIX of the Social Security Act, CHIP under title XXI of the Social Security Act, or a basic health program under section 1331 of the Affordable Care Act (if applicable). Section 6103(l)(21) identifies specific items of return information that will be disclosed and permits the disclosure of such other items prescribed by regulation that might indicate whether an individual is eligible for the premium tax credit under section 36B or cost-sharing reductions under section 1402, and the amount thereof. After an individual submits an application for financial assistance in obtaining health coverage provided pursuant to Title I, subtitle E, of the Affordable Care Act (''the application'') to an Exchange or State agency, the IRS will disclose the available items of return information described under section 6103(l)(21)(A) to HHS. Pursuant to section 6103(l)(21)(B), HHS will then disclose the information to the Exchange or State agency that is processing the application.

As a condition for receiving return information under section

6103(l)(21)(A) and (B), each receiving entity (that is, HHS, the Exchanges, and State agencies that administer Medicaid, CHIP, or basic health plans, and their respective contractors) is required to adhere to the safeguards established under section 6103(p)(4). Final HHS regulations published in the **Federal Register** on March 27, 2012 (77 FR at 18446, 18450) state that to be certified by HHS an Exchange must demonstrate readiness to meet the section 6103 confidentiality requirements with respect to the items of return information the Exchange will receive. As described in section 6103(l)(21)(C), each receiving entity may then use the return information received under sections 6103(l)(21)(A) and (B) only for the purposes of, and to the extent necessary in, establishing eligibility for participation in the Exchange, verifying the appropriate amount of any advance payments of the premium tax credit or cost-sharing reductions, and determining eligibility for participation in a State Medicaid program, CHIP, or basic health program under section 1331 of the Affordable Care Act.

Under section 6103(l)(21)(A), the IRS will disclose to HHS (including its contractor(s)) certain items of return information, as enumerated in the statute or by regulation, for any relevant taxpayer. For purposes of these regulations, a relevant taxpayer is defined to be any individual listed, by name and social security number or adoption taxpayer identification number (''taxpayer identity information''), on the application whose income may bear upon a determination of the eligibility of an individual for an insurance affordability program. For each relevant taxpayer, section 6103(l)(21) explicitly authorizes the disclosure of the following items of return information from the reference tax year: Taxpayer identity information, filing status, the number of individuals for which a deduction under section 151 was allowed (''family size''), MAGI, and the taxable year to which any such information relates or, alternatively, that such information is not available. The ''reference tax year'' is the first calendar year or, where no return information is available in that year the second calendar year, prior to the submission of the application. MAGI is defined under section 36B as the taxpayer's adjusted gross income defined under section 62, increased by three components: (1) Any amount excluded from gross income under section 911, (2) any amount of interest received or accrued by the taxpayer during the taxable year that is exempt from tax, and (3) the amount of social security benefits of the taxpayer excluded from gross income under section 86 for the tax year.

In some situations, the IRS will be unable to calculate MAGI. While uncommon, for certain relevant taxpayers who receive nontaxable social security benefits, the IRS may not have complete information from which to determine the amount of those benefits. If the IRS has information indicating that a relevant taxpayer received nontaxable social security benefits, but is unable to determine the amount of those benefits, the IRS will provide the aggregate amount of the other components used to calculate the relevant taxpayer's MAGI, as well as information indicating that the amount of nontaxable social security benefits must still be taken into account to determine MAGI. Similarly, where MAGI is not available, the IRS will disclose the adjusted gross income, as well as information indicating that the other components of MAGI must still be taken into account to determine MAGI. Because the Affordable Care Act and HHS's final regulations (77 FR at 18456–18458) require that Exchanges use alternative means to verify income where information is not available from the IRS, these explanatory items may assist an Exchange in determining an individual's eligibility for, and amount of, any advance payment of the premium tax credit or cost-sharing reductions.

The proposed regulations further provide that, in certain instances, where some or all of the items of return information prescribed by statute or regulation is unavailable, the IRS will provide information indicating why the particular item of return information is not available. Where an individual jointly filed with a spouse who is not a relevant taxpayer (that is, that spouse is not included on the application), the IRS will not disclose MAGI from the joint return because it cannot be appropriately allocated between the two spouses. Instead, the IRS will disclose that a joint return had been filed. This additional information may help individuals correct any errors or understand why they need to pursue alternative routes to verify their income. This information, therefore, also can assist Exchanges in determining whether an individual is eligible for advance payments of the premium tax credit or cost-sharing reductions.

Additionally, the IRS may have information in its records indicating that a relevant taxpayer had been a victim of identity theft or that a relevant taxpayer has been reported as deceased. The proposed regulations provide that the IRS will disclose that, although a return for that taxpayer is on file, the information described under section 6103(l)(21) is not being provided because IRS records suggest that the Exchange should take additional steps to authenticate the identities of the relevant taxpayers and may need to use alternate means for income verification.

Where an individual who is listed as a dependent on the application (for the tax year in which the premium tax credit will be claimed) filed a return in the reference tax year but did not have a tax filing requirement for that year (based upon the return filed), the IRS will provide information indicating the dependent listed did not have a filing requirement because the information is relevant to the Exchange's computation of household income.

The final regulations issued by HHS provide that advance payments of the premium tax credit will not be permitted where the relevant taxpayer has received advance payments in the reference tax year and failed to file a return reconciling the advance payments with the actual premium tax credit. (77 FR at 18453). Therefore, these proposed regulations provide that the IRS will disclose to HHS that a relevant taxpayer who received an advance payment of a premium tax credit in the reference tax year did not file a return reconciling the advance payments with any premium tax credit available.

Special Analyses

It has been determined that this Notice of Proposed Rule Making 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, because the regulations proposed do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

The Treasury Department and the IRS request comments on all aspects of the proposed rules. A public hearing has been scheduled for August 31, 2012, at 10:00 a.m., in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In

addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by July 30, 2012. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of the regulations is Steven L. Karon of the Office of the Associate Chief Counsel, Procedure and Administration.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding the entry for § 301.6103(l)(21) to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 301.6103(l)(21)–(1) also issued under 26 U.S.C. 6103(l)(21) and 6103(q).

Par. 2. Add § 301.6103(l)(21)–1 to read as follows:

§ 301.6103(l)(21)–1 Disclosure of return information to the Department of Health and Human Services to carry out eligibility requirements for health insurance affordability programs.

(a) *General rule.* Pursuant to the provisions of section 6103(l)(21)(A) of the Internal Revenue Code, officers and employees of the Internal Revenue Service will disclose, upon written request, for each relevant taxpayer on a single application those items of return information that are described under section 6103(l)(21)(A) and paragraphs (a)(1) through (6) of this section, for the reference tax year, as applicable, to officers, employees and contractors of the Department of Health and Human Services, solely for purposes of, and to the extent necessary in, establishing an individual's eligibility for participation in an Exchange established under the Patient Protection and Affordable Care Act, including eligibility for, and determining the appropriate amount of, any premium tax credit under section 36B or cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, or determining eligibility for the State programs described in section 6103(l)(21)(A).

(1) With respect to each relevant taxpayer for the reference tax year where the amount of social security benefits not included in gross income under section 86 of the Internal Revenue Code of that relevant taxpayer is unavailable:

(i) The aggregate amount of the following items of return information—

(A) Adjusted gross income, as defined by section 62 of the Internal Revenue Code;

(B) Any amount excluded from gross income under section 911 of the Internal Revenue Code; and

(C) Any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

(ii) Information indicating that the amount of social security benefits not included in gross income under section 86 of the Internal Revenue Code is unavailable.

(2) Adjusted gross income, as defined by section 62 of the Internal Revenue Code, of a relevant taxpayer for the reference tax year, in circumstances where the modified adjusted gross income (MAGI), as defined by section 36B(d)(2)(B) of the Internal Revenue Code, of that relevant taxpayer is unavailable, as well as information indicating that the components of MAGI other than adjusted gross income must be taken into account to determine MAGI;

(3) Information indicating that certain return information of a relevant taxpayer is unavailable for the reference tax year because the relevant taxpayer jointly filed a U.S. Individual Income Tax Return for that year with a spouse who is not a relevant taxpayer listed on the same application;

(4) Information indicating that, although a return for an individual identified on the application as a relevant taxpayer for the reference tax year is available, return information is not being provided because of possible authentication issues with respect to the identity of the relevant taxpayer;

(5) Information indicating that a relevant taxpayer who is identified as a dependent for the tax year in which the premium tax credit under section 36B of the Internal Revenue Code would be claimed, did not have a filing requirement for the reference tax year based upon the U.S. Individual Income Tax Return the relevant taxpayer filed for the reference tax year; and

(6) Information indicating that a relevant taxpayer who received advance payments of the premium tax credit in the reference tax year did not file a tax return for the reference tax year reconciling the advance payments of the premium tax credit with any premium tax credit under section 36B of the Internal Revenue Code available for that year.

(b) *Relevant taxpayer defined.* For purposes of paragraph (a) of this section, a relevant taxpayer is defined to be any individual listed, by name and social security number or adoption taxpayer identification number, on an application submitted pursuant to Title I, Subtitle E, of the Patient Protection and Affordable Care Act, whose income may bear upon a determination of any advance payment of any premium tax credit under section 36B of the Internal Revenue Code, cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, or eligibility for any program described in section 6103(l)(21)(A) of the Internal Revenue Code.

(c) *Reference tax year defined.* For purposes of section 6103(l)(21)(A) of the Internal Revenue Code and this section, the reference tax year is the first calendar year or, where no return information is available in that year, the second calendar year, prior to the submission of an application pursuant to Title I, Subtitle E, of the Patient Protection and Affordable Care Act.

(d) *Effective/applicability date.* This section applies to disclosures to the Department of Health and Human Services on or after these proposed regulations are published as final regulations in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–10440 Filed 4–27–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 5

[Docket No. TTB–2012–0002; Notice No. 127]

RIN 1513–AB33

Proposed Amendment to the Standards of Identity for Distilled Spirits

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes to amend the regulations setting forth the standards of identity for distilled spirits to include ''Cachaça'' as a type of rum and as a distinctive product of Brazil. This proposal follows requests received from the Government of Brazil and subsequent discussions with the Office of the United States Trade Representative. TTB invites comments on this proposed amendment to the TTB regulations.

DATES: Comments must be received on or before June 29, 2012.

ADDRESSES: You may send comments on this notice to one of the following addresses:

- *http://www.regulations.gov:* To submit comments via the Internet, use the comment form for this notice as posted within Docket No. TTB–2012–0002 at ''Regulations.gov,'' the Federal e-rulemaking portal;
- *Mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier in Lieu of Mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200–E, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this notice, selected supporting materials, and any comments TTB receives about this proposal within Docket No. TTB–2012–0002 at *http://www.regulations.gov.* A link to this Regulations.gov docket is posted on the TTB Web site at *http://www.ttb.gov/regulations_laws/all_rulemaking.shtml* under Notice No. 127. You also may view copies of this notice, all supporting materials, and any comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. Please call 202–453–2270 to make an appointment.

FOR FURTHER INFORMATION CONTACT: Christopher M. Thiemann, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200E, Washington, DC 20005; telephone 202–453–1039, Ext. 138.

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), codified in the United States Code at 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations relating to the packaging, marking, branding, labeling, and size and fill of containers of alcohol beverages that will prohibit consumer deception and provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120–01 (Revised), dated January 21, 2003, to the TTB Administrator to perform the functions and duties in the administration and enforcement of this law. Regulations implementing the provisions of section 105(e) as they relate to distilled spirits are set forth in part 5 of title 27 of the Code of Federal Regulations (27 CFR part 5).

Classes and Types of Spirits

The TTB labeling regulations require that the class and type of distilled spirits appear on the product's brand label. See 27 CFR 5.32(a)(2) and 5.35. Those regulations provide that the class and type must be stated in conformity with § 5.22 of the TTB regulations (27 CFR 5.22) if defined therein. Otherwise, the product must be designated in accordance with trade and consumer understanding thereof, or, if no such understanding exists, by a distinctive or fanciful name, and, in either case (with limited exceptions), followed by a truthful and adequate statement of composition.

Section 5.22 establishes standards of identity for distilled spirits products and categorizes these products according to various classes and types. As used in § 5.22, the term ''class'' refers to a general category of spirits, such as ''whisky'' or ''brandy.'' Currently, there are 12 different classes of distilled spirits recognized in § 5.22, including whisky, rum, and brandy. The term ''type'' refers to a subcategory within a class of spirits. For example, ''Cognac'' is a type of brandy, and ''Canadian whisky'' is a type of whisky.

Classification of Cachaça

''Cachaça'' is a term recognized by the Brazilian Government as a designation for a Brazilian distilled spirits product made from sugar cane. Cachaça products are generally classified as rums under the terms of TTB's current labeling regulations. The standard of identity for rum is set forth in § 5.22(f) as follows:

> *Class 6; rum.* ''Rum'' is an alcoholic distillate from the fermented juice of sugar cane, sugar cane syrup, sugar cane molasses, or other sugar cane by-products, produced at less than 190° proof in such manner that the distillate possesses the taste, aroma and characteristics generally attributed to rum, and bottled at not less than 80° proof; and also includes mixtures solely of such distillates.

The above standard does not currently provide for any subcategories or ''types'' of rum.

In some instances, products identified by importers as Cachaça have been manufactured using a small quantity of corn or corn syrup in the fermentation process. Since these products do not meet the standard for rum as described at § 5.22(f), TTB has required the labeling of these products as distilled spirit specialty products in accordance with § 5.35. In some instances, these products have been labeled with the fanciful name ''Cachaça,'' followed by a truthful and adequate statement of composition.

2001 Brazilian Petition

By letter dated April 30, 2001, the Embassy of the Government of Brazil submitted a petition to the Bureau of Alcohol, Tobacco and Firearms (ATF) in which it requested that ATF amend its regulations to recognize the Brazilian distilled spirits product known as ''Cachaça'' as a distinctive product of Brazil.

The Brazilian Embassy stated that Cachaça is known worldwide as a Brazilian product and that Brazil has been a supplier of Cachaça to the United States for many decades. After preliminary discussions with the Brazilian Embassy, no further action was taken with regard to the request.

2006 Brazilian Petition

In a petition dated March 6, 2006, the Brazilian Embassy requested that TTB amend its regulations to provide

recognition of Cachaça as a distinctive product of Brazil.

Among other things, the Embassy noted Brazilian Decree No. 4851, of October 2, 2003, which defines ''Cachaça'' as ''the typical and exclusive designation of the sugar cane aguardente produced in Brazil, with an alcohol content of 38 to 48 percent by volume at 20 degrees Celsius, obtained from the distillation of the fermented must of sugar cane with specific sensory characteristics, to which up to six grams of sugar per liter may be added, expressed in terms of sucrose.''

Brazil requested that TTB initiate regulatory action to recognize Cachaça as a typically and exclusively Brazilian beverage.

In addition, following discussions between officials of Brazil and the Office of the United States Trade Representative (USTR), and after consultations between USTR, and TTB, the United States Trade Representative and Brazil's Minister of Development, Industry, and Foreign Trade signed an agreement on April 9, 2012, setting out a procedure that could lead each party to recognize certain distinctive distilled spirits produced in the other party's territory, including Cachaça. The agreement provides in part that if, following the publication of a notice of proposed rulemaking, the United States publishes a final rule that provides, among other things, that Cachaça is a type of rum that is a distinctive product of Brazil, then Brazil, within 30 days thereafter, will recognize Bourbon Whiskey and Tennessee Whiskey as distinctive products of the United States.

In addition to the petition from the Brazilian Government and advice from USTR, TTB has received a number of essentially identical letters from private parties supporting the recognition of Cachaça as a distinctive type of spirit.

TTB Regulatory Proposal

TTB considers that it is appropriate to recognize Cachaça as a distinctive product of Brazil. Therefore, this notice proposes to recognize Cachaça as a type within the class designation rum that would be recognized as a distinctive product of Brazil, manufactured in Brazil in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country. Thus, the product may simply be labeled as ''Cachaça'' without the term ''rum'' on the label, just as a product labeled with the type designation ''Cognac'' is not required to also bear the class designation ''brandy.''

The proposed type description will not include as ''Cachaça'' any spirits that use corn or corn syrup in the fermentation process. TTB has confirmed with the Brazilian Government that the Brazilian standard for Cachaça would not allow for the use of corn or corn syrup in the fermentation process. As such, under the terms of the proposed text set forth in this document, distilled spirits that use any corn or corn syrup in the fermentation process would not meet the proposed standard for ''Cachaça'' because they are not manufactured in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country. Such products would not be entitled to be labeled as Cachaça.

The Brazilian standard allows products designated as Cachaça to have an alcohol content ranging from 38 to 48 percent alcohol by volume. However, since the standard proposed in this document would identify Cachaça as a type of rum, and the United States standard requires that rum must be bottled at not less than 40 percent alcohol by volume, or 80 degrees proof, any ''Cachaça'' imported into the United States would have to conform to this minimum bottling proof requirement. A product that is bottled at below 40 percent alcohol by volume would fall outside this class and type designation. Depending on the way that such a product is manufactured, it could be labeled as a ''diluted Cachaça'' or a distilled spirits specialty product bearing a statement of composition.

Public Participation

Comments Invited

TTB invites comments from interested members of the public on this proposed rule, including on whether the proposed amendment would have an adverse impact on owners of U.S. trademarks and on the extent to which distilled spirits labeled as ''Cachaça'' are produced outside Brazil. Although information currently before TTB suggests that all distilled spirits currently sold in the United States with ''Cachaça'' on the label are produced in Brazil, comments on the extent of production outside of Brazil will assist TTB in determining whether Cachaça should be recognized as a distinctive product of Brazil.

Submitting Comments

You may submit comments on this notice by using one of the following three methods:

- *Federal e-Rulemaking Portal:* You may send comments via the online comment form associated with this notice in Docket No. TTB–2012–0002 on ''Regulations.gov,'' the Federal e-rulemaking portal, at *http://www.regulations.gov.* A link to this Regulations.gov docket is available under Notice No. 127 on the TTB Web site at *http://www.ttb.gov/regulations_laws/all_rulemaking.shtml.* Supplemental files may be attached to comments submitted via Regulations.gov. For information on how to use Regulations.gov, click on the site's Help or FAQ tabs.
- *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier:* You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200–E, Washington, DC 20005.

If you are commenting on behalf of an association, business, or other entity, your comment must include the entity's name as well as your name and position title. If you comment via Regulations.gov, please include the entity's name in the ''Organization'' blank of the comment form. If you comment via postal mail, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

Public Disclosure

On the Federal e-rulemaking portal, Regulations.gov, TTB will post, and you may view, copies of this notice, selected supporting materials, and any electronic or mailed comments we receive about this proposal. A link to the Regulations.gov docket containing this notice, any posted supporting materials, and the comments received on this proposal is available on the TTB Web site at *http://www.ttb.gov/regulations_laws/all_rulemaking.shtml* under Notice No. 127. You may also reach the relevant docket through the Regulatons.gov search page at *http://www.regulations.gov.* For information

on how to use Regulations.gov, click on the site's Help or FAQ tabs.

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including email addresses. We may omit voluminous attachments or material that we consider unsuitable for posting.

You also may view copies of this notice, the related petitions, any other supporting materials, and any electronic or mailed comments we receive about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. You may also obtain copies at 20 cents per 8.5- × 11-inch page. Contact our information specialist at the above address or by telephone at 202–453–2270 to schedule an appointment or to request copies of comments or other materials.

Regulatory Flexibility Act

We certify that this proposed amendment, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed amendment only amends the standards of identity for rum at 27 CFR 5.22(f) and does not impose any new reporting, recordkeeping, or other administrative requirement. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

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.

Drafting Information

Christopher M. Thiemann of the Regulations and Rulings Division prepared this notice.

List of Subjects in 27 CFR Part 5

Advertising, Consumer protection, Customs duties and inspection, Imports, Labeling, Liquors, and Packaging and containers.

The Proposed Amendment

For the reasons discussed in the preamble, TTB proposes to amend 27 CFR part 5, as follows:

PART 5—LABELING AND ADVERTISING OF DISTILLED SPIRITS

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

Authority: 26 U.S.C. 5301, 7805, 27 U.S.C. 205.

2. Section 5.22 is amended by revising paragraph (f) to read as follows:

§ 5.22 The standards of identity.

* * * * *

(f) *Class 6; rum.* ''*Rum*'' is an alcoholic distillate from the fermented juice of sugar cane, sugar cane syrup, sugar cane molasses, or other sugar cane by-products, produced at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to rum, and bottled at not less than 80° proof; and also includes mixtures solely of such distillates.

(1) ''*Cachaça*'' is a type of rum that is a distinctive product of Brazil, manufactured in Brazil in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country. The word ''Cachaça'' may be spelled with or without the diacritic mark (*i.e.,* ''Cachaça'' or ''Cachaca'').

(2) [Reserved]

* * * * *

Signed: April 9, 2012.

John J. Manfreda,

Administrator.

Approved: April 11, 2012.

Timothy E. Skud,

Deputy Assistant Secretary, (Tax, Trade, and Tariff Policy).

[FR Doc. 2012–10332 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–31–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2012–0267; FRL–9665–6]

Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from wine storage. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by May 30, 2012.

ADDRESSES: Submit comments, identified by docket number [DOCKET NUMBER], by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.

2. *Email: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or email. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: Generally, documents in the docket for this action are available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Lily Wong, EPA Region IX, (415) 947–4114, *wong.lily@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the date that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULE

Local agency	Rule No.	Rule title	Adopted	Submitted
SJVUAPCD	4694	Wine Fermentation and Storage Tanks	12/15/05	11/18/11

On December 22, 2011, EPA determined that the November 18, 2011 submittal for SJVUAPCD Rule 4694 met the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

There are no previous versions of Rule 4694 in the SIP. CARB originally submitted Rule 4694 to EPA on June 16, 2006, and EPA will refer to that version of the rule as the ''originally submitted Rule 4694.'' While we can act on only the most recently submitted version, we have reviewed materials provided with previous submittals.

On August 18, 2011, SJVUAPCD adopted Resolution No. 11–08–20 in which the Governing Board approved ''* * * an amendment to its earlier SIP submittal of Rule 4694 (Wine Fermentation and Storage Tanks), as set forth in the strike-out version of the Rule, attached hereto and incorporated herein by this reference.'' The Resolution also stated that the strike-out text represents SJVUAPCD's withdrawal of those provisions for consideration by EPA for SIP approval. This revised SIP submittal of Rule 4694 was submitted to EPA from CARB on November 18, 2011, and will be referred to in this notice as the ''amended submittal of Rule 4694.''

C. What is the purpose of the submitted rule revision?

VOCs help produce ground-level ozone and smog, which harm human health and the environment. Section 110(a) of the CAA requires States to submit regulations that control VOC emissions. The amended submittal of Rule 4694 applies to wineries that store fermented wine in bulk containers (i.e., storage tanks), and requires that the stored wine be maintained at or below 75 degrees Fahrenheit and the storage tanks to be equipped with pressure-vacuum relief valves. EPA's technical support document (TSD) has more information about this rule.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rule?

Generally, SIP rules must be enforceable (see section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for each category of sources covered by a Control Techniques Guidelines (CTG) document as well as each major source in nonattainment areas (see sections 182(a)(2) and (b)(2)), and must not relax existing requirements (see sections 110(l) and 193). The SJVUAPCD regulates an ozone nonattainment area (see 40 CFR part 81). Because Rule 4694 regulates major sources, Rule 4694 must fulfill RACT.

Guidance and policy documents that we use to evaluate enforceability and RACT requirements consistently include the following:

1. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook).
2. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).
3. State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).

B. Does the rule meet the evaluation criteria?

We believe this rule is consistent with the relevant policy and guidance regarding enforceability, RACT, and SIP relaxations. SJVUAPCD evaluated RACT for emissions from wine fermentation and storage.

While EPA has not developed a CTG document for wine fermentation and storage, this category includes sources that emit more than 10 tons per year of VOCs (i.e., major sources). Consequently, Rule 4694 must fulfill RACT.

SJVUAPCD evaluated six technologies for controlling emissions from wine fermentation and wine storage. SJVUAPCD concluded that while the control technologies were technologically feasible, they were not demonstrated to be economically feasible at this time. Furthermore, SJVUAPCD determined that there are no control technologies currently achieved in practice in this source category. Consequently, SJVUAPCD concluded that there are no reasonably available control technologies for wine fermentation and wine storage.

EPA agrees with SJVUAPCD's conclusion that emission controls have not been demonstrated in practice for wine fermentation emissions on the scale of the affected facilities. Therefore EPA agrees that RACT for wine fermentation emissions at this time is no controls.

For wine storage emissions, SJVUAPCD concluded that the six control technologies as well as the use of pressure-vacuum relief valves and temperature control was not cost effective and that RACT for wine storage is also no controls. We note however that the amended submittal of Rule 4694 requires pressure-vacuum relief valves and temperature control, and EPA is not aware of reasonably available control technology that might be beyond this control technology. EPA therefore concludes that the amended submittal of Rule 4694 meets or exceeds RACT for emissions from wine storage. The TSD has more information on our evaluation.

C. Public Comment and Final Action

Because EPA believes the submitted rule fulfills all relevant requirements, we are proposing to fully approve it as described in section 110(k)(3) of the Act. We will accept comments from the public on this proposal for the next 30 days. Unless we receive convincing new information during the comment period, we intend to publish a final approval action that will incorporate this rule into the federally enforceable SIP.

On January 10, 2012, EPA partially approved and partially disapproved the RACT SIP submitted by California on June 18, 2009 for the SJV extreme ozone nonattainment area (2009 RACT SIP), based in part on our conclusion that the State had not fully satisfied CAA section

182 RACT requirements for wine fermentation and storage tank operations. See 77 FR 1417, 1425 (January 10, 2012). Final approval of Rule 4694 would satisfy California's obligation to implement RACT under CAA section 182 for this source category for the 1-hour ozone and 1997 8-hour ozone NAAQS.

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 proposed action merely proposes to approve State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: April 13, 2012.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2012–10202 Filed 4–27–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 15

[ET Docket No. 10–23; FCC 12–34]

Tank Level Probing Radars

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document proposes to expand the scope of this proceeding to propose a set of technical rules for the operation of unlicensed level probing radars (LPR) in several frequency bands. LPR devices are low-power radars that measure the level (relative height) of various substances in man-made or natural containments. In open-air environments, LPR devices may be used to measure levels of materials such as coal piles or water basin levels. An LPR device also may be installed inside an enclosure, *e.g.,* a tank made of materials such as steel or fiberglass and commonly referred to as a tank level probing radar (TLPR) that could be filled with liquids or granulates. During the pendency of the rulemaking proceeding, but outside this proceeding, the Commission received waiver requests and other inquiries regarding outdoor use on additional frequencies under existing rules for unlicensed devices. To address the apparent need for a comprehensive and consistent approach to LPR devices, the Commission is proposing in this FNPRM rules that would apply to the operation of LPR devices installed in both open-air environments and inside storage tanks in the following frequency bands: 5.925–7.250 GHz, 24.05–29.00 GHz, and 75–85 GHz.

DATES: Comments must be filed on or before May 30, 2012, and reply comments must be filed on or before June 29, 2012.

FOR FURTHER INFORMATION CONTACT: Anh Wride, Office of Engineering and Technology, (202) 418–0577, email: *Anh.Wride@fcc.gov,* TTY (202) 418–2989.

ADDRESSES: You may submit comments, identified by [docket number and/or rulemaking number], by any of the following methods:

- *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.
- *Mail:* Anh Wride, Office of Engineering and Technology, Room 7–A363, Federal Communications Commission, 445 12th SW., Washington, DC 20554.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further *Notice of Proposed Rule Making,* ET Docket No. 10–23, FCC 12–34, adopted March 26, 2012, and released March 27, 2012. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room, CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.*

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by

accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/*.

▪ *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

▪ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.

▪ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

▪ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Summary of Further Notice of Proposed Rulemaking

1. In the Further Notice of Proposed Rule Making (FNPRM), the Commission expands the scope of this proceeding to propose a set of technical rules for the operation of unlicensed level probing radars (LPR) in several frequency bands. LPR devices are low-power radars that measure the level (relative height) of various substances in man-made or natural containments. In open-air environments, LPR devices may be used to measure levels of materials such as coal piles or water basin levels. An LPR device also may be installed inside an enclosure, *e.g.,* a tank made of materials such as steel or fiberglass and commonly referred to as a tank level probing radar (TLPR) that could be filled with liquids or granulates. In the *Notice of Proposed Rule Making and Order* (Notice and Order), 75 FR 9850, March 4, 2010, in this proceeding, the Commission proposed rules applicable only to TLPR devices for operation in the 77–81 GHz band inside steel and concrete tanks, as that was the use requested by the initial proponents. During the pendency of the rulemaking proceeding, but outside this proceeding, the Commission received waiver requests and other inquiries regarding outdoor use on additional frequencies under existing part 15 rules for unlicensed devices. To address the apparent need for a comprehensive and consistent approach to LPR devices, the Commission proposed in this FNPRM rules that would apply to the operation of LPR devices installed in both open-air environments and inside storage tanks in the following frequency bands: 5.925–7.250 GHz, 24.05–29.00 GHz, and 75–85 GHz.

2. LPR devices can provide accurate and reliable target resolution to identify water levels in rivers and dams or critical levels of materials such as fuel, sewer-treated waste, and high risk substances, reducing overflow and spillage and minimizing exposure of maintenance personnel in the case of high risk materials. The Commission is proposing a set of rules that would be applicable to LPR devices (including TLPR devices) that would allow the expanded development of a variety of radar level-measuring products that will benefit the public and industry and improve the accuracy and reliability of these measuring tools beyond that which is permitted under our current part 15 rules. To the extent practicable, these proposals would also harmonize our technical rules for LPR devices with similar European standards in an effort to improve the competitiveness of U.S. manufacturers in the global economy. The Commission believes that, with appropriate rules, LPR devices can operate on an unlicensed basis in the proposed frequency bands without causing harmful interference to authorized services.

3. On January 14, 2010, the Commission adopted the *Notice and Order* in this proceeding in response to: (1) a Petition for Rulemaking from Siemens Milltronics Process Instruments Inc. (Siemens) requesting that the Commission amend its rules to allow TLPR devices to operate in the ''restricted'' 77–81 GHz frequency band inside steel or concrete tank enclosures; (2) a concurrent request for waiver, also by Siemens, of § 15.205(a) to allow TLPR operation in the 78–79 GHz frequency band, subject to certain conditions; and (3) a similar request for waiver by Ohmart/VEGA Corporation (Ohmart/VEGA) to allow TLPR operation in the 77–81 GHz band. The *Notice and Order* proposed to modify part 15 of the rules to allow the 77–81 GHz frequency band to be used on an unlicensed basis for the operation of LPR equipment installed inside closed storage tanks made of metal, concrete, or other material with similar attenuating characteristics and also sought comment on whether to allow TLPR operation on an unlicensed basis in the 75–85 GHz band. The *Notice and Order* also sought comment on whether the Commission should allow installation of TLPR devices in tanks made of materials with a lower attenuation coefficient than steel/concrete, including open-air installations, and requested input on additional measures to ensure that TLPR devices installed in such enclosures comply with the radiated emissions limit outside the tank. No comments were received in opposition to the specific proposals set forth in the *Notice and Order,* but no comments were received regarding open-air installations or other containers. The *Order* granted waivers of the restriction on spurious emissions in the 77–81 GHz band set forth in § 15.205(a) to Siemens, Ohmart/VEGA, and any other responsible party that meets the specified waiver conditions, to permit TLPR devices to be installed inside tanks with high attenuation characteristics, *e.g.,* steel or concrete, pending the conclusion of the concurrently initiated rulemaking.

4. To date, the Commission has authorized LPR devices primarily for use in tanks upon demonstration of compliance with § 15.209 of the rules, which specifies an average EIRP limit of −41.3 dBm for operations above 960 MHz. In addition, § 15.35(b) of the rules sets a peak limit at 20 dB above the average limit, *e.g.,* a peak EIRP limit of −21.3 dBm. For pulsed signals, it may be necessary to take into account the limitations of the measurement instrumentation to determine the total peak power level, through the use of a pulse desensitization correction factor (PDCF), which is an adjustment factor that must be added to the indicated value of a pulsed emission on a spectrum analyzer when the emission bandwidth of the pulse exceeds the resolution bandwidth of the analyzer. Therefore, pulsed LPR devices often must reduce their peak power output to comply with the peak emission limit in § 15.209 and thus may sacrifice the necessary precision and accuracy required in many applications. LPR devices using other modulation techniques, *e.g.,* FMCW, also need wider bandwidth in certain frequency

ranges to achieve the necessary measurement precision.

5. On January 26, 2010, the Commission placed on public notice a request for waiver of § 15.252(a) of the Commission's rules filed by Ohmart/VEGA to permit certification of LPR devices installed at fixed locations at outdoor sites as well as inside storage tanks in the 24.6–27 GHz frequency band. On January 3, 2011, the Commission also received a request for waiver of the frequency band restrictions of § 15.250 from Sutron Corporation to operate its water level probing radar in the 5.460–7.250 GHz frequency band with fixed outdoor infrastructure. Because these waiver requests raise issues that are, in part, similar to those raised in this FNPRM, we are holding these two requests in abeyance pending final action in this rulemaking proceeding.

6. In the FNPRM, the Commission proposes a set of rules that would be applicable to LPR devices used in any RF level-measuring application, whether in an open-air environment or inside an enclosure, to address the needs for a comprehensive and consistent approach to LPR devices. These proposals are intended to allow for the introduction of more diverse applications of LPRs in several frequency bands and improve the accuracy and reliability of these level-measuring tools beyond what is permitted under our current part 15 rules. The Commission also believes that the proposed rules will help to simplify equipment development and certification of LPR devices as well as provide a simplified method for measuring the radiated emissions from these devices.

7. The Commission has previously authorized LPR devices primarily for use in tanks upon demonstration of compliance with § 15.209 of the rules, which specifies an average EIRP limit of −41.3 dBm for operations above 960 MHz. In addition, these devices have also been required to demonstrate that they comply with § 15.35(b) of the rules, which sets a peak limit at 20 dB above the average limit, *e.g.,* a peak EIRP limit of −21.3 dBm. Pulsed LPR devices often must reduce their peak power output in order to comply with this peak emission limit and thus may sacrifice the necessary precision and accuracy required by many applications. LPR devices using other modulation techniques, *e.g.,* FMCW, also need wider bandwidth in certain frequency ranges to achieve the necessary measurement precision. LPR devices need higher power and wider bandwidth than permitted under § 15.209 of the rules to fully achieve the potential of RF level-measuring technology. In addition, the part 15 rules for similar wide-band devices such as §§ 15.250 or 15.252 contain frequency and operational restrictions which preclude the certification of LPR devices absent a waiver.

8. In expanding the scope of this rulemaking proceeding, the Commission is responding to an industry-wide need to employ wider bandwidth and higher power to implement more diverse applications in RF level-measuring while maintaining or improving accuracy and reliability. Specifically, it proposes to amend part 15 to provide a set of new rules to govern specifically the operation of LPR devices installed both in open-air environments and inside storage tanks (TLPR applications) in the following frequency bands: 5.925–7.250 GHz, 24.05–29.00 GHz, and 75–85 GHz. To permit LPR operation in the 75–85 GHz band, the Commission also proposes to modify existing § 15.205 of the rules to remove the prohibition on intentional emissions in this band. The Commission further proposes to treat LPR and TLPR devices the same with respect to emission limits and frequency bands of operation without any additional installation limitations. That is, a level measuring radar that complies with our proposed rules would be able to be used in any application, whether outdoors in the open or inside any type of enclosure. Accordingly, the proposals for emission limits in this FNPRM would supersede the emission limit proposals for TLPR devices in the *Notice and Order*.

9. The Commission is proposing emission limits for the main-beam emissions which are based on the ETSI LPR Technical Standard and take into account the fact that there may be no additional attenuation provided by a tank enclosure. The proposed limits would allow the main-beam emissions from LPRs to be higher in power than is allowed under the general emission limits in § 15.209. However, the levels of reflected emissions are not expected to exceed those general emission limits, and therefore no increased potential for interference is expected. The Commission also proposes to require that all spurious/unwanted emission limits from LPRs not exceed the general emission limits in § 15.209 when measured in the main beam of a device's transmit antenna; the measurement procedure would also utilize elevation and azimuth measurement scans to determine the location at which these unwanted emissions are maximized. To further protect authorized services operating in the same and adjacent frequency bands, the Commission proposes to: (1) Require the LPR antenna to be dedicated or integrated as part of the transmitter and professionally installed in a downward position; (2) limit installations of LPR devices to fixed locations; and (3) prohibit hand-held applications of LPR and the marketing of LPR devices to residential consumers.

10. The Commission based these proposals on the various waiver and informal rule interpretation requests it has received, and the emission limits adopted in Europe for LPR devices. Although our proposals would generally harmonize our rules with the European

LPR regulations with respect to the limits for fundamental emissions, they also would address the specific spectrum needs and restrictions in the U.S.

11. *Frequency Bands of Operation.* The Commission proposes to allow LPR operation under the new technical rules in the following frequency bands: 5.925–7.250 GHz, 24.05–29.00 GHz, and 75–85 GHz. In the *Notice and Order,* it proposed rules for TLPR devices in the 77–81 GHz band; in this FNPRM the Commission proposes to expand the frequency bands for LPR operation under the new rules for both in-tank and in open-air environments to include the 75–85 GHz band. It seeks comment on our proposals for LPR operation in each of the frequency bands discussed.

12. The Commission believes, that allowing LPR devices to operate under the technical rules it proposed herein will not increase the likelihood of harmful interference to incumbent authorized radiofrequency operations. LPR devices are typically installed at fixed industrial sites, such as quarries, paper mills, and ore refineries, or at facilities adjacent to bodies of water, such as dams, storm water lift stations, and sewage treatment plants, all of which are generally well away from residences. The Commission also proposed requiring LPR devices to utilize narrow beamwidth transmit antennas focused in a downward orientation. This will serve to minimize the likelihood of interference to any incumbent spectrum operations within proximity of a fixed LPR system. Finally, the emission limits proposed herein for LPR devices will ensure that incumbent operations are afforded similar protection as currently provided by the existing emission limits in § 15.209 of the rules.

13. Currently, unlicensed wide-band transmitter operation within the 5.925–7.250 GHz band is permitted under § 15.250 of our rules. In this band, licensed uses include non-Federal fixed,

fixed satellite, and mobile services from 5.925 MHz to 7.125 MHz; and Federal fixed and space research services (deep space & Earth-to-space) from 7.125 MHz to 7.250 MHz. Part 15 transmitters operating in this band are prohibited from being used in toys or operating on board an aircraft or satellite. They cannot utilize a fixed outdoor infrastructure, including outdoor-mounted transmit antennas, to establish a wide area communications network. The Commission believes that its proposal to adopt rules to permit LPR operation in the 5.925–7.250 GHz band, including permitting limited fixed outdoor installations, is consistent with the intent underlying the usage restrictions in § 15.250. In this regard, LPRs will be single, *i.e.,* relatively isolated, transmitters whose individual operations outdoors will not result in a dense deployment of transmitters.

14. Unlicensed wide-band operation in the 23.12–29.0 GHz band is permitted under § 15.252 of our rules. This band is shared between Federal and non-Federal services. Authorized licensed operations include radiolocation, EESS (active), amateur, fixed, inter-satellite, radionavigation, radiolocation satellite (Earth-to-space), fixed satellite (Earth-to-space), mobile, standard frequency and time signal satellite (Earth-to-space), space research (space-to-Earth), and EESS (space-to-Earth) services. Currently, unlicensed transmitters operating in this band must be mounted on vehicles and cannot be used in aviation applications. To provide expanded flexibility for optimizing LPR applications and to enhance global marketing opportunities by more closely harmonizing with ETSI in this frequency range, the Commission proposes to permit LPR operation in the 24.05–29.00 GHz band. The proposed frequency band is wider than that which ETSI has adopted; however, the Commission believes that the risk of interference to incumbent authorized services from LPR devices will be no greater than it is from existing part 15 radars currently operating in this band because LPR devices operate in a fixed downward-looking position.

15. Apart from a few exceptions, all spectrum above 38.6 GHz, including the 75–85 GHz band, is designated by footnote as a ''restricted band'' in § 15.205 of the rules. Consequently, unless expressly permitted by rule or waiver, unlicensed devices are not allowed to intentionally radiate energy into a restricted band in order to protect sensitive radio services from harmful interference. The Commission has permitted unlicensed operation within specific frequency bands above 38.6 GHz, *e.g.,* 46.7–46.9 GHz, 57–64 GHz, 76–77 GHz, and 92–95 GHz.

16. The 75–85 GHz band is shared between Federal and non-Federal services. Authorized operations in this band currently include radio astronomy, fixed/mobile/fixed satellite, mobile satellite, broadcast and broadcast satellite, radiolocation, space research (space-to-Earth), amateur and amateur satellite services. In addition, unlicensed vehicular radars are currently permitted to operate in the 76–77 GHz band. The services in this band typically employ highly directional antennas to overcome the relatively higher propagation loss that occurs at these frequencies. In the *Notice and Order,* the Commission proposed to allow TLPR operation in the 77–81 GHz band and also sought comment on whether it should permit TLPR devices to operate in the broader 75–85 GHz band. No objections were received from incumbent service operators with respect to TLPR operation in the 75–85 GHz band in response to the *Notice and Order.* The Commission believes that an extension of the frequency range to allow LPR operation in the 75–85 GHz band will not adversely affect incumbent authorized users, because this band is currently sparsely used and the propagation losses are significant at these frequencies, making harmful interference unlikely beyond a short distance from the LPR device. The Commission seeks comment on this proposal.

17. *Radiated Emission Limits.* The Commission proposes to adopt radiated emission limits for LPR devices operating in each of the proposed frequency bands as set forth in the table below. These limits are consistent with those adopted by ETSI. ETSI derived its emission limits for main-beam emissions by mathematically correlating the reflected emissions from an LPR with the existing part 15 average emission limit for devices operating above 960 MHz. The proposed emission limits therefore would maintain the existing level of interference protection to incumbent radio services. The Commission also believes that harmonization of our limits with the ETSI limits is desirable because it could serve to expand global marketing opportunities for U.S. manufacturers.

Frequency band (GHz)	Average emission limit (EIRP in dBm/MHz) as measured boresight (Note 2)	Peak emission limit (EIRP in dBm measured in 50 MHz) as measured boresight (Note 2)	Equivalent average reflected emissions if measured *in situ* (EIRP in dBm/MHz) (Note 3)
5.925–7.250	−33	+7	−55
24.05–29.00	−14	+26	−41.3
75–85	−3	+34	−41.3

Notes:
1. Minimum bandwidth at the −10 dB points is 50 megahertz.
2. All emission limits defined herein are based on boresight measurements (*i.e.,* measurements performed within the main beam of an LPR antenna).
3. Equivalent reflected emissions include antenna back-lobe and side-lobe emissions and worst-case reflections from material being measured.

18. ETSI/ECC based these limits on the results of mathematical modeling which was supported by measurement data. ETSI/ECC's modeling effort shows that if the LPR complies with the main-beam (boresight) emission limits specified in the second and third columns of the table above, any reflected emissions, including antenna back-lobe or side-lobe emissions and worst-case reflections from the target material, will also comply with the existing average emission limit specified in § 15.209 for devices operating above 960 MHz, shown in the table's fourth column. The main-beam emission limits vary with frequency band because the mathematical models accounted for the frequency-dependent propagation loss characteristics associated with each band. The Commission seeks comment on these proposed emission limits.

19. The Commission believes that the proposed LPR emission limits as measured in the main beam of the LPR antenna will adequately protect against harmful interference to incumbent

authorized services in any of the proposed frequency bands, based on several factors. First, LPR devices will be required to utilize downward-focused narrow-beam transmit antennas, which are also needed to optimize level-measuring performance. Therefore, the only LPR emissions likely to be incident on an incumbent receiver within proximity will be reflected from the target material and thus significantly attenuated. Second, the proposed LPR emission limits are consistent with the results expected from application of the existing limits in radiated *in situ* measurements and therefore will maintain the existing level of protection afforded to incumbent authorized services. Third, as the operating frequency increases, the propagation path loss also increases as a result of the increased attenuating effects on radio waves from intervening objects and atmospheric conditions. Finally, the Commission is proposing certain operational conditions that would further reduce the likelihood of harmful interference to authorized services. Accordingly, it concludes that LPR devices will be able to share spectrum with incumbent authorized services in the proposed bands at the proposed emission limits. The Commission seeks comment on this tentative conclusion.

20. In the *Notice and Order,* for TLPR devices operating in the 77–81 GHz band in tanks with very high RF attenuation characteristics, *e.g.,* steel or concrete, the Commission proposed an emission limit of +43 dBm on the transmitter's peak EIRP and +23 dBm on the transmitter's average EIRP levels for fundamental emissions when measured in a laboratory setting, *i.e.,* not installed in a tank. It also proposed to limit the radiated emissions from the TLPR device, when installed in representative tanks of each material type for testing *in situ,* to the general radiated emission limits for intentional radiators in § 15.209(a) of its rules when measured outside of the TLPR tank enclosure in any direction. The Commission stated that emissions outside of the tank will likely be minimal when considering the tank enclosure's attenuation coefficient in addition to the absorption characteristics of the target material (liquid or solid), and thus, any reflected signal will be mostly contained within the tank. The Commission also noted that *in situ* testing would require performance of compliance tests on a tank of each material type intended for use with the LPR at three representative installation sites (*e.g.,* a metallic tank at three representative installation sites, a concrete tank at three representative installation sites), which could prove quite burdensome to an applicant.

21. The Commission is now proposing to treat TLPR devices in the same manner as LPR devices with respect to both emission limits and frequency bands of operation. Thus, if an LPR complies with these proposed rules, it can be installed inside an enclosure or out in the open since the proposed emission limits do not assume any additional attenuation provided by a tank enclosure. Although the emission limits proposed herein are somewhat lower than the TLPR limits previously-proposed (*e.g.,* +34 dBm peak EIRP vs. +43 dBm peak EIRP, respectively), the Commission notes that the proposed limits do not assume any tank enclosure attenuation. It believes that this will alleviate the burdens involved in performing *in situ* compliance testing. These proposals also will permit TLPR devices to be used with a variety of tank materials, potentially increasing the useful applications of the technology. Accordingly, the Commission is proposing a definition for LPR devices that would encompass open-air and in-tank applications. The Commission seeks comment on these proposals.

22. *Antenna Beamwidth.* The Commission notes that the ECC recommendations are based on modeling results that assume the LPR antenna beamwidth is limited to less than 12 degrees for frequencies below 57 GHz and less than 8 degrees in the 75–85 GHz bands. It also notes that maintaining a narrow antenna beamwidth is also a performance criterion for optimizing LPR operations because a narrower beam reduces false echoes from objects other than the desired target material. The Commission proposes to adopt these antenna beamwidth requirements and seek comment on this proposal.

23. *Antenna Side Lobe Gain.* In assessing compatibility between LPR devices and systems operating in other radio services, the ETSI/ECC modeling effort assumed a maximum side lobe antenna gain of −10 dBi for off-axis angles from the main beam of greater than 60 degrees. In addition to the requirements for antenna beamwidth, the Commission seeks comment on the necessity of establishing limits on the gain of the antenna in the side lobe region and off-axis angle where the gain is to be defined.

24. *Automatic Power Control.* ECC also recommends the implementation of automatic power control (APC) with a dynamic range of 20 dB for LPRs. The Commission notes that as a consequence of our proposed emission limits, all reflected emissions from the LPR device will be kept at or below the § 15.209 general emission limits. Thus, as tentatively concluded, harmful interference to other spectrum users is not expected. Therefore, the Commission does not propose to adopt APC requirements for LPR devices. Any party advocating a requirement for APC should provide technical analyses as to why the emission limit in § 15.209 is not adequate.

25. *Compliance Measurement.* As stated, a primary reason for ECC adoption of a main-beam emission limit for LPR devices is to reduce the difficulties associated with measuring reflected emissions from an LPR device *in situ.* The Commission also notes, in concurrence with ETSI/ECC, that the current compliance practice of measuring reflected radiated emissions at a 3-meter horizontal distance from the radiating source while varying the measurement antenna height from 1 meter to 4 meters often does not yield repeatable results when LPR emissions are measured *in situ.* This is because the patterns of reflected emissions tend to vary and are therefore difficult to measure consistently, propagation losses in the higher frequency bands are significant, and it is not always practical to create a test bed that is representative of all of the substances that an LPR will measure, making it difficult to determine the worst-case reflectivity factor. In addition, the current measurement procedure does not consider any potential emissions that may radiate from the top of an LPR device. The limits proposed herein will account for such emissions that could be missed entirely when applying the existing *in situ* compliance measurement procedures. With a main-beam emission limit, emissions are to be evaluated with the measurement antenna pointed directly at the LPR antenna, and as long the LPR complies with this limit, its reflected emissions in any direction will generally not exceed the existing average emission limit in § 15.209, thereby maintaining the same level of interference protection to incumbent authorized users. The Commission tentatively concludes that the main-beam emission limit will facilitate representative, reliable, and repeatable emission measurements of the emissions from LPR devices. The Commission seeks comment on this tentative conclusion.

26. Based on our experience to date with compliance measurements of and the proposals herein for main-beam emission limits for LPR devices, the Commission seek comment on the following compliance measurement procedures. The Commission's Office of

Engineering and Technology may publish specific information on how to conduct compliance testing following these procedures, *e.g.,* by publication in a guidance document or as specified in the rules.

- Radiated measurements of the fundamental emission bandwidth and power shall be made with maximum main beam coupling between the LPR and test antennas (boresight).
- Measurements of the unwanted emissions radiating from an LPR shall be made utilizing elevation and azimuth scans to determine the location at which the emissions are maximized.
- All emissions at and below 960 MHz shall be measured with a CISPR quasi-peak detector.
- The fundamental emission bandwidth measurement shall be made using a peak detector with a resolution bandwidth of 1 MHz and a video bandwidth of at least 3 MHz.
- The provisions in § 15.35(b) and (c) that limit the peak power to 20 dB above the average limit and require emissions to be averaged over a 100 millisecond period do not apply to devices operating under this section.
- Compliance measurements of frequency-agile LPR devices shall be performed with any related frequency sweep, step, or hop function activated.

27. *Operational and Marketing Restrictions.* The Commission proposes to adopt operational restrictions to require the antenna of an LPR device to be dedicated or integrated as part of the transmitter and professionally installed in a downward position; to limit installations of LPR devices to fixed locations; to prohibit hand-held applications of LPR devices; and to prohibit the marketing of LPR devices to residential consumers. The Commission proposes these restrictions to protect incumbent authorized services operating in the same and adjacent frequency bands from harmful interference. It seeks comment on these proposals.

28. *Equipment Certification.* In the *Notice and Order,* the Commission proposed to require that TLPR devices designed to operate in the 77–81 GHz band be approved under the Commission's certification procedures and that certification be performed by the Commission's Laboratory rather than by Telecommunications Certification Bodies (TCB). The Commission noted that because a standard test procedure for LPR devices had not yet been devised for use at these frequencies, this requirement would give the Commission time to develop appropriate measurement guidelines for devices intended for operation in this frequency band. It observes, however, that the new proposals made herein will facilitate the direct measurement of emissions within the main beam of the LPR antenna and are consistent with compliance measurement methodologies currently used with other types of unlicensed transmitters. The Commission therefore proposes to permit TCBs to certify LPR devices operating under these proposed rules. The Commission seeks further comment on this proposal.

29. The Commission is aware that some approvals of TLPRs have already been granted under § 15.209 of our rules. These devices may continue to operate under § 15.209 if their worst-case radiated emissions continue to comply with the limits in these rules. The Commission recognizes that a certified TLPR device could be approved to operate under other conditions, *e.g.,* outdoor installations in open-air environments, in an enclosure with low RF attenuation characteristics, or with higher power. To allow previously-certified devices to take advantage of the changes proposed in this FNPRM, the Commission proposes to allow the responsible party to file for a permissive change request in accordance with the existing rules and practices, provided that: (1) The LPR device operates only within the frequency bands authorized by rules proposed herein; (2) measurement data taken in accordance with the measurement procedure proposed above is provided to demonstrate compliance with the new emission limits specified in these proposed rules; and (3) operational changes to the device are being implemented by software upgrade without any hardware change. The Commission seeks comment on this proposal.

30. *Cost Benefit Analysis.* The Commission believes that the benefits of the proposed regulations for manufacturers and users outweigh any potential costs. LPR devices need higher power and wider bandwidth than that which is permitted under the existing part 15 rules to fully achieve the potential of this measuring technology. The Commission's proposed rules would provide a necessary remedy for these devices to operate at the power levels and in the appropriate frequency bands required to deliver the needed accuracy for diverse applications, thereby promoting the expanded development and use of this technology to the benefit of businesses, consumers, and the economy. The proposed higher power levels in the proposed frequency bands would further the development of better and improved level-measuring tools, but these changes would not increase the potential for interference to authorized users beyond what is permitted under the current rules. In addition, the proposed rules will help to simplify equipment development and certification of LPR devices, as well as provide a simplified method for measuring the radiated emissions from these devices. The Commission seeks comment on this analysis and any additional benefits that may result from these proposed rules. Parties that oppose these proposed rules should cite specific harms that they believe would result from changing the rules.

Initial Regulatory Flexibility Analysis

31. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rule Making (FNPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of this FNPRM. The Commission will send a copy of this FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2]

A. Need for, and Objectives of, the Proposed Rules

32. This rule making proposal is initiated to obtain comments regarding proposed changes to the regulations for radio frequency devices that do not require a license to operate. The Commission proposed to expand the scope of the above proceeding to adopt technical rules for operation of specific types of low-power transmitters called level probing radar (LPR) devices, including tank level probing radars (TLPR), on an unlicensed basis under the provisions of part 15 of the Commission's rules in the following frequency bands: 5.925–7.250 GHz, 24.05–29.00 GHz and 75–85 GHz. The Commission proposed to amend its part 15 rules to revise the original proposed § 15.256 in the *Notice of Proposed Rule Making and Order* (Notice and Order) to permit the operation of LPR devices installed both outdoors in the open and inside storage tanks (TLPR) in the above

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 847 (1996).

[2] *See* 5 U.S.C. 603(a).

frequency bands. The Commission propose to treat LPR and TLPR devices the same with respect to emission limits and frequency bands of operation without any additional installation limitation. That is, a level-measuring radar that complies with our proposed rules will be able to be used in any application, whether outdoors in the open or inside any type of enclosure, *e.g.,* steel or plastic. These proposals will also extend the operation of TLPR devices from the originally proposed 77–81 GHz band to the additional proposed frequency bands, at the new proposed main-beam emission limits. The Commission proposes emission limits for fundamental emissions depending on the LPR frequency bands of operation, as measured in the antenna main beam, based on the LPR Technical Standards adopted in Europe, to promote savings for manufacturers that operate in the global economy. The Commission proposes to require that all spurious/unwanted emission limits not exceed the general emission limits in § 15.209 when measured in the main beam of the LPR antenna, as well as utilizing elevation and azimuth scans to determine the location at which the emissions are maximized. To further protect authorized services operating in the same and adjacent frequency bands, we also propose to adopt operational restrictions to require the LPR antenna to be dedicated or integrated as part of the transmitter and professionally installed in a downward position; to limit installations of LPR devices to fixed locations; and to prohibit hand-held applications of LPR and the marketing of LPR devices to consumers. The Commission believes that its proposals herein would enable LPR devices that will provide better accuracy and reliability in target resolution to identify critical levels of materials such as fuel, water and sewer treated waste, and high-risk substances. The proposed amendments to our rules will permit these devices to operate effectively and reliably, reducing storage tank overfill and spilling and minimizing exposure of maintenance personnel in the case of high-risk materials, all without increasing the risk of interference to authorized services.

B. Legal Basis

33. The proposed action is taken pursuant to sections 1, 4(i), 302, 303(e), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 302, 303(e), 303(f), 303(g), and 303(r).

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

34. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[3] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [4] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[5] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[6]

35. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' [7] The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is all such firms having 750 or fewer employees.[8] According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.[9] Of this total, 1,010 had fewer than 500 employees, and an additional 13 had between 500 and 999 employees.[10] Thus, under this size standard, the majority of firms can be considered small.

36. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of ''Paging'' [11] and ''Cellular and Other Wireless Telecommunications.'' [12] Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.[13] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[14] Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.[15] Of this total, 1,378 firms had 999 or fewer employees, and 19 firms had 1,000 employees or more.[16] Thus, under this second category and size standard, the majority of firms can, again, be considered small.

[3] 5 U.S.C. 603(b)(3).

[4] 5 U.S.C. 601(6).

[5] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register.**'' 5 U.S.C. 601(3).

[6] Small Business Act, 15 U.S.C. 632 (1996).

[7] U.S. Census Bureau, 2002 NAICS Definitions, ''334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing''; *http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342.*

[8] 13 CFR 121.201, NAICS code 334220.

[9] U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (released May 26, 2005); *http://factfinder.census.gov.* The number of ''establishments'' is a less helpful indicator of small business prevalence in this context than would be the number of ''firms'' or ''companies,'' because the latter takes into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census Bureau breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 929.

[10] *Id.* An additional 18 establishments had 1,000 or more employees.

[11] 13 CFR 121.201, NAICS code 517211.

[12] 13 CFR 121.201, NAICS code 517212.

[13] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517211 (issued Nov. 2005).

[14] *Id.* The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[15] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517212 (issued Nov. 2005).

[16] *Id.* The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is for firms with ''1,000 employees or more.''

37. The Commission has proposed to reduce burdens wherever possible. Our proposals for new technical rules regarding LPR operation in the 5.925–7.250 GHz, 24.05–29.00 GHz, and 75–85 GHz would reduce burdens on small entities. LPR operation in these bands will increase the utilization of this spectrum by allowing a radio-frequency type of level-measuring technology to access the spectrum that is currently not used under the current technical rules for these types of industrial applications, resulting in more efficient use of these bands. Where possible we have made an effort to harmonize with international technical standards in Europe to promote cost savings for small manufacturers competing in the global economy. The Commission will continue to examine further alternatives with the objectives of eliminating unnecessary regulations and minimizing significant economic impact on small entities. The Commission seeks comment on significant alternatives commenters believe it should adopt.

38. The Commission does expect that the rules proposed in this Further Notice of Proposed Rule Making will have a significant negative economic impact on small businesses.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

39. Part 15 transmitters already are required to be authorized under the Commission's certification procedure as a prerequisite to marketing and importation. The reporting and recordkeeping requirements associated with these equipment authorizations would not be changed by the proposals contained in this FNPRM. The changes to the regulations would permit operation of unlicensed radar devices used in specific industrial applications at frequencies already used by other part 15 devices and in a higher frequency band (75–85 GHz).

E. Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rules

40. None.

Ordering Clauses

41. Pursuant to sections 1, 4(i), 302, 303(e), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 302, 303(e), 303(f), 303(g), and 303(r), this Further Notice of Proposed Rule Making *is adopted.*

42. *Notice is hereby given* of the proposed regulatory changes described in this Further Notice of Proposed Rulemaking, and that comment is sought on these proposals.

43. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 15 to read as follows:

PART 15—RADIO FREQUENCY DEVICES

1. The authority citation for part 15 continues to read as follows:

Authority: 47 U.S.C. 154, 202, 303, 304, 307 and 544A.

2. Section 15.3 is amended by adding paragraph (hh) to read as follows:

§ 15.3 Definitions.

* * * * *

(hh) *Level Probing Radar (LPR):* A short-range radar transmitter used in a wide range of applications to measure the amount of various substances, mostly liquids or granulates. LPR equipment may operate in open-air environments or inside an enclosure containing the substance being measured.

* * * * *

3. Section 15.31 is amended by revising paragraph (c) to read as follows:

§ 15.31 Measurement standards.

* * * * *

(c) Except as otherwise indicated in § 15.256, for swept frequency equipment, measurements shall be made with the frequency sweep stopped at those frequencies chosen for the measurements to be reported.

* * * * *

4. Section 15.35 is amended by revising paragraph (b) to read as follows:

§ 15.35 Measurement detector functions and bandwidths.

* * * * *

(b) Unless otherwise specified, on any frequency or frequencies above 1000 MHz, the radiated emission limits are based on the use of measurement instrumentation employing an average detector function. Unless otherwise specified, measurements above 1000 MHz shall be performed using a minimum resolution bandwidth of 1 MHz. When average radiated emission measurements are specified in this part, including average emission measurements below 1000 MHz, there also is a limit on the peak level of the radio frequency emissions. Unless otherwise specified, *see, e.g.,* §§ 15.250, 15.252, 15.255, 15.256 and 15.509–15.519 of this part, the limit on peak radio frequency emissions is 20 dB above the maximum permitted average emission limit applicable to the equipment under test. This peak limit applies to the total peak emission level radiated by the device, *e.g.,* the total peak power level. Note that the use of a pulse desensitization correction factor may be needed to determine the total peak emission level. The instruction manual or application note for the measurement instrument should be consulted for determining pulse desensitization factors, as necessary.

* * * * *

5. Section 15.205 is amended by revising paragraph (d)(4) to read as follows:

§ 15.205 Restricted bands of operation.

* * * * *

(d) * * *

(4) Any equipment operated under the provisions of §§ 15.253, 15.255, 15.256 in the frequency band 75–85 GHz, or § 15.257 of this part.

* * * * *

6. Add § 15.256 to read as follows:

§ 15.256 Operation of level probing radars within the bands 5.925–7.250 GHz, 24.05–29.00 GHz, and 75–85 GHz.

(a) Operation under this section is limited to level probing radar (LPR) devices.

(b) LPR devices operating under the provisions of this section shall utilize a dedicated or integrated transmit antenna, and the system shall be professionally installed and maintained to ensure a downward orientation of the transmit antenna.

(c) LPR devices operating under the provisions of this section shall be installed only at fixed locations.

(d) Hand-held applications and marketing to residential consumers are prohibited.

(e) The fundamental bandwidth of an LPR emission is defined as the width of the signal between two points, one below and one above the center frequency, outside of which all emissions are attenuated by at least 10 dB relative to the maximum transmitter output power when measured in an equivalent resolution bandwidth.

(1) The minimum fundamental emission bandwidth shall be 50 MHz for LPR operation under the provisions of this section.

(2) LPR devices operating under this section must confine their fundamental emission bandwidth within the 5.925–7.250 GHz, 24.05–29.00 GHz, and 75–85 GHz bands under all conditions of operation.

(f) Fundamental Emissions Limits

(1) All emission limits provided in this section are expressed in terms of Equivalent Isotropic Radiated Power (EIRP).

(2) The EIRP level is to be determined from the maximum measured power within a specified bandwidth.

(i) The EIRP in 1 MHz is computed from the maximum power level measured within any 1-MHz bandwidth using a power averaging detector;

(ii) The EIRP in 50 MHz is computed from the maximum power level measured with a peak detector in a 50-MHz bandwidth centered on the frequency at which the maximum average power level is realized.

(3) The EIRP limits for LPR operations in the bands authorized by this rule section are provided in the following table:

Frequency band of operation (GHz)	EIRP limit in 1 MHz (dBm)	EIRP limit in 50 MHz (dBm)
5.925–7.250	−33	7
24.05–29.00	−14	26
75–85	−3	34

(g) Unwanted Emissions Limits

(1) All emission limits provided in this section are expressed in terms of Equivalent Isotropic Radiated Power (EIRP) and are computed based on the maximum average power level measured within any 1-MHz bandwidth.

(2) Unwanted emission limits applicable to LPR devices shall not exceed the general emission limits in § 15.209.

(h) Antenna Beamwidth

(1) LPR devices operating under the provisions of this section within the 5.925–7.250 GHz and 24.05–29.00 GHz bands must use an antenna with a maximum half-power beamwidth of 12 degrees.

(2) LPR devices operating under the provisions of this section within the 75–85 GHz band must use an antenna with a maximum half-power beamwidth of 8 degrees.

(i) Antenna Side Lobe Gain

(1) LPR devices operating under the provisions of this section must limit the side lobe antenna gain to −10 dBi for off-axis angles from the main beam of greater than 60 degrees.

(j) Measurement Procedures

(1) Radiated measurements of the fundamental emission bandwidth and power shall be made with maximum main beam coupling between the LPR and test antennas (boresight).

(2) Measurements of the unwanted emissions radiating from an LPR shall be made utilizing elevation and azimuth scans to determine the location at which the emissions are maximized.

(3) All emissions at and below 960 MHz are based on measurements employing a CISPR quasi-peak detector.

(4) The fundamental emission bandwidth measurement shall be made using a peak detector with a resolution bandwidth of 1 MHz and a video bandwidth of at least 3 MHz.

(5) The provisions in § 15.35(b) and (c) of this part that require emissions to be averaged over a 100 millisecond period and that limit the peak power to 20 dB above the average limit do not apply to devices operating under this section.

(6) Compliance measurements of frequency-agile LPR devices shall be performed with any related frequency sweep, step, or hop function activated.

(7) Compliance measurements shall be made in accordance with the specific procedures published or otherwise authorized by the Commission.

[FR Doc. 2012–9984 Filed 4–27–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120321208–2010–01]

RIN 0648–BC07

Fisheries of the Northeastern United States; Recreational Management Measures for the Summer Flounder, Scup, and Black Sea Bass Fisheries; Fishing Year 2012

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes management measures for the 2012 summer flounder, scup, and black sea bass recreational fisheries. The implementing regulations for these fisheries require NMFS to publish recreational measures for the fishing year and to provide an opportunity for public comment. The intent of these measures is to prevent overfishing of the summer flounder, scup, and black sea bass resources.

DATES: Comments must be received by 5 p.m. local time, on May 15, 2012.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2012–0081, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking portal: *http://www.regulations.gov*. To submit comments via the e-Rulemaking Portal, first click the ''Submit a Comment'' icon, then enter NOAA–NMFS–2012–0081 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Fax:* (978) 281–9135, Attn: Comments on 2012 Proposed Summer Flounder, Scup, and Black Sea Bass Recreational Measures, NOAA–NMFS–2012–0081.
- *Mail and Hand Delivery:* Daniel S. Morris, Acting Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: ''Comments on 2012 FSB Recreational Measures.''

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the Supplemental Environmental Assessment and Initial Regulatory Flexibility Analysis (SEA/IRFA) and other supporting documents for the recreational harvest measures, are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N. State Street, Dover, DE 19901. The recreational harvest measures document is also accessible via the Internet at: *http://www.nero.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Moira Kelly, Fishery Policy Analyst, (978) 281–9218.

SUPPLEMENTARY INFORMATION:

General Background

The summer flounder, scup, and black sea bass fisheries are managed cooperatively under the provisions of the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) developed by the Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission), in consultation with the New England and South Atlantic Fishery Management Councils. The management units specified in the FMP include summer flounder (*Paralichthys dentatus*) in U.S. waters of the Atlantic Ocean from the southern border of North Carolina (NC) northward to the U.S./Canada border, and scup (*Stenotomus chrysops*) and black sea bass (*Centropristis striata*) in U.S. waters of the Atlantic Ocean from 35 E. 13.3′ N. lat. (the latitude of Cape Hatteras Lighthouse, Buxton, NC) northward to the U.S./Canada border.

The Council prepared the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.* Regulations implementing the FMP appear at 50 CFR part 648, subparts A (general provisions), G (summer flounder), H (scup), and I (black sea bass). General regulations governing fisheries of the Northeastern U.S. also appear at 50 CFR part 648. States manage these three species within 3 nautical miles (4.83 km) of their coasts, under the Commission's plan for summer flounder, scup, and black sea bass. The applicable species-specific Federal regulations govern vessels and individual fishermen fishing in Federal waters of the exclusive economic zone (EEZ), as well as vessels possessing a summer flounder, scup, or black sea bass Federal charter/party vessel permit, regardless of where they fish.

Recreational Management Measures Background

The Council process for devising recreational management measures to recommend to NMFS for rulemaking is generically described in the following section. All meetings are open to the public and the materials utilized during such meetings, as well as any documents created to summarize the meeting results, are public information and typically posted on the Council's Web site (*www.mafmc.org*) or are available from the Council by request. Extensive background on the 2012 recreational management measures recommendation process is therefore not repeated in this preamble.

The FMP established monitoring committees for the three fisheries, consisting of representatives from the Commission, the Council, state marine fishery agency representatives from MA to NC, and NMFS. The FMP's implementing regulations require the monitoring committees to review scientific and other relevant information annually and to recommend management measures necessary to constrain landings within the recreational harvest limits established for the summer flounder, scup, and black sea bass fisheries for the upcoming fishing year. The FMP limits the choices for the types of measures to minimum fish size, possession limit, and fishing season.

The Council's Demersal Species Committee and the Commission's Summer Flounder, Scup, and Black Sea Bass Management Board (Board) then consider the monitoring committees' recommendations and any public comment in making their recommendations to the Council and the Commission, respectively. The Council reviews the recommendations of the Demersal Species Committee, makes its own recommendations, and forwards them to NMFS for review. The Commission similarly adopts recommendations for the states. NMFS is required to review the Council's recommendations to ensure that they are consistent with the targets specified for each species in the FMP and all applicable laws and Executive Orders before ultimately implementing measures for Federal waters.

All minimum fish sizes discussed hereafter are total length measurements of the fish, i.e., the straight-line distance from the tip of the snout to the end of the tail while the fish is lying on its side. For black sea bass, total length measurement does not include the caudal fin tendril. All possession limits discussed below are per person.

Proposed 2012 Recreational Management Measures

NMFS is proposing the following measures that would apply in the Federal waters of the EEZ and to all federally permitted party/charter vessels with applicable summer flounder, scup, or black sea bass permits regardless of where they fish for the 2012 recreational summer flounder, scup, and black sea bass fisheries: For summer flounder, use of state-by-state conservation equivalency measures, which are the status quo measures; for scup, a 10.5-inch (26.67-cm) minimum fish size, a 20-fish per person possession limit, and an open season of January 1 through December 31; and, for black sea bass, a 12.5-inch (31.71-cm) minimum fish size, a 15-fish per person possession limit for a January 1 through February 29 open season, and a 25-fish per person possession limit for open seasons of May 19 through October 14 and November 1 through December 31. NMFS will consider retaining or reinstating status quo black sea bass measures, as needed, for Federal waters (i.e., a 12.5-in (31.75-cm) minimum fish size, a 25-fish per person possession limit, and fishing seasons from May 22–October 11 and November 1–December 31) if the Commission develops and implements a state-waters conservation equivalency system that, when paired with the Council's recommended measures, does not provide the necessary conservation to ensure the 2012 recreational harvest limit will not be exceeded. More detail on these proposed measures is provided in the following sections.

Summer Flounder Recreational Management Measures

The 2012 recreational harvest limit for summer flounder is 8.76 million lb (3,973 mt), as published in interim final rule (76 FR 82189, December 30, 2011). Final landings for 2011 are approximately 5.6 million lb (2,541.57 mt), well below the recreational harvest limit. The Council and Commission have recommended the use of conservation equivalency to manage the 2012 summer flounder recreational fishery.

NMFS implemented Framework Adjustment 2 to the FMP on July 29, 2001 (66 FR 36208), to permit the use of conservation equivalency to manage the recreational summer flounder fishery. Conservation equivalency allows each state to establish its own recreational management measures (possession limits, minimum fish size, and fishing seasons) to achieve its state harvest limit partitioned by the Commission from the coastwide recreational harvest limit, as long as the combined effect of all of the states' management measures achieves the same level of conservation as would Federal coastwide measures.

The Council and Board annually recommend that either state- or region-specific recreational measures be developed (conservation equivalency) or coastwide management measures be implemented by all states to ensure that the recreational harvest limit will not be exceeded. Even when the Council and Board recommend conservation equivalency, the Council must specify a

set of coastwide measures that would apply if conservation equivalency is not approved for use in Federal waters.

When conservation equivalency is recommended, and following confirmation that the proposed state measures developed through the Commission's technical and policy review processes achieve conservation equivalency, NMFS may waive the permit condition found at § 648.4(b), which requires Federal permit holders to comply with the more restrictive management measures when state and Federal measures differ. In such a situation, federally permitted summer flounder charter/party permit holders and individuals fishing for summer flounder in the EEZ would then be subject to the recreational fishing measures implemented by the state in which they land summer flounder, rather than the coastwide measures.

In addition, the Council and the Board must recommend precautionary default measures when recommending conservation equivalency. The Commission would require adoption of the precautionary default measures by any state that either does not submit a summer flounder management proposal to the Commission's Summer Flounder Technical Committee, or that submits measures that would exceed the Commission-specified harvest limit for that state.

Much of the conservation equivalency measures development process happens at both the Commission and individual state level. The selection of appropriate data and analytic techniques for technical review of potential state conservation equivalent measures and the process by which the Commission evaluates and recommends proposed conservation equivalent measures is wholly a function of the Commission and its individual member states. Individuals seeking information regarding the process to develop specific state measure or the Commission process for technical evaluation of proposed measures should contact the marine fisheries agency in the state of interest, the Commission, or both.

Once states select their final 2012 summer flounder management measures through their respective development, analytical, and review processes and submit them to the Commission, the Commission will conduct further review and evaluation of the state-submitted proposals, ultimately notifying NMFS as to which individual state proposals have been approved or disapproved. NMFS has no overarching authority in the state or Commission management measure development, but is an equal participant along with all the member states in the measures review process. NMFS retains the final authority either to approve or to disapprove the use of conservation equivalency in place of the coastwide measures in Federal waters, and will publish its determination as a final rule in the **Federal Register** to establish the 2012 recreational measures for these fisheries.

States that do not submit conservation equivalency proposals, or whose proposals are disapproved by the Commission, will be required by the Commission to adopt the precautionary default measures. In the case of states that are initially assigned precautionary default measures, but subsequently receive Commission approval of revised state measures, NMFS will publish a notice in the **Federal Register** announcing a waiver of the permit condition at § 648.4(b).

The 2012 precautionary default measures recommended by the Council and Board are for a 20.0-inch (50.80-cm) minimum fish size, a possession limit of two fish, and an open season of May 1 through September 30, 2012.

In this action, NMFS proposes to implement conservation equivalency with a precautionary default backstop, as previously outlined, for states that either fail to submit conservation equivalent measures or whose measures are not approved by the Commission. NMFS proposes the alternative of coastwide measures, as previously described, for use if conservation equivalency is not approved in the final rule. The coastwide measures would be waived if conservation equivalency is approved in the final rule.

Scup Recreational Management Measures

The 2012 scup recreational harvest limit is 8.45 million lb (3,833 mt), as published in interim final rule (December 30, 2011; 76 FR 82189). Estimated 2011 scup recreational landings are 3.48 million lb (1,580.39 mt). The Council and Commission's recommended measures for the 2012 scup recreational fishery are for a 10.5-in (26.67-cm) minimum fish size, a 20-fish per person possession limit, and an open season of January 1 through December 31. NMFS proposes to implement the recommended scup recreational management measures for 2012 in Federal waters.

NMFS acknowledges that the Commission has indicated its intent to continue managing the recreational scup fishery through a Commission-based conservation equivalency program that has no comparable measures in the Federal FMP. Thus, recreational management measures will differ between state and Federal waters in 2012. Historically, very little of the scup recreational harvest comes from the Federal waters of the EEZ. The scup recreational harvest from Federal waters for 2010 was approximately 4 percent of the total coastwide landings.

Black Sea Bass Recreational Management Measures

The 2012 black sea bass recreational harvest limit is 1.32 million lb (599 mt), as published in interim final rule (December 30, 2011; 76 FR 82189). The 2011 black sea bass recreational landings were 1.09 million lb (494 mt); however, at the time the Council and Commission were making recommendations for the 2012 recreational black sea bass fishery, the 2011 landings were estimated to be 0.99 million lb (449 mt).

The Council has recommended measures designed to allow for an increase in black sea bass recreational landings (from the estimated 0.99 million lb to the allowable 1.32 million lb). These measures for Federal waters are a 12.5-inch (31.75-cm) minimum fish size and a 15-fish per person possession limit for an open season of January 1 through February 28; and a 12.5-inch (31.75-cm) minimum fish size and a 25-fish per person possession limit for open seasons of May 19 through October 14 and November 1 through December 31.

The Commission is developing conservation equivalency measures for state waters based on the original 2011 landings, which would have allowed for an increase in landings and more flexibility. NMFS is proposing to implement the aforementioned Council-recommended measures for Federal waters while the Commission's process for determining state waters conservation equivalency proceeds. However, it may be necessary to maintain the status quo measures (12.5-inch (31.75-cm) minimum fish size, 25-fish per person possession limit, and an open season of May 22 through October 11 and November 1 through December 31), if the proposed Council recommended measures and the Commission's state waters conservation equivalency measures are likely to result in the recreational harvest limit being exceeded.

If the timing of this Commission process is complete, including the necessary correspondence to NMFS and the Council, before a final rule has been issued by NMFS for the 2011 recreational management measures, NMFS may implement the Council's recommended measures for Federal

waters. The decision to implement the Council's recommended measures for Federal waters will be contingent on the as of yet to be completed analyses and recommendation from the Commission, and any such decision would be relayed in the final rule published in the **Federal Register**. If the Commission conservation equivalency development process extends beyond the issuance of a recreational management measures final rule, NMFS may issue a second rule to implement the Council's recommended 2012 measures for Federal waters, pending the completion of the Commission process and concurrence by NMFS that the combination of state waters conservation equivalency and the Council's recommended measures will achieve the desired 2012 fishery performance. Should NMFS ultimately determine that the Commission's conservation equivalency measures for use in state waters for the 2012 fishery and the Council's recommended measures would likely result in the recreational harvest limit being exceeded, then Federal status quo measures would remain for the duration of the 2012 fishing year: A 12.5-inch (31.75-cm) minimum fish size, 25-fish possession limit, and May 22 through October 14 and November 1 through December 31 open seasons.

The proposed January 1 through February 29 open season has already passed, but would roll-over into fishing year 2013, if approved in the final rule. However, because the fishing year 2013 recreational harvest limit is unknown, it is not possible to determine the impact that this additional fishing opportunity would have on keeping the fishery within the 2013 recreational harvest limit. As such, if this additional season is approved and implemented in the final rule for the 2012 recreational harvest measures, NMFS may re-evaluate the open season during the 2013 specifications process.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator has determined that this proposed rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. In order to ensure that any final rule can be published as soon as possible, NMFS is requesting that comments for this proposed rule be submitted within 15 days. This will allow interested parties adequate opportunity to comment while ensuring that NMFS can publish a final rule in a timely manner in an attempt to avoid a delay in the opening of the fishing season, should the proposed black sea bass fishing season be approved.

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

The Council prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act (RFA), which is included in the Supplemental EA and supplemented by information contained in the preamble to this proposed rule. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section of the preamble and in the **SUMMARY** of this proposed rule. A summary of the IRFA follows. A copy of this analysis is available from the Council (see **ADDRESSES**).

All of the entities (charter/party permitted fishing vessels) affected by this action are considered small entities under the Small Business Administration size standards for businesses in the recreational fishery with gross revenues of up to $7.0 million. Therefore, there are no disproportionate effects on small versus large entities. Information on costs in the fishery is not readily available and individual vessel profitability cannot be determined directly; therefore, expected changes in gross revenues were used as a proxy for profitability.

This action does not introduce any new reporting, recordkeeping, or other compliance requirements. This proposed rule does not duplicate, overlap, or conflict with other Federal rules.

Description and Estimate of Number of Small Entities to Which the Rule Would Apply

The proposed recreational management measures could affect any recreational angler who fishes for summer flounder, scup, or black sea bass in the EEZ or on a party/charter vessel issued a Federal permit for summer flounder, scup, and/or black sea bass. However, the only regulated entities affected by this action are party/charter vessels issued a Federal permit for summer flounder, scup, and/or black sea bass, and so the IRFA focuses upon the expected impacts on this segment of the affected public. These vessels are all considered small entities for the purposes of the RFA, i.e., businesses in the recreational fishery with gross revenues of up to $7.0 million. These small entities can be specifically identified in the Federal vessel permit database and would be impacted by the recreational measures, regardless of whether they fish in Federal or state waters. Although fishing opportunities by individual recreational anglers may be impacted by this action, they are not considered small entities under the RFA.

The Council estimated that the proposed measures could affect any of the 902 vessels possessing a Federal charter/party permit for summer flounder, scup, and/or black sea bass in 2010, the most recent year for which complete permit data are available. However, only 355 vessels reported active participation in the 2010 recreational summer flounder, scup, and/or black sea bass fisheries.

Economic Impacts of the Proposed Action Compared to Significant Non-Selected Alternatives

In the IRFA, the no-action alternative (i.e., maintenance of the regulations as codified) is: (1) For summer flounder, coastwide measures of a 18-inch (45.72-cm) minimum fish size, a 2-fish possession limit, and an open season from May 1 through September 30; (2) for scup, a 10.5-inch (26.67-cm) minimum fish size, a 10-fish possession limit, and an open season of June 6 through September 26; and (3) for black sea bass, a 12.5-inch (31.75-cm) minimum size, a 25-fish possession limit, and open seasons of May 22 through October 11 and November 1 through December 31. The status quo alternative is: (1) For summer flounder, conservation equivalency, with precautionary default measures of a 20-inch (50.8-cm) minimum fish size, a 2-fish possession limit, and an open season of May 1 through September 30; (2) for scup and black sea bass, the same as the no action alternative. The proposed alternative is: (1) For summer flounder, the same as the status quo alternative; (2) for scup, a 10.5-inch (26.67-cm) minimum fish size, a 10-fish possession limit, and an open season of January 1 through December 31; and (3) for black sea bass, a 12.5-inch (31.75-cm) minimum fish size and a 15-fish possession limit for an open season of January 1 through February 28, and a 12.5-inch (31.75-cm) minimum fish size and a 25-fish possession limit for open seasons of May 19 through October 14 and November 1 through December 31.

The impacts of the alternatives on small entities (i.e., federally permitted party/charter vessels in each state in the Northeast region) were analyzed, assessing potential changes in gross revenues for all 18 combinations of

alternatives proposed. Although NMFS's RFA guidance recommends assessing changes in profitability as a result of proposed measures, the quantitative impacts were instead evaluated using expected changes in party/charter vessel revenues as a proxy for profitability. This is because reliable cost and revenue information is not available for charter/party vessels at this time. Without reliable cost and revenue data, profits cannot be discriminated from gross revenues. As reliable cost data become available, impacts to profitability can be more accurately forecast. Similarly, changes to long-term solvency were not assessed, due both to the absence of cost data and because the recreational management measures change annually according to the specification-setting process. Effects of the various management measures were analyzed by employing quantitative approaches, to the extent possible. Where quantitative data were not available, qualitative analyses were utilized.

Because the proposed action is less restrictive than the other alternatives considered and provides the most opportunity for recreational fishing, the affected regulated entities are expected to be able to maximize fishery-related revenue under the preferred alternative relative to the non-preferred alternatives. The preferred alternative for scup would open the fishing season from June 6–September 26 to all year, and the preferred alternative for black sea bass would increase the summer season from May 22–October 11 to May 19–October 14, plus provide for a two month season in January–February 2013. For summer flounder, the preferred alternative for conservation equivalency is expected to increase fishing opportunities because, under the Commission's plan, all states but one (Delaware) are authorized to increase landings in 2012. The Council and NMFS did not consider any alternatives that would provide additional fishing opportunities because any such alternative would increase the risk of the fishery exceeding the recreational harvest limit, which could result in overfishing the stock and/or exceeding the annual catch limit. This would be contrary to the goals and objectives of the Magnuson-Stevens Act.

There are no new reporting or recordkeeping requirements contained in any of the alternatives considered for this action.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 25, 2012.

Alan D. Risenhoover,

Acting Deputy Director for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.107, paragraph (a) introductory text and paragraph (b) are revised to read as follows:

§ 648.107 Conservation equivalent measures for the summer flounder party/charter and recreational fishery.

(a) The Regional Administrator has determined that the recreational fishing measures proposed to be implemented by Massachusetts through North Carolina for 2012 are the conservation equivalent of the season, minimum fish size, and possession limit prescribed in §§ 648.105, 648.104(b), and 648.106(a), respectively. This determination is based on a recommendation from the Summer Flounder Board of the Atlantic States Marine Fisheries Commission.

* * * * *

(b) Federally permitted vessels subject to the recreational fishing measures of this part, and other recreational fishing vessels subject to the recreational fishing measures of this part and registered in states whose fishery management measures are not determined by the Regional Administrator to be the conservation equivalent of the season, minimum size, and possession limit prescribed in §§ 648.105, 648.104(b) and 648.106(a), respectively, due to the lack of, or the reversal of, a conservation equivalent recommendation from the Summer Flounder Board of the Atlantic States Marine Fisheries Commission, shall be subject to the following precautionary default measures: Season—May 1 through September 30; minimum size—20.0 inches (50.80 cm); and possession limit—two fish.

3. Section 648.127 is revised to read as follows:

§ 648.127 Scup recreational fishing season.

Fishermen and vessels that are not eligible for a moratorium permit under § 648.4(a)(6), may possess scup year-round, subject to the possession limit specified in § 648.128(a). The recreational fishing season may be adjusted pursuant to the procedures in § 648.122.

4. In § 648.128, paragraph (a) is revised to read as follows:

§ 648.128 Scup possession restrictions.

(a) *Party/Charter and recreational possession limits.* No person shall possess more than 20 scup in, or harvested from, the EEZ unless that person is the owner or operator of a fishing vessel issued a scup moratorium permit, or is issued a scup dealer permit. Persons aboard a commercial vessel that is not eligible for a scup moratorium permit are subject to this possession limit. The owner, operator, and crew of a charter or party boat issued a scup moratorium permit are subject to the possession limit when carrying passengers for hire or when carrying more than five crew members for a party boat, or more than three crew members for a charter boat. This possession limit may be adjusted pursuant to the procedures in § 648.122.

* * * * *

5. In § 648.145, paragraph (a) is revised to read as follows:

§ 648.145 Black sea bass possession limit.

(a) From January 1 through February 29, no person shall possess more than 15 black sea bass in, or harvested from, the EEZ unless that person is the owner or operator of a fishing vessel issued a black sea bass moratorium permit, or is issued a black sea bass dealer permit. From May 19 through October 14, and from November 1 through December 31, no person shall possess more than 25 black sea bass in, or harvested from, the EEZ unless that person is the owner or operator of a fishing vessel issued a black sea bass moratorium permit, or is issued a black sea bass dealer permit. Persons aboard a commercial vessel that is not eligible for a black sea bass moratorium permit may not retain more than 15 black sea bass from January 1 through February 29, or more than 25 black sea bass from May 19 through October 14 and from November 1 through December 31. The owner, operator, and crew of a charter or party boat issued a black sea bass moratorium permit are subject to the possession limit when carrying passengers for hire or when carrying more than five crew members for a party boat, or more than three crew members for a charter boat. This possession limit may be adjusted pursuant to the procedures in § 648.142.

* * * * *

6. Section 648.146 is revised to read as follows:

§ 648.146 Black sea bass recreational fishing season.

Vessels that are not eligible for a moratorium permit under § 648.4(a)(7),

and fishermen subject to the possession limit specified in § 648.145(a), may possess black sea bass from January 1 through February 28, May 19 through October 14, and November 1 through December 31, unless this time period is adjusted pursuant to the procedures in § 648.142.

[FR Doc. 2012–10358 Filed 4–25–12; 4:15 pm]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 77, No. 83

Monday, April 30, 2012

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

Rural Business—Cooperative Service

Announcement of Small, Socially-Disadvantaged Producer Grant (SSDPG) Application Deadlines in Fiscal Year 2012

Correction

In notice document 2012–9997 appearing on pages 24678–24683 in the issue of April 25, 2012, make the following correction:

1. On page 24678, in the third column, under **DATES:** in the third full paragraph, in the second line, ''April 25, 2012'' should read ''July 24, 2012''.

[FR Doc. C1–2012–9997 Filed 4–27–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 48–2011]

Foreign-Trade Zone 109—Watertown, NY; Application for Manufacturing Authority; North American Tapes, LLC; Comment Period on New Evidence

The FTZ Board is inviting public comment on new evidence submitted on behalf of North American Tapes, LLC (NAT), in the applicant's rebuttal to comments submitted by interested parties on the amended application requesting authority on behalf of NAT to manufacture athletic tape under FTZ procedures within FTZ 109 (76 FR 43259–43260, 7–20–2011; Amendment—77 FR 13263–13264, 3–6–2012). The rebuttal comments submitted on April 18, 2012, on behalf of NAT contained new evidence on which there has not been a chance for public comment. The comment period on the new evidence is open through May 30, 2012 to allow interested parties to comment on the new evidence in the applicant's rebuttal submission. Submissions shall be addressed to the Board's Executive Secretary at the following address: Office of the Executive Secretary, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002.

For further information, contact Pierre Duy at *Pierre.Duy@trade.gov* or (202) 482–1378.

Dated: April 24, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–10353 Filed 4–27–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–980]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is aligning the final determination in this countervailing duty (CVD) investigation of crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells) from the People's Republic of China (PRC) with the final determination in the companion antidumping duty (AD) investigation.

DATES: *Effective Date:* April 30, 2012.

FOR FURTHER INFORMATION CONTACT: Gene Calvert, Jun Jack Zhao, or Emily Halle, AD/CVD Operations, Office 6, Import Administration, U.S. Department of Commerce, Room 7866, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3586, (202) 482–1396, or (202) 482–0176, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 8, 2011, the Department initiated the AD and CVD investigations of solar cells from the PRC.[1] On March 26, 2012, the Department published the preliminary affirmative CVD determination pertaining to solar cells from the PRC.[2] On March 27, 2012, the petitioner, SolarWorld Industries America, Inc., timely requested alignment of the deadline for the final CVD determination with the deadline for the final determination in the companion AD investigation of solar cells from the PRC, in accordance with section 705(a)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(b)(4)(i) and 210(i).

Because the AD and CVD investigations were initiated simultaneously and involve the same class or kind of merchandise from the same country, we are aligning the deadline for the final CVD determination of solar cells from the PRC with the deadline for the final determination in the companion AD investigation of solar cells from the PRC, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4)(i). The final CVD determination will be issued on the same date as the final AD determination, which is currently scheduled to be issued no later than July 30, 2012, unless postponed.

This notice is issued and published pursuant to section 705(a)(1) of the Act.

Dated: April 24, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–10352 Filed 4–27–12; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Initiation of Countervailing Duty Investigation,* 76 FR 70966 (November 16, 2011), and *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Initiation of Antidumping Duty Investigation,* 76 FR 70960 (November 16, 2011).

[2] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination,* 77 FR 17439 (March 26, 2012).

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with March anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews.

DATES: *Effective Date:* April 30, 2012.

FOR FURTHER INFORMATION CONTACT: Brenda E. Waters, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various antidumping and countervailing duty orders and findings with March anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by the Department discussed below refer to the number of calendar days from the applicable starting time.

Notice of No Sales

If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (''POR''), it must notify the Department within 60 days of publication of this notice in the **Federal Register**. All submissions must be filed electronically at *http://iaaccess.trade.gov* in accordance with 19 CFR 351.303. *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011). Such submissions are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended (''Act''). Further, in accordance with 19 CFR 351.303(f)(3)(ii), a copy of each request must be served on the petitioner and each exporter or producer specified in the request.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews, the Department intends to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports during the POR. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties having an APO within seven days of publication of this initiation notice and to make our decision regarding respondent selection within 21 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the applicable review.

In the event the Department decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, the Department has found that determinations concerning whether particular companies should be ''collapsed'' (i.e., treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, the Department will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (i.e., investigation, administrative review, new shipper review or changed circumstances review). For any company subject to this review, if the Department determined, or continued to treat, that company as collapsed with others, the Department will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, the Department will not-collapse companies for purposes of respondent selection. Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Quantity and Value Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where the Department considered collapsing that entity, complete quantity and value data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that, with regard to reviews requested on the basis of anniversary months on or after August 2011, the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.

Separate Rates

In proceedings involving non-market economy (''NME'') countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991), as amplified by *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2, 1994). In accordance with the separate rates criteria, the Department

assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's Web site at *http://www.trade.gov/ia* on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to the Department no later than 60 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding [1] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[2] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Status Application will be available on the Department's Web site at *http://www.trade.gov/ia* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application. Separate Rate Status Applications are due to the Department no later than 60 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

For exporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than March 31, 2013.

	Period to be reviewed
Antidumping Duty Proceedings	
Brazil:	
Orange Juice, A–351–840	3/1/11–3/8/11
Citrovita Agro Industrial Ltd.	
Coinbra-Frutesp S.A.[3]	
Fischer S.A Comercio, Industria, and Agricultura	
Montecitrus Trading S.A.	
Sucocitrico Cutrale Ltda.	
France:	
Brass Sheet and Strip, A–427–602	3/1/11–2/29/11
Griset SA	
KME France	
Germany:	
Brass Sheet and Strip, A–428–602	3/1/11–2/29/12
Aurubis Stolberg GmbH & Co. KG	
Carl Schreiber GmbH	
KME Germany AG & Co. KG	
Messingwerk Plettenberg Herfeld GmbH & Co. KG	
MKM Mansfelder Kupfer & Messing GmbH	
Schlenk Metallfolien GmbH & Co. KG	
Schwermetall Halbzeugwerk GmbH & Co. KG	
Sundwiger Messingwerke GmbH & Co. KG	
ThyssenKrupp VDM GmbH	
Wieland-Werke AG	
Italy:	
Brass Sheet and Strip, A–475–601	3/1/11–2/29/12
KME Italy SpA	
Republic of Korea:	
Certain Cut-to-Length Carbon-Quality Steel Plate,[4] A–580–836	2/1/11–1/31/12
Daewoo International Corp.	
Taiwan:	
Polyvinyl Alcohol, A–583–841	3/1/11–2/29/12

[1] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (*e.g.,* an ongoing administrative review, new shipper review, *etc.*) and entities that lost their separate rate in the most recently complete segment of the proceeding in which they participated.

[2] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

	Period to be reviewed
Chang Chun Petrochemical Co., Ltd.	
Thailand:	
Certain Welded Carbon Steel Pipe and Tubes, A–549–502	3/1/11–2/29/12
Pacific Pipe Public Company Limited	
Saha Thai Steel Pipe (Public) Company, Ltd.	
The People's Republic of China:	
Certain Frozen Warmwater Shrimp,[5] A–570–893	2/1/11–1/31/12
Glycine,[6] A–570–836	3/1/11–2/29/12
A&A Pharmachem Inc.	
Advance Exports	
AICO Laboratories India Ltd.	
Avid Organics Pvt. Ltd.	
Baoding Mantong Fine Chemistry Co., Ltd.	
Chiyuen International Trading Ltd.	
E–Heng Import and Export Co., Ltd.	
General Ingredient Inc.	
Hebei Donghua Chemical General Corporation	
Hebei Donghua Jiheng Fine Chemical Co., Ltd.	
Jiangsu Dongchang Chemical	
Jizhou City Huayang Chemical Co., Ltd.	
Kissner Milling Co. Ltd.	
Nantong Dongchang Chemical Industrial Co. Ltd.	
Ningbo Create-Bio Engineering Co. Ltd.	
Nutracare International	
Paras Intermediates Pvt. Ltd.	
Qingdao Samin Chemical Co., Ltd.	
Ravi Industries	
Salvi Chemical Industries	
Shanghai Waseta International Trading	
Showa Denko K.K.	
Tianjin Tiancheng Pharmaceutical Company	
Wisent Pharma Inc.	
XPAC Technologies Inc.	
Yuki Gosei Kogyo Co., Ltd.	
Sodium Hexametaphosphate,[7] A–570–908	3/1/11–2/29/12
Aditya Birla Chemicals (Thailand) Ltd.	
Anhui Technology Import & Export Co., Ltd.	
Anshan Career Economic Trade Co., Ltd.	
Blue Science Limited	
Boon Stream Chemical International Trade	
Chengdu Boon Stream Chemical Industry Co., Ltd.	
Dezhou Hualude Hardware Products Co. Ltd.	
Gatehouse International Freight Ltd.	
Henan Sinchems Imp and Exp Co., Ltd.	
Hubei Xingfa Chemical Group Co., Ltd.	
Hubei Xingfa Chemical Export Import Co. Ltd.	
Rushan Wooyoung Trading Co., Ltd.	
Sichuan Mianzhu Norwest Phosphate Co.	
Unison Chemical Industrial Co, Ltd.	
Zhejiang Chun-an Foreign Trade Co.	
Socialist Republic of Vietnam:	
Frozen Warmwater Shrimp,[8] A–552–802	2/1/11–1/31/12
Countervailing Duty Proceedings	
The People's Repubic of China:	
Drill Pipe, C–570–966	3/3/11–12/31/11
Shanxi Yida Special Steel Imp. & Exp. Co., Ltd.	
Turkey:	
Welded Carbon Steel Pipe and Tube, C–489–502	1/1/11–12/31/11
Borusan Group	
Borusan Mannesmann Boru Sanayi ve Ticaret A.S.	
Borusan Istikbal Ticaret T.A.S.	
ERBOSAN Erciyas Boru Sanayi ve Ticaret A.S.	
Tosyali dis Ticaret A.S.	
Toscelik Profil ve Sac Endustisi A.S.	

Suspension Agreements

None.

[3] The Department has preliminarily determined that Louis Dreyfus Commodities Agroindustrial S.A. is the successor-in-interest to Coinbra-Frutesp S.A. *See Certain Orange Juice from Brazil: Preliminary Results of Antidumping Duty Administrative Review and Preliminary No Shipment Determination,* 77 FR 21724, 21726 (April 11, 2012).

[4] The company name listed below was misspelled in the initiation notice that published on March 30, 2012 (77 FR 19179). The correct spelling of the company is listed in this notice.

Continued

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia* v. *United States,* 291 F.3d 806 (Fed Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period, of the order, if such a gap period is applicable to the period of review.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that the meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Any party submitting factual information in an antidumping duty or countervailing duty proceeding must certify to the accuracy and completeness of that information. *See* section 782(b) of the Act. Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in all segments of any antidumping duty or countervailing duty proceedings initiated on or after March 14, 2011. *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule,* 76 FR 7491 (February 10, 2011) (''*Interim Final Rule''*), amending 19 CFR 351.303(g)(1) and (2). The formats for the revised certifications are provided at the end of the *Interim Final Rule.* The Department intends to reject factual submissions in any proceeding segments initiated on or after March 14, 2011 if the submitting party does not comply with the revised certification requirements.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: April 20, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–10238 Filed 4–27–12; 8:45 am]

BILLING CODE 3510–DS–P

[5] In the initiation notice that published on March 30, 2012 (77 FR 19179), covering cases with the February anniversary dates, the Department inadvertently stated that it had received a timely request to revoke in part the antidumping duty order on Certain Frozen Warmwater Shrimp from the PRC with respect to one exporter, however, the Department actually received timely requests with respect to two exporters.

[6] If one of the above-named companies does not qualify for a separate rate, all other exporters of Glycine from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[7] If the above-named company does not qualify for a separate rate, all other exporters of Sodium Hexametaphosphate from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[8] In the initiation notice that published on March 30, 2012 (77 FR 19179), covering cases with February anniversary dates, the Department inadvertently did not note that it had received timely requests to revoke in part the antidumping duty order on Certain Frozen Warmwater Shrimp from Vietnam with respect to two exporters.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–820]

Certain Hot-Rolled Carbon Steel Flat Products From India: Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* April 30, 2012.

FOR FURTHER INFORMATION CONTACT: George McMahon or James Terpstra, AD/CVD Operations Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1167 and (202) 482–3965, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 1, 2011, the Department published in the **Federal Register** a notice announcing the opportunity to request an administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from India for the period December 1, 2010, through November 30, 2011. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 76 FR 74773, 74774 (December 1, 2011).

On December 30, 2011, and January 3, 2012, Nucor Corporation and U.S. Steel Corporation (collectively, ''Petitioners'') timely requested that the Department conduct an administrative review of Essar Steel Limited (''Essar''), Ispat Industries Limited (''Ispat''), JSW Steel Limited (''JSW''), and Tata Steel Limited (''Tata''). Pursuant to these requests and in accordance with 19 CFR 351.221(c)(1)(i), the Department published a notice initiating the administrative review of Essar, Ispat, JSW, and Tata. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 77 FR 4759 (January 31, 2012).

On January 31, 2012, the Department placed on the record and invited interested parties to comment on U.S. Customs and Border Protection (''CBP'') data, which the Department stated it would use for respondent selection in the instant review. *See* Memorandum to the File from George McMahon, Senior International Trade Analyst, through Melissa Skinner, Office Director, concerning ''Certain Hot Rolled Carbon Steel Flat Products from India: Customs and Border Protection Data for Selection of Respondents for Individual Review,'' dated January 31, 2012. We received no comments from interested parties on the CBP data.

On February 1, 7, 14, and 15, 2012, JSW, Tata, Essar, and Ispat, respectively, submitted letters informing the Department that they did not make shipments of subject merchandise to the United States during the period of review.

On March 7, 2012 and March 29, 2012, respectively, Nucor Corporation and U.S. Steel Corporation timely withdrew their respective requests for review of Essar, Ispat, JSW, and Tata.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the

request within 90 days of the date of publication of the notice of initiation of the requested review. As noted above, Petitioners withdrew their respective requests for review of Essar, Ispat, JSW, and Tata within 90 days of the date of publication of the notice of initiation. Moreover, no other interested party requested an administrative review of these respondents. Therefore, in accordance with 19 CFR 351.213(d)(1) and consistent with our practice, we are rescinding this review with respect to Essar, Ispat, JSW, and Tata, and in its entirety.[1]

Assessment

The Department will instruct CBP to assess antidumping duties on all appropriate entries. For Essar, Ispat, JSW, and Tata, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice of rescission of administrative review.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent increase in antidumping duties by the amount of antidumping and/or countervailing duties reimbursed.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: April 24, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–10351 Filed 4–27–12; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See, e.g., Certain Lined Paper Products From India: Notice of Partial Rescission of Antidumping Duty Administrative Review and Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review,* 74 FR 21781, 21783 (May 11, 2009).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–816]

Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Cindy Robinson, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3797.

Background

On October 3, 2011, the U.S. Department of Commerce (''Department'') published a notice of initiation of the administrative review of the antidumping duty order on corrosion-resistant carbon steel flat products from the Republic of Korea, covering the period August 1, 2010, to July 31, 2011. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 76 FR 61076 (October 3, 2011). The preliminary results of this review are currently due no later than May 2, 2012.

Extension of Time Limit of Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires that the Department make a preliminary determination within 245 days after the last day of the anniversary month of an order for which a review is requested. Section 751(a)(3)(A) of the Act further states that if it is not practicable to complete the review within the time period specified, the administering authority may extend the 245-day period to issue its preliminary results to up to 365 days.

We determine that completion of the preliminary results of this review within the 245-day period is not practicable. Additional time is needed to gather and analyze a significant amount of information pertaining to sales practices, manufacturing costs and corporate relationships pertaining to each company participating in the review. Given the number and complexity of issues in this case, in accordance with section 751(a)(3)(A) of the Act, we are fully extending by 120 days the time period for issuing the preliminary results of review. Therefore, the preliminary results are now due no later than August 30, 2012. The final results continue to be due 120 days after publication of the preliminary results.

This notice is published pursuant to sections 751(a)(3)(A) and 777(i)(1) of the Act.

Dated: April 24, 2012.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–10350 Filed 4–27–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Modification to Content Published by Import Administration in the Federal Register

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: Due to the mounting costs of publishing notices in the **Federal Register** and widespread access to the internet, Import Administration intends to modify the manner in which its determinations in antidumping and countervailing duty proceedings are made available to the public. The content of many of Import Administration's **Federal Register** notices will be reduced, with much of the information previously included in our **Federal Register** notices being made available to the public in separate memoranda published on Import Administration's Web site. Extension notices for preliminary and final results of reviews and certain other notices will no longer be published in the **Federal Register**.

DATES: *Effective Date:* April 30, 2012.

FOR FURTHER INFORMATION CONTACT: Dustin Ross, AD/CVD Operations, Office 1, Import Administration, or Shana Hofstetter, Office of Chief Counsel for Import Administration, U.S. Department

of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0747 and (202) 482–3414, respectively.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to sections 703(c)(2), 733(c)(3), 751(a)(1), 751(b)(1), 751(c)(2), and 777(i)(1) of the Tariff Act of 1930 as amended (''the Act''), Import Administration (IA) is required to publish certain notices in the **Federal Register** (FR). Following review of the requirements of the Act and our regulations, we have identified ways to shorten the length of many of our FR publications while also making available to the public and interested parties all pertinent information regarding our decisions. In addition, as neither the Act nor the Department of Commerce (''Department'') regulations require publication of extension notices for the preliminary and final results of reviews conducted under section 751 of the Act, we will no longer publish such notices. Further, IA will cease publishing a list of pending scope decisions in its quarterly scope ruling publication and will cease publishing an Advance Notification of Sunset Reviews when no such review is scheduled for initiation the following month.

These modifications are in line with the modification IA adopted in 2000, when it reduced the size of FR notices for final determinations and results of review by developing Issues and Decision Memoranda that now regularly accompany FR notices. *See Notice of Reduction in the Size of Antidumping/Countervailing Duty* ***Federal Register*** *Notices,* 65 FR 3654 (January 24, 2000). The proven success of that modification, and the fact that interested parties now accept that as the standard for the final determinations and results of review, inform the decision to adopt these changes.

Outside parties and the public at large will continue to have access to all significant information that historically has been included in our FR notices. With the exception of the Advance Notification of Sunset Reviews, when no such review is scheduled for initiation the following month, and pending scope determinations, the information that we are henceforth omitting from the FR notices will be transferred to other memoranda, included in disclosure packages, and published on IA's Web site.

Modifications

IA has determined that it will no longer publish extension notices for preliminary and final results of reviews, as there are no statutory or regulatory requirements for doing so and the financial burden outweighs the benefits associated with their publication. Rather, the Department will place a memorandum extending the deadline on the official case file which, when the service becomes available, will be accessible to parties on IA ACCESS, at *http://iaaccess.trade.gov*. In addition, parties and the public will be informed of upcoming deadlines and any extensions associated with these deadlines in a calendar published on IA's Web site.

IA will cease publishing our notices of Advance Notification of Sunset Review when no such reviews are scheduled for initiation in the following month. IA has also determined to cease publishing a list of pending scope inquiries in its quarterly publication of scope decisions.

All other notices will continue to be published in the FR, in a modified and condensed format. IA will continue to include in its published notices fundamental case information (*e.g.,* segment of proceeding, an abbreviated scope description, period of review, summary of findings, summary of methodology, names of exporters/producers subject to the proceeding, margins calculated, notification of disclosure and public comment, notifications of assessment and cash deposit instructions, and a reminder of any deadlines associated with the notice's publication) in accordance with the requirements of the Act. For preliminary and final determinations of investigations, and antidumping and countervailing duty orders, IA will include the entire scope discussion in the FR, and not an abbreviated format. Abbreviated scope descriptions in other notices will provide a reference to the location of the full scope description. All other information will be transferred to separate memoranda. For example, for preliminary results of an administrative review, IA will issue a memorandum to accompany the FR notice, which will include the complete, detailed discussion of our margin calculation methodology, significant case issues, and background/history of the order. The memorandum will be a public document released to interested parties and published on IA's Web site. External services, such as Lexis and Westlaw, may also make the memorandum available to their clients in an electronically searchable format. In the coming months, IA will create such memoranda for most notices that will continue to be published in the FR and identify the content that will remain in the FR notices and the content that will be included in the separate memorandum.

Implementation

The modifications described in this notice will be incrementally implemented. Beginning May 15, 2012, IA will no longer publish extension notices in the FR. Rather, these extensions will be published in calendar form on the IA Web site, available at *http://ia.ita.doc.gov/frn/*. On that date, IA will stop publishing Advance Notification of Sunset Reviews when no such review is scheduled for initiation the following month. The next quarterly scope decision will no longer contain a list of pending scope decisions. Beginning September 1, 2012, abbreviated notices for all preliminary determinations and preliminary results of review will be published in the FR, while the memorandum accompanying each notice that includes the background, methodology, and additional content will be adopted through the notice's publication and posted on the IA Web site, available at *http://ia.ita.doc.gov/frn/ext/*.

Finally, we anticipate that other IA notices will be published in abbreviated format in the near future, following implementation of the changes discussed in this notice.

Dated: April 23, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–10354 Filed 4–27–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Consortium on ''Concrete Rheology: Enabling Metrology (CREME)'': Membership Fee Update

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: On October 25, 2011, the National Institute of Standards and Technology (NIST) published a notice of a public meeting, which was held on November 8, 2011, to explore the feasibility of establishing a NIST/Industry Consortium on Concrete Rheology: Enabling Metrology (CREME)''. The notice stated that membership fees for participation in the CREME consortium would be Twenty-five Thousand ($25,000) per year. As a result of the November 8, 2011, public

meeting, revisions have been made to the membership fee structure.

DATES: This notice is effective on April 30, 2012.

ADDRESSES: Questions about joining the consortium should be sent to Chiara Ferraris at the National Institute of Standards and Technology; 100 Bureau Drive; MS 8615; Gaithersburg, MD 20899–8615.

FOR FURTHER INFORMATION CONTACT: Chiara Ferraris or Nicos Martys via email at *chiara.ferraris@nist.gov; nicos.martys@nist.gov* or telephone at (301) 975–6711 or (301) 975–5915.

SUPPLEMENTARY INFORMATION:

CREME Consortium Description

The goal of the CREME consortium is to predict the pumpability of a grout/mortar or a concrete from the rheological properties of the materials and the geometry/material of the pipe. This goal will be achieved by developing test methods and models to measure and predict the performance parameters of grout. It is expected that the conclusions obtained for grout could be extrapolated for concrete. To move these ideas into practice and to engage industry, test bed facilities and quality control test methods for the field will be developed at NIST. The consortium will be administered by NIST. Consortium planning, research and development will be conducted by NIST staff along with at least one technical representative from each participating member company. Each member of the consortium will be required to sign a Cooperative Research and Development Agreement (''CRADA'') with NIST.

At the November 8, 2011 public meeting, organizations interested in participating in the CREME Consortium discussed membership fees and agreed to the following revisions to the membership fee structure. Initial membership fees will be Twenty Five Thousand Dollars ($25,000) per year payable by Member to NIST at the time of CRADA execution and annually thereafter, or an in-kind contribution, equitable in value and mutually acceptable to NIST and Member. In recognition of the contributions made and risks taken by the initial Consortium Members, the membership fee for Consortium Members who join after the first year will be Fifty Thousand Dollars ($50,000) or mutually acceptable to NIST and Member in-kind contribution the first year and Twenty Five Thousand Dollars ($25,000) or mutually acceptable to NIST and Member in-kind contribution each year thereafter.

Dated: April 23, 2012.

Willie E. May,

Associate Director for Laboratory Programs.

[FR Doc. 2012–10265 Filed 4–27–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA935

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coral and Coral Reefs Off the Southern Atlantic States; Exempted Fishing Permit

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

ACTION: Notice of receipt of an application for an exempted fishing permit; request for comments.

SUMMARY: NMFS announces the receipt of an application for an exempted fishing permit (EFP) from the South Carolina Aquarium. If granted, the EFP would authorize the South Carolina Aquarium to collect, with certain conditions, various species of reef fish, crabs, and lobsters in Federal waters off South Carolina and North Carolina. The specimens would be used in educational exhibits displaying South Carolina native species at the South Carolina Aquarium located in Charleston, SC.

DATES: Comments must be received no later than 5 p.m., e.t., on May 30, 2012.

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

- *Email: Kate.Michie@noaa.gov;* include in the subject line of the email comment the following document identifier: South Carolina Aquarium EFP.
- *Mail:* Kate Michie, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

The application and related documents are available for review upon written request to any of the above addresses.

FOR FURTHER INFORMATION CONTACT: Kate Michie, 727–824–5305; email: *Kate.Michie@noaa.gov.*

SUPPLEMENTARY INFORMATION: The EFP is requested under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), and regulations at 50 CFR 600.745(b) concerning exempted fishing.

The proposed specimen collection involves activities otherwise prohibited by regulations at 50 CFR part 622, as they pertain to species managed by the South Atlantic Fishery Management Council (Council) including snapper-grouper, golden crab, wreckfish, coastal migratory pelagics, dolphin and wahoo, spiny lobster, and shrimp. The applicant requires authorization to collect 1,615 live fish, crabs, lobsters, and shrimp in Federal waters off South Carolina, and sporadically in Federal waters off North Carolina. The federally-managed species to be collected over a 5-year period, listed by common name with the collection total, include: Black snapper (10); cero (12); cobia (6); coney (10); dolphin (50); golden crab (5); graysby (10); groupers *Epinephelus spp.* including, misty, red hind, rock hind, snowy, yellowedge (40); groupers *Myctoperca spp.* including black grouper, gag, yellowmouth, yellowfin, and scamp (50); grunts *Haemulon spp.* including cottonwick, margate, sailors choice, Spanish, tomtate, and white grunt (250); hogfish (8); jacks (200); king mackerel (15); little tunny (25); longspine porgy (50); triggerfish (22); porgies (65); queen snapper (2); red porgy (25); scup (50); sea bass (100); white shrimp (200); pink and brown shrimp (200); gray snapper (75); Spanish mackerel (15); spiny lobster (25); vermilion snapper (75); wahoo (5); and yellowtail snapper (15).

The project proposes to use vertical hook-and-line gear with artificial and natural baits, black sea bass pots, spiny lobster traps, golden crab traps, habitat traps, octopus traps, dip nets, and bait traps (bait traps would be used and tended while SCUBA diving). This EFP would authorize sampling operations to be conducted on four vessels designated by the South Carolina Aquarium including: F/V ON THE CLOCK SC–5264–BW; F/V CUB SCOUT SC–9288–BF; F/V MISTRESS SC–5326–BS; and a 25 ft (7.62 m) Parker NC5836P. The specimens would be opportunistically collected year-round for a period of 5 years, commencing on July 2, 2012. This EFP would not authorize the collection of species with an annual catch limit of zero (red snapper, warsaw grouper, speckled hind, goliath grouper, and Nassau grouper).

The overall intent of the project is to incorporate South Carolina native species into educational exhibits at the South Carolina Aquarium. The aquarium uses these displays of native South Carolina species to teach the public about stewardship and habitat preservation.

NMFS finds this application warrants further consideration. Based on a

preliminary review, NMFS intends to issue an EFP. Possible conditions the agency may impose on this permit, if it is granted, include but are not limited to, a prohibition of collection of specimens within marine protected areas, marine sanctuaries, special management zones, or artificial reefs without additional authorization. Additionally, NMFS prohibits the possession of Nassau grouper, goliath grouper, red snapper, speckled hind or warsaw grouper, and requires any sea turtles taken incidentally during the course of fishing or scientific research activities to be handled with due care to prevent injury to live specimens, observed for activity, and returned to the water.

A final decision on issuance of the EFP will depend on NMFS' review of public comments received on the application, consultations with the affected states, the Council, and the U.S. Coast Guard, as well as a determination that the EFP is consistent with all applicable laws.

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

Dated: April 25, 2012.

Emily H. Menashes,

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

[FR Doc. 2012–10372 Filed 4–27–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB150

International Whaling Commission; 64th Annual Meeting; Announcement of Public Meetings

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

ACTION: Notice of public meeting.

SUMMARY: This notice announces the date, time, and location of the public meeting being held prior to the 64th annual International Whaling Commission (IWC) meeting.

DATES: The public meeting will be held June 5, 2012, at 2 p.m.

ADDRESSES: The meeting will be held in the NOAA Science Center Room, 1301 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Melissa Andersen, 301–427–8385.

SUPPLEMENTARY INFORMATION: The Secretary of Commerce is responsible for discharging the domestic obligations of the United States under the International Convention for the Regulation of Whaling, 1946. The U.S. IWC Commissioner has responsibility for the preparation and negotiation of U.S. positions on international issues concerning whaling and for all matters involving the IWC. The U.S. IWC Commissioner is staffed by the Department of Commerce and assisted by the Department of State, the Department of the Interior, the Marine Mammal Commission, and other U.S. Government agencies.

A draft agenda for the annual IWC meeting should be posted on the IWC Secretariat's Web site at *http://www.iwcoffice.org* by late May.

NOAA will a hold public meeting to discuss the tentative U.S. positions for the upcoming IWC meeting. Because the meeting will address U.S. positions, the substance of the meeting must be kept confidential. Any U.S. citizen with an identifiable interest in U.S. whale conservation policy may participate, but NOAA reserves the authority to inquire about the interests of any person who appears at the meeting and to determine the appropriateness of that person's participation. In particular, persons who represent foreign interests may not attend. These stringent measures are necessary to protect the confidentiality of U.S. negotiating positions.

The June 5, 2012, meeting will be held in the NOAA Science Center Room, 1301 East-West Highway, Silver Spring, MD 20910. Photo identification is required to enter the building.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Melissa Andersen, *Melissa.Andersen@noaa.gov* or 301–427–8385, by May 23, 2012.

Dated: April 24, 2012.

Rebecca J. Lent,

Director, Office of International Affairs, National Marine Fisheries Service.

[FR Doc. 2012–10374 Filed 4–27–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB146

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to a Pile Replacement Project

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received an application from the U.S. Navy (Navy) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to construction activities as part of a pile replacement project. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to the Navy to take, by Level B Harassment only, six species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than May 30, 2012.

ADDRESSES: Comments on the application should be addressed to Tammy C. Adams, Acting Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *ITP.Laws@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

An electronic copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this

notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

Summary of Request

NMFS received an application on March 8, 2012 from the Navy for the taking of marine mammals incidental to pile removal and removal in association with a pile replacement project in the Hood Canal at Naval Base Kitsap at Bangor, WA (NBKB). This pile replacement project is proposed to occur between July 16, 2012 and July 15, 2013. This IHA would cover the second and final year of this project; NMFS previously issued an IHA for the first year of work associated with this project (76 FR 30130; May 24, 2011). In-water work, including all pile removal activities, would occur only within an approved window from July 16–February 15. Seven species of marine mammals are known from the waters surrounding NBKB: Steller sea lions (*Eumetopias jubatus*), California sea lions (*Zalophus californianus*), harbor seals (*Phoca vitulina*), killer whales (*Orcinus orca;* transient type only), Dall's porpoises (*Phocoenoides dalli*), harbor porpoises (*Phocoena phocoena*), and the humpback whale (*Megaptera novaeangliae*). These species may occur year-round in the Hood Canal, with the exception of the Steller sea lion, which is present only from fall to late spring (October to mid-April), and the California sea lion, which is not present during part of summer (late June through July). Additionally, while the Southern resident killer whale (listed as endangered under the Endangered Species Act [ESA]) is resident to the inland waters of Washington and British Columbia, it has not been observed in the Hood Canal in over 15 years and was therefore excluded from further analysis.

NBKB provides berthing and support services for OHIO Class ballistic missile submarines (SSBN), also known as TRIDENT submarines. The Navy proposes to complete necessary repairs and maintenance at the Explosive Handling Wharf #1 (EHW–1) facility at NBKB as part of a pile replacement project to restore and maintain the structural integrity of the wharf and ensure its continued functionality to support necessary operational requirements. The EHW–1 facility, constructed in 1977, has become compromised due to the deterioration of the wharf's existing piling sub-structure. Under the proposed action, ninety-six 24-in (0.6-m) diameter concrete piles, twenty-one 12-in (0.3-m) diameter steel fender piles, eight 16-in (0.4-m) diameter steel falsework piles, and one 24-in diameter steel fender pile will be removed. The proposed action represents the remainder of work planned for the initial 2-year rehabilitation plan, following the work that was completed in 2011. The Navy may continue rehabilitation work at EHW–1 in the long-term, but has no immediate plans to do so. All concrete piles would be removed via pneumatic chipping or similar method. All steel piles would be removed via vibratory hammer or direct pull; however, the analysis in this document assumes that all piles would be removed via vibratory hammer. No pile installation—and therefore no impact pile removal—is proposed for this action.

For pile removal activities, the Navy used NMFS-promulgated thresholds for assessing impacts (NMFS, 2005b, 2009), outlined later in this document. The Navy used recommended spreading loss formulas (the practical spreading loss equation for underwater sounds and the spherical spreading loss equation for airborne sounds) and empirically-measured source levels from 18- to 30-in (0.5- to 0.8-m) diameter steel pile removal events, or concrete pile removal events using similar methodology, to estimate potential marine mammal exposures. Predicted exposures are outlined later in this document. The calculations predict that no Level A harassments would occur associated with pile removal activities, and that as many as 1,416 Level B harassments may occur during the pile replacement project from generation of underwater sound. No incidents of harassment were predicted from airborne sounds associated with pile removal.

Description of the Specified Activity

NBKB is located on the Hood Canal approximately 20 miles (32 km) west of Seattle, Washington (see Figures 2–1 through 2–3 in the Navy's application). NBKB provides berthing and support services for OHIO Class ballistic missile submarines (SSBN), also known as TRIDENT submarines. The Navy proposes a pile replacement project to maintain the structural integrity of EHW–1 and ensure its continued functionality to support operational requirements of the TRIDENT submarine program. The proposed actions with the potential to cause harassment of marine mammals within the waterways adjacent to NBKB, under the MMPA, are vibratory and pneumatic chipping pile removal operations associated with the pile replacement project. The proposed activities that would be authorized by this IHA would occur between July 16, 2012 and February 15, 2013. All in-water construction activities within the Hood

Canal are only permitted during July 16–February 15 in order to protect spawning fish populations.

As part of the Navy's sea-based strategic deterrence mission, the Navy Strategic Systems Programs directs research, development, manufacturing, test, evaluation, and operational support for the TRIDENT Fleet Ballistic Missile program. Maintenance and development of necessary facilities for handling of explosive materials is part of these duties. The proposed action includes the removal of 126 steel and concrete piles at EHW–1. Please see Figures 1–1 through 1–3 of the Navy's application for conceptual and schematic representations of the work proposed for EHW–1. Of the piles requiring removal, 96 are 24-in (0.6-m) diameter hollow pre-cast concrete piles which will be excised down to the mud line. One additional 24-in steel fender pile, twenty-one 12-in (0.3-m) steel fender piles, and eight 16-in (0.4-m) steel falsework piles will be extracted using a vibratory hammer or direct pull. Also included in the repair work is removal of the fragmentation barrier and walkway, construction of new cast-in-place pile caps (concrete formwork may be located below Mean Higher High Water [MHHW]), installation of the pre-stressed superstructure, installation of four sled-mounted cathodic protection (CP) systems, and installation or re-installation of related appurtenances.

During the first year of work, conducted under an IHA issued by NMFS (76 FR 30130; May 24, 2011), the Navy completed the following work:

- Removal of ten steel fender piles (eight 12-in diameter piles and two 24-in diameter piles) and associated fender system components. A fender pile, typically set beside slips or wharves, guides approaching vessels and is driven so as to yield slightly when struck in order to lessen the shock of contact. The fender system components attach the fender piles to the structure, and are above the water line.
- Installation of twenty-eight 30-in diameter steel piles and eight 16-in diameter steel falsework piles. These eight falsework piles would be removed in 2012.

In addition, the Navy plans to complete construction of six cast-in-place concrete pile caps in early 2012. Pile caps are situated on the tops of the steel piles located directly beneath the structure, and function as a load transfer mechanism between the superstructure and the piles. This work is above-water, and does not have the potential to impact marine mammals.

During the 2012–13 in-water work season, the Navy proposes to complete the 2-year rehabilitation project, including the following work:

- Removal of 126 steel and concrete piles, as described previously.
- Removal of the concrete fragmentation barrier and walkway, used to get from the Wharf Apron to the Outboard Support. These structures will likely be removed by cutting the concrete into sections (potentially three or four in total) using a saw, or other equipment, and removed using a crane. The crane will lift the sections from the existing piles and place them on a barge.
- Installation of a pre-stressed concrete superstructure. The superstructure is the concrete deck of the wharf found above, or supported by, the caps or sills, including the deck, girders, and stringers.
- Installation of three sled-mounted passive CP systems. The passive CP system is a metallic rod or anode that is attached to a metal object to protect it from corrosion. The anode is composed of a more active metal than that on which it is mounted and is more easily oxidized, thus corroding first and acting as a barrier against corrosion for the object to which it is attached. This system would be banded to the steel piles to prevent metallic surfaces of the wharf from corroding due to the saline conditions in Hood Canal.
- Installation or re-installation of related appurtenances, the associated parts of the superstructure that connect the superstructure to the piles. These pieces include components such as bolts, welded metal hangers and fittings, brackets, etc.

Concrete piles would be removed with a pneumatic chipping hammer or another tool capable of cutting through concrete. A pneumatic chipping hammer is similar to a jackhammer or other similar electric power tool, but uses compressed air instead of electricity, and consists of a steel piston that is reciprocated in a steel barrel. On its forward stroke the piston strikes the end of the chisel, reciprocating at a rate such that the chisel edge vibrates against the concrete with enough force to fragment or splinter the pile. When possible, piles will be first scored by a diver using a smaller pneumatic hammer, with the pile then moved slightly back and forth to break at the score. Remaining parts of the pile will be chipped away with the larger pneumatic hammer. If the scoring/breaking technique is not feasible, the entire base of the pile will be chipped away with a pneumatic hammer such that the pile may be removed. Concrete debris will be captured as practicable using debris curtains/sheeting and removed from the project area.

The installation of the concrete pile caps, the concrete superstructure, and sled-mounted passive CP systems will occur out of the water and on the tops of the piles or attached to the wharf's superstructure. The removal of the fragmentation barrier and walkway will occur above the water with best management practices in place to prevent material from entering the water. While sound transmission from these activities could occur and enter the water, this is expected to be minimal, and above-water work is not considered to have the potential to impact marine mammals. However, these activities will occur during the in-water work window of July 16 to February 15 to minimize the potential for impacts to other listed species, particularly fish. The Navy will conduct acoustic monitoring for pneumatic chipping only—acoustic monitoring was conducted in 2011 for vibratory pile installation at NBKB—and will monitor the presence and behavior of marine mammals during vibratory pile removal and pneumatic chipping activities.

The Navy estimates that steel pile removal will occur at an average rate of two piles per day, and is expected to require no more than 1 hour per pile. It is estimated that concrete pile removal will occur at a rate of three piles per day, and is expected to take approximately 2 hours per pile. This results in an estimated maximum of 2 hours per day of steel pile removal, and potentially 6 hours per day of pneumatic chipping. These two activities would likely not occur on the same day, however. On the basis of these estimates, the Navy states that steel pile removal would require 15 days and concrete pile removal would require an additional 32 days. The analysis contained herein is thus based upon these numbers, and assumes that (1) all marine mammals available to be incidentally taken within the relevant area would be; and (2) individual marine mammals may only be incidentally taken once in a 24-hour period—for purposes of authorizing specified numbers of take—regardless of actual number of exposures in that period.

The number of construction barges (derrick and material) on site at any one time would vary depending on the type of construction taking place. Tug boats would tow barges to and from the construction site and position the barges for construction activity. Tug boats would leave the site once these tasks were completed and so would not be on site for extended periods. Smaller skiff-type boats would be on site performing various functions in support of

construction and monitoring requirements.

Description of Sound Sources

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in Hz or cycles per second. Wavelength is the distance between two peaks of a sound wave; lower frequency sounds have longer wavelengths than higher frequency sounds and attenuate more rapidly in shallower water. Amplitude is the height of the sound pressure wave or the 'loudness' of a sound and is typically measured using the decibel (dB) scale. A dB is the ratio between a measured pressure (with sound) and a reference pressure (sound at a constant pressure, established by scientific standards). It is a logarithmic unit that accounts for large variations in amplitude; therefore, relatively small changes in dB ratings correspond to large changes in sound pressure. When referring to SPLs (SPLs; the sound force per unit area), sound is referenced in the context of underwater sound pressure to 1 microPascal (μPa). One pascal is the pressure resulting from a force of one newton exerted over an area of one square meter. The source level represents the sound level at a distance of 1 m from the source (referenced to 1 μPa). The received level is the sound level at the listener's position.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Rms is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1975). Rms accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in all directions away from the source (similar to ripples on the surface of a pond), except in cases where the source is directional. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones. Underwater sound levels ('ambient sound') are comprised of multiple sources, including physical (e.g., waves, earthquakes, ice, atmospheric sound), biological (e.g., sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (e.g., vessels, dredging, aircraft, construction). Even in the absence of anthropogenic sound, the sea is typically a loud environment. A number of sources of sound are likely to occur within Hood Canal, including the following (Richardson *et al.,* 1995):

- *Wind and waves:* The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient noise for frequencies between 200 Hz and 50 kHz (Mitson, 1995). In general, ambient noise levels tend to increase with increasing wind speed and wave height. Surf noise becomes important near shore, with measurements collected at a distance of 8.5 km (5.3 mi) from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions.
- *Precipitation noise:* Noise from rain and hail impacting the water surface can become an important component of total noise at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times.
- *Biological noise:* Marine mammals can contribute significantly to ambient noise levels, as can some fish and shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz.
- *Anthropogenic noise:* Sources of ambient noise related to human activity include transportation (surface vessels and aircraft), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies (Richardson *et al.,* 1995). Shipping noise typically dominates the total ambient noise for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they will attenuate (decrease) rapidly (Richardson *et al.,* 1995).

In-water construction activities associated with the project would include vibratory pile removal and pneumatic chipping of concrete piles. The sounds produced by these activities are considered non-pulsed (defined in next paragraph) as opposed to pulsed sounds. The distinction between these two general sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (e.g., Ward, 1997 in Southall *et al.,* 2007). Please see Southall *et al.,* (2007) for an in-depth discussion of these concepts.

Pulsed sounds (e.g., explosions, gunshots, sonic booms, and impact pile removal) are brief, broadband, atonal transients (ANSI, 1986; Harris, 1998) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a decay period that may include a period of diminishing, oscillating maximal and minimal pressures. Pulsed sounds generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulse (intermittent or continuous sounds) can be tonal, broadband, or both. Some of these non-pulse sounds can be transient signals of short duration but without the essential properties of pulses (e.g., rapid rise time). Examples of non-pulse sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile removal, and active sonar systems. The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Vibratory hammers install or remove piles by vibrating them—thus causing liquefaction of the surrounding substrate—which then allows the piles to be more easily pushed or pulled. Vibratory hammers produce significantly less sound than impact hammers. Peak SPLs during vibratory installation may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile removal of the same-sized pile (Caltrans, 2009). Rise time is slower, reducing the probability and severity of injury (USFWS, 2009), and sound energy is distributed over a greater amount of time (Nedwell and Edwards, 2002; Carlson *et al.,* 2001).

Ambient Sound

The underwater acoustic environment consists of ambient sound, defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995). The ambient underwater sound level of a region is defined by the total acoustical energy being generated by known and unknown sources, including sounds from both natural and anthropogenic sources. The sum of the various natural and anthropogenic sound sources at any given location and time depends not

only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, the ambient sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995).

In the vicinity of the project area, the average broadband ambient underwater sound levels were measured at 114 dB re 1μPa between 100 Hz and 20 kHz (Slater, 2009). Peak spectral sound from industrial activity was noted below the 300 Hz frequency, with maximum levels of 110 dB re 1μPa noted in the 125 Hz band. In the 300 Hz to 5 kHz range, average levels ranged between 83–99 dB re 1μPa. Wind-driven wave sound dominated the background sound environment at approximately 5 kHz and above, and ambient sound levels flattened above 10 kHz.

Airborne sound levels at NBKB vary based on location but are estimated to average around 65 dBA (A-weighted decibels) in the residential and office park areas, with traffic sound ranging from 60–80 dBA during daytime hours (Cavanaugh and Tocci, 1998). The highest levels of airborne sound are produced along the waterfront and at the ordnance handling areas, where estimated sound levels range from 70–90 dBA and may peak at 99 dBA for short durations. These higher sound levels are produced by a combination of sound sources including heavy trucks, forklifts, cranes, marine vessels, mechanized tools and equipment, and other sound-generating industrial or military activities.

Sound Thresholds

Since 1997, NMFS has used generic sound exposure thresholds to determine when an activity in the ocean that produces sound might result in impacts to a marine mammal such that a take by harassment might occur (NMFS, 2005b). To date, no studies have been conducted that examine impacts to marine mammals from pile removal sounds from which empirical sound thresholds have been established. Current NMFS practice regarding exposure of marine mammals to sound is that cetaceans and pinnipeds exposed to sound levels of 180 and 190 dB rms or above, respectively, are considered to have been taken by Level A (i.e., injurious) harassment. Behavioral harassment (Level B) is considered to have occurred when marine mammals are exposed to sounds at or above 120 dB rms for continuous sound (such as would be produced by the proposed activities), but below injurious thresholds. For airborne sound, pinniped disturbance from haul-outs has been documented at 100 dB (unweighted) for pinnipeds in general, and at 90 dB (unweighted) for harbor seals. NMFS uses these levels as guidelines to estimate when harassment may occur.

Distance to Sound Thresholds

Underwater Sound Propagation Formula—Pile removal would generate underwater noise that potentially could result in disturbance to marine mammals in the project area. Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. A practical sound propagation modeling technique was used by the Navy to estimate the range from the activity to various SPL thresholds in water. This model follows a geometric propagation loss based on the distance from the pile, resulting in a 4.5 dB reduction in level for each doubling of distance from the source. In this model, the SPL at some distance away from the source (e.g., driven pile) is governed by a measured source level, minus the transmission loss of the energy as it dissipates with distance. The formula for underwater TL is:

$TL = 15 * \log_{10}(R_1/R_2)$, where

R_1 = the distance of the modeled SPL from the pile, and

R_2 = the distance from the pile of the initial measurement.

The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source (20*log[range]). Cylindrical spreading occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source (10*log[range]). The propagation environment along the NBKB waterfront conforms to neither spherical nor cylindrical spreading; as the receiver moves away from the shoreline, the water increases in depth, resulting in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions. Since there is no available data regarding propagation loss along the NBKB waterfront, a practical spreading loss model was adopted as the most likely approximation of the sound propagation environment. Hydroacoustic monitoring results from the Navy's Test Pile Project (see 76 FR 38361; July 30, 2011) and from the first year of EHW–1 construction will be used, when available, to confirm the validity of the practical spreading model for estimating acoustic propagation in the project area.

Underwater Sound from Pile Removal—The intensity of pile removal sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. Despite a large quantity of literature regarding SPLs recorded from pile removal projects, there is a general lack of empirical data regarding vibratory pile removal and the acoustic output of chipping hammers. In order to determine reasonable SPLs and their associated affects on marine mammals that are likely to result from pile removal at NBKB, studies with similar properties to the proposed action were evaluated. Overall, studies which met the following parameters were considered: (1) *Pile size and materials:* Steel pipe pile removal (12- to 24-in diameter) and concrete pile removal with chipping hammer or similar method (because these tools are used to chip portions of concrete from the pile, sound output is not tied to pile size); (2) *Hammer machinery:* Vibratory hammer for steel piles and pneumatic chipping hammer or similar tool for concrete piles; and (3) *Physical environment:* Shallow depth (less than 100 ft [30 m]). Table 1 details representative SPLs that have been recorded from similar construction activities in recent years. Due to the similarity of these actions and the Navy's proposed action, these values represent reasonable SPLs which could be anticipated, and which were used in the acoustic modeling and analysis.

TABLE 1—REPRESENTATIVE UNDERWATER SPLS FOR PILE REMOVAL

Project and location	Pile size and type	Removal method	Water depth	Measured SPLs
California (location not specified).	24-in steel pipe pile	Vibratory hammer	~15 m (49 ft)	165 dB re: 1 μPa (rms) at 10 m (33 ft)
United Kingdom (location not specified).	Concrete (size not specified).	Jackhammer	Unknown	161 dB re: 1 μPa (rms) at 1 m (3.3 ft)

Sources: Caltrans, 2007; Nedwell and Howell, 2004.

Based on these representative SPLs, the source levels used in this analysis are 180 dB re: 1 μPa (rms) for vibratory removal and 161 dB re: 1 μPa (rms) for pneumatic chipping, which is considered analogous to the jackhammer. Therefore, vibratory removal would produce SPLs that are below the injury threshold for pinnipeds, while SPLs resulting from pneumatic chipping are well below levels that may cause injury to any marine mammal. All calculated distances to and the total area encompassed by the marine mammal underwater sound thresholds are provided in Table 2.

TABLE 2—CALCULATED DISTANCE(S) TO AND AREA ENCOMPASSED BY UNDERWATER MARINE MAMMAL SOUND THRESHOLDS

Threshold	Distance	Area, km^2 (mi^2)
Vibratory removal, cetacean injury (180 dB)	1 m (3.3 ft)	0.000003 (0.000001)
Vibratory removal, disturbance (120 dB)	10,000 m (32,808 ft)	314 (121)
Pneumatic chipping, disturbance (120 dB)	542 m (1,778 ft)	0.9 (0.4)

The values presented in Tables 2 assume a field free of obstruction, which is unrealistic, because Hood Canal does not represent open water conditions (free field). Therefore, sounds would attenuate as they encounter land masses or bends in the canal. As a result, some of the distances and areas of impact calculated cannot actually be attained at the project area. The actual distances to the behavioral disturbance thresholds for vibratory pile removal and pneumatic chipping may be shorter than those calculated due to the irregular contour of the waterfront, the narrowness of the canal, and the maximum fetch (furthest distance sound waves travel without obstruction [i.e., line of sight]) at the project area. The actual areas encompassed by sound exceeding or reaching the 120 dB threshold are 35.9 km^2 and 0.6 km^2 for vibratory removal and pneumatic chipping, respectively. See Figures 6–1 and 6–2 of the Navy's application for a depiction of the size of areas in which each underwater sound threshold is predicted to occur at the project area due to pile removal.

Airborne Sound Propagation Formula—Pile removal can generate airborne sound that could potentially result in disturbance to marine mammals (specifically, pinnipeds) which are hauled out or at the water's surface. As a result, the Navy analyzed the potential for pinnipeds hauled out or swimming at the surface near NBKB to be exposed to airborne SPLs that could result in Level B behavioral harassment. The appropriate airborne sound threshold for behavioral disturbance for all pinnipeds, except harbor seals, is 100 dB re: 20 μPa rms (unweighted). For harbor seals, the threshold is 90 dB re: 20 μPa rms (unweighted). A spherical spreading loss model, assuming average atmospheric conditions, was used to estimate the distance to the airborne thresholds. The formula for calculating spherical spreading loss is:

$TL = 20\log(R_1/R_2)$

TL = Transmission loss

R_1 = the distance of the modeled SPL from the pile, and

R_2 = the distance from the pile of the initial measurement.

Airborne Sound from Pile Installation—As was discussed for underwater sound from pile removal, the intensity of pile removal sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. In order to determine reasonable airborne SPLs and their associated effects on marine mammals that are likely to result from pile removal at NBKB, studies with similar properties to the proposed action, as described previously, were evaluated. Table 3 details representative pile removal activities that have occurred in recent years. Due to the similarity of these actions and the Navy's proposed action, they represent reasonable SPLs which could be anticipated. Given these data, representative source levels are approximately 116.5 dB re: 20 μPa rms (unweighted) for vibratory removal and 112 dB re: 20 μPa rms (unweighted) for chipping.

TABLE 3—REPRESENTATIVE AIRBORNE SPLS

Project and location	Pile size and type	Method	Water depth	Measured SPLs
Wahkiakum Ferry Terminal, WA.	18-in (0.5 m) steel pipe pile.	Vibratory	~ 3–4 m (10–12 ft)	87.5 dB re: 20 μPa (rms) at 50 ft (15.2 m)
Keystone Ferry Terminal, WA.	30-in (0.8 m) steel pipe pile.	Vibratory	~ 9 m (30 ft)	98 dB re: 20 μPa (rms) at 36 ft (10.9 m)

TABLE 3—REPRESENTATIVE AIRBORNE SPLS—Continued

Project and location	Pile size and type	Method	Water depth	Measured SPLs
Not specified	Concrete, size not specified.	Chipping hammer	Unknown	92 dB re: 20 μPa (rms) at 10 m (33 ft)

Sources: WSDOT, 2010; Cheremisinoff, 1996.

The distances to the airborne thresholds were calculated with the airborne transmission loss formula presented previously. All calculated distances to and the total area encompassed by the marine mammal underwater sound thresholds are provided in Table 4.

TABLE 4—CALCULATED DISTANCE(S) TO AND AREA ENCOMPASSED BY AIRBORNE MARINE MAMMAL SOUND THRESHOLDS

Threshold	Distance	Area, km^2 (mi^2)
Vibratory removal, pinniped disturbance (100 dB)	7 m (23 ft)	0.0002 (0.0001)
Vibratory removal, harbor seal disturbance (90 dB)	20 m (66 ft)	0.001 (0.0005)
Pneumatic chipping, pinniped disturbance (100 dB)	4 m (13 ft)	0.00005 (0.00002)
Pneumatic chipping, harbor seal disturbance (90 dB)	13 m (43 ft)	0.0005 (0.0002)

All airborne distances are less than those calculated for underwater sound thresholds for disturbance. Protective measures would be in place out to the distances calculated for the underwater thresholds, and the distances for the airborne thresholds would be covered fully by mitigation and monitoring measures in place for underwater sound thresholds. Construction sound associated with the project would not extend beyond the disturbance zone for underwater sound that would be established to protect pinnipeds. No haul-outs or rookeries are located within the airborne harassment radii. See Figures 6–3 through 6–6 of the Navy's application for a depiction of the size of areas in which each airborne sound threshold is predicted to occur at the project area due to pile removal.

Description of Marine Mammals in the Area of the Specified Activity

There are seven marine mammal species, four cetaceans and three pinnipeds, which may inhabit or transit through the waters nearby NBKB in the Hood Canal. These include the transient killer whale, harbor porpoise, Dall's porpoise, Steller sea lion, California sea lion, harbor seal, and humpback whale. While the Southern Resident killer whale is resident to the inland waters of Washington and British Columbia, it has not been observed in the Hood Canal in over 15 years, and therefore was excluded from further analysis. The Steller sea lion and humpback whale are the only marine mammals that may occur within the Hood Canal that are listed under the ESA; the humpback whale is listed as endangered and the eastern distinct population segment (DPS) of Steller sea lion is listed as threatened. All marine mammal species are protected under the MMPA. This section summarizes the population status and abundance of these species, followed by detailed life history information. Table 5 lists the marine mammal species that occur in the vicinity of NBKB and their estimated densities within the project area during the proposed timeframe. Daily maximum abundance data only is presented for sea lions because sightings data have no defined survey area.

TABLE 5—MARINE MAMMALS THAT MAY BE PRESENT IN THE HOOD CANAL

Species	Stock abundance [1]	Relative occurrence in Hood Canal [2]	Season of occurrence	Density during in-water work season (individuals/km^2)
Steller sea lion—Eastern U.S. DPS.	58,334–72,223 [3]	Common	Fall to late spring (Oct to mid-April).	[4] 1.2
California sea lion—U.S. stock	238,000	Common	Fall to late spring (Aug to early June).	[4] 26.2
Harbor seal—WA inland waters stock.	14,612 (CV = 0.15)	Common	Year-round; resident species in Hood Canal.	[5] 1.31
Humpback whale—CA/OR/WA stock.	2,043 (CV = 0.10)	Extremely rare	Year-round in Puget Sound	[6] 0.003
Killer whale—West Coast transient stock.	354	Rare	Year-round	[7] 0.038
Dall's porpoise—CA/OR/WA stock.	42,000 (CV = 0.33)	Rare	Year-round	[7] 0.014
Harbor porpoise—WA inland waters stock.	10,682 (CV = 0.38)	Possible common to occasional presence.	Year-round	[9] 0.250

[1] NMFS marine mammal stock assessment reports at: *http://www.nmfs.noaa.gov/pr/sars/species.htm.*

[2] Common: Consistently present either year-round or during non-breeding season; Occasional: Documented at irregular intervals; Rare: Sporadic sightings not occurring on a yearly basis; Extremely rare: Generally not observed over multiple years.

[3] Range calculated on basis of total pup counts 2006–2009 and extrapolation factors derived from vital rate parameters estimated for an increasing population.

[4] Density for sea lions is not calculated due to the lack of a defined survey area for sightings data. Abundance calculated as the average of the maximum number of individuals present during shore-based surveys at NBKB waterfront during the in-water construction season.
[5] Jeffries *et al.,* 2003; Huber *et al.,* 2001.
[6] Density calculated on the basis of one individual observed in Hood Canal.
[7] Density calculated as the maximum number of individuals present at a given time during occurrences of killer whales at Hood Canal in 2003 and 2005 (London, 2006) divided by the area of Hood Canal.
[8] Density calculated from number of individuals observed in 18 vessel-based surveys of NBKB waterfront area (Tannenbaum *et al.,* 2009, 2011).
[9] Density calculated from number of individuals observed during vessel-based surveys conducted during Test Pile Program and corrected for detectability (Navy, in prep.).

Steller Sea Lion

Species Description—Steller sea lions are the largest members of the Otariid (eared seal) family. Steller sea lions show marked sexual dimorphism, in which adult males are noticeably larger and have distinct coloration patterns from females. Males average approximately 1,500 lb (680 kg) and 10 ft (3 m) in length; females average about 700 lb (318 kg) and 8 ft (2.4 m) in length. Adult females have a tawny to silver-colored pelt. Males are characterized by dark, dense fur around their necks, giving a mane-like appearance, and light tawny coloring over the rest of their body (NMFS, 2008a). Steller sea lions are distributed mainly around the coasts to the outer continental shelf along the North Pacific Ocean rim from northern Hokkaido, Japan through the Kuril Islands and Okhotsk Sea, Aleutian Islands and central Bering Sea, southern coast of Alaska and south to California. The population is divided into the Western and the Eastern Distinct Population Segments (DPSs) at 144° W (Cape Suckling, Alaska). The Western DPS includes Steller sea lions that reside in the central and western Gulf of Alaska, Aleutian Islands, as well as those that inhabit coastal waters and breed in Asia (e.g., Japan and Russia). The Eastern DPS extends from California to Alaska, including the Gulf of Alaska.

Status—Steller sea lions were listed as threatened range-wide under the ESA in 1990. After division into two DPSs, the western DPS was listed as endangered under the ESA in 1997, while the eastern DPS remained classified as threatened. Animals found in the Region of Activity are from the eastern DPS (NMFS, 1997a; Loughlin, 2002; Angliss and Outlaw, 2005). The eastern DPS breeds in rookeries located in southeast Alaska, British Columbia, Oregon, and California. While some pupping has been reported recently along the coast of Washington, there are no active rookeries in Washington. A final revised species recovery plan addresses both DPSs (NMFS, 2008a).

NMFS designated critical habitat for Steller sea lions in 1993. Critical habitat is associated with breeding and haul-out sites in Alaska, California, and Oregon, and includes so-called 'aquatic zones' that extend 3,000 ft (900 m) seaward in state and federally managed waters from the baseline or basepoint of each major rookery in Oregon and California (NMFS, 2008a). Three major rookery sites in Oregon (Rogue Reef, Pyramid Rock, and Long Brown Rock and Seal Rock on Orford Reef at Cape Blanco) and three rookery sites in California (Ano Nuevo I, Southeast Farallon I, and Sugarloaf Island and Cape Mendocino) are designated critical habitat (NMFS, 1993). There is no designated critical habitat within the Region of Activity.

Factors that have previously been identified as threats to Steller sea lions include reduced food availability, possibly resulting from competition with commercial fisheries; incidental take and intentional kills during commercial fish harvests; subsistence take; entanglement in marine debris; disease; pollution; and harassment. Steller sea lions are also sensitive to disturbance at rookeries (during pupping and breeding) and haul-out sites.

The Recovery Plan for the Steller Sea Lion (NMFS, 2008a) states that the overall abundance of Steller sea lions in the eastern DPS has increased for a sustained period of at least three decades, and that pup production has increased significantly, especially since the mid-1990s. Between 1977 and 2002, researchers estimated that overall abundance of the eastern DPS had increased at an average rate of 3.1 percent per year (NMFS, 2008a; Pitcher *et al.,* 2007). NMFS' most recent stock assessment report estimates that population for the eastern DPS is a minimum of 52,847 individuals; this estimate is not corrected for animals at sea, and actual population is estimated to be within the range 58,334 to 72,223 (Allen and Angliss, 2010). The minimum count for Steller sea lions in Oregon and Washington was 5,813 in 2002 (Pitcher *et al.,* 2007; Allen and Angliss, 2010).

The abundance of the eastern DPS of Steller sea lions is increasing throughout the northern portion of its range (southeast Alaska and British Columbia), and stable or increasing in the central portion (Oregon through central California). Surveys indicate that pup production in Oregon increased at 3 percent per year from 1990–2009, while pup production in California increased at 5 percent per year between 1996 and 2009, with the number of non-pups reported as stable. The best available information indicates that, overall, the eastern DPS has increased from an estimated 18,040 animals in 1979 to an estimated 63,488 animals in 2009; therefore the overall estimated rate of increase for this period is 4.3 percent per year (NMML, 2012).

In the far southern end of Steller sea lion range (Channel Islands in southern California), population declined significantly after the 1930s—probably due to hunting and harassment (Bartholomew and Boolootian, 1960; Bartholomew, 1967)—and several rookeries and haul-outs have been abandoned. The lack of recolonization at the southernmost portion of the range (e.g., San Miguel Island rookery), despite stability in the non-pup portion of the overall California population, is likely a response to a suite of factors, including changes in ocean conditions (e.g., warmer temperatures) that may be contributing to habitat changes that favor California sea lions over Steller sea lions (NMFS, 2007) and competition for space on land, and possibly prey, with species that have experienced explosive growth over the past three decades (California sea lions and northern elephant seals [*Mirounga angustirostris*]). Although recovery in California has lagged behind the rest of the DPS, this portion of the DPS' range has recently shown a positive growth rate (NMML, 2012). While non-pup counts in California in the 2000s are only 34 percent of pre-decline counts (1927–47), the population has increased significantly since 1990.

Despite the abandonment of certain rookeries in California, pup production at other rookeries in California has increased over the last 20 years and, overall, the eastern DPS has increased at an average annual growth rate of 4.3 percent per year for 30 years. Even though these rookeries might not be recolonized, their loss has not prevented the increasing abundance of Steller sea lions in California or in the eastern DPS overall.

Because the eastern DPS of Steller sea lion is currently listed as threatened under the ESA, it is therefore designated as depleted and classified as a strategic stock under the MMPA. However, the eastern DPS has been considered a potential candidate for removal from listing under the ESA by the Steller sea lion recovery team and NMFS (NMFS, 2008), based on observed annual rates of increase. Although the stock size has increased, the status of this stock relative to its Optimum Sustainable Population (OSP) size is unknown. The overall annual rate of increase of the eastern stock has been consistent and long-term, and may indicate that this stock is reaching OSP.

Behavior and Ecology—Steller sea lions forage near shore and in pelagic waters. They are capable of traveling long distances in a season and can dive to approximately 1,300 ft (400 m) in depth. They also use terrestrial habitat as haul-out sites for periods of rest, molting, and as rookeries for mating and pupping during the breeding season. At sea, they are often seen alone or in small groups, but may gather in large rafts at the surface near rookeries and haul-outs. Steller sea lions prefer the colder temperate to sub-arctic waters of the North Pacific Ocean. Haul-outs and rookeries usually consist of beaches (gravel, rocky or sand), ledges, and rocky reefs. In the Bering and Okhotsk Seas, sea lions may also haul-out on sea ice, but this is considered atypical behavior (NOAA, 2010a).

Steller sea lions are gregarious animals that often travel or haul out in large groups of up to 45 individuals (Keple, 2002). At sea, groups usually consist of female and subadult males; adult males are usually solitary while at sea (Loughlin, 2002). In the Pacific Northwest, breeding rookeries are located in British Columbia, Oregon, and northern California. Steller sea lions form large rookeries during late spring when adult males arrive and establish territories (Pitcher and Calkins, 1981). Large males aggressively defend territories while non-breeding males remain at peripheral sites or haul-outs. Females arrive soon after and give birth. Most births occur from mid-May through mid-July, and breeding takes place shortly thereafter. Most pups are weaned within a year. Non-breeding individuals may not return to rookeries during the breeding season but remain at other coastal haul-outs (Scordino, 2006).

Steller sea lions are opportunistic predators, feeding primarily on fish and cephalopods, and their diet varies geographically and seasonally (Bigg, 1985; Merrick *et al.,* 1997; Bredesen *et al.,* 2006; Guenette *et al.,* 2006). Foraging habitat is primarily shallow, nearshore and continental shelf waters; freshwater rivers; and also deep waters (Reeves *et al.,* 2008; Scordino, 2010). Steller sea lions occupy major winter haul-out sites on the coast of Vancouver Island in the Strait of Juan de Fuca and the Georgia Basin (Bigg, 1985; Olesiuk, 2008); the closest breeding rookery to the project area is at Carmanah Point near the western entrance to the Strait of Juan de Fuca. There are no known breeding rookeries in Washington (NMFS, 1992; Angliss and Outlaw, 2005) but Eastern stock Steller sea lions are present year-round along the outer coast of Washington at four major haul-out sites (NMFS, 2008a). Both sexes are present in Washington waters; these animals are likely immature or non-breeding adults from rookeries in other areas (NMFS, 2008a). In Washington, Steller sea lions primarily occur at haul-out sites along the outer coast from the Columbia River to Cape Flattery. In inland waters, Steller sea lions use haul-out sites along the Vancouver Island coastline of the Strait of Juan de Fuca (Jeffries *et al.,* 2000; COSEWIC, 2003; Olesiuk, 2008). Numbers vary seasonally in Washington waters with peak numbers present during the fall and winter months (Jeffries *et al.,* 2000). The highest breeding season Steller sea lion count at Washington haul-out sites was 847 individuals during the period from 1978 to 2001 (Pitcher *et al.,* 2007). Non-breeding season surveys of Washington haul-out sites reported as many as 1,458 individuals between 1980 and 2001 (NMFS, 2008a).

Steller sea lions are occasionally present at the Toliva Shoals haul-out site in south Puget Sound (Jeffries *et al.,* 2000) and a rock three miles south of Marrowstone Island (NMFS, 2010). Fifteen Steller sea lions have been observed using this haul-out site. At NBKB, Steller sea lions have been observed hauled out on submarines at Delta Pier on several occasions from 2008 through 2011 during fall through spring months (October to April) (Navy 2010). Other potential haul-out sites may include isolated islands, rocky shorelines, jetties, buoys, rafts, and floats (Jeffries *et al.,* 2000). Steller sea lions likely utilize foraging habitats in Hood Canal similar to those of the California sea lion and harbor seal, which include marine nearshore and deeper water habitats.

Acoustics—Like all pinnipeds, the Steller sea lion is amphibious; while all foraging activity takes place in the water, breeding behavior is carried out on land in coastal rookeries (Mulsow and Reichmuth 2008). On land, territorial male Steller sea lions regularly use loud, relatively low-frequency calls/roars to establish breeding territories (Schusterman *et al.,* 1970; Loughlin *et al.,* 1987). The calls of females range from 0.03 to 3 kHz, with peak frequencies from 0.15 to 1 kHz; typical duration is 1.0 to 1.5 sec (Campbell *et al.,* 2002). Pups also produce bleating sounds. Individually distinct vocalizations exchanged between mothers and pups are thought to be the main modality by which reunion occurs when mothers return to crowded rookeries following foraging at sea (Mulsow and Reichmuth, 2008).

Mulsow and Reichmuth (2008) measured the unmasked airborne hearing sensitivity of one male Steller sea lion. The range of best hearing sensitivity was between 5 and 14 kHz. Maximum sensitivity was found at 10 kHz, where the subject had a mean threshold of 7 dB. The underwater hearing threshold of a male Steller sea lion was significantly different from that of a female. The peak sensitivity range for the male was from 1 to 16 kHz, with maximum sensitivity (77 dB re: 1μPa-m) at 1 kHz. The range of best hearing for the female was from 16 to above 25 kHz, with maximum sensitivity (73 dB re: 1μPa-m) at 25 kHz. However, because of the small number of animals tested, the findings could not be attributed to either individual differences in sensitivity or sexual dimorphism (Kastelein *et al.,* 2005).

California Sea Lion

Species Description—California sea lions are members of the Otariid family (eared seals). The species, *Zalophus californianus,* includes three subspecies: *Z. c. wollebaeki* (in the Galapagos Islands), *Z. c. japonicus* (in Japan, but now thought to be extinct), and *Z. c. californianus* (found from southern Mexico to southwestern Canada; referred to here as the California sea lion) (Carretta *et al.,* 2007). The California sea lion is sexually dimorphic. Males may reach 1,000 lb (454 kg) and 8 ft (2.4 m) in length; females grow to 300 lb (136 kg) and 6 ft (1.8 m) in length. Their color ranges from chocolate brown in males to a lighter, golden brown in females. At around five years of age, males develop a bony bump on top of the skull called a sagittal crest. The crest is visible in the dog-like profile of male sea lion heads, and hair around the crest gets lighter with age.

Status—The U.S. stock of California sea lions is estimated at 238,000 and the minimum population size of this stock is 141,842 individuals (Carretta *et al.,* 2007). These numbers are from counts

during the 2001 breeding season of animals that were ashore at the four major rookeries in southern California and at haul-out sites north to the Oregon/California border. Sea lions that were at-sea or hauled-out at other locations were not counted (Carretta *et al.,* 2007). The stock has likely reached its carrying capacity and, even though current total human-caused mortality is unknown (due to a lack of observer coverage in the California set gillnet fishery that historically has been the largest source of human-caused mortalities), California sea lions are not considered a strategic stock under the MMPA because total human-caused mortality is still likely to be less than the potential biological removal (PBR). An estimated 3,000 to 5,000 California sea lions migrate to waters of Washington and British Columbia during the non-breeding season from September to May (Jeffries *et al.,* 2000). Peak numbers of up to 1,000 California sea lions occur in Puget Sound (including Hood Canal) during this time period (Jeffries *et al.,* 2000).

Distribution—The geographic distribution of California sea lions includes a breeding range from Baja California, Mexico to southern California. During the summer, California sea lions breed on islands from the Gulf of California to the Channel Islands and seldom travel more than about 31 mi (50 km) from the islands (Bonnell *et al.,* 1983). The primary rookeries are located on the California Channel Islands of San Miguel, San Nicolas, Santa Barbara, and San Clemente (Le Boeuf and Bonnell, 1980; Bonnell and Dailey, 1993). Their distribution shifts to the northwest in fall and to the southeast during winter and spring, probably in response to changes in prey availability (Bonnell and Ford, 1987).

The non-breeding distribution extends from Baja California north to Alaska for males, and encompasses the waters of California and Baja California for females (Reeves *et al.,* 2008; Maniscalco *et al.,* 2004). In the non-breeding season, an estimated 3,000–5,000 adult and sub-adult males migrate northward along the coast to central and northern California, Oregon, Washington, and Vancouver Island from September to May (Jeffries *et al.,* 2000) and return south the following spring (Mate, 1975; Bonnell *et al.,* 1983). Along their migration, they are occasionally sighted hundreds of miles offshore (Jefferson *et al.,* 1993). Females and juveniles tend to stay closer to the rookeries (Bonnell *et al.,* 1983).

California sea lions are present in Hood Canal during much of the year with the exception of mid-June through August, and occur regularly in the vicinity of the project site, as observed during Navy waterfront surveys conducted at NBKB from April 2008 through June 2010 (Navy, 2010). They are known to utilize man-made structures such as piers, jetties, offshore buoys, log booms, and oil platforms (Riedman, 1990), and are often seen rafted off of river mouths (Jeffries *et al.,* 2000). Although there are no regular California sea lion haul-outs known within the Hood Canal (Jeffries *et al.,* 2000), they are frequently observed hauled out at several opportune areas at NBKB (e.g., submarines, floating security fence, barges). As many as 58 California sea lions have been observed hauled out together at NBKB (Agness and Tannenbaum, 2009a; Tannenbaum *et al.,* 2009a; Walters, 2009). California sea lions have also been observed swimming in the Hood Canal in the vicinity of the project area on several occasions and likely forage in both nearshore marine and inland marine deeper waters (DoN, 2001a).

Behavior and Ecology—California sea lions feed on a wide variety of prey, including many species of fish and squid (Everitt *et al.,* 1981; Roffe and Mate, 1984; Antonelis *et al.,* 1990; Lowry *et al.,* 1991). In the Puget Sound region, they feed primarily on fish such as Pacific hake (*Merluccius productus*), walleye pollock (*Theragra chalcogramma*), Pacific herring (*Clupea pallasii*), and spiny dogfish (*Squalus acanthias*) (Calambokidis and Baird, 1994). In some locations where salmon runs exist, California sea lions also feed on returning adult and out-migrating juvenile salmonids (London, 2006). Sexual maturity occurs at around four to five years of age for California sea lions (Heath, 2002). California sea lions are gregarious during the breeding season and social on land during other times.

Acoustics—On land, California sea lions make incessant, raucous barking sounds; these have most of their energy at less than 2 kHz (Schusterman *et al.,* 1967). Males vary both the number and rhythm of their barks depending on the social context; the barks appear to control the movements and other behavior patterns of nearby conspecifics (Schusterman, 1977). Females produce barks, squeals, belches, and growls in the frequency range of 0.25–5 kHz, while pups make bleating sounds at 0.25–6 kHz. California sea lions produce two types of underwater sounds: clicks (or short-duration sound pulses) and barks (Schusterman *et al.,* 1966, 1967; Schusterman and Baillet, 1969). All underwater sounds have most of their energy below 4 kHz (Schusterman *et al.,* 1967).

The range of maximal hearing sensitivity underwater is between 1–28 kHz (Schusterman *et al.,* 1972). Functional underwater high frequency hearing limits are between 35–40 kHz, with peak sensitivities from 15–30 kHz (Schusterman *et al.,* 1972). The California sea lion shows relatively poor hearing at frequencies below 1 kHz (Kastak and Schusterman, 1998). Peak hearing sensitivities in air are shifted to lower frequencies; the effective upper hearing limit is approximately 36 kHz (Schusterman, 1974). The best range of sound detection is from 2–16 kHz (Schusterman, 1974). Kastak and Schusterman (2002) determined that hearing sensitivity generally worsens with depth—hearing thresholds were lower in shallow water, except at the highest frequency tested (35 kHz), where this trend was reversed. Octave band sound levels of 65–70 dB above the animal's threshold produced an average temporary threshold shift (TTS; discussed later in ''Potential Effects of the Specified Activity on Marine Mammals'') of 4.9 dB in the California sea lion (Kastak *et al.,* 1999).

Harbor Seal

Species Description—Harbor seals, which are members of the Phocid family (true seals), inhabit coastal and estuarine waters and shoreline areas from Baja California, Mexico to western Alaska. For management purposes, differences in mean pupping date (i.e., birthing) (Temte, 1986), movement patterns (Jeffries, 1985; Brown, 1988), pollutant loads (Calambokidis *et al.,* 1985) and fishery interactions have led to the recognition of three separate harbor seal stocks along the west coast of the continental U.S. (Boveng, 1988). The three distinct stocks are: (1) Inland waters of Washington (including Hood Canal, Puget Sound, and the Strait of Juan de Fuca out to Cape Flattery), (2) outer coast of Oregon and Washington, and (3) California (Carretta *et al.,* 2007). The inland waters of Washington stock is the only stock that is expected to occur within the project area.

The average weight for adult seals is about 180 lb (82 kg) and males are slightly larger than females. Male harbor seals weigh up to 245 lb (111 kg) and measure approximately 5 ft (1.5 m) in length. The basic color of harbor seals' coat is gray and mottled but highly variable, from dark with light color rings or spots to light with dark markings (NMFS, 2008c).

Status—Estimated population numbers for the inland waters of Washington, including the Hood Canal,

Puget Sound, and the Strait of Juan de Fuca out to Cape Flattery, are 14,612 individuals (Carretta *et al.,* 2007). The minimum population is 12,844 individuals. The harbor seal is the only species of marine mammal that is consistently abundant and considered resident in the Hood Canal (Jeffries *et al.,* 2003). The population of harbor seals in Hood Canal is a closed population, meaning that they do not have much movement outside of Hood Canal (London, 2006). The abundance of harbor seals in Hood canal has stabilized, and the population may have reached its carrying capacity in the mid-1990s with an approximate abundance of 1,000 harbor seals (Jeffries *et al.,* 2003).

Harbor seals are not considered to be depleted under the MMPA or listed under the ESA. Human-caused mortality relative to PBR is unknown, but it is considered to be small relative to the stock size. Therefore, the Washington Inland Waters stock of harbor seals is not classified as a strategic stock.

Distribution—Harbor seals are coastal species, rarely found more than 12 mi (20 km) from shore, and frequently occupy bays, estuaries, and inlets (Baird 2001). Individual seals have been observed several miles upstream in coastal rivers. Ideal harbor seal habitat includes haul-out sites, shelter during the breeding periods, and sufficient food (Bjorge, 2002). Haul-out areas can include intertidal and subtidal rock outcrops, sandbars, sandy beaches, peat banks in salt marshes, and man-made structures such as log booms, docks, and recreational floats (Wilson, 1978; Prescott, 1982; Schneider and Payne, 1983; Gilber and Guldager, 1998; Jeffries *et al.,* 2000). Human disturbance can affect haul-out choice (Harris *et al.,* 2003).

Harbor seals occur throughout Hood Canal and are seen relatively commonly in the area. They are year-round, non-migratory residents, and pup (i.e., give birth) in Hood Canal. Surveys in the Hood Canal from the mid-1970s to 2000 show a fairly stable population between 600–1,200 seals (Jeffries *et al.,* 2003). Harbor seals have been observed swimming in the waters along NBKB in every month of surveys conducted from 2007–2010 (Agness and Tannenbaum, 2009b; Tannenbaum *et al.,* 2009b). On the NBKB waterfront, harbor seals have not been observed hauling out in the intertidal zone, but have been observed hauled-out on man-made structures such as the floating security fence, buoys, barges, marine vessels, and logs (Agness and Tannebaum, 2009a; Tannenbaum *et al.,* 2009a). The main haul-out locations for harbor seals in Hood Canal are located on river delta and tidal exposed areas at Quilcene, Dosewallips, Duckabush, Hamma Hamma, and Skokomish River mouths (see Figure 4–1 of the Navy's application), with the closest haul-out area to the project area being ten miles (16 km) southwest of NBKB at Dosewallips River mouth, outside the potential area of effect for this project (London, 2006).

Behavior and Ecology—Harbor seals are typically seen in small groups resting on tidal reefs, boulders, mudflats, man-made structures, and sandbars. Harbor seals are opportunistic feeders that adjust their patterns to take advantage of locally and seasonally abundant prey (Payne and Selzer 1989; Baird 2001; Bjørge 2002). The harbor seal diet consists of fish and invertebrates (Bigg, 1981; Roffe and Mate, 1984; Orr *et al.,* 2004). Although harbor seals in the Pacific Northwest are common in inshore and estuarine waters, they primarily feed at sea (Orr *et al.,* 2004) during high tide. Researchers have found that they complete both shallow and deep dives during hunting depending on the availability of prey (Tollit *et al.,* 1997). Their diet in Puget Sound consists of many of the prey resources that are present in the nearshore and deeper waters of NBKB, including hake, herring and adult and out-migrating juvenile salmonids. Harbor seals in Hood Canal are known to feed on returning adult salmon, including ESA-threatened summer-run chum (*Oncorhynchus keta*). Over a 5-year study of harbor seal predation in the Hood Canal, the average percent escapement of summer-run chum consumed was eight percent (London, 2006).

Harbor seals mate at sea and females give birth during the spring and summer, although the pupping season varies by latitude. In coastal and inland regions of Washington, pups are born from April through January. Pups are generally born earlier in the coastal areas and later in the Puget Sound/Hood Canal region (Calambokidis and Jeffries, 1991; Jeffries *et al.,* 2000). Suckling harbor seal pups spend as much as forty percent of their time in the water (Bowen *et al.,* 1999).

Acoustics—In air, harbor seal males produce a variety of low-frequency (less than 4 kHz) vocalizations, including snorts, grunts, and growls. Male harbor seals produce communication sounds in the frequency range of 100–1,000 Hz (Richardson *et al.,* 1995). Pups make individually unique calls for mother recognition that contain multiple harmonics with main energy below 0.35 kHz (Bigg, 1981; Thomson and Richardson, 1995). Harbor seals hear nearly as well in air as underwater and had lower thresholds than California sea lions (Kastak and Schusterman, 1998). Kastak and Schusterman (1998) reported airborne low frequency (100 Hz) sound detection thresholds at 65.4 dB re 20 μPa for harbor seals. In air, they hear frequencies from 0.25–30 kHz and are most sensitive from 6–16 kHz (Richardson, 1995; Terhune and Turnbull, 1995; Wolski *et al.,* 2003).

Adult males also produce underwater sounds during the breeding season that typically range from 0.25–4 kHz (duration range: 0.1 s to multiple seconds; Hanggi and Schusterman 1994). Hanggi and Schusteman (1994) found that there is individual variation in the dominant frequency range of sounds between different males, and Van Parijs *et al.* (2003) reported oceanic, regional, population, and site-specific variation that could be vocal dialects. In water, they hear frequencies from 1–75 kHz (Southall *et al.,* 2007) and can detect sound levels as weak as 60–85 dB re 1 μPa within that band. They are most sensitive at frequencies below 50 kHz; above 60 kHz sensitivity rapidly decreases.

Humpback Whale

Species Description—The humpback whale is a baleen whale, and a member of the Balaenopterid family (rorquals), with a worldwide distribution in all ocean basins. Similar to all baleen whales, adult females are larger than adult males, reaching lengths of up to 60 ft (18 m). Their body coloration is primarily dark grey, but individuals have a variable amount of white on their pectoral fins and belly. This variation is so distinctive that the pigmentation pattern on the undersides of their flukes is used to identify individual whales. Humpback whales are known for their long pectoral fins, which can be up to 15 ft (4.6 m) in length and provide significant maneuverability. In the summer, most humpback whales are found in high latitude or highly biologically productive feeding grounds. In the winter, they congregate in subtropical or tropical waters for mating.

In the North Pacific, there are at least three separate populations: (1) CA/OR/WA stock, which winters in coastal Central America and Mexico and migrates to areas ranging from the coast of California to southern British Columbia in summer/fall; (2) Central North Pacific stock, which winters in the Hawaiian Islands and migrates to northern British Columbia/Southeast Alaska and Prince William Sound west to Kodiak; and (3) Western North Pacific

stock, which winters near Japan and probably migrates to waters west of the Kodiak Archipelago (the Bering Sea and Aleutian Islands) in summer/fall. Though there is some mixing between these populations, they are considered distinct stocks. The stock structure of humpback whales is defined based on feeding areas, as distinct populations have a high degree of fidelity to specific feeding areas. Humpback whales found in inland Washington waters are members of the CA/OR/WA stock. Carretta *et al.* (2011) described distinct feeding populations in the eastern Pacific, and the waters off northern Washington may be an area of mixing between the CA/OR/WA stock and British Columbia/Alaska whales, or whales in northern Washington and southern British Columbia may be a distinct feeding population and a separate stock.

Status—Humpback whales were listed as endangered under the Endangered Species Preservation Act of 1966 because of declines due to commercial whaling. This protection was transferred to the ESA in 1973. Because of this listing, it is therefore designated as depleted and classified as a strategic stock under the MMPA. The recovery plan for humpback whales was finalized in November 1991 (NMFS, 1991). Critical habitat has not been designated for this species.

Humpback whales are increasing in abundance through much of their range, including the CA/OR/WA stock. In the North Pacific, humpback abundance was estimated at fewer than 1,400 whales in 1966, after heavy commercial exploitation. The current abundance estimate for the North Pacific is about 20,000 whales in total. Carretta *et al.* (2011) reported the best estimate for the CA/OR/WA stock as 2,043 individuals, based on mark-recapture estimates by Calambokidis *et al.* (2009). However, this estimate excludes some whales in Washington. Population trends from mark-recapture estimates have shown an overall long-term increase of approximately 7.5 percent per year for the CA/OR/WA stock (Calambokidis, 2009).

Distribution—The worldwide population of humpback whales is divided into various northern and southern ocean populations (Mackintosh, 1965). Geographical overlap of these populations has been documented only off Central America (Acevedo and Smultea, 1995; Rasmussen *et al.,* 2004, 2007). The humpback whale is one of the most abundant cetaceans off the Pacific coast of Costa Rica during the winter breeding season of northern hemisphere humpbacks.

Humpback whales were one of the most common large cetaceans in the inland waters of Washington prior to the early 1900s (Scheffer and Slipp, 1948). However, sightings became infrequent in Puget Sound and the Georgia Basin through the late 1990s, and prior to 2003 the presence of only three individual humpback whales was confirmed (Falcone *et al.,* 2005). However, in 2003 and 2004, thirteen individuals were sighted in the inland waters of Washington, mainly during the fall (Falcone *et al.,* 2005). Records available for 2001 to 2012 include observations in the Strait of Juan de Fuca; the Gulf Islands and the vicinity of Victoria, British Columbia; Admiralty Inlet; the San Juan Islands; Hood Canal; and Puget Sound (Orca Network, 2012).

In Hood Canal, several humpback whale sightings were recorded beginning on January 27, 2012 (Orca Network, 2012). Review of the sightings information indicates the sightings are of a single individual. The most recent sighting reported was on February 17, 2012. It is currently unknown if this individual has left Hood Canal. Prior to these sightings, there have been no confirmed reports of humpback whales entering Hood Canal (Calambokidis, 2012). No other reports of humpback whales in the Hood Canal were found in the Orca Network database, the scientific literature, or agency reports. Construction of the Hood Canal Bridge occurred in 1961 and could have contributed to the lack of historical sightings (Calambokidis, 2010). Only a few records of humpback whales near Hood Canal are in the Orca Network database, but these are north of the Hood Canal Bridge.

Behavior and Ecology—Humpback whales travel great distances during their seasonal migrations from high latitude feeding grounds to tropical and subtropical breeding grounds. One of the more closely studied routes is between Alaska and Hawaii, where humpbacks have been observed making the 3,000 mi (4,830 km) trip in as few as 36 days. During the summer months, humpbacks spend the majority of their time feeding and building up fat reserves (blubber) that they will live off of during the winter breeding season. Humpbacks filter feed on tiny crustaceans (mostly krill), plankton, and small fish and are known to consume up to 3,000 lb (1,360 kg) of food per day. Several hunting methods involve using air bubbles to herd, corral, or disorient fish. One highly complex variant, called bubble netting, is unique to humpbacks and is often performed in groups with defined roles for distracting, scaring, and herding before whales lunge at prey corralled near the surface. While on their winter breeding grounds, humpback whales congregate and engage in mating activities. Humpbacks are generally polygynous, with males exhibiting competitive behavior including aggressive and antagonistic displays. Breeding usually occurs once every 2 years, but sometimes occurs twice in 3 years.

Although the humpback whale is considered a primarily coastal species, it often traverses deep pelagic areas while migrating (Clapham and Mattila, 1990; Norris *et al.,* 1999; Calambokidis *et al.,* 2001). During migration, humpbacks stay near the surface of the ocean, and tend to generally prefer shallow waters. During calving, humpbacks are usually found in the warmest waters available at that latitude. Calving grounds are commonly near offshore reef systems, islands, or continental shores. Humpback feeding grounds are in cold, productive coastal waters.

Humpback whales are often sighted singly or in groups of two or three, but while on breeding and feeding grounds they may occur in groups larger than twenty (Leatherwood and Reeves, 1983; Jefferson *et al.,* 2008). The diving behavior of humpback whales is related to time of year and whale activity (Clapham and Mead, 1999). In summer feeding areas, humpbacks typically forage in the upper 120 m of the water column, with a maximum recorded dive depth of 500 m (Dolphin, 1987; Dietz *et al.,* 2002). On winter breeding grounds, humpback dives have been recorded at depths greater than 100 m (Baird *et al.,* 2000). The CA/OR/WA stock winters in coastal Central America and Mexico, and the stock migrates to areas ranging from the coast of California to southern British Columbia in summer and fall.

Acoustics—Humpback whales, like all baleen whales, are considered low-frequency cetaceans. Functional hearing for low-frequency cetaceans is estimated to range from 7 Hz to 22 kHz (Southall *et al.,* 2007). During the winter breeding season, males sing complex songs that can last up to 20 minutes and be heard at great distance, and may sing for hours, repeating the song several times. All males in a population sing the same song, but that song continually evolves over time.

Killer Whale

Species Description—Killer whales are members of the Delphinid family and are the most widely distributed cetacean species in the world. Killer whales have a distinctive color pattern,

with black dorsal and white ventral portions. They also have a conspicuous white patch above and behind the eye and a highly variable gray or white saddle area behind the dorsal fin. The species shows considerable sexual dimorphism. Adult males develop larger pectoral flippers, dorsal fins, tail flukes, and girths than females. Male adult killer whales can reach up to 32 ft (9.8 m) in length and weigh nearly 22,000 lb (10,000 kg); females reach 28 ft (8.5 m) in length and weigh up to 16,500 lb (7,500 kg).

Based on appearance, feeding habits, vocalizations, social structure, and distribution and movement patterns there are three types of populations of killer whales (Wiles, 2004; NMFS, 2005). The three distinct forms or types of killer whales recognized in the North Pacific Ocean are: (1) Resident, (2) Transient, and (3) Offshore. The resident and transient populations have been divided further into different subpopulations based mainly on genetic analyses and distribution; not enough is known about the offshore whales to divide them into subpopulations (Wiles, 2004). Only transient killer whales are known from the project area.

Transient killer whales occur throughout the eastern North Pacific, and have primarily been studied in coastal waters. Their geographical range overlaps that of the resident and offshore killer whales. The dorsal fin of transient whales tends to be more erect (straighter at the tip) than those of resident and offshore whales (Ford and Ellis, 1999; Ford *et al.,* 2000). Saddle patch pigmentation of transient killer whales is restricted to two patterns, and never has the large areas of black pigmentation intruding into the white of the saddle patch that is seen in resident and offshore types. Transient type whales are often found in long-term stable social units that tend to be smaller than resident social groups (e.g., fewer than ten whales); these social units do not seem as permanent as matrilines are in resident type whales. Transient killer whales feed nearly exclusively on marine mammals (Ford and Ellis, 1999), whereas resident whales primarily eat fish. Offshore whales are presumed to feed primarily on fish, and have been documented feeding on sharks.

Within the transient type, association data (Ford *et al.,* 1994; Ford and Ellis, 1999; Matkin *et al.,* 1999), acoustic data (Saulitis, 1993; Ford and Ellis, 1999) and genetic data (Hoelzel *et al.,* 1998, 2002; Barrett-Lennard, 2000) confirms that three communities of transient whales exist and represent three discrete populations: (1) Gulf of Alaska, Aleutian Islands, and Bering Sea transients, (2) AT1 transients (Prince William Sound, AK; listed as depleted under the MMPA), and (3) West Coast transients. Among the genetically distinct assemblages of transient killer whales in the northeastern Pacific, only the West Coast transient stock, which occurs from southern California to southeastern Alaska, may occur in the project area.

Status—The West Coast transient stock is a trans-boundary stock, with minimum counts for the population of transient killer whales coming from various photographic datasets. Combining these counts of cataloged transient whales gives a minimum number of 354 individuals for the West Coast transient stock (Allen and Angliss, 2010). However, the number in Washington waters at any one time is probably fewer than 20 individuals (Wiles, 2004). The West Coast transient killer whale stock is not designated as depleted under the MMPA or listed under the ESA. The estimated annual level of human-caused mortality and serious injury does not exceed the PBR. Therefore, the West Coast Transient stock of killer whales is not classified as a strategic stock. Population trends and status of this stock relative to its Optimum Sustainable Population (OSP) level are currently unknown.

Distribution—The geographical range of transient killer whales includes the northeast Pacific, with preference for coastal waters of southern Alaska and British Columbia (Krahn *et al.,* 2002). Transient killer whales in the eastern North Pacific spend most of their time along the outer coast, but visit Hood Canal and the Puget Sound in search of harbor seals, sea lions, and other prey. Transient occurrence in inland waters appears to peak during August and September (Morton, 1990; Baird and Dill, 1995; Ford and Ellis, 1999) which is the peak time for harbor seal pupping, weaning, and post-weaning (Baird and Dill, 1995). In 2003 and 2005, small groups of transient killer whales (eleven and six individuals, respectively) visited Hood Canal to feed on harbor seals and remained in the area for significant periods of time (59 and 172 days, respectively) between the months of January and July.

Behavior and Ecology—Transient killer whales show greater variability in habitat use, with some groups spending most of their time foraging in shallow waters close to shore while others hunt almost entirely in open water (Felleman *et al.,* 1991; Baird and Dill, 1995; Matkin and Saulitis, 1997). Transient killer whales feed on marine mammals and some seabirds, but apparently no fish (Morton, 1990; Baird and Dill, 1996; Ford *et al.,* 1998; Ford and Ellis, 1999; Ford *et al.,* 2005). While present in Hood Canal in 2003 and 2005, transient killer whales preyed on harbor seals in the subtidal zone of the nearshore marine and inland marine deeper water habitats (London, 2006). Other observations of foraging transient killer whales indicate they prefer to forage on pinnipeds in shallow, protected waters (Heimlich-Boran, 1988; Saulitis *et al.,* 2000). Transient killer whales travel in small, matrilineal groups, but they typically contain fewer than ten animals and their social organization generally is more flexible than that of resident killer whales (Morton, 1990, Ford and Ellis, 1999). These differences in social organization probably relate to differences in foraging (Baird and Whitehead, 2000). There is no information on the reproductive behavior of killer whales in this area.

Acoustics—Killer whales produce a wide variety of clicks and whistles, but most of their sounds are pulsed, with frequencies ranging from 0.5–25 kHz (dominant frequency range: 1–6 kHz) (Thomson and Richardson, 1995; Richardson *et al.,* 1995). Source levels of echolocation signals range between 195–224 dB re 1 μPa-m peak-to-peak (p-p), dominant frequencies range from 20–60 kHz, with durations of about 0.1 s (Au *et al.,* 2004). Source levels associated with social sounds have been calculated to range between 131–168 dB re 1 μPa-m and vary with vocalization type (Veirs, 2004).

Both behavioral and auditory brainstem response techniques indicate killer whales can hear in a frequency range of 1–100 kHz and are most sensitive at 20 kHz. This is one of the lowest maximum-sensitivity frequencies known among toothed whales (Szymanski *et al.,* 1999).

Dall's Porpoise

Species Description—Dall's porpoises are members of the Phocoenid (porpoise) family and are common in the North Pacific Ocean. They can reach a maximum length of just under 8 ft (2.4 m) and weigh up to 480 lb (218 kg). Males are slightly larger and thicker than females, which reach lengths of just under 7 ft (2.1 m) long. The body of Dall's porpoises is a very dark gray or black in coloration with variable contrasting white thoracic panels and white 'frosting' on the dorsal fin and tail that distinguish them from other cetacean species. These markings and colorations vary with geographic region and life stage, with adults having more distinct patterns.

Based on NMFS stock assessment reports, Dall's porpoises within the Pacific U.S. Exclusive Economic Zone are divided into two discrete, noncontiguous areas: (1) Waters off California, Oregon, and Washington, and (2) Alaskan waters (Carretta *et al.,* 2008). Only individuals from the CA/OR/WA stock may occur within the project area.

Status—The NMFS population estimate, recently updated in 2010 for the CA/OR/WA stock, is 42,000 (CV = 0.33) which is based on vessel line transect surveys by Barlow (2010) and Forney (2007). The minimum population is considered to be 32,106. Additional numbers of Dall's porpoises occur in the inland waters of Washington, but the most recent estimate was obtained in 1996 (900 animals; CV = 0.40; Calambokidis *et al.,* 1997) and is not included in the overall estimate of abundance for this stock due to the need for more up-to-date information. Dall's porpoise are not listed as depleted under the MMPA or listed under the ESA. The average annual human-caused mortality is estimated to be less than the PBR, and therefore the stock is not classified as a strategic stock under the MMPA. The status of Dall's porpoises in California, Oregon and Washington relative to OSP is not known, and there are insufficient data to evaluate potential trends in abundance.

Distribution—The Dall's porpoise is found from northern Baja California, Mexico, north to the northern Bering Sea and south to southern Japan (Jefferson *et al.,* 1993). The species is only common between 32–62° N in the eastern North Pacific (Morejohn, 1979; Houck and Jefferson, 1999). North-south movements in California, Oregon, and Washington have been suggested. Dall's porpoises shift their distribution southward during cooler-water periods (Forney and Barlow, 1998). Norris and Prescott (1961) reported finding Dall's porpoises in southern California waters only in the winter, generally when the water temperature was less than 15°C (59 °F). Seasonal movements have also been noted off Oregon and Washington, where higher densities of Dall's porpoises were sighted offshore in winter and spring and inshore in summer and fall (Green *et al.,* 1992).

In Washington, they are most abundant in offshore waters. They are year-round residents in Washington (Green *et al.,* 1992), but their distribution is highly variable between years, likely due to changes in oceanographic conditions (Forney and Barlow, 1998). Dall's porpoises are observed throughout the year in the Puget Sound north of Seattle (Osborne *et al.,* 1998) and are seen occasionally in southern Puget Sound. Dall's porpoises may also occasionally occur in Hood Canal (Jeffries 2006, personal communication). Nearshore habitats used by Dall's porpoises could include the marine habitats found in the inland marine waters of the Hood Canal. A Dall's porpoise was observed in the deeper water at NBKB in summer 2008 (Tannenbaum *et al.,* 2009a).

Behavior and Ecology—Dall's porpoises can be opportunistic feeders but primarily consume schooling forage fish. They are known to eat squid, crustaceans, and fishes such as blackbelly eelpout (*Lycodopsis pacifica*), herring, pollock, hake, and Pacific sandlance (*Ammodytes hexapterus*) (Walker *et al.,* 1998). Groups of Dall's porpoises generally include fewer than ten individuals and are fluid, probably aggregating for feeding (Jefferson, 1990, 1991; Houck and Jefferson, 1999). Dall's porpoises become sexually mature at three and a half to eight years of age (Houck and Jefferson, 1999) and give birth to a single calf after ten to twelve months. Breeding and calving typically occurs in the spring and summer (Angell and Balcomb, 1982). In the North Pacific, there is a strong summer calving peak from early June through August (Ferrero and Walker, 1999), and a smaller peak in March (Jefferson, 1989). Resident Dall's porpoises breed in Puget Sound from August to September.

Acoustics—Only short duration pulsed sounds have been recorded for Dall's porpoises (Houck and Jefferson, 1999); this species apparently does not whistle often (Richardson *et al.,* 1995). Dall's porpoises produce short duration (50–1,500 μs), high-frequency, narrow band clicks, with peak energies between 120–160 kHz (Jefferson, 1988). There is no published data on the hearing abilities of this species.

Harbor Porpoise

Species Description—Harbor porpoises belong to the Phocoenid (porpoise) family and are found extensively along the Pacific U.S. coast. Harbor porpoises are small, with males reaching average lengths of approximately 5 ft (1.5 m); Females are slightly larger with an average length of 5.5 ft (1.7 m). The average adult harbor porpoise weighs between 135–170 lb (61–77 kg). Harbor porpoises have a dark grey coloration on their backs, with their belly and throats white. They have a dark grey chin patch and intermediate shades of grey along their sides.

Recent preliminary genetic analyses of samples ranging from Monterey, CA to Vancouver Island, BC indicate that there is small-scale subdivision within the U.S. portion of this range (Chivers *et al.,* 2002). Although geographic structure exists along an almost continuous distribution of harbor porpoises from California to Alaska, stock boundaries are difficult to draw because any rigid line is generally arbitrary from a biological perspective. Nevertheless, based on genetic data and density discontinuities identified from aerial surveys, NMFS identifies eight stocks in the Northeast Pacific Ocean. Pacific coast harbor porpoise stocks include: (1) Monterey Bay, (2) San Francisco-Russian River, (3) northern California/southern Oregon, (4) Oregon/Washington coastal, (5) inland Washington, (6) Southeast Alaska, (7) Gulf of Alaska, and (8) Bering Sea. Only individuals from the Washington Inland Waters stock may occur in the project area.

Status—Aerial surveys of the inland waters of Washington and southern British Columbia were conducted during August of 2002 and 2003 (J. Laake, unpubl. data). These aerial surveys included the Strait of Juan de Fuca, San Juan Islands, Gulf Islands, and Strait of Georgia, which includes waters inhabited by the Washington Inland Waters stock of harbor porpoises as well as harbor porpoises from British Columbia. An average of the 2002 and 2003 estimates of abundance in U.S. waters resulted in an uncorrected abundance of 3,123 (CV = 0.10) harbor porpoises in Washington inland waters (J. Laake, unpubl. data). When corrected for availability and perception bias, the estimated abundance for the Washington Inland Waters stock of harbor porpoise is 10,682 (CV = 0.38) animals (Carretta *et al.,* 2008). The minimum population estimate is 7,841. Harbor porpoise are not listed as depleted under the MMPA or listed under the ESA. Based on currently available data, the total level of human-caused mortality is not known to exceed the PBR. Therefore, the Washington Inland Waters harbor porpoise stock is not classified as strategic. The status of this stock relative to its OSP level and population trends is unknown. Although long-term harbor porpoise sightings in southern Puget Sound have declined since the 1940s, sightings have increased in Puget Sound and northern Hood Canal in recent years and are now considered to regularly occur year-round in these waters (Calambokidis, 2010). This may represent a return to historical conditions, when harbor porpoises were considered one of the

most common cetaceans in Puget Sound (Scheffer and Slipp, 1948).

Distribution—Harbor porpoises are generally found in cool temperate to subarctic waters over the continental shelf in both the North Atlantic and North Pacific (Read, 1999). This species is seldom found in waters warmer than 17 °C (63 °F; Read, 1999) or south of Point Conception (Hubbs, 1960; Barlow and Hanan, 1995). Harbor porpoises can be found year-round primarily in the shallow coastal waters of harbors, bays, and river mouths (Green *et al.,* 1992). Along the Pacific coast, harbor porpoises occur from Monterey Bay, California to the Aleutian Islands and west to Japan (Reeves *et al.,* 2002). Harbor porpoises are known to occur in Puget Sound year round (Osmek *et al.,* 1996, 1998; Carretta *et al.,* 2007), and harbor porpoise observations in northern Hood Canal have increased in recent years (Calambokidis, 2010). Prior to recent construction projects conducted by the Navy at NBKB, harbor porpoises were considered as likely occurring only occasionally in the project area. A single harbor porpoise had been sighted in deeper water at NBKB during 2010 field observations (SAIC, 2010). However, while implementing monitoring plans for work conducted from July-October, 2011, the Navy recorded multiple sightings of harbor porpoise in the deeper waters of the project area. Following these sightings, the Navy conducted dedicated line transect surveys, recording multiple additional sightings of harbor porpoise, and have revised local density estimates accordingly. The current density estimates are based upon a small sample size of transect surveys, and may be further revised as more information becomes available from ongoing Navy survey efforts.

Behavior and Ecology—Harbor porpoises are non-social animals usually seen in small groups of two to five animals. Little is known about their social behavior. Harbor porpoises can be opportunistic foragers but primarily consume schooling forage fish (Osmek *et al.,* 1996; Bowen and Siniff, 1999; Reeves *et al.,* 2002). Along the coast of Washington, harbor porpoises primarily feed on herring, market squid (*Loligo opalescens*) and eulachon (*Thaleichthys pacificus*) (Gearin *et al.,* 1994). Females reach sexual maturity at three to four years of age and may give birth every year for several years in a row. Calves are born in late spring (Read, 1990; Read and Hohn, 1995). Dall's and harbor porpoises appear to hybridize relatively frequently in the Puget Sound area (Willis *et al.,* 2004).

Acoustics—Harbor porpoise vocalizations include clicks and pulses (Ketten, 1998), as well as whistle-like signals (Verboom and Kastelein, 1995). The dominant frequency range is 110–150 kHz, with source levels of 135–177 dB re 1 μPa-m (Ketten, 1998). Echolocation signals include one or two low-frequency components in the 1.4–2.5 kHz range (Verboom and Kastelein, 1995).

A behavioral audiogram of a harbor porpoise indicated the range of best sensitivity is 8–32 kHz at levels between 45–50 dB re 1 μPa-m (Andersen, 1970); however, auditory-evoked potential studies showed a much higher frequency of approximately 125–130 kHz (Bibikov, 1992). The auditory-evoked potential method suggests that the harbor porpoise actually has two frequency ranges of best sensitivity. More recent psycho-acoustic studies found the range of best hearing to be 16–140 kHz, with a reduced sensitivity around 64 kHz (Kastelein *et al.,* 2002). Maximum sensitivity occurs between 100–140 kHz (Kastelein *et al.,* 2002).

Potential Effects of the Specified Activity on Marine Mammals

NMFS has determined that pile removal, as outlined in the project description, has the potential to result in behavioral harassment of marine mammals that may be swimming, foraging, or resting in the project vicinity while pile removal is being conducted. Pile removal could potentially harass those pinnipeds that are in the water close to the project site, whether their heads are above or below the surface.

Marine Mammal Hearing

The primary effect on marine mammals anticipated from the specified activities would result from exposure of animals to underwater sound. Exposure to sound can affect marine mammal hearing. When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data, Southall *et al.* (2007) designate functional hearing groups for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): functional hearing is estimated to occur between approximately 7 Hz and 22 kHz;
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and nineteen species of beaked and bottlenose whales): Functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (six species of true porpoises, four species of river dolphins, two members of the genus *Kogia,* and four dolphin species of the genus *Cephalorhynchus*): Functional hearing is estimated to occur between approximately 200 Hz and 180 kHz; and
- Pinnipeds in water: Functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.

As mentioned previously in this document, three pinniped and four cetacean species are likely to occur in the proposed project area. Of the four cetacean species likely to occur in the project area, two are classified as high frequency cetaceans (Dall's and harbor porpoises), one is classified as a mid-frequency cetacean (killer whales), and one is classified as a low-frequency cetacean (humpback whales) (Southall *et al.,* 2007).

Underwater Sound Effects

Potential Effects of Construction Sound—The effects of sounds from pile removal might—in theory, at least—result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007). The effects of pile driving or removal on marine mammals are generally dependent on several factors, including the size, type, and depth of the animal; the depth, intensity, and duration of the pile removal sound; the depth of the water column; the substrate of the habitat; the standoff distance between the pile and the animal; and the sound propagation properties of the environment. Impacts to marine mammals from the proposed activities are expected to result primarily from acoustic pathways. As such, the degree of effect is intrinsically related to the received level and duration of the sound exposure, which are in turn influenced by the distance between the animal and

the source. The further away from the source, the less intense the exposure should be. The substrate and depth of the habitat affect the sound propagation properties of the environment. Shallow environments are typically more structurally complex, which leads to rapid sound attenuation. In addition, substrates that are soft (e.g., sand) would absorb or attenuate the sound more readily than hard substrates (e.g., rock) which may reflect the acoustic wave. Soft porous substrates would also likely require less time to remove the pile, which would ultimately decrease the intensity of the acoustic source.

In the absence of mitigation, impacts to marine species would be expected to result from physiological and behavioral responses to both the type and strength of the acoustic signature (Viada *et al.,* 2008). The type and severity of behavioral impacts are more difficult to define due to limited studies addressing the behavioral effects of underwater sounds on marine mammals. Potential effects from sound sources can range in severity, ranging from effects such as behavioral disturbance, tactile perception, physical discomfort, slight injury of the internal organs and the auditory system, to mortality (Yelverton *et al.,* 1973; O'Keefe and Young, 1984; DoN, 2001b).

Hearing Impairment and Other Physical Effects—Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.,* 1999; Schlundt *et al.,* 2000; Finneran *et al.,* 2002, 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Marine mammals depend on acoustic cues for vital biological functions, (e.g., orientation, communication, finding prey, avoiding predators); thus, TTS may result in reduced fitness in survival and reproduction, either permanently or temporarily. However, this depends on the frequency and duration of TTS, as well as the biological context in which it occurs. TTS of limited duration, occurring in a frequency range that does not coincide with that used for recognition of important acoustic cues, would have little to no effect on an animal's fitness. Repeated sound exposure that leads to TTS could cause PTS. PTS is considered to constitute injury, but TTS is not considered injury (Southall *et al.,* 2007). It is unlikely that the project would result in any cases of temporary or especially permanent hearing impairment or any significant non-auditory physical or physiological effects; these effects are most frequently associated with pulsed sound, which would not occur during the proposed action. Some behavioral disturbance is expected, but it is likely that this would be localized and short-term because of the short project duration.

In addition, given the low source levels expected in association with the non-pulsed sounds proposed for this activity, it is highly unlikely that any marine mammals could experience physiological effects or even TTS. All source levels for the proposed action would be less than 190 dB re: 1 μPa rms; therefore, there is no possibility of injury for pinnipeds. While vibratory pile removal is expected to produce sound equaling the 180 dB threshold for potential cetacean injury, that sound is expected to be restricted to a radius no more than 1 m (3.3 ft) from the pile removal, therefore essentially eliminating the possibility for cetacean injury, as it is extremely unlikely that any cetacean would approach so closely. Nevertheless, several aspects of the planned monitoring and mitigation measures for this project (see the ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'' sections later in this document) are designed to detect marine mammals occurring near the pile removal to avoid exposing them to sound that might, in theory, cause injury. The following subsection discusses TTS in somewhat more detail.

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. In terrestrial mammals, TTS can last from minutes or hours to days (in cases of strong TTS). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals. Available data on TTS in marine mammals are summarized in Southall *et al.* (2007).

Disturbance Reactions

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement. Reactions to sound, if any, depend on species, state of maturity, experience, current activity, reproductive state, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2004; Southall *et al.,* 2007; Weilgart, 2007). Behavioral responses to sound are highly variable and context specific. For each potential behavioral change, the magnitude of the change ultimately determines the severity of the response. A number of factors may influence an animal's response to sound, including its previous experience, its auditory sensitivity, its biological and social status (including age and sex), and its behavioral state and activity at the time of exposure.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003/04). Animals are most likely to habituate to sounds that are predictable and unvarying. The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. Behavioral state may affect the type of response as well. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC, 2003; Wartzok *et al.,* 2003/04). Controlled experiments with captive marine mammals showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). However, responses to non-pulsed sound, such as vibratory pile installation, have not been documented as well as responses to pulsed sounds.

With both types of pile removal, it is likely that the onset of pile removal could result in temporary, short term changes in an animal's typical behavior and/or avoidance of the affected area. These behavioral changes may include (Richardson *et al.,* 1995): Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located; and/or flight responses (e.g., pinnipeds flushing into water from haul-outs or rookeries). Pinnipeds may increase their haul-out time, possibly to avoid in-water disturbance (Caltrans 2001, 2006). Since pile removal would likely only occur for a few hours a day, over a short period of time, it is unlikely to result in permanent displacement. Any potential impacts from pile removal activities

could be experienced by individual marine mammals, but would not be likely to cause population level impacts, or affect the long-term fitness of the species.

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be expected to be biologically significant if the change affects growth, survival, or reproduction. Significant behavioral modifications that could potentially lead to effects on growth, survival, or reproduction include:

- Drastic changes in diving/surfacing patterns (such as those thought to be causing beaked whale stranding due to exposure to military mid-frequency tactical sonar);
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cessation of feeding or social interaction.

The onset of behavioral disturbance from anthropogenic sound depends on both external factors (characteristics of sound sources and their paths) and the specific characteristics of the receiving animals (hearing, motivation, experience, demography) and is difficult to predict (Southall *et al.,* 2007).

Auditory Masking

Natural and artificial sounds can disrupt behavior by masking, or interfering with, a marine mammal's ability to hear other sounds. Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher levels. Chronic exposure to excessive, though not high-intensity, sound could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions. Masking can interfere with detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction. If the coincident (masking) sound were man-made, it could be potentially harassing if it disrupted hearing-related behavior. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. Because sound generated from in-water pile removal is mostly concentrated at low frequency ranges, it may have less effect on high frequency echolocation sounds made by porpoises. However, lower frequency man-made sounds are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey sound. It may also affect communication signals when they occur near the sound band and thus reduce the communication space of animals (e.g., Clark *et al.,* 2009) and cause increased stress levels (e.g., Foote *et al.,* 2004; Holt *et al.,* 2009).

Masking has the potential to impact species at population, community, or even ecosystem levels, as well as at individual levels. Masking affects both senders and receivers of the signals and can potentially have long-term chronic effects on marine mammal species and populations. Recent research suggests that low frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, and that most of these increases are from distant shipping (Hildebrand, 2009). All anthropogenic sound sources, such as those from vessel traffic, pile removal, and dredging activities, contribute to the elevated ambient sound levels, thus intensifying masking. However, the sum of sound from the proposed activities is confined in an area of inland waters (Hood Canal) that is bounded by landmass; therefore, the sound generated is not expected to contribute to increased ocean ambient sound.

Typically, the most intense underwater sounds associated with marine construction are those produced by impact pile removal, which is not proposed for this action. However, the energy distribution of pile removal covers a broad frequency spectrum, and sound from these sources would likely be within the audible range of the marine mammals found in the Hood Canal. Vibratory pile removal is relatively short-term, with rapid oscillations occurring for approximately 1 hour per pile, with the total vibratory pile removal occurring for 15 days. The probability for vibratory pile removal masking acoustic signals important to the behavior and survival of marine mammal species is likely to be negligible. Any masking event that could possibly rise to Level B harassment under the MMPA would occur concurrently within the zones of behavioral harassment already estimated for pile removal, and which have already been taken into account in the exposure analysis.

Airborne Sound Effects

Marine mammals that occur in the project area could be exposed to airborne sounds associated with pile removal that have the potential to cause harassment, depending on their distance from pile removal activities. Airborne pile removal sound would have less impact on cetaceans than pinnipeds because sound from atmospheric sources does not transmit well underwater (Richardson *et al.,* 1995); thus, airborne sound would only be an issue for pinnipeds that are hauled-out or have their heads above water in the project area. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon their habitat and move further from the source. Studies by Blackwell *et al.* (2004) and Moulton *et al.* (2005) indicate a tolerance or lack of response to unweighted airborne sounds as high as 96 dB rms.

Anticipated Effects on Habitat

The proposed activities at NBKB would not result in permanent impacts to habitats used directly by marine mammals, such as haul-out sites, but may have potential short-term impacts to food sources such as forage fish and salmonids. There are no rookeries or major haul-out sites within 10 km (6.2 mi), foraging hotspots, or other ocean bottom structures of significant biological importance to marine mammals that may be present in the marine waters in the vicinity of the project area. Therefore, the main impact issue associated with the proposed activity would be temporarily elevated sound levels and the associated direct effects on marine mammals, as discussed previously in this document. The most likely impact to marine mammal habitat occurs from pile removal effects on likely marine mammal prey (i.e., fish) near NBKB and minor impacts to the immediate substrate during removal of piles during the wharf rehabilitation project.

Pile Removal Effects on Potential Prey (Fish)

Construction activities would produce non-pulsed sounds. Fish react to sounds which are especially strong and/or intermittent low-frequency sounds which are generally unlike the sounds that would be produced by the proposed action. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. Hastings and Popper (2005, 2009) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. SPLs of 180 dB may cause noticeable changes in behavior (Chapman and Hawkins, 1969; Pearson *et al.,* 1992; Skalski *et al.,* 1992). SPLs of sufficient strength have been known to cause injury to fish and fish mortality (Caltrans, 2001; Longmuir and Lively, 2001). The most likely impact to fish from pile removal activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile removal stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the short timeframe and nature of sound produced for the project. Impacts could also result from potential impacts to fish eggs and larvae.

Pile Removal Effects on Potential Foraging Habitat

The area likely impacted by the project is relatively small compared to the available habitat in the Hood Canal. Avoidance by potential prey (i.e., fish) of the immediate area due to the temporary loss of this foraging habitat is also possible. The duration of fish avoidance of this area after pile removal stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the Hood Canal and nearby vicinity.

Given the short daily duration of sound associated with individual pile removal events and the relatively small areas being affected, pile removal activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Therefore, pile removal is not likely to have a permanent, adverse effect on marine mammal foraging habitat at the project area.

Previous Activity

The proposed action for this IHA request represents the second year of a 2-year project. NMFS issued an IHA for the first year of work on May 24, 2011 (76 FR 30130). The Navy complied with the mitigation and monitoring required under the previous authorization. In accordance with the 2011 IHA, the Navy submitted a monitoring report, and the information contained therein was considered in this analysis. During the course of activities conducted under the previous authorization, the Navy did not exceed the take levels authorized under that IHA. Additional information regarding harbor porpoise, Steller sea lion, and humpback whale occurrence in the Hood Canal has been considered in this analysis.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(D) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

The modeling results for zones of influence (ZOIs; see ''Estimated Take by Incidental Harassment'') were used to develop mitigation measures for pile removal activities at NBKB. ZOIs are often used to effectively represent the mitigation zone that would be established around each pile to prevent Level A harassment of marine mammals, and also establish zones within which Level B harassment of marine mammals may occur. In addition to the measures described later in this section, the Navy would employ the following standard mitigation measures:

(a) Conduct briefings between construction supervisors and crews, marine mammal monitoring team, acoustical monitoring team, and Navy staff prior to the start of all pile removal activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

(b) Comply with applicable equipment sound standards and ensure that all construction equipment has sound control devices no less effective than those provided on the original equipment.

(c) For in-water heavy machinery work other than pile removal, if a marine mammal comes within 10 m (33 ft), operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include, for example, movement of the barge to the pile location or removal of the pile from the water column/substrate via a crane (i.e., direct pull). For these activities, monitoring would take place from 15 minutes prior to initiation until the action is complete.

Monitoring and Shutdown

The following measures would apply to the Navy's mitigation through shutdown and disturbance zones:

Shutdown Zone—For all pile removal activities, the Navy would establish a shutdown zone (defined as, at minimum, the area in which SPLs equal or exceed the 180/190 dB rms acoustic injury criteria). The purpose of a shutdown zone is to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area), thus preventing injury, serious injury, or death of marine mammals. Although predictions indicate that radial distances to the 180/190-dB threshold would be less than 10 m—or would not exist because source levels are lower than the threshold—shutdown zones would conservatively be set at a minimum 10 m. This precautionary measure is intended to further reduce any possibility of injury to marine mammals by incorporating a buffer to the 180/190-dB threshold within the shutdown area.

Disturbance Zone—For all pile removal activities, the Navy would establish a disturbance zone. Disturbance zones are typically defined as the area in which SPLs equal or exceed 120 dB rms (for non-pulsed sound). However, when the size of a disturbance zone is sufficiently large as to make monitoring of the entire area impracticable (as in the case of the vibratory removal zone here, predicted to encompass an area of 35.9 km^2), the disturbance zone may be defined as some area that may reasonably be monitored. The Navy would establish an observation position within the Waterfront Restricted Area (WRA), maximally distant from the pile removal operations. The additional position would be able to monitor an effective area of at least 542 m distance (corresponding to the predicted radial distance to the 120-dB threshold for chipping) from the pile removal activity. In addition, the Navy would place a protected species observer (PSO) aboard

any vessel used outside the WRA for hydroacoustic monitoring, for the duration of any such monitoring. Disturbance zones provide utility for monitoring conducted for mitigation purposes (i.e., shutdown zone monitoring) by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring of disturbance zones enables PSOs to be aware of and communicate the presence of marine mammals in the project area but outside the shutdown zone and thus prepare for potential shutdowns of activity. However, the primary purpose of disturbance zone monitoring is for documenting incidents of Level B harassment; disturbance zone monitoring is discussed in greater detail later (see Proposed Monitoring and Reporting). As with any such large action area, it is impossible to guarantee that all animals would be observed or to make comprehensive observations of fine-scale behavioral reactions to sound.

All disturbance and shutdown zones would initially be based on the distances from the source that are predicted for each threshold level. However, should data from previously conducted acoustic monitoring (i.e., from monitoring of test pile or previous EHW–1 work), which is still in preparation, or from in-situ acoustic monitoring indicate that actual distances to these threshold zones are different, the size of the shutdown and disturbance zones would be adjusted accordingly.

Monitoring Protocols—Monitoring would be conducted for a minimum 10 m shutdown zone and a minimum approximate 600 m disturbance zone (although this may be larger for the duration of hydroacoustic monitoring) surrounding each pile for the presence of marine mammals before, during, and after pile removal activities. If a marine mammal is observed within the disturbance zone, a take would be recorded and behaviors documented. However, that pile segment would be completed without cessation, unless the animal approaches or enters the shutdown zone, at which point all pile removal activities would be halted.

The disturbance zone was set at the largest area practicable for the Navy to maintain a monitoring presence over the duration of the activity. Sightings occurring outside this area (within the predicted 35.9 km^2 disturbance zone predicted for the vibratory removal 120-dB isopleths) would still be recorded and noted as a take, but detailed observations outside this zone would not be possible, and it would be impossible for the Navy to account for all individuals occurring in such a zone with any degree of certainty. Monitoring would take place from 15 minutes prior to initiation through 30 minutes post-completion of pile removal activities. Pile removal activities include the time to remove a single pile or series of piles, as long as the time elapsed between uses of the pile removal equipment is no more than 30 minutes.

The following additional measures would apply to visual monitoring:

(a) Monitoring would be conducted by qualified observers. Qualified observers are trained biologists, with the following minimum qualifications:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;
- Advanced education in biological science, wildlife management, mammalogy, or related fields (bachelor's degree or higher is required);
- Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury from construction sound of marine mammals observed within a defined shutdown zone; and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

A trained observer would be placed from the best vantage point(s) practicable (e.g., from a small boat, the pile removal barge, on shore, or any other suitable location) to monitor for marine mammals and implement shutdown or delay procedures when applicable by calling for the shutdown to the equipment operator.

(b) Prior to the start of pile removal activity, the shutdown zone would be monitored for 15 minutes to ensure that it is clear of marine mammals. Pile removal would only commence once observers have declared the shutdown zone clear of marine mammals; animals would be allowed to remain in the disturbance zone (i.e., must leave of their own volition) and their behavior would be monitored and documented.

(c) If a marine mammal approaches or enters the shutdown zone during the course of pile removal operations, pile removal would be halted and delayed until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal.

Acoustic Measurements

Acoustic measurements would be used to empirically verify the predicted shutdown and disturbance zones for pneumatic chipping. For further detail regarding the Navy's acoustic monitoring plan see ''Proposed Monitoring and Reporting''.

Timing Restrictions

The Navy has set timing restrictions for pile removal activities to avoid in-water work when ESA-listed fish populations are most likely to be present. The in-water work window for avoiding negative impacts to fish species is July 16–February 15.

Soft Start

The use of a soft-start procedure is believed to provide additional protection to marine mammals by warning, or providing marine mammals a chance to leave the area prior to the hammer operating at full capacity. The wharf rehabilitation project would utilize soft-start techniques for vibratory pile removal. The soft-start requires contractors to initiate sound from vibratory hammers for fifteen seconds at reduced energy followed by a 30-second waiting period. This procedure would be repeated two additional times.

Daylight Construction

Pile removal and other in-water work would occur only during daylight hours (i.e., civil dawn to civil dusk).

Mitigation Effectiveness

It should be recognized that although marine mammals would be protected through the use of measures described here, the efficacy of visual detection depends on several factors including the observer's ability to detect the animal, the environmental conditions (visibility and sea state), and monitoring platforms. All observers utilized for mitigation activities would be experienced biologists with training in marine mammal detection and behavior.

Trained observers have specific knowledge of marine mammal physiology, behavior, and life history, which may improve their ability to detect individuals or help determine if observed animals are exhibiting behavioral reactions to construction activities.

The Puget Sound region, including the Hood Canal, only infrequently experiences winds with velocities in excess of 25 kn (Morris *et al.,* 2008). The typically light winds afforded by the surrounding highlands coupled with the fetch-limited environment of the Hood Canal result in relatively calm wind and sea conditions throughout most of the year. The wharf rehabilitation project site has a maximum fetch of 8.4 mi (13.5 km) to the north, and 4.2 mi (6.8 km) to the south, resulting in maximum wave heights of from 2.85–5.1 ft (0.9–1.6 m) (Beaufort Sea State (BSS) between two and four), even in extreme conditions (30 kt winds) (CERC, 1984). Visual detection conditions are considered optimal in BSS conditions of three or less, which align with the conditions that should be expected for the wharf rehabilitation project at NBKB.

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation, including consideration of personnel safety, and practicality of implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must, where applicable, set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that would result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Acoustic Monitoring

The Navy would conduct acoustic monitoring for pneumatic chipping of concrete piles to determine the actual distances to the 120 dB re 1 μPa rms isopleths for behavioral harassment relative to background levels. Underwater sound levels were measured at the project site in 2011 in the absence of construction activities to determine background sound levels and, therefore, will not be recorded again during this work window. Airborne acoustic monitoring would be conducted during pile removal through chipping to identify the actual distance to the 90 dB re 20 μPa rms and 100 dB re 20 μPa rms airborne isopleths.

At a minimum, the methodology would include:

- Acoustic monitoring will be conducted on a minimum of five concrete piles.
- For underwater recordings, a stationary hydrophone system with the ability to measure SPLs will be placed in accordance with NMFS' most recent guidance for collection of source levels.
- For airborne recordings, reference recordings will be attempted at approximately 50 ft (15.2 meters) from the source via a stationary hydrophone. However, other distances may be utilized to obtain better data if the signal cannot be isolated clearly due to other sound sources (i.e., barges or generators).
- Each hydrophone (underwater) and microphone (airborne) will be calibrated prior to the start of the action and will be checked at the beginning of each day of monitoring activity. Other hydrophones will be placed at other distances and/or depths as necessary to determine the distance to the thresholds for marine mammals.
- Environmental data will be collected including but not limited to: Wind speed and direction, wave height, water depth, precipitation, and type and location of in-water construction activities, as well as other factors that could contribute to influencing the airborne and underwater sound levels (e.g. aircraft, boats);
- The construction contractor will supply the Navy and other relevant monitoring personnel with the substrate composition, hammer model and size, hammer energy settings and any changes to those settings during the piles being monitored.
- For acoustically monitored piles, post-analysis of the sound level signals will include the average, minimum, and maximum rms value for each pile monitored during removal. A frequency spectrum will also be provided for the pneumatic chipping signal.
- Airborne levels would be recorded as an unweighted time series. The distance to marine mammal airborne sound disturbance thresholds would be determined.

Visual Monitoring

The Navy would collect sighting data and behavioral responses to construction for marine mammal species observed in the region of activity during the period of activity. All observers would be trained in marine mammal identification and behaviors. NMFS requires that the observers have no other construction-related tasks while conducting monitoring.

Methods of Monitoring—The Navy would monitor the shutdown zone and disturbance zone before, during, and after pile removal. There would, at all times, be at least one observer stationed at an appropriate vantage point to observe the shutdown zones associated with each operating hammer. There would also at all times be at least one vessel-based observer stationed within the WRA. In addition, at least one marine mammal observer would be stationed on any vessel conducting acoustic monitoring outside the WRA, for as long as such monitoring is conducted. Based on NMFS requirements, the Marine Mammal Monitoring Plan would include the following procedures for pile removal:

(1) MMOs would be located at the best vantage point(s) in order to properly see the entire shutdown zone and as much of the disturbance zone as possible. This may require the use of a small boat to monitor certain areas while also monitoring from one or more land based vantage points.

(2) During all observation periods, observers would use binoculars and the naked eye to search continuously for marine mammals.

(3) If the shutdown or disturbance zones are obscured by fog or poor lighting conditions, pile removal at that location would not be initiated until that zone is visible.

(4) The shutdown and disturbance zones around the pile would be

monitored for the presence of marine mammals before, during, and after any pile removal activity.

Pre-Activity Monitoring—The shutdown and disturbance zones would be monitored for 15 minutes prior to initiating pile removal. If marine mammal(s) are present within the shutdown zone prior to pile removal, or during the soft start, the start of pile removal would be delayed until the animal(s) leave the shutdown zone. Pile removal would resume only after the PSO has determined, through observation or by waiting 15 minutes, that the animal(s) has moved outside the shutdown zone.

During Activity Monitoring—The shutdown and disturbance zones would also be monitored throughout the time required to remove a pile. If a marine mammal is observed entering the disturbance zone, a take would be recorded and behaviors documented. However, that pile segment would be completed without cessation, unless the animal enters or approaches the shutdown zone, at which point all pile removal activities would be halted. Pile removal can only resume once the animal has left the shutdown zone of its own volition or has not been resighted for a period of 15 minutes.

Post-Activity Monitoring—Monitoring of the shutdown and disturbance zones would continue for 30 minutes following the completion of pile removal.

Individuals implementing the monitoring protocol would assess its effectiveness using an adaptive approach. Monitoring biologists would use their best professional judgment throughout implementation and would seek improvements to these methods when deemed appropriate. Any modifications to protocol would be coordinated between the Navy and NMFS.

Data Collection

NMFS requires that the PSOs use NMFS-approved sighting forms. In addition to the following requirements, the Navy would note in their behavioral observations whether an animal remains in the project area following a Level B taking (which would not require cessation of activity). This information would ideally make it possible to determine whether individuals are taken (within the same day) by one or more types of pile removal. NMFS requires that, at a minimum, the following information be collected on the sighting forms:

(1) Date and time that pile removal begins or ends;

(2) Construction activities occurring during each observation period;

(3) Weather parameters identified in the acoustic monitoring (e.g., percent cover, visibility);

(4) Water conditions (e.g., sea state, tide state);

(5) Species, numbers, and, if possible, sex and age class of marine mammals;

(6) Marine mammal behavior patterns observed, including bearing and direction of travel, and if possible, the correlation to SPLs;

(7) Distance from pile removal activities to marine mammals and distance from the marine mammals to the observation point;

(8) Locations of all marine mammal observations; and

(9) Other human activity in the area.

Reporting

A draft acoustic monitoring report would be submitted to NMFS within 90 calendar days of the completion of the acoustic measurements. Separately, a draft marine mammal monitoring report would be submitted within 90 calendar days of the completion of construction activity. The report would include marine mammal observations pre-activity, during-activity, and post-activity during pile removal days. Final reports would be prepared and submitted to NMFS within 30 days following receipt of comments on the draft report from NMFS. At a minimum, the reports would include:

- Date and time of activity;
- Water and weather conditions (e.g., sea state, tide state, percent cover, visibility);
- Description of the pile removal activity (e.g., size and type of piles, machinery used);
- The vibratory hammer force or chipping hammer setting used to extract the piles;
- A description of the monitoring equipment;
- The distance between hydrophone(s) and pile;
- The depth of the hydrophone(s);
- The physical characteristics of the bottom substrate from which the pile was extracted (if possible);
- The rms range and mean for each monitored pile;
- The results of the acoustic measurements, including the frequency spectrum, peak and rms SPLs for each monitored pile;
- The results of the airborne sound measurements (unweighted levels);
- Date and time observation is initiated and terminated;
- A description of any observable marine mammal behavior in the immediate area and, if possible, the correlation to underwater sound levels occurring at that time;
- Actions performed to minimize impacts to marine mammals;
- Times when pile removal is stopped due to presence of marine mammals within shutdown zones and time when pile removal resumes;
- Results, including the detectability of marine mammals, species and numbers observed, sighting rates and distances, behavioral reactions within and outside of shutdown zones; and
- A refined take estimate based on the number of marine mammals observed in the shutdown and disturbance zones.

Estimated Take by Incidental Harassment

With respect to the activities described here, the MMPA defines ''harassment'' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

All anticipated takes would be by Level B harassment, involving temporary changes in behavior. The proposed mitigation and monitoring measures are expected to minimize the possibility of injurious or lethal takes such that take by Level A harassment, serious injury or mortality is considered remote. However, it is unlikely that injurious or lethal takes would occur even in the absence of the planned mitigation and monitoring measures.

If a marine mammal responds to an underwater sound by changing its behavior (e.g., through relatively minor changes in locomotion direction/speed or vocalization behavior), the response may or may not constitute taking at the individual level, and is unlikely to affect the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on animals or on the stock or species could potentially be significant (Lusseau and Bejder, 2007; Weilgart, 2007). Given the many uncertainties in predicting the quantity and types of impacts of sound on marine mammals, it is common practice to estimate how many animals are likely to be present within a particular distance of a given activity, or exposed to a particular level of sound. This practice potentially overestimates the numbers of marine mammals taken. For example, during the past 10 years, killer

whales have been observed within the project area twice. On the basis of that information, an estimated amount of potential takes for killer whales is presented here. However, while a pod of killer whales could potentially visit again during the project timeframe, and thus be taken, it is more likely that they would not.

The proposed project area is not believed to be particularly important habitat for marine mammals, although harbor seals are year-round residents of Hood Canal and sea lions are known to haul-out on submarines and other man-made objects at the NBKB waterfront (although typically at a distance of a mile or greater from the project site). Therefore, behavioral disturbances that could result from anthropogenic sound associated with the proposed activities are expected to affect only a relatively small number of individual marine mammals, although those effects could be recurring if the same individuals remain in the project vicinity.

The Navy is requesting authorization for the potential taking of small numbers of Steller sea lions, California sea lions, harbor seals, transient killer whales, Dall's porpoises, and harbor porpoises in the Hood Canal that may result from pile removal during construction activities associated with the wharf rehabilitation project described previously in this document. No incidental take of humpback whale is predicted. The takes requested are expected to have no more than a minor effect on individual animals and no effect at the population level for these species. Any effects experienced by individual marine mammals are anticipated to be limited to short-term disturbance of normal behavior or temporary displacement of animals near the source of the sound.

Marine Mammal Densities

For all species, the best scientific information available was used to construct density estimates or estimate local abundance. Of available information deemed suitable for use, the data that produced the most conservative (i.e., highest) density or abundance estimate for each species was used. For harbor seals, this involved published literature describing harbor seal research conducted in Washington and Oregon as well as more specific counts conducted in Hood Canal (Huber *et al.,* 2001; Jeffries *et al.,* 2003). Killer whales are known from two periods of occurrence (2003 and 2005) and are not known to preferentially use any specific portion of the Hood Canal. Therefore, density was calculated as the maximum number of individuals present at a given time during those occurrences (London, 2006), divided by the area of Hood Canal. The best information available for the remaining species in Hood Canal came from surveys conducted by the Navy at the NBKB waterfront or in the vicinity of the project area. These consist of three discrete sets of survey effort, and are described here in greater detail.

Beginning in April 2008, Navy personnel have recorded sightings of marine mammals occurring at known haul-outs along the NBKB waterfront, including docked submarines or other structures associated with NBKB docks and piers and the nearshore pontoons of the floating security fence. Sightings of marine mammals within the waters adjoining these locations were also recorded. Sightings were attempted whenever possible during a typical work week (i.e., Monday through Friday), but inclement weather, holidays, or security constraints often precluded surveys. These sightings took place frequently (average fourteen per month) although without a formal survey protocol. During the surveys, staff visited each of the above-mentioned locations and recorded observations of marine mammals. Surveys were conducted using binoculars and the naked eye from shoreline locations or the piers/wharves themselves. Because these surveys consist of opportunistic sighting data from shore-based observers, largely of hauled-out animals, there is no associated survey area appropriate for use in calculating a density from the abundance data. Thus, NMFS has not used these data to derive a density but rather has used the absolute abundance to estimate take. For analysis in this proposed IHA, data were compiled for the period from April 2008 through June 2010—with the additional inclusion of twelve surveys from October 2011 in which only Steller sea lion observations were recorded, as this was the first record of Steller sea lion presence during the month of October—and these data provided the basis for take estimation for Steller and California sea lions. Other information, including sightings data from other Navy survey efforts at NBKB, is available for these two species, but these data provide the most conservative (i.e., highest) local abundance estimates (and thus the highest estimates of potential take). For all other species, the data source that provided the most conservative density estimate was used.

Vessel-based marine wildlife surveys were conducted according to established survey protocols during July through September 2008 and November through May 2009–10 (Tannenbaum *et al.,* 2009, 2011). Eighteen complete surveys of the nearshore area resulted in observations of four marine mammal species (harbor seal, California sea lion, harbor porpoise, and Dall's porpoise). These surveys operated along pre-determined transects parallel to the shoreline from the nearshore out to approximately 1,800 ft (549 m) from shoreline, at a spacing of 100 yd (91 m), and covered the entire NBKB waterfront (approximately 3.9 km^2 per survey) at a speed of 5 kn or less. Two observers recorded sightings of marine mammals both in the water and hauled out, including date, time, species, number of individuals, age (juvenile, adult), behavior (swimming, diving, hauled out, avoidance dive), and haul-out location. Positions of marine mammals were obtained by recording distance and bearing to the animal with a rangefinder and compass, noting the concurrent location of the boat with GPS, and, subsequently, analyzing these data to produce coordinates of the locations of all animals detected. These surveys produced the information used to estimate take for Dall's porpoise.

During 2011 construction activities, marine mammal monitoring was conducted on construction days for mitigation purposes. During those efforts, the Navy observed that harbor porpoises were more common in deeper waters of Hood Canal than the previously described, nearshore vessel-based surveys indicated. For that reason, the Navy conducted vessel-based line transect surveys in Hood Canal on days when no construction activities occurred in order to collect additional density data for species present in Hood Canal. These surveys were primarily conducted in September and detected three marine mammal species (harbor seal, California sea lion, and harbor porpoise), and included surveys conducted in both the main body of Hood Canal, near the project area, and baseline surveys conducted for comparison in Dabob Bay, an area of Hood Canal that is not affected by sound from Navy actions at the NBKB waterfront (see Figures 2–1 and 4–1 in the Navy's application). The surveys operated along pre-determined transects that followed a double saw-tooth pattern to achieve uniform coverage of the entire NBKB waterfront. The vessel traveled at a speed of approximately 5 kn when transiting along the transect lines. Two observers recorded sightings of marine mammals both in the water and hauled out, including the date, time, species, number of individuals,

and behavior (swimming, diving, etc.). Positions of marine mammals were obtained by recording the distance and bearing to the animal(s), noting the concurrent location of the boat with GPS, and subsequently analyzing these data to produce coordinates of the locations of all animals detected. Sighting information for harbor porpoises was corrected for detectability (g(0) = 0.54; Barlow, 1988; Calambokidis *et al.,* 1993; Carretta *et al.,* 2001). Distance sampling methodologies were used to estimate densities of animals for these data. Due to the recent execution of these surveys, not all data have been processed. Due to the unexpected abundance of harbor porpoises encountered, data for this species were processed first and are available for use in this proposed IHA. All other species data may be included in subsequent environmental compliance documents once all post-processing is complete, but preliminary analysis indicates that use of the previously described data would still provide the most conservative take estimates for the other species.

The cetaceans, as well as the harbor seal, appear to range throughout Hood Canal; therefore, the analysis in this proposed IHA assumes that harbor seal, humpback whale, transient killer whale, harbor porpoise, and Dall's porpoise are uniformly distributed in the project area. However, it should be noted that there have been no observations of cetaceans within the WRA security barrier; the barrier thus appears to effectively prevent cetaceans from approaching the shutdown zones (please see Figure 6–2 of the Navy's application; the WRA security barrier, which is not denoted in the figure legend, is represented by a thin gray line). Although source levels associated with the proposed actions are so low that no Level A harassments would likely occur even in the absence of any mitigation measures, it appears that cetaceans at least are not at risk of Level A harassment at NBKB even from louder activities (e.g., impact pile driving). The remaining species that occur in the project area, Steller sea lion and California sea lion, do not appear to utilize most of Hood Canal. The sea lions appear to be attracted to the man-made haul-out opportunities along the NBKB waterfront while dispersing for foraging opportunities elsewhere in Hood Canal. California sea lions were not reported during aerial surveys of Hood Canal (Jeffries *et al.,* 2000), and Steller sea lions have only been documented at the NBKB waterfront.

Description of Take Calculation

The take calculations presented here rely on the best data currently available for marine mammal populations in the Hood Canal, as discussed in preceding sections. The formula was developed for calculating take due to pile removal activity and applied to each group-specific sound impact threshold. The formula is founded on the following assumptions:

- All pilings to be installed would have a sound disturbance distance equal to that of the piling that causes the greatest sound disturbance (i.e., the piling furthest from shore);
- All marine mammal individuals potentially available are assumed to be present within the relevant area, and thus incidentally taken; and,
- An individual can only be taken once during a 24-hour period.

The calculation for marine mammal takes is estimated by:

Take estimate = (n * ZOI) * days of total activity

Where:

n = density estimate used for each species/season

ZOI = sound threshold zone of influence (ZOI) impact area; the area encompassed by all locations where the SPLs equal or exceed the threshold being evaluated

n * ZOI produces an estimate of the abundance of animals that could be present in the area for exposure, and is rounded to the nearest whole number before multiplying by days of total activity.

The ZOI impact area is the estimated range of impact to the sound criteria. The distances specified in Tables 2 and 4 (actual distances rather than modeled) were used to calculate ZOI around each pile. The ZOI impact area took into consideration the possible affected area of the Hood Canal from the pile removal site furthest from shore with attenuation due to land shadowing from bends in the canal. Because of the close proximity of some of the piles to the shore, the narrowness of the canal at the project area, and the maximum fetch, the ZOIs for each threshold are not necessarily spherical and may be truncated.

For sea lions, as described previously, the surveys offering the most conservative estimates of abundance do not have a defined survey area and so are not suitable for deriving a density construct. Instead, abundance is estimated on the basis of previously described opportunistic sighting information at the NBKB waterfront, and it is assumed that the total amount of animals known from NBKB haul-outs would be ''available'' to be taken in a given pile removal day. Thus, for these two species, take is estimated by multiplying abundance by days of activity.

The total number of days spent removing piles is expected to be a maximum of 15 for vibratory removal and 32 for chipping. While pile removal can occur any day throughout the in-water work window, and the analysis is conducted on a per day basis, only a fraction of that time is actually spent in pile removal. For each pile, vibratory pile removal is expected to be no more than 1 hour. Pneumatic chipping is expected to take approximately 2 hours per pile.

The exposure assessment methodology is an estimate of the numbers of individuals exposed to the effects of pile removal activities exceeding NMFS-established thresholds. Of note in these exposure estimates, mitigation methods (i.e., visual monitoring and the use of shutdown zones) were not quantified within the assessment and successful implementation of this mitigation is not reflected in exposure estimates. Results from acoustic impact exposure assessments should be regarded as conservative estimates.

Airborne Sound—No incidents of incidental take are predicted as a result of exposure to airborne sound, using the formula given in this section and the information from Table 4. This is primarily due to the low source levels associated with the specified activities. However, it is NMFS' view that authorization for incidental take resulting from exposure to airborne sound, in the absence of any haul-outs or opportunities for an animal to haul out within the ZOI, would effectively result in double counting. Such exposure results when pinnipeds raise their heads above water; thus, those individuals are within the larger ZOI corresponding to Level B harassment resulting from underwater sound produced by the same source, and are already exposed and considered as an incidental take. As noted previously, NMFS considers an individual as able to be incidentally taken once per 24-hour period. Multiple incidents of exposure to sound above NMFS' thresholds for behavioral harassment are not believed to result in increased behavioral disturbance, in either nature or intensity of disturbance reaction.

California Sea Lion

California sea lions are present in Hood Canal during much of the year with the exception of mid-June through August. California sea lions occur regularly in the vicinity of the project

site from September through mid-June, as determined by Navy waterfront surveys conducted from April 2008 through June 2010 (Navy, 2010; Table 6). With regard to the range of this species in Hood Canal and the project area, it is assumed on the basis of waterfront observations (Agness and Tannenbaum, 2009; Tannenbaum *et al.,* 2009, 2011) that the opportunity to haul out on submarines docked at Delta Pier is a primary attractant for California sea lions in Hood Canal, as they have rarely been reported, either hauled out or swimming, elsewhere in Hood Canal (Jeffries, 2007). Abundance is calculated as the monthly average of the maximum number observed in a given month, as opposed to the overall average (Table 6). For example, in the month of May, the maximum number of animals observed on any one day was 25 in 2008, 33 in 2009, and 17 in 2010, providing a monthly average of the maximum daily number observed of 25. This provides a conservative overall daily abundance of 26.2 for the in-water work window, as compared with an actual per survey abundance of 11.4 during the same period.

TABLE 6—CALIFORNIA SEA LION SIGHTING INFORMATION FROM NBKB, APRIL 2008–JUNE 2010

Month	Number of surveys	Number of surveys with animals present	Frequency of presence [1]	Abundance [2]
January	25	15	0.60	24.0
February	28	24	0.86	31.0
March	28	26	0.93	38.5
April	38	27	0.71	36.3
May	44	34	0.77	25.0
June	44	7	0.16	5.3
July	31	0	0	0
August	29	1	0.03	0.5
September	26	9	0.35	22.0
October	26	22	0.85	45.5
November	22	22	1	54.0
December	24	14	0.58	32.5
Total or average (in-water work season only)	211	107	0.53	26.2

Totals (number of surveys) and averages (frequency and abundance) presented for in-water work season (July–February) only. Information from March–June presented for reference.

[1] Frequency is the number of surveys with California sea lions present/number of surveys conducted.

[2] Abundance is calculated as the monthly average of the maximum daily number observed in a given month.

The largest observed number of California sea lions hauled out along the NBKB waterfront was 58 in a November survey. During the in-water construction period (mid-July to mid-February) the largest daily attendance average for each month ranged from 24 individuals to 54 individuals. The likelihood of California sea lions being present at NBKB is greatest from October through May, when the frequency of attendance in surveys was at least 0.58. Attendance along the NBKB waterfront in November surveys (2008–09) was 100 percent. Additionally, five navigational buoys near the entrance to Hood Canal were documented as potential haul-outs, each capable of supporting three adult California sea lions (Jeffries *et al.,* 2000). Breeding rookeries are in California; therefore, pups are not expected to be present in Hood Canal (NMFS 2008b). Female California sea lions are rarely observed north of the California/Oregon border; therefore, only adult and sub-adult males are expected to be exposed to project impacts.

The ZOI for vibratory removal encompasses areas where California sea lions are known to haul-out; assuming that 26 individuals could be taken per day of vibratory removal provides an estimate of 390 takes for that activity. The ZOI for pneumatic chipping does not encompass areas where California sea lions are known to occur; nevertheless, it is likely that some individuals would transit this area in route to haul out or forage. Therefore, and in order to ensure that the Navy is adequately authorized for incidental take, NMFS predicts that at least one individual California sea lion could be exposed to sound levels indicating Level B harassment per day of pneumatic chipping. Table 8 depicts the estimated number of behavioral harassments.

Steller Sea Lion

Steller sea lions were first documented at the NBKB waterfront in November 2008, while hauled out on submarines at Delta Pier (Bhuthimethee, 2008; Navy, 2010) and have been periodically observed since that time. Steller sea lions typically occur at NBKB from November through April; however, the first October sightings of Steller sea lions at NBKB occurred in 2011. Based on waterfront observations, Steller sea lions appear to use available haul-outs (typically in the vicinity of Delta Pier, approximately one mile south of the project area) and habitat similarly to California sea lions, although in lesser numbers. On occasions when Steller sea lions are observed, they typically occur in mixed groups with California sea lions also present, allowing observers to confirm their identifications based on discrepancies in size and other physical characteristics. During October 2011, up to four individuals were sighted either hauled out at the submarines docked at Delta Pier or swimming in the waters just adjacent to those haul-outs.

Vessel-based survey effort in NBKB nearshore waters have not detected any Steller sea lions (Agness and Tannenbaum, 2009; Tannenbaum *et al.,* 2009, 2011). Opportunistic sightings data provided by Navy personnel since April 2008 have continued to document sightings of Steller sea lions at Delta Pier from November through April (Table 7). Steller sea lions have only been observed hauled out on submarines docked at Delta Pier. Delta Pier and other docks at NBKB are not accessible to pinnipeds due to the height above water, although the smaller California sea lions and harbor seals are able to haul out on pontoons that support the floating security barrier. One to two animals are typically seen hauled out with California sea lions; the maximum Steller sea lion group size seen at any given time was six individuals in November 2009.

TABLE 9—STELLER SEA LION SIGHTING INFORMATION FROM NBKB, APRIL 2008–JUNE 2010; OCTOBER 2011

Month	Number of surveys	Number of surveys with animals present	Frequency of presence [1]	Abundance [2]
January	25	4	0.16	1.0
February	28	1	0.04	0.5
March	28	4	0.14	1.0
April	38	5	0.13	1.3
May	44	0	0	0
June	44	0	0	0
July	31	0	0	0
August	29	0	0	0
September	26	0	0	0
October	38	12	0.32	1.3
November	22	3	0.14	5.0
December	24	5	0.21	1.5
Total or average (in-water work season only)	223	25	0.11	1.2

Totals (number of surveys) and averages (frequency and abundance) presented for in-water work season (July–February) only. Information from March–June presented for reference.

[1] Frequency is the number of surveys with Steller sea lions present/number of surveys conducted.

[2] Abundance is calculated as the monthly average of the maximum daily number observed in a given month.

Their frequency of occurrence by month typically has not exceeded 0.21 (in December 2009), i.e., they were present in only 21 percent of surveys that month. However, all 12 surveys conducted in October 2011 resulted in Steller sea lion sightings, raising the frequency of occurrence for that month to 0.32. The time period from November through April coincides with the time when Steller sea lions are frequently observed in Puget Sound. Only adult and sub-adult males are likely to be present in the project area during this time; female Steller sea lions have not been observed in the project area. Since there are no known breeding rookeries in the vicinity of the project site, Steller sea lion pups are not expected to be present. By May, most Steller sea lions have left inland waters and returned to their rookeries to mate. Although sub-adult individuals (immature or pre-breeding animals) will occasionally remain in Puget Sound over the summer, observational data (Table 7) have indicated that Steller sea lions are present only from October through April and not during the summer months.

Local abundance information, rather than density, was used in estimating take for Steller sea lions. Please see the discussion provided previously for California sea lions. Steller sea lions are known only from haul-outs over one mile from the project area, and would not be subject to harassment from airborne sound. The ZOI for vibratory removal encompasses areas where Steller sea lions are known to haul-out; assuming that one individual could be taken per day of vibratory removal provides an estimate of fifteen takes for that activity. However, the available abundance information does not reflect the nature of Steller sea lion occurrence at NBKB. According to the most recent observational information, if Steller sea lions are present at NBKB, it is possible that as many as four individuals could be present on submarines docked at Delta Pier or in waters adjacent to these haul-outs. Thus, NMFS conservatively assumes that up to four individuals could be exposed to sound levels indicating Level B harassment per day of vibratory pile removal. Similar to California sea lions, the ZOI for pneumatic chipping does not encompass areas where Steller sea lions are known to occur; nevertheless, it is possible that some individuals could transit this area in route to haul out or forage. Therefore, and in order to ensure that the Navy is adequately authorized for incidental take, NMFS predicts that at least one individual Steller sea lion could be exposed to sound levels indicating Level B harassment per day of pneumatic chipping. Table 8 depicts the number of estimated behavioral harassments.

Harbor Seal

Harbor seals are the most abundant marine mammal in Hood Canal, where they can occur anywhere in Hood Canal waters year-round. The Navy detected harbor seals during marine mammal boat surveys of the waterfront area from July to September 2008 (Tannenbaum *et al.,* 2009) and November to May 2010 (Tannenbaum *et al.,* 2011), as described previously. Harbor seals were sighted during every survey and were found in all marine habitats including nearshore waters and deeper water, and hauled out on certain manmade objects, such as the pontoons of the floating security barrier. During most of the year, all age and sex classes could occur in the project area throughout the period of construction activity. As there are no known regular pupping sites in the vicinity of the project area, harbor seal neonates are not expected to be present during pile removal. However, the first documented birth of a harbor seal at NBKB occurred in August 2011 at Carderock Pier (several miles south of the project site), so the presence of neonates is possible, if unlikely. Otherwise, during most of the year, all age and sex classes could occur in the project area throughout the period of construction activity. Harbor seal numbers increase from January through April and then decrease from May through August as the harbor seals move to adjacent bays on the outer coast of Washington for the pupping season. From April through mid-July, female harbor seals haul out on the outer coast of Washington at pupping sites to give birth. The main haul-out locations for harbor seals in Hood Canal are located on river delta and tidal exposed areas at various river mouths, with the closest haul-out area to the project area being 10 mi (16 km) southwest of NBKB (London, 2006). Please see Figure 4–1 of the Navy's application for a map of haul-out locations in relation to the project area.

Jeffries *et al.* (2003) conducted aerial surveys of the harbor seal population in Hood Canal in 1999 for the Washington Department of Fish and Wildlife and reported 711 harbor seals hauled out. The authors adjusted this abundance with a correction factor of 1.53 to account for seals in the water, which

were not counted, and estimated that there were 1,088 harbor seals in Hood Canal. The correction factor (1.53) was based on the proportion of time seals spend on land versus in the water over the course of a day, and was derived by dividing one by the percentage of time harbor seals spent on land. These data came from tags (VHF transmitters) applied to harbor seals at six areas (Grays Harbor, Tillamook Bay, Umpqua River, Gertrude Island, Protection/Smith Islands, and Boundary Bay, BC) within two different harbor seal stocks (the coastal stock and the inland waters of WA stock) over four survey years. The Hood Canal population is part of the inland waters stock, and while not specifically sampled, Jeffries *et al.* (2003) found the VHF data to be broadly applicable to the entire stock. The tagging research in 1991 and 1992 conducted by Huber *et al.* (2001) and Jeffries *et al.* (2003) used the same methods for the 1999 and 2000 survey years. These surveys indicated that approximately 35 percent of harbor seals are in the water versus hauled out on a daily basis (Huber *et al.,* 2001; Jeffries *et al.,* 2003). Exposures were calculated using a density derived from the number of harbor seals that are present in the water at any one time (35 percent of 1,088, or approximately 381 individuals), divided by the area of the Hood Canal (291 km^2 [112 mi^2]) and the formula presented previously.

NMFS recognizes that over the course of the day, while the proportion of animals in the water may not vary significantly, different individuals may enter and exit the water. However, fine-scale data on harbor seal movements within the project area on time durations of less than a day are not available. Previous monitoring experience from Navy actions conducted from July-October 2011 in the same project area has indicated that this density provides an appropriate estimate of potential exposures. Data from those monitoring efforts are currently in post-processing and are not available in report form at this time. However, the density of harbor seals calculated in this manner (1.3 animals/km^2) is corroborated by results of the Navy's vessel-based marine mammal surveys at NBKB in 2008 and 2009–10, in which an average of five individual harbor seals per survey was observed in the 3.9 km^2 survey area (density = 1.3 animals/km^2) (Tannenbaum *et al.,* 2009, 2011). Table 8 depicts the number of estimated behavioral harassments.

Humpback Whales

One humpback whale has recently been documented in Hood Canal. This individual was originally sighted on January 27, 2012 and, while potentially still present, was last reported on February 23, 2012. Although known to be historically abundant in the inland waters of Washington, no other confirmed documentation of humpback whales in Hood Canal is available. Their presence has likely not occurred in several decades, with the last known reports being anecdotal accounts of three humpback sightings from 1972–82. Although it cannot be confirmed that this individual has departed the Hood Canal, with the absence of sighting records since February 23 (following regular sightings between January 27–February 23) and the lack of any historical regular occurrence in the Hood Canal it is likely that this individual has departed and that no humpback whales would be present in the proposed action area. In addition, the proposed action is estimated to occur for only 15 days, with short pile removal durations per day. As described before, cetaceans are not known from within the WRA and it's virtually impossible that an animal as large as a humpback whale could occur within the WRA; therefore, sound from pneumatic chipping, which is not expected to extend beyond the floating security barrier, would not have the potential to affect humpback whales. NMFS believes that the possibility for incidental take of humpback whales is discountable. In addition to the preceding rationale given in support of this belief, a density was derived from the available information: One humpback whale ranging through the Hood Canal (291 km^2), or 0.003 animals/km^2. Using this density and the formula given previously, no takes are predicted.

Killer Whales

Transient killer whales are uncommon visitors to Hood Canal. Transients may be present in the Hood Canal anytime during the year and traverse as far as the project site. Resident killer whales have not been observed in Hood Canal, but transient pods (six to eleven individuals per event) were observed in Hood Canal for lengthy periods of time (59–172 days) in 2003 (January–March) and 2005 (February–June), feeding on harbor seals (London, 2006).

These whales used the entire expanse of Hood Canal for feeding. Subsequent aerial surveys suggest that there has not been a sharp decline in the local seal population from these sustained feeding events (London, 2006). Based on this data, the density for transient killer whales in the Hood Canal for January to June is 0.038/km^2 (eleven individuals divided by the area of the Hood Canal [291 km^2]). Table 8 depicts the number of estimated behavioral harassments.

Dall's Porpoise

Dall's porpoises may be present in the Hood Canal year-round and could occur as far south as the project site. Their use of inland Washington waters, however, is mostly limited to the Strait of Juan de Fuca. The Navy conducted vessel-based surveys of the waterfront area in 2008–10 (Tannenbaum *et al.,* 2009, 2011). During one of the surveys a Dall's porpoise was sighted in August in the deeper waters off Carlson Spit.

In the absence of an abundance estimate for the entire Hood Canal, a density was derived from the waterfront survey by the number of individuals seen divided by total number of kilometers of survey effort (18 surveys with approximately 3.9 km^2 [1.5 mi^2] of effort each), assuming strip transect surveys. In the absence of any other survey data for the Hood Canal, this density is assumed to be throughout the project area. Exposures were calculated using the formula presented previously. Table 8 depicts the number of estimated behavioral harassments.

Harbor Porpoise

Harbor porpoises may be present in the Hood Canal year-round; their presence had previously been considered rare. During waterfront surveys of NBKB nearshore waters from 2008–10 only one harbor porpoise had been seen in 18 surveys of 3.9 km^2 each. However, during monitoring of recent Navy actions at NBKB, several sightings indicated that their presence may be more frequent in deeper waters of Hood Canal than had been believed on the basis of existing survey data and anecdotal evidence. Subsequently, the Navy conducted dedicated vessel-based line transect surveys on days when no construction activity occurred (due to security, weather, etc.), described previously in this document, with regular observations of harbor porpoise groups. Sightings in the deeper waters of Hood Canal ranged up to eleven individuals, with an average of approximately six animals sighted per survey day (Navy, in prep.).

Sightings of harbor porpoises during these surveys were used to generate a density for Hood Canal. Based on guidance from other line transect surveys conducted for harbor porpoises using similar monitoring parameters (e.g., boat speed, number of observers) (Barlow, 1988; Calambokidis *et al.,* 1993; Caretta *et al.,* 2001), the Navy determined the effective strip width for the surveys to be 1 km, or a

perpendicular distance of 500 m from the transect to the left or right of the vessel. The effective strip width was set at the distance at which the detection probability for harbor porpoises was equivalent to one, which assumes that all individuals on a transect are detected. Only sightings occurring within the effective strip width were used in the density calculation. By multiplying the trackline length of the surveys by the effective strip width, the total area surveyed during the surveys was 259.01 km^2. Thirty-five individual harbor porpoises were sighted within this area, resulting in a density of 0.135 animals per km^2. To account for availability bias, or the animals which are unavailable to be detected because they are submerged, the Navy utilized a g(0) value of 0.54, derived from other similar line transect surveys (Barlow, 1988; Calambokidis *et al.,* 1993; Carretta *et al.,* 2001). This resulted in a density of 0.250 harbor porpoises per km^2. For comparison, 274.27 km^2 of trackline survey effort in nearby Dabob Bay produced a corrected density estimate of 0.203 harbor porpoises per km^2. Exposures were calculated using the formula described previously. Table 8 depicts the number of estimated behavioral harassments.

Potential takes could occur if individuals of these species move through the area on foraging trips when pile removal is occurring. Individuals that are taken could exhibit behavioral changes such as increased swimming speeds, increased surfacing time, or decreased foraging. Most likely, individuals may move away from the sound source and be temporarily displaced from the areas of pile removal. Potential takes by disturbance would likely have a negligible short-term effect on individuals and not result in population-level impacts.

TABLE 8—NUMBER OF POTENTIAL INCIDENTAL TAKES OF MARINE MAMMALS WITHIN VARIOUS ACOUSTIC THRESHOLD ZONES

Species	Density/ abundance	Underwater			Airborne	Total proposed authorized takes
		Injury threshold [1]	Disturbance threshold—vibratory removal (120 dB)	Disturbance threshold—pneumatic chipping (120 dB)	Disturbance threshold [2]	
California sea lion	[3] 26.2	0	* 390	* 32	0	422
Steller sea lion	[3] 1.2	0	* 60	* 32	0	92
Harbor seal	1.31	0	705	32	0	737
Humpback whale	0.003	0	0	0	N/A	0
Killer whale	0.038	0	15	0	N/A	15
Dall's porpoise	0.014	0	15	0	N/A	15
Harbor porpoise	0.250	0	135	0	N/A	135
Total		0	1,320	96	0	1,416

* See preceding species-specific discussions for description of take estimate.

[1] Acoustic injury threshold is 190 dB for pinnipeds and 180 dB for cetaceans. No activity would produce source levels equal to 190 dB, while only vibratory removal would produce a source level of 180 dB.

[2] Acoustic disturbance threshold is 100 dB for sea lions and 90 dB for harbor seals. NMFS does not believe that pinnipeds would be available for airborne acoustic harassment because they are known to haul-out only at locations well outside the zone in which airborne acoustic harassment could occur; nevertheless, calculations predict that no incidental take would occur as a result of airborne sound.

[3] Figures presented are abundance numbers, not density, and are calculated as the average of average daily maximum numbers per month. Abundance numbers are rounded to the nearest whole number for take estimation.

Negligible Impact and Small Numbers Analysis and Preliminary Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the take occurs.

Pile removal activities associated with the wharf rehabilitation project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the proposed activities may result in take, in the form of Level B harassment (behavioral disturbance) only, from underwater sounds generated through pile removal. No mortality, serious injury, or Level A harassment is anticipated given the nature of the activity (i.e., non-pulsed sound with low source levels) and measures designed to minimize the possibility of injury to marine mammals, while Level B harassment would be reduced to the level of least practicable adverse impact for the same reasons. Specifically, these removal methods would produce lower source levels than would pile installation with a vibratory hammer, which does not have significant potential to cause injury to marine mammals due to its sound source characteristics and relatively low source levels. Pile removal would either not start or be halted if marine mammals approach the shutdown zone (described previously in this document). The pile removal activities analyzed here carry significantly less risk of impact to marine mammals than did other construction activities analyzed and monitored within the Hood Canal, including two recent projects conducted by the Navy at the same location (test pile project and the first year of EHW–1 pile replacement work) as well as work conducted in 2005 for the Hood Canal Bridge (SR–104) by the Washington Department of Transportation. These activities have taken place with no reported injuries or mortality to marine mammals.

The proposed numbers of authorized take for marine mammals would be considered small relative to the relevant stocks or populations even if each estimated taking occurred to a new individual—an extremely unlikely scenario. The proposed numbers of authorized take represent 5 percent of the relevant stock for harbor seals, 4.2

percent for transient killer whales, and 1.3 percent for harbor porpoises; the proposed numbers are less than 1 percent for the remaining species. However, even these low numbers represent potential instances of take, not the number of individuals taken. That is, it is likely that a relatively small subset of Hood Canal harbor seals, which is itself a small subset of the regional stock, would be harassed by project activities.

For example, while the available information and formula estimate that as many as 737 exposures of harbor seals to stimuli constituting Level B harassment could occur, that number represents some portion of the approximately 1,088 harbor seals resident in Hood Canal (approximately 7 percent of the regional stock) that could potentially be exposed to sound produced by pile removal activities on multiple days during the project. No rookeries are present in the project area, there are no haul-outs other than those provided opportunistically by man-made objects, and the project area is not known to provide foraging habitat of any special importance. Repeated exposures of individuals to levels of sound that may cause Level B harassment are unlikely to result in hearing impairment or to significantly disrupt foraging behavior. Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in viability for Hood Canal harbor seals, and thus would not result in any adverse impact to the stock as a whole.

NMFS has preliminarily determined that the impact of the previously described wharf rehabilitation project may result, at worst, in a temporary modification in behavior (Level B harassment) of small numbers of marine mammals. No injury, serious injury, or mortality is anticipated as a result of the specified activity, and none is proposed to be authorized. Additionally, animals in the area are not expected to incur hearing impairment (i.e., TTS or PTS) or non-auditory physiological effects. For pinnipeds, the absence of any major rookeries and only a few isolated and opportunistic haul-out areas near or adjacent to the project site means that potential takes by disturbance would have an insignificant short-term effect on individuals and would not result in population-level impacts. Similarly, for cetacean species the absence of any known regular occurrence adjacent to the project site means that potential takes by disturbance would have an insignificant short-term effect on individuals and would not result in population-level impacts. Due to the nature, degree, and context of behavioral harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

While the number of marine mammals potentially incidentally harassed would depend on the distribution and abundance of marine mammals in the vicinity of the survey activity, the number of potential harassment takings is estimated to be small relative to regional stock or population number, and has been mitigated to the lowest level practicable through incorporation of the proposed mitigation and monitoring measures mentioned previously in this document. This activity is expected to result in a negligible impact on the affected species or stocks. The eastern DPS of the Steller sea lion is listed as threatened under the ESA; no other species for which take authorization is requested are either ESA-listed or considered depleted under the MMPA.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that the proposed wharf construction project would result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the activity would have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

No tribal subsistence hunts are held in the vicinity of the project area; thus, temporary behavioral impacts to individual animals would not affect any subsistence activity. Further, no population or stock level impacts to marine mammals are anticipated or authorized. As a result, no impacts to the availability of the species or stock to the Pacific Northwest treaty tribes are expected as a result of the proposed activities. Therefore, no relevant subsistence uses of marine mammals are implicated by this action.

Endangered Species Act (ESA)

There are two ESA-listed marine mammal species with known occurrence in the project area: The eastern DPS of the Steller sea lion, listed as threatened, and the humpback whale, listed as endangered. Because of the potential presence of these species, the Navy has requested a formal consultation with the NMFS Northwest Regional Office under section 7 of the ESA. NMFS' Office of Protected Resources has also initiated formal consultation on its authorization of incidental take of Steller sea lions. These consultations are in progress. These species do not have critical habitat in the action area.

National Environmental Policy Act (NEPA)

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), as implemented by the regulations published by the Council on Environmental Quality (40 CFR parts 1500–1508), and NOAA Administrative Order 216–6, the Navy prepared an Environmental Assessment (EA) to consider the direct, indirect and cumulative effects to the human environment resulting from the pile replacement project. NMFS adopted that EA in order to assess the impacts to the human environment of issuance of an IHA to the Navy. NMFS signed a Finding of No Significant Impact (FONSI) on May 17, 2011. On the basis of new information related to the occurrence of marine mammals in the Hood Canal, the Navy is preparing a supplement to that EA. NMFS will review that document and, if appropriate, issue a new FONSI.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to authorize the take of marine mammals incidental to the Navy's wharf rehabilitation project, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: April 24, 2012.

Helen M. Golde,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–10370 Filed 4–27–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB109

Taking and Importing Marine Mammals; Naval Explosive Ordnance Disposal School Training Operations at Eglin Air Force Base, Florida

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

ACTION: Notice; issuance of a Letter of Authorization (LOA).

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) and implementing regulations, notification is hereby given that a LOA has been issued to the U.S. Department of the Air Force, Headquarters 96th Air Base Wing (U.S. Air Force), Eglin Air Force Base (Eglin AFB) to take marine mammals, by Level B harassment, incidental to Naval Explosive Ordnance Disposal School (NEODS) training operations at Eglin AFB, Florida from approximately April, 2012, to April, 2017. The U.S. Air Force activities are considered military readiness activities pursuant to the MMPA, as amended by the National Defense Authorization Act of 2004 (NDAA).

DATES: Effective April 23, 2012, through April 24, 2017.

ADDRESSES: The LOA and supporting documentation are available by writing to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, by telephoning one of the contacts listed here (see **FOR INFORMATION CONTACT**), or online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address. NMFS has prepared an Environmental Assessment titled ''Environmental Assessment on the Promulgation of Regulations and the Issuance of Letters of Authorization to Take Marine Mammals, by Level B Harassment, Incidental to Naval Explosive Ordnance Disposal School Training Operations at Eglin Air Force Base, Florida'' (EA) and Finding of No Significant Impact (FONSI) in accordance with the National Environmental Policy Act (NEPA) as implemented by regulations published by the Council on Environmental Quality (CEQ).

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301–427–8401.

SUPPLEMENTARY INFORMATION:

Background

Paragraphs 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary), upon request, to allow for a period of not more than five years, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued. Alternatively, if the taking is limited to harassment, certain determinations are made and the authorization does not exceed one year, an IHA may be issued. Upon making a finding that an application for incidental take is adequate and complete, NMFS commences the incidental take authorization process by publishing in the **Federal Register** a notice of receipt of an application for the implementation of regulations or a proposed IHA initiating a period for public review and comment.

An authorization for the incidental takings may be granted if NMFS finds that the taking during the period for the authorization will have a negligible impact on the species or stock(s) of marine mammals, will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth to achieve the least practicable adverse impact.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as: ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

The National Defense Authorization Act of 2004 (NDAA) (Pub. L. 108–36) modified the MMPA by removing the ''small numbers'' and ''specified geographic region'' limitations and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (section 3(18)(B) of the MMPA): ''(i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or behavioral patterns are abandoned or significantly altered (Level B harassment).''

Summary of Request

On November 6, 2009, NMFS received an application from the U.S. Air Force requesting an authorization for the take of marine mammals incidental to NEODS training operations. These training operations are properly considered ''military readiness activity'' under the provisions of the NDAA. On January, 15, 2010, NMFS published notification of receipt (75 FR 2490) in the **Federal Register** for the U.S. Air Force's NEODS training operations and determined that its application was adequate and complete. The **Federal Register** notice solicited comments from the public. After the close of the public comment period and review of comments, NMFS, on October 1, 2010, NMFS published a notification of a proposed rule (75 FR 60694) with the text of the proposed rule in the **Federal Register** for the U.S. Air Force's NEODS training operations. The **Federal Register** notice solicited public comments on the preliminary approach taken in the proposed rule. On November 30, 2010, NMFS received a revised application from the U.S. Air Force which addressed public comments received during the comment period for the proposed rule. The application re-estimated the Zones of Influence (ZOI) and associated takes on revised thresholds for Level A and Level B harassment. On December 5, 2011, NMFS received a revised application from the U.S. Air Force with revised monitoring and mitigation measures to reduce the potential for lethal take of bottlenose dolphins due to an event involving the mortality of common dolphins associated with similar explosive training operations at the U.S. Navy's Silver Strand Training Complex near San Diego, California. On March 22, 2012, NMFS published a notice of final rule (77 FR 16718) and final regulation in the **Federal Register** authorizing take by Level B harassment of Atlantic bottlenose dolphins (*Tursiops truncatus*) incidental to the U.S. Air Force's NEODS training operations. The final regulations are codified in the Code of Federal Regulations at 50 CFR 217.80–89.

Pursuant to these regulations, NMFS is issuing this LOA to authorize the take, by Level B (behavioral) harassment, of Atlantic bottlenose dolphins incidental to conducting NEODS training operations and testing at Eglin Gulf Test and Training Range (EGTTR) at property off Santa Rosa Island, FL, in the northern Gulf of Mexico (GOM) in accordance with the issuance of one or more Letters of Authorization over a 5-year period. Estimated take would average approximately 10 animals per year; approximately 50 animals over the 5-year period.

Specified Activities

The specified activities covered by this 5-year LOA are identical to those covered in the regulations. NEODS

missions involve underwater detonations of small, live explosive charges adjacent to inert mines. The NEODS may conduct up to eight two-day demolition training events annually; these missions may occur at any time of the year. Each demolition training event involves a maximum of five detonations. Up to 20 five-pound (lb) charges (five lbs net explosive weight [NEW] per charge) and 20 ten-lb charges (ten lbs NEW per charge) would be detonated annually in the GOM, approximately three nautical miles (5.6 kilometers) offshore of Eglin AFB. Detonations would be conducted on the sea floor, adjacent to an inert mine, at a depth of approximately 60 feet (18.3 meters). Additional information on the NEODS training operations is contained in the application and final rule, which is available upon request (see **ADDRESSES**).

Mitigation and Monitoring

The mitigation and monitoring included in this LOA are identical to those required by the governing regulations. In summary, they include:

(1) The time of detonation will be limited to daylight hours (i.e., an hour after sunrise and an hour before sunset);

(2) NEODS missions would be delayed if the Beaufort sea state is greater than scale number three (i.e., if whitecaps cover more than 50 percent of the surface or waves are greater than 0.9 meters (m) (3 feet [ft]) to ensure visibility of marine mammals to observers);

(3) Time delays longer than 10 minutes will not be used and initiation of the timer device will not start until the mitigation-monitoring zone is clear of marine mammals for 30 minutes;

(4) Observers on boats and/or helicopters will conduct monitoring pre-mission, throughout the mission, and post-mission for the presence of marine mammals and other protected species indicators;

(5) NEODS mission would be postponed or suspended if marine mammals and/or large concentrations of protected species indicators are observed within or about to enter the mitigation-monitoring zone:

(6) After a delay due to the aforementioned wildlife being detected in the mitigation-monitoring zone, the mission would not be continued until the wildlife in question is confirmed to be outside the mitigation-monitoring zone, the animal(s) are moving away from the mission area, and the animal(s) does not re-enter the mitigation-monitoring zone for 30 minutes; and

(7) Post-mission monitoring would be conducted to report any injured, seriously injured, or dead marine mammals.

Negligible Impact Determination

As analyzed and described in further detail in the preamble to the final regulations, taking authorized under the regulations will have a negligible impact on the affected species and stocks of marine mammals.

Authorization

Accordingly, NMFS has issued an LOA to the U.S. Air Force authorizing takes of marine mammals incidental to NEODS training operations at Eglin AFB. Issuance of this LOA was based on NMFS's determination that the total number of marine mammals taken by the activity as a whole shall have no more than a negligible impact on the affected marine mammal species, Atlantic bottlenose dolphin. The basis for this determination is described in the preamble to the final rule (77 FR 16718, March 22, 2012). NMFS also determined that the LOA will not have an unmitigable adverse impact on the availability of the affected marine mammal stocks for subsistence uses.

Dated: April 24, 2012.

Helen M. Golde,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–10376 Filed 4–27–12; 8:45 am]

BILLING CODE 3510–22–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comments.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau), 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. 3507(a)(1)(D)). The Bureau is soliciting comments regarding the information collection requirements relating to the Equal Credit Opportunity Act that have been submitted to the Office of Management and Budget for review and approval. A copy of the submission may be obtained by contacting the agency contact listed below.

DATES: Written comments are encouraged and must be received on or before May 30, 2012 to be assured of consideration.

ADDRESSES: You may submit comments, identified by OMB number 3170–0013, by any of the following methods:

- *Agency Contact:* Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552: (202) 435–7741: *CFPB_Public_PRA@cfpb.gov*.
- *OMB Reviewer:* Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Joseph Durbala, (202) 435–7893, at the Consumer Financial Protection Bureau, (Attention: Joseph Durbala, PRA Office) 1700 G Street NW., Washington, DC 20552, or through the internet at *CFPB_Public_PRA@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

Title: Equal Credit Opportunity Act (Regulation B) 12 CFR Part 1002.

OMB Number: 3170–0013.

Abstract: Federal and state enforcement agencies and private litigants use recordkeeping information to, for example, compare accepted and rejected applicants or the terms and conditions of accepted applicants in order to determine whether applicants are treated less favorably on the basis of race, sex, age, or other prohibited bases under the Equal Credit Opportunity Act (ECOA). Information derived from these records provides an important piece of evidence of law violations in ECOA enforcement actions brought by Federal agencies. Self-testing records (including for corrective action) are used by creditors to identify potential violations and reflect their efforts to correct the problem. Absent the Regulation B requirement that creditors retain monitoring information, the CFPB's and other agencies' ability to detect unlawful discrimination and enforce the ECOA would be significantly impaired. The CFPB, other agencies, and private litigants use adverse action notices, appraisal reports, and other information in the application file to compare applicants in order to determine whether any applicants are discriminated against on the basis of race/national origin, sex, marital status, age, or other prohibited bases under the ECOA. The adverse action notice requirement apprises applicants of their rights under the ECOA and of the basis for a creditor's decision. Applicants use their copy of the appraisal to review (and possibly challenge) the accuracy

and/or fairness of the information contained within, and to determine the role that the appraisal played in the credit decision. Applicants use the self-testing disclosure to facilitate understanding of creditors' information collection, including its optionality.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for profits.

Estimated Number of Responses: 500,500.

Estimated Time per Response: 3 Hours.

Estimated Total Annual Burden Hours: 1,502,000.

Dated: April 6, 2012.

Chris Willey,

Chief Information Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2012–10282 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comments.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau), 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. 3507(a)(1)(D)). The Bureau is soliciting comments regarding the information collection requirements relating to the Privacy of Consumer Financial Information that have been submitted to the Office of Management and Budget for review and approval. A copy of the submission may be obtained by contacting the agency contact listed below.

DATES: Written comments are encouraged and must be received on or before May 30, 2012 to be assured of consideration.

ADDRESSES: You may submit comments, identified by OMB number 3170–0010, by any of the following methods:

- *Agency Contact:* Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC, 20552: (202) 435–7741: *CFPB_Public_PRA@cfpb.gov*.
- *OMB Reviewer:* Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Joseph Durbala, (202) 435–7893, at the Consumer Financial Protection Bureau, (Attention: Joseph Durbala, PRA Office) 1700 G Street NW., Washington, DC 20552, or through the internet at *CFPB_Public_PRA@cfpb.gov*.

SUPPLEMENTARY INFORMATION: *Title:* Privacy of Consumer Financial Information (Regulation P) 12 CFR Part 1016. *OMB Number:* 3170–0010.

Form Number: N/A.

Abstract: Section 502 of the Gramm-Leach-Bliley Act (GLB Act) (Pub. L. 106–102) generally prohibits a financial institution from sharing nonpublic personal information about a consumer with nonaffiliated third parties unless the institution satisfies various disclosure requirements (including provision of initial privacy notices, annual notices, notices of revisions to the institution's privacy policy, and opt-out notices) and the consumer has not elected to opt out of the information sharing. The CFPB is promulgating regulations to implement the GLB Act's notice requirements and restrictions on a financial institution's ability to disclose nonpublic personal information about consumers to nonaffiliated third parties.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for profits.

Estimated Number of Responses: 467,213.

Estimated Time per Response: 1 hour 6 minutes.

Estimated Total Annual Burden Hours: 516,000.

Dated: April 6, 2012.

Chris Willey,

Chief Information Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2012–10286 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Proposed Collection; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau or CFPB), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Bureau is soliciting comments concerning the information collection efforts relating to the Office of Intergovernmental Affairs Outreach Activities.

DATES: Written comments are encouraged and must be received on or before June 29, 2012 to be assured of consideration.

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

- *Electronic: CFPB_Public_PRA@cfpb.gov*.
- *Mail/Hand Delivery/Courier:* Direct all written comments to Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552. Instructions: All submission should include agency name and proposed collection title. Comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552 on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect comments 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. You should only submit information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the documents contained under this approval number should be directed to R. Joseph Durbala, (202) 435–7893, at the Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, or through the internet at *CFPB_Public_PRA@cfpb.gov*.

SUPPLEMENTARY INFORMATION: *Title:* CFPB Office of Intergovernmental Affairs Outreach Activities.

OMB Number: 3170–XXXX.

Abstract: The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') contemplates that the Bureau will conduct outreach activities, as appropriate. See, e.g., 12 U.S.C. 5495; 12 U.S.C. 5512(c)(1), 12 U.S.C. 5493(d), 12 U.S.C. 5493(b)(2), 12 U.S.C. 5511(c)(6). The Bureau's Office of Intergovernmental Affairs seeks to conduct outreach by collecting

information from state, local, and tribal governments related to the Bureau's exercise of its functions under the Dodd Frank Act. These governments interact closely with consumers and are critical partners in promoting transparency and competition in the marketplace, preventing unfair and unlawfully discriminatory practices, and enforcing consumer financial laws. The information collected through the Office of Intergovernmental Affairs Outreach Activities will be shared, as appropriate, within the Bureau in the exercise of its functions, such as the Bureau's financial education, rulemaking, market monitoring, outreach to traditionally underserved populations, fair lending monitoring, supervision, and enforcement functions.

The information collected may be used to form policies and programs presented to state, local, and tribal governments, as well as to other federal agencies and the general public. Nearly all information collection will involve the use of electronic communication or other forms of information technology and telephonic means.

Current Actions: Request for new approval of collection activities.

Type of Review: New collection.

Affected Public: State, Local, or Tribal Governments.

Estimated Number of Responses: 1,600.

Estimated Time per Respondent: 2 hours.

Estimated Total Annual Burden Hours: 3,200.

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

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Dated: April 24, 2012,

Chris Willey,

Chief Information Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2012–10288 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comments.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau), 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. 3507(a)(1)(D)). The Bureau is soliciting comments regarding the information collection requirements relating to the Mortgage Assistance Relief Services that have been submitted to the Office of Management and Budget for review and approval. A copy of the submission may be obtained by contacting the agency contact listed below.

DATES: Written comments are encouraged and must be received on or before May 30, 2012 to be assured of consideration.

ADDRESSES: You may submit comments, identified by OMB number 3170–0008, by any of the following methods:

- *Agency Contact:* Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552: (202) 435–7741: *CFPB_Public_PRA@cfpb.gov.*
- *OMB Reviewer:* Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Joseph Durbala, (202) 435–7893, at the Consumer Financial Protection Bureau, (Attention: Joseph Durbala, PRA Office), 1700 G Street NW., Washington, DC 20552, or through the internet at *CFPB_Public_PRA@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Title: Home Mortgage Disclosure Act (Regulation C) 12 CFR Part 1003.

OMB Number: 3170–0008.

Abstract: The Home Mortgage Disclosure Act (HMDA) requires most mortgage lenders lending 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. The CFPB's regulation requires covered financial institutions that meet certain thresholds to maintain data about home loan applications (e.g., the type of loan requested, the purpose of the loan, whether the loan was approved, and the type of purchaser if the loan was later sold), to update the information quarterly, and to report the information annually. The purpose of the information collection is: (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.

The information collection will assist the CFPB's examiners, and examiners of other Federal supervisory agencies, in determining that the financial institutions they supervise comply with applicable provisions of HMDA.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for profits.

Estimated Number of Responses: 23,453.

Estimated Time per Response: 6 hours 34 minutes.

Estimated Total Annual Burden Hours: 154,000.

Dated: April 6, 2012.

Chris Willey,

Chief Information Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2012–10287 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comments.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau), 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. 3507(a)(1)(D)). The Bureau is soliciting comments regarding the information collection requirements relating to the Interstate Land Sales Full Disclosure Act that have been submitted to the Office of Management and Budget for review and approval. A copy of the submission may be obtained by contacting the agency contact listed below.

DATES: Written comments are encouraged and must be received on or before May 30, 2012 to be assured of consideration.

ADDRESSES: You may submit comments, identified by OMB number 3170–0012, by any of the following methods:

- *Agency Contact:* Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552: (202) 435–7741: *CFPB_Public_PRA@cfpb.gov*.
- *OMB Reviewer:* Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Joseph Durbala, (202) 435–7893, at the Consumer Financial Protection Bureau, (Attention: Joseph Durbala, PRA Office), 1700 G Street NW., Washington, DC 20552, or through the internet at *CFPB_Public_PRA@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

Title: Interstate Land Sales Full Disclosure Act (Regulations J, K, and L) 12 CFR Part 1010.

OMB Number: 3170–0012.

Abstract: The respondents are land developers (or attorneys or others who work for them). Developers must submit an initial Statement of Record (registration) to the CFPB and receive an effective date before they can offer lots for sale or lease. The Statement of Record includes the proposed property report and additional information and documents that support the developer's disclosures in the property report. The developer is responsible for ensuring that the registration is accurate and does not omit information needed for a purchaser to make an informed decision. Developers must give purchasers an effective property report before the purchaser signs the sales contract. Developers must submit amendments to their registrations if any information in their initial registration changes. They must also submit a consolidated filing if they offer additional lots for sale. Each year the developer must submit an annual financial statement and an annual report that is prepared in the format required by Section 1010.310 of the regulations. A developer may voluntarily suspend his registration by submitting a Voluntary Suspension form or through the Annual Report. There are no other forms. The CFPB conducts a facial review of the submissions. The developer may request an Advisory Opinion if a developer has questions about the applicability of one of the exemptions from registration. A CFPB determination is required only if a developer claims an exemption from registration under the multiple site or substantial compliance exemption. The other 24 exemptions are self-determining. Finally, the CFPB may require additional information from developers in response to investigations of complaints. The Voluntary Suspension form is voluntary and is a convenient way for developers to voluntarily suspend their registration. The form is not required and is not the only way that developers may close their registration. They may also end their registration through their annual report.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for profits.

Estimated Number of Responses: 88,887.

Estimated Time per Response: 23 minutes.

Estimated Total Annual Burden Hours: 34,563.

Dated: April 6, 2012.

Chris Willey,

Chief Information Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2012–10285 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comments.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau), 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. 3507(a)(1)(D)). The Bureau is soliciting comments regarding the information collection requirements relating to the Truth in Lending Act that have been submitted to the Office of Management and Budget for review and approval. A copy of the submission may be obtained by contacting the agency contact listed below.

DATES: Written comments are encouraged and must be received on or before May 30, 2012 to be assured of consideration.

ADDRESSES: You may submit comments, identified by OMB number 3170–0015, by any of the following methods:

- *Agency Contact:* Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552: (202) 435–7741: *CFPB_Public_PRA@cfpb.gov*.
- *OMB Reviewer:* Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Joseph Durbala, (202) 435–7893, at the Consumer Financial Protection Bureau, (Attention: Joseph Durbala, PRA Office), 1700 G Street NW., Washington, DC 20552, or through the internet at *CFPB_Public_PRA@cfpb.gov*.

SUPPLEMENTARY INFORMATION: *Title:* Truth in Lending Act (Regulation Z) 12 CFR Part 1026.

OMB Number: 3170–0015.

Abstract: Federal and state enforcement agencies and private litigants use records retained under the requirement of Regulation Z to ascertain whether accurate and complete disclosures of the cost of credit have been provided to consumers prior to consummation of the credit obligation and, in some instances, during the loan term. The information is also used to determine whether other actions required under the TILA, including complying with billing error resolution procedures and limitation of consumer liability for unauthorized use of credit, have been met. The information retained provides the primary evidence of law violations in TILA enforcement actions brought by Federal agencies. Without the Regulation Z recordkeeping requirement, the agencies' ability to enforce the TILA would be significantly impaired. As noted above, consumers rely on the disclosures required by the TILA and Regulation Z to shop among

options and to facilitate informed credit decision making. Without this information, consumers would be severely hindered in their ability to assess the true costs and terms of financing offered. Also, without the special billing error information, consumers would be unable to detect and correct errors or fraudulent charges on their open-end credit accounts. Additionally, enforcement agencies and private litigants need the information in these disclosures to enforce the TILA and Regulation Z. See 15 U.S.C. 1607, 1640.

Affected Public: Businesses or other for profits.

Estimated Number of Responses: 201,389,041.

Estimated Time per Response: 2 Minutes.

Estimated Total Annual Burden Hours: 6,467,000.

Dated: April 6, 2012.

Chris Willey,

Chief Information Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2012–10283 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Proposed Collection; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Bureau is soliciting comments concerning the information collection efforts relating to streamlining inherited regulations.

DATES: Written comments should be received on or before June 29, 2012 to be assured of consideration.

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

- *Electronic: CFPB_Public_PRA@cfpb.gov.*
- *Mail/Hand Delivery/Courier:* Direct all written comments to Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552.

Instructions: Comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552 on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect comments 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. You should only submit information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the documents contained under this approval number should be directed to R. Joseph Durbala, (202) 435–7893, at the Consumer Financial Protection Bureau, (Attention: R. Joseph Durbala, PRA Office),1700 G Street NW., Washington, DC 20552, or through the internet at *CFPB_Public_PRA@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Title: Streamlining Inherited Regulations.

OMB Number: 3170–0020.

Form Number: N/A.

Abstract: The purpose of this data collection is to help the Bureau identify priority areas for such streamlining. The Bureau's effort to identify and address such priorities is and will continue to be based in part on guidance provided by the Office of Management and Budget Memorandum for the Heads of Independent Regulatory Agencies, M–11–28, ''Executive Order 13579, 'Regulation and Independent Regulatory Agencies''' (July 22, 2011). That guidance discusses the importance of opportunities for public participation in the development of any retrospective analysis plan. Consistent with this guidance, the Bureau seeks to reach interested parties through two mechanisms. The first mechanism is a **Federal Register** notice. On December 5, 2011, a notice titled ''Streamlining Inherited Regulations'' was published in the **Federal Register**. The notice seeks comment in writing, or through the regulations.gov Web site. The data collection for which the Bureau now seeks approval would be the second mechanism. In order to reach respondents that might not be inclined to respond to the **Federal Register** notice, the Bureau seeks to collect input from interested parties through a specialized web tool on the CFPB Web site.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals and Households.

Estimated Number of Responses: 500.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 500.

The following paragraph applies to all of the collections of information covered by this notice:

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

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Dated: April 9, 2012.

Chris Willey,

Chief Information Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2012–10284 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Revised Non-Foreign Overseas Per Diem Rates

AGENCY: Per Diem, Travel and Transportation Allowance Committee, DoD.

ACTION: Notice of revised non-foreign overseas per diem rates.

SUMMARY: The Per Diem, Travel and Transportation Allowance Committee is publishing Civilian Personnel Per Diem Bulletin Number 281. This bulletin lists revisions in the per diem rates prescribed for U.S. Government employees for official travel in Alaska, Hawaii, Puerto Rico, the Northern

Mariana Islands and Possessions of the United States. AEA changes announced in Bulletin Number 194 remain in effect. Bulletin Number 281 is being published in the **Federal Register** to assure that travelers are paid per diem at the most current rates.

DATES: *Effective Date:* May 1, 2012.

FOR FURTHER INFORMATION CONTACT: Mrs. Sonia Malik, 571–372–1276.

SUPPLEMENTARY INFORMATION: This document gives notice of revisions in per diem rates prescribed by the Per Diem Travel and Transportation Allowance Committee for non-foreign areas outside the continental United States. It supersedes Civilian Personnel Per Diem Bulletin Number 280. Distribution of Civilian Personnel Per Diem Bulletins by mail was discontinued. Per Diem Bulletins published periodically in the **Federal Register** now constitute the only notification of revisions in per diem rates to agencies and establishments outside the Department of Defense. For more information or questions about per diem rates, please contact your local travel office. The text of the Bulletin follows: The changes in Civilian Bulletin 281 are updated rates for Hawaii and the Midway Islands.

Dated: April 24, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
ALASKA						
[OTHER]						
01/01 - 12/31	110		105		215	2/1/2012
ADAK						
01/01 - 12/31	120		79		199	7/1/2003
ANCHORAGE [INCL NAV RES]						
05/16 - 09/30	181		104		285	2/1/2012
10/01 - 05/15	99		96		195	2/1/2012
BARROW						
01/01 - 12/31	159		95		254	10/1/2002
BETHEL						
01/01 - 12/31	157		99		256	7/1/2011
BETTLES						
01/01 - 12/31	135		62		197	10/1/2004
CLEAR AB						
01/01 - 12/31	90		82		172	10/1/2006
COLDFOOT						
01/01 - 12/31	165		70		235	10/1/2006
COPPER CENTER						
09/16 - 05/14	99		95		194	2/1/2012
05/15 - 09/15	149		99		248	2/1/2012
CORDOVA						
01/01 - 12/31	95		109		204	2/1/2012
CRAIG						
10/01 - 04/30	99		78		177	11/1/2011
05/01 - 09/30	129		81		210	11/1/2011
DELTA JUNCTION						
01/01 - 12/31	129		62		191	2/1/2012
DENALI NATIONAL PARK						
05/01 - 09/30	159		101		260	2/1/2012
10/01 - 04/30	89		94		183	2/1/2012

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
DILLINGHAM						
05/15 - 10/15	185		111		296	1/1/2011
10/16 - 05/14	169		109		278	1/1/2011
DUTCH HARBOR-UNALASKA						
01/01 - 12/31	121		102		223	2/1/2012
EARECKSON AIR STATION						
01/01 - 12/31	90		77		167	6/1/2007
EIELSON AFB						
09/16 - 05/14	75		92		167	2/1/2012
05/15 - 09/15	175		102		277	2/1/2012
ELFIN COVE						
01/01 - 12/31	175		46		221	2/1/2012
ELMENDORF AFB						
05/16 - 09/30	181		104		285	2/1/2012
10/01 - 05/15	99		96		195	2/1/2012
FAIRBANKS						
05/15 - 09/15	175		102		277	2/1/2012
09/16 - 05/14	75		92		167	2/1/2012
FOOTLOOSE						
01/01 - 12/31	175		18		193	10/1/2002
FT. GREELY						
01/01 - 12/31	129		62		191	2/1/2012
FT. RICHARDSON						
05/16 - 09/30	181		104		285	2/1/2012
10/01 - 05/15	99		96		195	2/1/2012
FT. WAINWRIGHT						
05/15 - 09/15	175		102		277	2/1/2012
09/16 - 05/14	75		92		167	2/1/2012
GAMBELL						
01/01 - 12/31	105		39		144	1/1/2011
GLENNALLEN						
05/15 - 09/15	149		99		248	2/1/2012
09/16 - 05/14	99		95		194	2/1/2012
HAINES						

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01	- 12/31	107		101		208	1/1/2011
HEALY							
05/01	- 09/30	159		101		260	2/1/2012
10/01	- 04/30	89		94		183	2/1/2012
HOMER							
09/16	- 05/04	79		108		187	2/1/2012
05/05	- 09/15	167		117		284	2/1/2012
JUNEAU							
05/16	- 09/15	149		104		253	2/1/2012
09/16	- 05/15	135		103		238	2/1/2012
KAKTOVIK							
01/01	- 12/31	165		86		251	10/1/2002
KAVIK CAMP							
01/01	- 12/31	150		69		219	10/1/2002
KENAI-SOLDOTNA							
05/01	- 08/31	179		102		281	2/1/2012
09/01	- 04/30	79		92		171	2/1/2012
KENNICOTT							
01/01	- 12/31	175		111		286	2/1/2012
KETCHIKAN							
05/01	- 09/30	140		97		237	2/1/2012
10/01	- 04/30	99		94		193	2/1/2012
KING SALMON							
05/01	- 10/01	225		91		316	10/1/2002
10/02	- 04/30	125		81		206	10/1/2002
KLAWOCK							
05/01	- 09/30	129		81		210	11/1/2011
10/01	- 04/30	99		78		177	11/1/2011
KODIAK							
05/01	- 09/30	152		93		245	2/1/2012
10/01	- 04/30	100		88		188	2/1/2012
KOTZEBUE							
01/01	- 12/31	219		115		334	2/1/2012
KULIS AGS							

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
10/01 - 05/15	99		96		195	2/1/2012
05/16 - 09/30	181		104		285	2/1/2012
MCCARTHY						
01/01 - 12/31	175		111		286	2/1/2012
MCGRATH						
01/01 - 12/31	165		69		234	10/1/2006
MURPHY DOME						
05/15 - 09/15	175		102		277	2/1/2012
09/16 - 05/14	75		92		167	2/1/2012
NOME						
01/01 - 12/31	140		132		272	2/1/2012
NUIQSUT						
01/01 - 12/31	180		53		233	10/1/2002
PETERSBURG						
01/01 - 12/31	110		105		215	2/1/2012
POINT HOPE						
01/01 - 12/31	200		49		249	1/1/2011
POINT LAY						
01/01 - 12/31	225		51		276	8/1/2011
PORT ALEXANDER						
01/01 - 12/31	150		43		193	8/1/2010
PORT ALSWORTH						
01/01 - 12/31	135		88		223	10/1/2002
PRUDHOE BAY						
01/01 - 12/31	170		68		238	1/1/2011
SELDOVIA						
05/05 - 09/15	167		117		284	2/1/2012
09/16 - 05/04	79		108		187	2/1/2012
SEWARD						
05/01 - 10/15	172		103		275	2/1/2012
10/16 - 04/30	85		95		180	2/1/2012
SITKA-MT. EDGECUMBE						
10/01 - 04/30	99		90		189	2/1/2012
05/01 - 09/30	119		92		211	2/1/2012

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
SKAGWAY						
10/01 - 04/30	99		94		193	2/1/2012
05/01 - 09/30	140		97		237	2/1/2012
SLANA						
05/01 - 09/30	139		55		194	2/1/2005
10/01 - 04/30	99		55		154	2/1/2005
SPRUCE CAPE						
05/01 - 09/30	152		93		245	2/1/2012
10/01 - 04/30	100		88		188	2/1/2012
ST. GEORGE						
01/01 - 12/31	129		55		184	6/1/2004
TALKEETNA						
01/01 - 12/31	100		89		189	10/1/2002
TANANA						
01/01 - 12/31	140		132		272	2/1/2012
TOK						
05/15 - 09/30	95		89		184	2/1/2012
10/01 - 05/14	85		88		173	2/1/2012
UMIAT						
01/01 - 12/31	350		64		414	2/1/2012
VALDEZ						
05/16 - 09/14	159		89		248	2/1/2012
09/15 - 05/15	119		85		204	2/1/2012
WAINWRIGHT						
01/01 - 12/31	175		83		258	1/1/2011
WASILLA						
05/01 - 09/30	153		90		243	2/1/2012
10/01 - 04/30	89		84		173	2/1/2012
WRANGELL						
10/01 - 04/30	99		94		193	2/1/2012
05/01 - 09/30	140		97		237	2/1/2012
YAKUTAT						
01/01 - 12/31	105		94		199	1/1/2011
AMERICAN SAMOA						

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
AMERICAN SAMOA						
01/01 - 12/31	139		122		261	12/1/2010
GUAM						
GUAM (INCL ALL MIL INSTAL)						
01/01 - 12/31	159		86		245	7/1/2011
HAWAII						
[OTHER]						
07/01 - 08/21	114		118		232	5/1/2012
08/22 - 06/30	104		117		221	5/1/2012
CAMP H M SMITH						
01/01 - 12/31	177		126		303	5/1/2012
EASTPAC NAVAL COMP TELE AREA						
01/01 - 12/31	177		126		303	5/1/2012
FT. DERUSSEY						
01/01 - 12/31	177		126		303	5/1/2012
FT. SHAFTER						
01/01 - 12/31	177		126		303	5/1/2012
HICKAM AFB						
01/01 - 12/31	177		126		303	5/1/2012
HONOLULU						
01/01 - 12/31	177		126		303	5/1/2012
ISLE OF HAWAII: HILO						
07/01 - 08/21	114		118		232	5/1/2012
08/22 - 06/30	104		117		221	5/1/2012
ISLE OF HAWAII: OTHER						
01/01 - 12/31	180		129		309	5/1/2012
ISLE OF KAUAI						
01/01 - 12/31	243		131		374	5/1/2012
ISLE OF MAUI						
01/01 - 12/31	209		137		346	5/1/2012
ISLE OF OAHU						
01/01 - 12/31	177		126		303	5/1/2012
KEKAHA PACIFIC MISSILE RANGE FAC						

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01 - 12/31	243		131		374	5/1/2012
KILAUEA MILITARY CAMP						
07/01 - 08/21	114		118		232	5/1/2012
08/22 - 06/30	104		117		221	5/1/2012
LANAI						
01/01 - 12/31	249		155		404	5/1/2012
LUALUALEI NAVAL MAGAZINE						
01/01 - 12/31	177		126		303	5/1/2012
MCB HAWAII						
01/01 - 12/31	177		126		303	5/1/2012
MOLOKAI						
01/01 - 12/31	131		89		220	5/1/2012
NAS BARBERS POINT						
01/01 - 12/31	177		126		303	5/1/2012
PEARL HARBOR						
01/01 - 12/31	177		126		303	5/1/2012
SCHOFIELD BARRACKS						
01/01 - 12/31	177		126		303	5/1/2012
WHEELER ARMY AIRFIELD						
01/01 - 12/31	177		126		303	5/1/2012
MIDWAY ISLANDS						
MIDWAY ISLANDS						
01/01 - 12/31	125		68		193	5/1/2012
NORTHERN MARIANA ISLANDS						
[OTHER]						
01/01 - 12/31	55		72		127	10/1/2002
ROTA						
01/01 - 12/31	130		93		223	7/1/2011
SAIPAN						
01/01 - 12/31	121		94		215	7/1/2011
TINIAN						
01/01 - 12/31	85		74		159	7/1/2011
PUERTO RICO						

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
[OTHER]						
01/01 - 12/31	62		57		119	10/1/2002
AGUADILLA						
01/01 - 12/31	124		113		237	9/1/2010
BAYAMON						
01/01 - 12/31	195		128		323	9/1/2010
CAROLINA						
01/01 - 12/31	195		128		323	9/1/2010
CEIBA						
01/01 - 12/31	210		141		351	11/1/2010
CULEBRA						
01/01 - 12/31	150		98		248	3/1/2012
FAJARDO [INCL ROOSEVELT RDS NAVSTAT]						
01/01 - 12/31	210		141		351	11/1/2010
FT. BUCHANAN [INCL GSA SVC CTR, GUAYNABO]						
01/01 - 12/31	195		128		323	9/1/2010
HUMACAO						
01/01 - 12/31	210		141		351	11/1/2010
LUIS MUNOZ MARIN IAP AGS						
01/01 - 12/31	195		128		323	9/1/2010
LUQUILLO						
01/01 - 12/31	210		141		351	11/1/2010
MAYAGUEZ						
01/01 - 12/31	109		112		221	9/1/2010
PONCE						
01/01 - 12/31	149		87		236	9/1/2010
SABANA SECA [INCL ALL MILITARY]						
01/01 - 12/31	195		128		323	9/1/2010
SAN JUAN & NAV RES STA						
01/01 - 12/31	195		128		323	9/1/2010
VIEQUES						
01/01 - 12/31	175		95		270	3/1/2012
VIRGIN ISLANDS (U.S.)						

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
ST. CROIX						
04/15 - 12/14	135		92		227	5/1/2006
12/15 - 04/14	187		97		284	5/1/2006
ST. JOHN						
04/15 - 12/14	163		98		261	5/1/2006
12/15 - 04/14	220		104		324	5/1/2006
ST. THOMAS						
04/15 - 12/14	240		105		345	5/1/2006
12/15 - 04/14	299		111		410	5/1/2006
WAKE ISLAND						
WAKE ISLAND						
01/01 - 12/31	145		42		187	7/1/2011

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BILLING CODE 5001–06–C

DEPARTMENT OF EDUCATION

Applications for New Awards; Territories and Freely Associated States Education Grant Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

Overview Information: Territories and Freely Associated States Education Grant Program; Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.256A.

DATES:

Applications Available: April 30, 2012.

Deadline for Transmittal of Applications: June 29, 2012.

Deadline for Intergovernmental Review: August 28, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Territories and Freely Associated States Education Grant (T&FASEG) program supports projects to raise student achievement through direct educational services. Grants are awarded competitively to local educational agencies (LEAs) in the U.S. Territories (American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the Virgin Islands) and the Republic of Palau. The LEA may use grant funds to carry out activities authorized by the Elementary and Secondary Education Act of 1965, as amended (ESEA), including teacher training, curriculum development, the development or acquisition of instructional materials, and general school improvement and reform.

Under the T&FASEG program the Secretary awards grants for projects to—

(a) Conduct activities consistent with the programs described in the ESEA, including the types of activities authorized under—

(1) Title I of the ESEA—Improving the Academic Achievement of the Disadvantaged.

(2) Title II of the ESEA—Preparing, Training, and Recruiting High-Quality Teachers and Principals.

(3) Title III of the ESEA—Language Instruction for Limited English Proficient and Immigrant Students.

(4) Title IV of the ESEA—21st Century Schools.

(5) Title V of the ESEA—Promoting Informed Parental Choice and Innovative Programs; and

(b) Provide direct educational services that assist all students with meeting challenging State academic achievement standards.

Note: The Secretary interprets the term ''direct educational services'' to mean—

(1) Activities that are designed to improve student achievement or the quality of education; and

(2) Instructional services for students and teacher training.

Priorities: Under this competition we are particularly interested in applications that address the following priorities.

Invitational Priorities: For FY 2012, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1), we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Priority 1—Standards and Assessments.

The Secretary is particularly interested in receiving applications that focus on developing standards in reading and language arts and mathematics that build toward college- and career-readiness by the time students graduate from high school. The Secretary encourages the development or use, or both, of a new generation of assessments that align with the college- and career-ready standards and that will better determine whether students have acquired the skills needed for success.

Priority 2—Effective Teachers and Leaders.

The Secretary is particularly interested in receiving applications that focus on recruiting and improving the effectiveness of teachers, principals, and administrative leaders through professional development and training in order to better meet the needs of students, especially students in high-need schools. Further, the Secretary is interested in receiving applications that focus on developing pathways and practices for preparing, placing, and supporting beginning teachers and principals in high-need schools.

Priority 3—Technology.

The Secretary is particularly interested in LEA projects that are designed to improve student achievement or teacher effectiveness through the use of high-quality digital tools or materials, which may include preparing teachers to use the technology to improve instruction, as well as developing, implementing, or evaluating digital tools or materials.

Program Authority: 20 U.S.C. 6331.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 84, 85, 97, 98, and 99.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $4,750,000 of FY 2011 funds are available for new awards in FY 2012.

Estimated Range of Awards: $800,000 to $1,000,000.

Estimated Average Size of Awards: $900,000.

Estimated Number of Awards: 4–6.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* LEAs in American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, the U.S. Virgin Islands, and the Republic of Palau.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain the application package electronically by downloading it from the Territories and Freely Associated States Education Grant program Web site: *http://www2.ed.gov/programs/tfasegp/applicant.html*.

To obtain a copy from the program office, contact: Collette Fisher, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W227, LBJ, Washington, DC 20202–6400. Telephone: (202) 260–2544 or by email: *collette.fisher@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), 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 to no more than 35 pages, using 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, including 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 or no smaller than 10 pitch (characters per inch).

• Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section [Part III].

Our reviewers will not read any pages of your application that exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: April 30, 2012.

Deadline for Transmittal of Applications: June 29, 2012.

Applications for grants under this competition 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: August 28, 2012.

4. *Intergovernmental Review:* This competition 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 competition.

5. *Funding Restrictions:* We reference 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 2–5 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 competition 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 Territories and Freely Associated States Education Grant Program competition, CFDA number 84.256A, 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 Territories and Freely Associated States Education 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 84.256, not 84.256A).

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 4:30:00 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: Collette Fisher, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W227, LBJ, Washington, DC 20202–6400. Fax: (202) 205–5870.

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 84.256A), 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 84.256A), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 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 competition are from 34 CFR 75.210. The maximum score for each criterion is indicated after the title of the criterion. The maximum score for all selection criteria is 100 points.

As provided for in section 1121(b)(3)(B) of the ESEA, the Secretary, in making awards under this program, will take into consideration the recommendations of Pacific Region Educational Laboratory (PREL). PREL will use the following criteria in developing its recommendations, and the Secretary will use them in making final funding decisions. The notes following the selection criteria are meant to serve as guidance to assist the applicant in creating a stronger application and are not required by statute or regulation.

(a) *Need for project.* (5 points)

(1) The Secretary considers the need for the proposed project. (34 CFR 75.210(a)(1)).

(2) In determining the need for the proposed project, the Secretary considers the following factors:

(i) The magnitude or severity of the problem to be addressed by the proposed project. (34 CFR 75.210(a)(2)(i)).

(ii) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project. (34 CFR 75.210(a)(2)(ii)).

(iii) The extent to which the proposed project will provide services or otherwise address the needs of students at risk of educational failure. (34 CFR 75.210(a)(2)(iii)).

Note: In addressing this criterion, applicants may want to consider including in the project narrative information that clearly demonstrates the unique needs and circumstances that justify funding support for their project. Applicants may also consider including information to demonstrate the extent to which local resources are used to meet the needs addressed by the project proposal.

(b) *Significance.* (10 points)

(1) The Secretary considers the significance of the proposed project. (34 CFR 75.210(b)(1)).

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The national significance of the proposed project. (34 CFR 75.210(b)(2)(i)).

(ii) The significance of the problem or issue to be addressed by the proposed project. (34 CFR 75.210(b)(2)(ii)).

(iii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement. (34 CFR 75.210(b)(2)(xiv)).

(c) *Quality of the project design.* (25 points)

(1) The Secretary considers the quality of the design of the proposed project. (34 CFR 75.210(c)(1)).

(2) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable. (34 CFR 75.210(c)(2)(i)).

(ii) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs. (34 CFR 75.210(c)(2)(ii)).

(iii) The extent to which the proposed project will be coordinated with similar or related efforts, and with other appropriate community, State, and Federal resources. (34 CFR 75.210(c)(2)(xvi)).

(iv) The extent to which the proposed project is part of a comprehensive effort to improve teaching and learning and support rigorous academic standards for students. (34 CFR 75.210(c)(2)(xviii)).

(v) The extent to which the proposed project encourages parental involvement. (34 CFR 75.210(c)(2)(xix)).

(vi) The extent to which performance feedback and continuous improvement are integral to the design of the proposed project. (34 CFR 75.210(c)(2)(xxi)).

(d) *Adequacy of resources.* (5 points)

(1) The Secretary considers the adequacy of resources for the proposed project. (34 CFR 75.210(f)(1)).

(2) In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

(i) The extent to which the budget is adequate to support the proposed project. (34 CFR 75.210(f)(2)(iii)).

(ii) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project. (34 CFR 75.210(f)(2)(iv)).

(iii) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits. (34 CFR 75.210(f)(2)(v)).

(e) *Quality of project personnel.* (15 points)

(1) The Secretary considers the quality of the personnel who will carry out the proposed project. (34 CFR 75.210(e)(1)).

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. (34 CFR 75.210(e)(2)).

(3) In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of the project director or principal investigator. (34 CFR 75.210(e)(3)(i)).

(ii) The qualifications, including relevant training and experience, of key project personnel. (34 CFR 75.210(e)(3)(ii)).

(iii) The qualifications, including relevant training and experience, of project consultants or subcontractors. (34 CFR 75.210(e)(3)(iii)).

Note: In addressing this criterion, applicants may want to consider including curriculum vitae and resumes of key project personnel.

(f) *Quality of the project evaluation.* (25 points)

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project. (34 CFR 75.210(h)(1)).

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation provide for examining the

effectiveness of project implementation strategies. (34 CFR 75.210(h)(2)(iii)).

(ii) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible. (34 CFR 75.210(h)(2)(iv)).

Note: In addressing this criterion, applicants may want to consider aligning their evaluations with the performance measures described in section VI. 4 of this notice.

(g) *Quality of project services.* (15 points)

(1) The Secretary considers the quality of the services to be provided by the proposed project. (34 CFR 75.210(d)(1)).

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. (34 CFR 75.210(d)(2)).

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services. (34 CFR 75.210(d)(3)(i)).

(ii) The likely impact of the services to be provided by the proposed project on the intended recipients of those services. (34 CFR 75.210(d)(3)(iv)).

(iii) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services. (34 CFR 75.210(d)(3)(v)).

(iv) The extent to which the services to be provided by the proposed project are focused on those with greatest needs. (34 CFR 75.210(d)(3)(xi)).

2. *Review and Selection Process:* 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 Department has developed the following three performance measures for evaluating the effectiveness of the T&FASEG program:

(1) The percentage of teachers participating in professional development activities under the T&FASEG program who demonstrate progress toward State teacher certification;

(2) The percentage of students participating in reading programs under the T&FASEG program who score proficient or above in reading on State assessments; and

(3) The percentage of students participating in mathematics programs under the T&FASEG program who score proficient or above in mathematics on State assessments.

These measurements constitute the Department's indicators of success for this program. Consequently, we advise an applicant for a grant under this program to give careful consideration to these measures in conceptualizing the approach and evaluation for its proposed project. Each grantee will be required to provide, in its annual performance and final reports, data about its progress in meeting these measures.

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: Collette Fisher, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W227, LBJ, Washington, DC 20202–6400. Telephone: (202) 260–2544 or by email: *collette.fisher@ed.gov*.

If you use a TDD or a TTY, 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 the 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: April 25, 2012.

Michael Yudin,

Acting Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2012–10377 Filed 4–27–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Enhanced Assessment Instruments Grants Program—Enhanced Assessment Instruments (English Language Proficiency (ELP) Competition)

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

Overview Information:

Enhanced Assessment Instruments Grants Program—Enhanced Assessment Instruments (English Language Proficiency Competition);

Notice inviting applications for new awards for fiscal year (FY) 2011 funds.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.368A–1.

DATES:

Applications Available: April 30, 2012.

Deadline for Notice of Intent to Apply: May 30, 2012.

Deadline for Transmittal of Applications: June 14, 2012.

Deadline for Intergovernmental Review: August 13, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Enhanced Assessment Instruments Grant program, also called the Enhanced Assessment Grants (EAG) program, is to enhance the quality of assessment instruments and systems used by States for measuring the academic achievement of elementary and secondary school students.

In 2012, the Department is holding two separate competitions for FY 2011 EAG funds. The competition announced in this notice (EAG ELP Competition) (CFDA No. 84.368A–1) will support the development of a system of English language proficiency assessments aligned with a common set of English language proficiency standards that correspond to a common set of college- and career-ready standards in English language arts and mathematics, and, in so doing, will give priority to collaborative efforts among States in developing these assessments. Elsewhere in this issue of the **Federal Register**, we are publishing a notice inviting applications for a separate competition for FY 2011 EAG funds to be awarded in 2012 (EAG Accessibility Competition) (CFDA No. 84.368A–2). The Department may use any unused funds from the competition announced in this notice to make awards in the EAG Accessibility Competition. Conversely, the Department may use any unused funds from the EAG Accessibility Competition to make awards in the competition announced in this notice.

Priorities: This competition includes five absolute priorities and one competitive preference priority. In accordance with 34 CFR 75.105(b)(2)(iv), absolute priorities 1 through 4 (Statutory Priorities) are based on section 6112 of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 7301a). Absolute priority 5 (Regulatory Priority) and competitive preference priority 1 are from the notice of final priorities, requirements, definitions, and selection criteria published in the **Federal Register** on April 19, 2011 (76 FR 21986).

Absolute Priorities: For awards made from this competition in 2012 with FY 2011 funds, and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet: (a) one or more of the Statutory Priorities (Absolute Priorities 1 through 4) and (b) the Regulatory Priority (Absolute Priority 5).

These priorities are:

Absolute Priority 1—Collaboration. Collaborate with institutions of higher education, other research institutions, or other organizations to improve the quality, validity, and reliability of State academic assessments beyond the requirements for these assessments described in section 1111(b)(3) of the ESEA.

Absolute Priority 2—Use of Multiple Measures of Student Academic Achievement. Measure student academic achievement using multiple measures of student academic achievement from multiple sources.

Absolute Priority 3—Charting Student Progress Over Time. Chart student progress over time.

Absolute Priority 4—Comprehensive Academic Assessment Instruments. Evaluate student academic achievement through the development of comprehensive academic assessment instruments, such as performance- and technology-based academic assessments.

Absolute Priority 5—English Language Proficiency Assessment System.

To meet this priority, an applicant must propose a comprehensive plan to develop an English language proficiency assessment system that is valid, reliable, and fair for its intended purpose. Such a plan must include the following features:

(a) *Design.* The assessment system must—

(1) Be designed for implementation in multiple States;

(2) Be based on a common definition of *English learner* adopted by the applicant State and, if the applicant applies as part of a consortium, adopted and held in common by all States in the consortium, where common with respect to the definition of ''English learner'' means identical for purposes of the diagnostic (e.g., screener or placement) assessments and associated achievement standards used to classify students as English learners as well as the summative assessments and associated achievement standards used to exit students from English learner status;

(3) At a minimum, include diagnostic (e.g., screener or placement) and summative assessments;

(4) Measure students' English proficiency against a set of English language proficiency standards held by

the applicant State and, if the applicant applies as part of a consortium, held in common by all States in the consortium;

(5) Measure students' English proficiency against a set of English language proficiency standards that correspond to a common set of college- and career-ready standards (as defined in this notice) in English language arts and mathematics, are rigorous, are developed with broad stakeholder involvement, are vetted with experts and practitioners, and for which external evaluations have documented rigor and correspondence with a common set of college- and career-ready standards in English language arts and mathematics;

(6) Cover the full range of the English language proficiency standards across the four language domains of reading, writing, speaking, and listening, as required by section 3113(b)(2) of the ESEA;

(7) Ensure that the measures of students' English proficiency consider the students' control over the linguistic components of language (e.g., phonology, syntax, morphology);

(8) Produce results that indicate whether individual students have attained the English proficiency necessary to participate fully in academic instruction in English and meet or exceed college- and career-ready standards;

(9) Provide at least an annual measure of English proficiency and student progress in learning English for English learners in kindergarten through grade 12 in each of the four language domains of reading, writing, speaking, and listening;

(10) Assess all English learners, including English learners who are also students with disabilities and students with limited or no formal education, except for English learners with the most significant cognitive disabilities who are eligible to participate in alternate assessments based on alternate academic achievement standards in accordance with 34 CFR 200.6(a)(2); and

(11) Be accessible to all English learners, including by providing appropriate accommodations for English learners with disabilities, except for English learners with the most significant cognitive disabilities who are eligible to participate in alternate assessments based on alternate academic achievement standards in accordance with 34 CFR 200.6(a)(2).

(b) *Technical quality.* The assessment system must measure students' English proficiency in ways that—

(1) Are consistent with nationally recognized professional and technical standards; and

(2) As appropriate, elicit complex student demonstrations of comprehension and production of academic English (e.g., performance tasks, selected responses, brief or extended constructed responses).

(c) *Data.* The assessment system must produce data that—

(1) Include student attainment of English proficiency and student progress in learning English (including data disaggregated by English learner subgroups such as English learners by years in a language instruction educational program; English learners whose formal education has been interrupted; students who were formerly English learners by years out of the language instruction educational program; English learners by level of English proficiency, such as those who initially scored proficient on the English language proficiency assessment; English learners by disability status; and English learners by native language);

(2) Provide a valid and reliable measure of students' abilities in each of the four language domains (reading, writing, speaking, and listening) and a comprehensive English proficiency score based on all four domains, with each language domain score making a significant contribution to the comprehensive ELP score, at each proficiency level; and

(3) Can be used for the—

(i) Identification of students as English learners;

(ii) Decisions about whether a student should exit from English language instruction educational programs;

(iii) Determinations of school, local educational agency, and State effectiveness for the purposes of accountability under Title I and Title III of the ESEA;

(4) Can be used, as appropriate, as one of multiple measures, to inform—

(i) Evaluations of individual principals and teachers in order to determine their effectiveness;

(ii) Determinations of principal and teacher professional development and support needs; and

(iii) Strategies to improve teaching, learning, and language instruction education programs.

(d) *Compatibility.* The assessment system must use compatible approaches to technology, assessment administration, scoring, reporting, and other factors that facilitate the coherent inclusion of the assessments within States' student assessment systems.

(e) *Students with the most significant cognitive disabilities.* The comprehensive plan to develop an English language proficiency assessment system must include the strategies the applicant State and, if the applicant is part of a consortium, all States in the consortium, plans to use to assess the English proficiency of English learners with the most significant cognitive disabilities who are eligible to participate in alternate assessments based on alternate academic achievement standards in accordance with 34 CFR 200.6(a)(2) in lieu of including those students in the operational administration of the assessments developed for other English learners under a grant from this competition.

Competitive Preference Priority: For awards made in 2012 with FY 2011 funds, and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i) we award up to an additional 5 points to an application, depending on how well the application meets this priority.

This priority is:

Competitive Preference Priority 1—Collaborative Efforts Among States.

To meet this priority, an applicant must—

(a) Include a minimum of 15 States in the consortium;

(b) Identify in its application a proposed project management partner and provide an assurance that the proposed project management partner is not partnered with any other eligible applicant applying for an award under this competition; [1]

(c) Provide a description of the consortium's structure and operation. The description must include—

(1) The organizational structure of the consortium (e.g., differentiated roles that a member State may hold);

(2) The consortium's method and process (e.g., consensus, majority) for making different types of decisions (e.g., policy, operational);

(3) The protocols by which the consortium will operate, including protocols for member States to change roles in the consortium, for member States to leave the consortium, and for new member States to join the consortium;

(4) The consortium's plan, including the process and timeline, for setting key policies and definitions for implementing the proposed project, including, for any assessments developed through a project funded by this grant, the common set of standards upon which to base the assessments, a

[1] In selecting a proposed project management partner, an eligible applicant must comply with the requirements for procurement in 34 CFR 80.36.

common set of performance-level descriptors, a common set of achievement standards, common assessment administration procedures, common item-release and test-security policies, and a common set of policies and procedures for accommodations and student participation; and

(5) The consortium's plan for managing grant funds received under this competition; and

(d) Provide a memorandum of understanding or other binding agreement executed by each State in the consortium that includes an assurance that, to remain in the consortium, the State will adopt or use any instrument, including to the extent applicable, assessments, developed under the proposed project no later than the end of the project period.

Requirements: The following requirements, which were published in the **Federal Register** on April 19, 2011 (76 FR 21986), apply to this competition. An eligible applicant awarded a grant under this program must:

(a) Evaluate the validity, reliability, and fairness of any assessments or other assessment-related instruments developed under a grant from this competition, and make available documentation of evaluations of technical quality through formal mechanisms (e.g., peer-reviewed journals) and informal mechanisms (e.g., newsletters), both in print and electronically;

(b) Actively participate in any applicable technical assistance activities conducted or facilitated by the Department or its designees, coordinate with the RTTA program in the development of assessments under this program, and participate in other activities as determined by the Department;

(c) Develop a strategy to make student-level data that result from any assessments or other assessment-related instruments developed under a grant from this competition available on an ongoing basis for research, including for prospective linking, validity, and program improvement studies; [2]

(d) Ensure that any assessments or other assessment-related instruments developed under a grant from this competition will be operational (ready for large-scale administration) at the end of the project period;

(e) Ensure that funds awarded under the EAG program are not used to support the development of standards, such as under the English language proficiency assessment system priority or any other priority.

(f) Maximize the interoperability of any assessments and other assessment-related instruments developed with funds from this competition across technology platforms and the ability for States to move their assessments from one technology platform to another by doing the following, as applicable, for any assessments developed with funds from this competition by—

(1) Developing all assessment items in accordance with an industry-recognized open-licensed interoperability standard that is approved by the Department during the grant period, without non-standard extensions or additions; and

(2) Producing all student-level data in a manner consistent with an industry-recognized open-licensed interoperability standard that is approved by the Department during the grant period;

(g) Unless otherwise protected by law or agreement as proprietary information, make any assessment content (i.e., assessments and assessment items) and other assessment-related instruments developed with funds from this competition freely available to States, technology platform providers, and others that request it for purposes of administering assessments, provided that those parties receiving assessment content comply with consortium or State requirements for test or item security; and

(h) For any assessments and other assessment-related instruments developed with funds from this competition, use technology to the maximum extent appropriate to develop, administer, and score the assessments and report results.

Definitions: The following definitions, which were published in the **Federal Register** on April 19, 2011 (76 FR 21986), apply to this competition.

Common set of college- and career-ready standards means a set of academic content standards for grades K–12 held in common by multiple States, that (a) define what a student must know and be able to do at each grade level; (b) if mastered, would ensure that the student is college- and career-ready by the time of high school graduation; and (c) for any consortium of States applying under the EAG program, are substantially identical across all States in the consortium.

A State in a consortium may supplement the common set of college- and career-ready standards with additional content standards, provided that the additional standards do not comprise more than 15 percent of the State's total standards for that content area.

English language proficiency assessment system, for purposes of the English language proficiency assessment system priority, means a system of assessments that includes, at a minimum, diagnostic (e.g., screener or placement) and summative assessments at each grade level from kindergarten through grade 12 that cover the four language domains of reading, writing, speaking, and listening, as required by section 3113(b)(2) of the ESEA, and that meets all other requirements of the priority.

English learner means a student who is an English learner as defined by the applicant consistent with the definition of a student who is ''limited English proficient'' as that term is defined in section 9101(25) of the ESEA. If the applicant submits an application on behalf of a consortium, member States must develop and adopt a common definition of the term during the period of the grant.

Student with a disability means a student who has been identified as a child with a disability under the Individuals with Disabilities Education Act, as amended.

Program Authority: 20 U.S.C. 7301a and 7842.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Debarment and Suspension regulations in 2 CFR part 3485. (c) The notice of final priorities, requirements, definitions, and selection criteria published in the **Federal Register** on April 19, 2011 (76 FR 21986). (d) The notice of final revision to selection criteria, published elsewhere in this issue of the **Federal Register**.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $6,000,000 in FY 2011 funds to be awarded in 2012. Contingent upon the availability of funds and the quality of applications, we may make additional awards with FY 2012 funds from the list of unfunded applicants from this competition.

Estimated Range of Awards: $5,000,000 to $7,000,000.

Estimated Average Size of Awards: $6,000,000.

Estimated Number of Awards: 1.

[2] Eligible applicants awarded a grant under this program must comply with the Family Educational Rights and Privacy Act (FERPA) and 34 CFR part 99, as well as State and local requirements regarding privacy.

Note: Applicants should submit a single budget request for a single budget and project period of up to 48 months. Subject to the availability of future years' funds, the Department may make supplemental grant awards to the grants awarded with FY 2011 funds.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

III. Eligibility Information

1. *Eligible Applicants:* State educational agencies (SEAs) as defined in section 9101(41) of the ESEA and consortia of such SEAs.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other:* An application from a consortium of SEAs must designate one SEA as the fiscal agent.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can access the electronic grant application for the Enhanced Assessment Instruments Grants Program at *http://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 84.368, not 84.368A). Your search will result in two grant opportunities; be sure to select the opportunity for the EAG ELP Competition application package. You can also obtain a copy of the application package by contacting the program contact persons listed under *Agency Contacts* in section VII of this notice.

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 person listed under *Accessible Format* in section VIII of this notice.

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 competition.

Page Limit: The project narrative (Part 3 of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application and the absolute and competitive preference priorities. You must limit the project narrative (Part 3) to the equivalent of no more than 65 pages, using 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 project narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Times New Roman font no smaller than 11.0 point for all text in the project narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables figures, and graphs. (Font sizes that are smaller than 11 but round up to 11, such as 10.7 point, will be considered smaller than 11.0.)
- Any screen shots included as part of the narrative should follow these standards or, if other standards are applied, be sized to equal the equivalent amount of space if these standards were applied.

The page limit applies to the project narrative (Part 3), including the table of contents, which must include a discussion of how the application meets one or more of the statutory absolute priorities and how well the applicant meets the regulatory absolute priority; if applicable, how the application meets the competitive preference priority; and how well the application addresses each of the selection criteria. The page limit also applies to any attachments to the project narrative other than the references/bibliography. In other words, the entirety of Part 3 of the application, including the aforementioned discussion and any attachments to the project narrative, must be limited to the equivalent of no more than 65 pages. The only allowable attachments other than those included in the project narrative are those outlined as ''Other Attachments Forms'' for Part 6 in the application package. Any attachments other than those included within the page limit of the project narrative and those outlined for Part 6 will not be reviewed.

The 65-page limit, or its equivalent, does not apply to the following sections of an application: Part 1 (including the response regarding research activities involving human subjects); Part 2 (two-page project abstract); Part 4 (the budget sections, including the chart and narrative budget justification); Part 5 (standard assurances and certifications); and Part 6 (other attachments forms, including, if applicable, references/bibliography for the project narrative; individual résumés for project director(s) and key personnel—applicants are encouraged to limit each résumé to no more than five pages; memoranda of understanding or other binding agreement; assurance regarding management partner; copy of applicant's indirect cost rate agreement; and letters of commitment and support from collaborating SEAs and organizations).

Our reviewers will not read any pages of your project narrative that exceed the page limit; or exceed the equivalent of the page limit if you apply other standards. Applicants are encouraged to submit applications that meet the page limit following the standards outlined in this section rather than submitting applications that are the equivalent of the page limit applying other standards.

3. *Submission Dates and Times:*

Applications Available: April 30, 2012.

Deadline for Notice of Intent to Apply: May 30, 2012.

We will be able to develop a more efficient process for reviewing grant applications if we have a better understanding of the number of applicants that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify us of the applicant's intent to submit an application for funding by sending a short email message. This short email should provide the applicant organization's name and address. The Secretary requests that this email be sent to *Collette.Roney@ed.gov* with ''Intent to Apply'' in the email subject line. Applicants that do not provide this email notification may still apply for funding.

Deadline for Transmittal of Applications: June 14, 2012.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). Note that applications for this EAG ELP Competition must be submitted under CFDA number 84.368A–1; only applications for the EAG Accessibility Competition should be submitted under CFDA number 84.368A–2. 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: August 13, 2012.

4. *Intergovernmental Review:* This competition 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 competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in 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 2–5 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 in the Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this competition 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 Enhanced Assessment Instruments Grants Program ELP Competition, CFDA number 84.368A–1, 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. You should submit applications to this competition, the EAG ELP Competition, under CFDA number 84.368A–1; do not submit applications for this competition under CFDA number 84.368A–2, which is the number for the EAG Accessibility Competition.

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 Enhanced Assessment Instruments Grants Program 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 84.368, not 84.368A).

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 *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 4:30:00 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: Collette Roney, U.S. Department of Education, 400 Maryland Avenue SW., room 3W210, Washington, DC 20202. Fax: (202) 260–7764.

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 84.368A–1), 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 84.368A–1), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 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 competition are from the notice of final priorities, requirements, definitions, and selection criteria published in the **Federal Register** on April 19, 2011 (76 FR 21986) and are listed in the application package.

2. *Review and Selection Process:* 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).

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has developed four measures to evaluate the overall effectiveness of the Enhanced Assessment Instruments Grants program: (1) The number of States that participate in Enhanced Assessment Instruments Grants projects funded by this competition; (2) the percentage of grantees that, at least twice during the period of their grants, make available to SEA staff in non-participating States and to assessment researchers information on findings resulting from the Enhanced Assessment Instruments Grants through presentations at national conferences, publications in refereed journals, or other products disseminated to the assessment community; (3) for each grant cycle and as determined by an expert panel, the percentage of Enhanced Assessment Instruments Grants that yield significant research, methodologies, products, or tools regarding assessment systems or assessments; and (4) for each grant cycle and as determined by an expert panel, the percentage of Enhanced Assessment Instruments Grants that yield significant research, methodologies, products, or tools specifically regarding accommodations and alternate assessments for students with disabilities and limited English proficient students. Grantees will be expected to include in their interim and final performance reports information about the accomplishments of their projects because the Department will need data on these measures.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Collette Roney, Enhanced Assessment Grants Program, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue SW., room 3W210, Washington, DC 20202–6132. Telephone: (202) 401–5245 or by email: *Collette.Roney@ed.gov.*

If you use a TDD or a TTY, 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 in 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 the 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: April 25, 2012.

Michael Yudin,

Acting Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2012–10359 Filed 4–27–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Enhanced Assessment Instruments Grants Program—Enhanced Assessment Instruments (Accessibility Competition)

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

Overview Information:

Enhanced Assessment Instruments Grants Program—Enhanced Assessment Instruments (Accessibility Competition) Notice inviting applications for new awards for fiscal year (FY) 2011 funds.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.368A–2.

DATES:

Applications Available: April 30, 2012.

Deadline for Notice of Intent to Apply: May 30, 2012.

Deadline for Transmittal of Applications: June 14, 2012.

Deadline for Intergovernmental Review: August 13, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Enhanced Assessments Instruments Grants program, also called the Enhanced Assessment Grants (EAG) program, is to enhance the quality of assessment instruments and systems used by States for measuring the

academic achievement of elementary and secondary school students.

In 2012, the Department is holding two separate competitions for FY 2011 EAG funds. The competition announced in this notice (EAG Accessibility Competition) (CFDA No. 84.368A–2) will support efforts designed to advance practice significantly in the area of increasing the accessibility and validity of assessments for students with disabilities or limited English proficiency, or both, including strategies for test design, administration with accommodations, scoring, and reporting. Elsewhere in this issue of the **Federal Register** we are publishing a notice inviting applications for a separate competition for FY 2011 EAG funds to be awarded in 2012 (the EAG English Language Proficiency (ELP) Competition, CFDA No. 84.368A–1). The Department may use any unused funds from the competition announced in this notice to make awards in the EAG ELP Competition. Conversely, the Department may use any unused funds from the EAG ELP Competition to make awards in the competition announced in this notice.

Priorities: This competition includes four absolute priorities and three competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(iv), absolute priorities 1 through 4 (Statutory Priorities) are based on section 6112 of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 7301a). Competitive Preference Priority 1 and Competitive Preference Priority 3 are from Appendix E to the notice of final requirements for optional State consolidated applications submitted under section 9302 of the ESEA, published in the **Federal Register** on May 22, 2002 (67 FR 35967). Competitive Preference Priority 2 is from the notice of final priorities, requirements, definitions, and selection criteria, published in the **Federal Register** on April 19, 2011 (76 FR 21986).

Absolute Priorities: For awards made from this competition in 2012 with FY 2011 funds, and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet one or more of the Statutory Priorities.

These priorities are:

Absolute Priority 1—Collaboration. Collaborate with institutions of higher education, other research institutions, or other organizations to improve the quality, validity, and reliability of State academic assessments beyond the requirements for these assessments described in section 1111(b)(3) of the ESEA.

Absolute Priority 2—Use of Multiple Measures of Student Academic Achievement. Measure student academic achievement using multiple measures of student academic achievement from multiple sources.

Absolute Priority 3—Charting Student Progress Over Time. Chart student progress over time.

Absolute Priority 4—Comprehensive Academic Assessment Instruments. Evaluate student academic achievement through the development of comprehensive academic assessment instruments, such as performance- and technology-based academic assessments.

Competitive Preference Priorities: For awards made in 2012 with FY 2011 funds, and any subsequent year in which we make awards from the list of unfunded applicants from this competition, the following priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award up to an additional 25 points to an application, depending on how well the application meets these competitive preference priorities.

These priorities are:

Competitive Preference Priority 1—Accommodations and Alternate Assessments (up to 15 points). Applications that can be expected to advance practice significantly in the area of increasing accessibility and validity of assessments for students with disabilities or limited English proficiency, or both, including strategies for test design, administration with accommodations, scoring, and reporting.

Competitive Preference Priority 2—Collaborative Efforts Among States (up to 5 points).

To meet this priority, an applicant must—

(a) Include a minimum of 15 States in the consortium;

(b) Identify in its application a proposed project management partner and provide an assurance that the proposed project management partner is not partnered with any other eligible applicant applying for an award under this competition [1];

(c) Provide a description of the consortium's structure and operation. The description must include—

(1) The organizational structure of the consortium (e.g., differentiated roles that a member State may hold);

(2) The consortium's method and process (e.g., consensus, majority) for making different types of decisions (e.g., policy, operational);

(3) The protocols by which the consortium will operate, including protocols for member States to change roles in the consortium, for member States to leave the consortium, and for new member States to join the consortium;

(4) The consortium's plan, including the process and timeline, for setting key policies and definitions for implementing the proposed project, including, for any assessments developed through a project funded by this grant, the common set of standards upon which to base the assessments, a common set of performance-level descriptors, a common set of achievement standards, common assessment administration procedures, common item-release and test-security policies, and a common set of policies and procedures for accommodations and student participation; and

(5) The consortium's plan for managing grant funds received under this competition; and

(d) Provide a memorandum of understanding or other binding agreement executed by each State in the consortium that includes an assurance that, to remain in the consortium, the State will adopt or use any instrument, including to the extent applicable, assessments, developed under the proposed project no later than the end of the project period.

Competitive Preference Priority 3—Dissemination (5 points). Applications that include an effective plan for dissemination of results.

Requirements: The following requirement, which was published in the **Federal Register** on April 19, 2011 (76 FR 21986), applies to this competition. An eligible applicant awarded a grant under this program must:

Unless otherwise protected by law or agreement as proprietary information, make any assessment content (i.e., assessments and assessment items) and other assessment-related instruments developed with funds from this competition freely available to States, technology platform providers, and others that request it for purposes of administering assessments, provided that those parties receiving assessment content comply with consortium or State requirements for test or item security.

Definitions: The following definition, which was published in the **Federal Register** on April 19, 2011 (76 FR 21986), applies to this competition.

[1] In selecting a proposed project management partner, an eligible applicant must comply with the requirements for procurement in 34 CFR 80.36.

Student with a disability means a student who has been identified as a child with a disability under the Individuals with Disabilities Education Act, as amended.

Program Authority: 20 U.S.C. 7301a and 7842.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Debarment and Suspension regulations in 2 CFR part 3485. (c) The notice of final requirements for optional State consolidated applications submitted under section 9302 of the ESEA, published in the **Federal Register** on May 22, 2002 (67 FR 35967). (d) The notice of final priorities, requirements, definitions, and selection criteria, published in the **Federal Register** on April 19, 2011 (76 FR 21986). (e) The notice of final revision to selection criteria, published elsewhere in this issue of the **Federal Register**.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $3,900,000 in FY 2011 funds to be awarded in 2012. Contingent upon the availability of funds and the quality of applications, we may make additional awards with FY 2012 funds from the list of unfunded applicants from this competition.

Estimated Range of Awards: $1,000,000 to $3,000,000.

Estimated Average Size of Awards: $1,950,000.

Estimated Number of Awards: 2.

Note: Applicants should submit a single budget request for a single budget and project period of up to 24 months. Subject to the availability of future years' funds, the Department may make supplemental grant awards to the grants awarded with FY 2011 funds.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months.

III. Eligibility Information

1. *Eligible Applicants:* State educational agencies (SEAs) as defined in section 9101(41) of the ESEA and consortia of such SEAs.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other:* An application from a consortium of SEAs must designate one SEA as the fiscal agent.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can access the electronic grant application for the Enhanced Assessment Instruments Grants Program 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 84.368, not 84.368A). Your search will result in two grant opportunities; be sure to select the opportunity for the EAG Accessibility Competition application package. You can also obtain a copy of the application package by contacting the program contact persons listed under *Agency Contacts* in section VII of this notice.

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 person listed under *Accessible Format* in section VIII of this notice.

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 competition.

Page Limit: The application narrative (Part 4 of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application and the absolute and competitive preference priorities. You must limit the application narrative (Part IV) to the equivalent of no more than 45 pages, using 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, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Times New Roman font no smaller than 11.0 point for all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs. (Font sizes that round up to 11, such as 10.7 point, will be considered as smaller than 11.0.)
- Any screen shots included as part of the application narrative should follow these standards or, if other standards are applied, be sized to equal the equivalent amount of space if these standards were applied.

The page limit does not apply to: Part 1 (including the response regarding research activities involving human subjects); Parts 2 and 5 (the budget sections, including the chart and narrative budget justification); Part 3 (one-page project abstract); Part 6 (other attachments forms, including, if applicable, references/bibliography for the application narrative; résumés for the project director and key personnel—applicants are encouraged to limit each résumé to no more than five pages; memoranda of understanding or other binding agreement; assurance regarding management partner; copy of indirect cost rate agreement; and letters of commit and support); and Part 7 (the assurances and certifications, including the General Education Provisions Act 427 response).

The page limit applies to Part 4 project narrative, including any table of contents for it. This section must include a discussion of how the application meets at least one of the absolute priorities, how well the application meets the competitive preference priorities (if applicable), and how well the application addresses each of the selection criteria. The page limit also applies to any attachments to the project narrative other than references/bibliography. In other words, the entirety of Part 4 of the application, including the discussion described in this paragraph and any attachments to the narrative, must be limited to the equivalent of no more than 45 pages. The only allowable attachments other than any included in the project narrative are those described in Part 6. Any attachments other than those included within the page limit of the project narrative and those outlined for Part 6 will not be reviewed.

Our reviewers will not read any pages of your project narrative that exceed the page limit or that exceed the equivalent of the page limit if you apply other standards. Applicants are encouraged to submit applications that meet the page limit following the standards outlined in this section rather than submitting applications that are the equivalent of the page limit applying other standards.

3. *Submission Dates and Times:*

Applications Available: April 30, 2012.

Deadline for Notice of Intent to Apply: May 30, 2012.

We will be able to develop a more efficient process for reviewing grant applications if we have a better understanding of the number of applicants that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to

notify us of the applicant's intent to submit an application for funding by sending a short email message. This short email should provide the applicant organization's name and address. The Secretary requests that this email be sent to *Collette.Roney@ed.gov* with ''Intent to Apply'' in the email subject line. Applicants that do not provide this email notification may still apply for funding.

Deadline for Transmittal of Applications: June 14, 2012.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). Note that applications for this EAG Accessibility Competition must be submitted under CFDA number 84.368A–2; only applications for the EAG ELP Competition should be submitted under CFDA number 84.368A–1. 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: August 13, 2012.

4. *Intergovernmental Review:* This competition 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 competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in 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 2–5 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 in the Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this competition 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 Enhanced Assessment Instruments Grants Program, CFDA number 84.368A–2, 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. You should submit applications to this competition, the EAG Accessibility Competition, under CFDA number 84.368A–2; do not submit applications for this competition under CFDA number 84.368A–1, which is the number for the EAG ELP Competition.

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 Enhanced Assessment Instruments Grants Program 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 84.368, not 84.368A).

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 *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 4:30:00 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: Collette Roney, U.S. Department of Education, 400 Maryland Avenue SW., room 3W210, Washington, DC 20202. Fax: (202) 260–7764.

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 84.368A–2), 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 84.368A–2), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 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 competition are from the notice of final priorities, requirements, definitions, and selection criteria, published elsewhere in this issue of the **Federal Register** and are listed in the application package.

2. *Review and Selection Process:* 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).

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has developed four measures to evaluate the overall effectiveness of the Enhanced Assessment Instruments Grants program: (1) The number of States that participate in Enhanced Assessment Instruments Grants projects funded by this competition; (2) the percentage of grantees that, at least twice during the period of their grants, make available to SEA staff in non-participating States and to assessment researchers information on findings resulting from the Enhanced Assessment Instruments Grants through presentations at national conferences, publications in refereed journals, or other products disseminated to the assessment community; (3) for each grant cycle and as determined by an expert panel, the percentage of Enhanced Assessment Instruments Grants that yield significant research, methodologies, products, or tools regarding assessment systems or assessments; and (4) for each grant cycle and as determined by an expert panel, the percentage of Enhanced Assessment Instruments Grants that yield significant research, methodologies, products, or tools specifically regarding accommodations and alternate assessments for students with disabilities and limited English proficient students. Grantees will be expected to include in their interim and final performance reports information about the accomplishments of their projects because the Department will need data on these measures.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Collette Roney, Enhanced Assessment Grants Program, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W210, Washington, DC 20202–6132. Telephone: (202) 401–5245 or by email: *Collette.Roney@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 in 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 the 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: April 25, 2012.

Michael Yudin,

Acting Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2012–10382 Filed 4–27–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Investing in Innovation Fund, Scale-Up Grants

Catalog of Federal Domestic Assistance (CFDA) Number: 84.411A (Scale-up grants).

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice; extension of deadline date and correction.

SUMMARY: On March 27, 2012, the Office of Innovation and Improvement in the U.S. Department of Education published in the **Federal Register** (77 FR 18216) a notice inviting applications for new awards for fiscal year 2012 for the Investing in Innovation (i3) Scale-up grant competition (March 27 i3 Scale-up NIA). This notice extends the deadline date and date for intergovernmental review announced in, and corrects an error in, the March 27 i3 Scale-up NIA.

DATES:

Deadline for Transmittal of Applications: May 30, 2012.

Deadline for Intergovernmental Review: July 26, 2012.

SUPPLEMENTARY INFORMATION:

Deadline Date Extension

In the March 27 i3 Scale-up NIA the Department announced the 2012 i3 Scale-up grant competition and indicated that the Deadline for Transmittal of Applications was May 29, 2012. Applicants under this competition are required to use Grants.gov. Since publishing the March 27 i3 Scale-up NIA, it has come to the Department's attention that the Grants.gov help desk will be closed in observance of Memorial Day on Monday, May 28—the day before the original Deadline for the Transmittal of Applications that was announced in the March 27 i3 Scale-up NIA. The Department extends the deadline date for this competition to May 30, 2012 so that applicants will have sufficient access to the Grants.gov help desk to address any technical issues related to the application submission that may arise the day before the deadline date. As a result of the change in the deadline date, we are also extending the Date for Intergovernmental Review by one day—to July 26, 2012.

Correction

An error appears in the *Electronic Submission of Applications* section of the March 27 i3 Scale-up NIA. In seven places within that section, the notice indicates that applications must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. These references to ''4:30 p.m.'' should be references to ''4:30:00 p.m.'' For this reason, we correct the March 27 i3 Scale-up NIA as follows:

On page 18225, second column, second bulleted paragraph, correct the three references to ''4:30 p.m.'' to read ''4:30:00 p.m.''.

On page 18225, third column, last paragraph, correct the reference to ''4:30 p.m.'' to read ''4:30:00 p.m.''.

On page 18226, first column, first full paragraph, correct the two references to ''4:30 p.m.'' to read ''4:30:00 p.m.''.

On page 18226, second column, last paragraph, correct the reference to ''4:30 p.m.'' to read ''4:30:00 p.m.''.

Program Authority: American Recovery and Reinvestment Act of 2009, Division A, Section 14007, Public Law 111–5.

VIII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Carol Lyons, U.S. Department of Education, 400 Maryland Avenue SW., room 4W203, Washington, DC 20202–5930. FAX: (202) 205–5631. Telephone: (202) 453–7122 or by email: *i3@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

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 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 the 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: April 25, 2012.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2012–10383 Filed 4–27–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Investing in Innovation Fund, Validation

Catalog of Federal Domestic Assistance (CFDA) Number: 84.411B (Validation grants).

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice; extension of deadline date and correction.

SUMMARY: On March 27, 2012, the Office of Innovation and Improvement in the U.S. Department of Education published in the **Federal Register** (77 FR 18229) a notice inviting applications for new awards for fiscal year 2012 for the Investing in Innovation (i3) Validation grant competition (March 27 i3 Validation NIA). This notice extends the deadline date and date for intergovernmental review announced in, and corrects an error in the March 27 i3 Validation NIA.

DATES:

Deadline for Transmittal of Applications: May 30, 2012.

Deadline for Intergovernmental Review: July 26, 2012.

SUPPLEMENTARY INFORMATION:

Deadline Date Extension

In the March 27 i3 Validation NIA the Department announced the 2012 i3 Validation grant competition and indicated that the Deadline for Transmittal of Applications was May 29, 2012. Applicants under this competition are required to use Grants.gov. Since publishing the March 27 i3 Validation NIA, it has come to the Department's attention that the Grants.gov help desk will be closed in observance of Memorial Day on Monday, May 28—the day before the original Deadline for the Transmittal of Applications that was announced in the March 27 i3 Validation NIA. The Department extends the deadline date for this competition to May 30, 2012 so that applicants will have sufficient

access to the Grants.gov help desk to address any technical issues related to application submission that may arise the day before the deadline date. As a result of the change in the deadline date, we are also extending the Date for Intergovernmental Review by one day—to July 26, 2012.

Correction

An error appears in the *Electronic Submission of Applications* section of the March 27 i3 Validation NIA. In seven places within that section, the notice indicates that applications must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. These references to ''4:30 p.m.'' should be references to ''4:30:00 p.m.'' For this reason, we correct the March 27 i3 Validation NIA as follows:

On page 18238, second column, second bulleted paragraph, correct the three references to ''4:30 p.m.'' to read ''4:30:00 p.m.''.

On page 18238, third column, sixth paragraph, correct the reference to ''4:30 p.m.'' to read ''4:30:00 p.m.''.

On page 18238, third column, seventh paragraph, correct the two references to ''4:30 p.m.'' to read ''4:30:00 p.m.''.

On page 18239, second column, fifth full paragraph, correct the reference to ''4:30 p.m.'' to read ''4:30:00 p.m.''.

Program Authority: American Recovery and Reinvestment Act of 2009, Division A, Section 14007, Public Law 111–5.

VIII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Carol Lyons, U.S. Department of Education, 400 Maryland Avenue SW., Room 4W203, Washington, DC 20202–5930. Fax: (202) 205–5631. Telephone: (202) 453–7122 or by email: *i3@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

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 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 the 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: April 25, 2012.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2012–10373 Filed 4–27–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2012–OESE–0002]

Final Revision to Selection Criteria—Enhanced Assessment Instruments; CFDA Number: 84.368

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Assistant Secretary for Elementary and Secondary Education amends the selection criteria under the Enhanced Assessment Instruments Grant program, also called the Enhanced Assessment Grant (EAG) program, as established in the notice of final priorities, requirements, definitions, and selection criteria published in the **Federal Register** on April 19, 2011 (2011 NFP). The 2011 NFP established specific priorities, requirements, definitions, and selection criteria that may be used for the EAG program. The revisions in this notice provide the Secretary with additional flexibility with respect to selection criteria for EAG competitions in 2012 that use fiscal year (FY) 2011 funds and for subsequent competitions. We believe that these revisions will enable the Department to administer this program more effectively, simplify the application and review processes, and better ensure that the strongest applications receive EAG funds.

DATES: *Effective Date:* The revisions are effective May 30, 2012.

FOR FURTHER INFORMATION CONTACT: Collette Roney, U.S. Department of Education, 400 Maryland Avenue SW., room 3W210, Washington, DC 20202. Telephone: (202) 401–5245 or by email: *Collette.Roney@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Purpose of Program: The purpose of the EAG program is to enhance the quality of assessment instruments and systems used by States for measuring the academic achievement of elementary and secondary school students.

Program Authority: 20 U.S.C. 7301a.

We published a notice of proposed revisions for this program in the **Federal Register** on January 30, 2012 (77 FR 4553). That notice contained background information and our reasons for proposing the revisions relating to the use of selection criteria for this program.

Public Comment: In response to our invitation in the notice of proposed revisions, we did not receive any comments. However, as a result of our further review of the proposed revisions since publication of the notice of proposed revisions, we have made one change as follows:

Analysis of Comments and Changes

Comment: None.

Discussion: In reviewing the statement of the proposed revisions to selection criteria further, the Department has decided that it may be helpful to address the assignment of maximum possible points—not only with respect to criteria used for competitions, but also with respect to factors under those criteria. The Department has the authority under 34 CFR 75.201 to assign maximum points at the factor level. This change, therefore, does not substantively change the Department's authority or practice; it merely describes the manner in which the Department may indicate whether factors under a selection criterion have been assigned maximum points.

Changes: We have added language to the statement of revisions to clarify that the Department may assign, in the notice inviting applications, the application package, or both, the maximum possible points an applicant may earn under each factor under a selection criterion.

Final Revisions to Selection Criteria

The Secretary may use one or more of the selection criteria listed in paragraphs (a) through (d) for evaluating an application under this program. This flexibility includes the authority to reduce the number of selection criteria. In order to assist peer reviewers in

determining the degree to which an applicant meets a criterion, the Secretary may further define each criterion from each of these sources by selecting one or more specific factors within a criterion or assigning factors from one criterion, from any of those sources, to another criterion, in any of those sources. We may apply one or more of these criteria in any year in which this program is in effect. In the notice inviting applications or the application package, or both, we will announce the maximum possible points assigned to each criterion and may also assign the maximum possible points for each factor.

Selection criteria for any EAG competition may come from:

(a) The selection criteria established in the 2011 NFP.

(b) The selection criteria in 34 CFR 75.210.

(c) Selection criteria based on the statutory requirements for the EAG program in accordance with 34 CFR 75.209.

(d) Any combination of selection criteria and factors in paragraphs (a) through (c).

This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does not solicit applications. In any year in which we choose to use one or more of these selection criteria, we invite applications through a notice in the **Federal Register.**[1]

Executive Orders 12866 and 13563

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement 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 stated in the Executive order.

This regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed this regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are taking this regulatory action only on a reasoned determination that its benefits justify its costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

Summary of Potential Costs and Benefits

This regulatory action affects only State educational agencies (SEAs) or consortia of SEAs applying for assistance under the EAG program. It creates flexibility for the Department, with respect to EAG competitions in 2012 for FY 2011 funds and for subsequent competitions, to select from among, or to combine, selection criteria that were established in the 2011 NFP criteria, selection criteria from 34 CFR 75.210, and other selection criteria based on the statute under 34 CFR 75.209. This flexibility allows the Department to align selection criteria with program needs and ensure that the strongest applications are selected for funding under the program.

This flexibility does not impose a financial burden that SEAs would not otherwise incur in the development and submission of a grant application under the EAG program. In addition, under some circumstances (for example, if the Department elected to use fewer criteria or factors in a given competition), the revisions could reduce the financial burden of preparing an EAG grant application by a modest amount. Moreover, the Department typically only receives a small number of applications for this program, which further serves to mitigate any potential costs because few entities are affected.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

[1] Availability of funds for the EAG program for a given year is contingent upon an appropriation of funds for the program by the Congress.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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 the 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: April 25, 2012.

Michael Yudin,

Acting Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2012–10357 Filed 4–27–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Amended Notice of Intent To Modify the Scope of the Environmental Impact Statement for the Champlain Hudson Power Express Transmission Line Project in New York State

AGENCY: Department of Energy.

ACTION: Amended Notice of Intent.

SUMMARY: The United States (U.S.) Department of Energy (DOE) intends to modify the scope of the *Champlain Hudson Power Express Transmission Line Project Environmental Impact Statement* (CHPE EIS; DOE/EIS–0447) and to conduct additional public scoping. As described in the original Notice of Intent (NOI) (75 FR 34720; June 18, 2010), in January 2010, Transmission Developers Inc. (TDI) submitted, on behalf of Champlain Hudson Power Express, Inc. (Applicant), an application to DOE for a Presidential permit for the Champlain Hudson Power Express (Champlain Hudson) project. As explained in the NOI, DOE will assess the potential environmental impacts associated with the construction, operation, maintenance, and connection of the proposed new electric transmission line across the U.S.-Canada border in northeastern New York State. Public scoping originally closed on August 2, 2010. On February 28, 2012, TDI submitted an amendment to the application for a Presidential permit to DOE that reflects proposed changes to the route of the Champlain Hudson project, and DOE now intends to revise the scope of the EIS to address these proposed changes. The proposed changes are the result of settlement negotiations among New York (NY) State agencies, Champlain Hudson Power Express, Inc., CHPE Properties, Inc. and other stakeholders as part of the project review under Article VII of the New York State Public Service Law, and are reflected in a February 24, 2012, ''Joint Proposal'' submitted to the New York Public Service Commission.

The U.S. Fish & Wildlife Service, New York Field Office (USFWS Region 5), the U.S. Army Corps of Engineers (USACE), the U.S. Environmental Protection Agency (EPA Region 2), the New York State Department of Environmental Conservation (NYSDEC), and the New York State Department of Public Service (NYSDPS) are cooperating agencies in the preparation of the EIS.

DATES: DOE is accepting public comments on the revised scope of the CHPE EIS until June 14, 2012. DOE will consider comments submitted after this date to the extent practicable.

ADDRESSES: Please direct written comments on the scope of the EIS and requests to be added to the document mailing list to: Brian Mills, Office of Electricity Delivery and Energy Reliability (OE–20), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585; by electronic mail to *Brian.Mills@hq.doe.gov;* or by facsimile to 202–586–8008. For general information on the DOE NEPA process contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585; telephone 202–586–4600, or leave a message at 1–800–472–2756; by facsimile at 202–586–7031; or send an email to *askNEPA@hq.doe.gov.*

For information on the USFWS's role as a cooperating agency, contact Tim R. Sullivan by electronic mail at *Tim_R_Sullivan@fws.gov;* by phone at 602–753–9334; or by mail at 3817 Luker Road, Cortland, NY 13045.

For information on the Army Corps of Engineers' permit process, contact Naomi J. Handell by electronic mail at *Naomi.J.Handell@usace.army.mil;* or by mail at 696 Virginia Road, Concord, MA 01742.

For information on the EPA's role as a cooperating agency, contact Lingard Knutson by electronic mail at *Knutson.Lingard@epamail.epa.gov;* by phone at 212–637–3747; or by mail at 290 Broadway, Mail Code: 25th Floor, New York, NY 10007–1866.

For information on the New York State Department of Environmental Conservation's role as a cooperating agency, contact Patricia Desnoyers by electronic mail to *pjdesnoy@gw.dec.state.ny.us;* or by mail at 625 Broadway, Albany, NY 12233.

For information on the New York State Department of Public Service's role as a cooperating agency, contact James Austin by electronic mail at *james_austin@dps.state.ny.us;* or by mail at 3 Empire State Plaza, Albany, NY 12223.

SUPPLEMENTARY INFORMATION:

Background

Executive Order (E.O.) 10485, *Providing for the performance of certain functions heretofore performed by the President with respect to electric power and natural gas facilities located on the borders of the United States,* as amended by E.O. 12038 *Relating to certain Functions transferred to the Secretary of Energy by the Department of Energy Organization Act,* requires issuance of a Presidential permit by DOE before electric transmission facilities may be constructed, operated, maintained, or connected at the U.S. international border. The E.O. provides that a Presidential permit may be issued after a finding that the proposed project is consistent with the public interest and after favorable recommendations from the U.S. Departments of State and Defense. In determining consistency with the public interest, DOE considers the potential environmental impacts of the proposed project under NEPA, determines the project's impact on electric reliability (including whether the proposed project would adversely affect the operation of the U.S. electric power supply system under normal and contingency conditions), and considers any other factors that DOE may find relevant to the public interest. The regulations implementing the E.O. have been codified at 10 CFR 205.320–205.329. DOE's issuance of a Presidential permit would indicate that there is no Federal objection to the project, but would not mandate that the project be constructed.

On January 25, 2010, TDI submitted an application, on behalf of Champlain

Hudson Power Express, Inc., to DOE's Office of Electricity Delivery and Energy Reliability for a Presidential permit to construct, operate, maintain, and connect a 2,000-megawatt (MW) high-voltage direct current (HVDC) Voltage Source Converter (VSC) controllable transmission system from the Canadian Province of Quebec to the New York City and southwestern Connecticut regions. After due consideration of the nature and extent of the proposed project, including evaluation of the ''Information Regarding Potential Environmental Impacts'' section of the Presidential permit application, DOE determined that the appropriate level of NEPA review for this project is an EIS. DOE issued its original NOI for this EIS on June 18, 2010 (75 FR 34720).

On August 5, 2010, TDI submitted an amendment to the application that eliminated a portion of the proposed transmission line consisting of a bipole (two cables) that would have extended into Connecticut (the Connecticut Circuit). This change in the project's design resulted in a proposed HVDC transmission line that would consist of a bipole with a capacity of 1,000-MW. The amendment also proposed extending the route using existing railroad easements to Whitehall, NY, and connecting to the Consolidated Edison (Con Edison) system at a new substation in Astoria, Queens, NY. On July 7, 2011, TDI submitted an amendment to the application that addressed five conditions required by the New York State Department of State (NYSDOS). A copy of these amendments can be found at *http://chpexpresseis.org.*

On February 28, 2012, TDI submitted another amendment to the Champlain Hudson project Presidential permit application to reflect changes to the proposed route that resulted from a project review process under Article VII of the New York State Public Service Law. A copy of the February 28, 2012, permit application amendment letter and other project-related documents can be viewed at *http://chpexpresseis.org.*

New York State Certification Review Process

Article VII of the New York State Public Service Law establishes the review process for consideration of any application to construct and operate a major electric transmission system. As part of this process, the New York State Public Service Commission (Commission) received the application for a Certificate of Environmental Compatibility and Public Need from Champlain Hudson Power Express, Inc. in a series of documents dated March 29, 2010, and held public statement hearings on the original application in 2010.

Subsequently, the Applicant entered into settlement negotiations with several parties regarding the proposed facility need and benefits, alternate locations, environmental impacts, and mitigation measures. These negotiations resulted in a ''Joint Proposal'' which includes a proposed project alignment and configuration that is different from the original proposal for the Champlain Hudson project. The Joint Proposal also contains provisions regarding construction methods, environmental controls and mitigation measures, including the creation of a trust to study and mitigate possible impacts of the Champlain Hudson project's underwater cables on habitat in the Hudson River Estuary, the Harlem and East Rivers, Lake Champlain, and their tributaries. A copy of the Joint Proposal and other related documents can be viewed at *http://chpexpresseis.org.*

Applicant's Proposal

As set forth in the Joint Proposal, the Applicant's preferred alternative now consists of a single 1,000-MW HVDC bipole. The bipole is comprised of two connected submarine or underground cables, one of which is positively charged, and the other negatively charged. In total, two cables would be laid between the Province of Quebec, Canada, and a proposed converter station in Astoria, Queens, NY. The converter station would change the electrical power from direct current to alternating current (AC). The converter station would be connected to the New York Power Authority gas insulated switchgear substation via an underground HVAC line, and the substation would be connected to Con Edison's Rainey Substation, located in Astoria, via HVAC cables installed under New York City streets. The proposed transmission line would connect renewable sources of power generation in Canada with load centers in and around New York City.

The Champlain Hudson project would still originate at an HVDC converter station near Hydro-Québec TransÉnergie's 765/315-kilovolt (kV) Hertel substation, located southeast of Montreal, and continue approximately 35 miles to the international border between the United States and Canada where the HVDC cables would originate underwater at the Town of Champlain, NY and extend south through Lake Champlain for approximately 101 miles, entirely within the jurisdictional waters of New York State. However, instead of exiting the southern end of Lake Champlain at the Village of Whitehall, NY, as originally proposed, the cables would now exit Lake Champlain at the Town of Dresden and run underground along New York State Route 22 to Whitehall.

The Upper Hudson River portion of the Hudson River polychlorinated biphenyl (PCB) site (USEPA Identification Number NYD980763841) stretches from Hudson Falls, NY, to the Federal Dam at Troy, NY. To avoid installing and burying HVDC cables within this area and in certain sensitive areas of the lower Hudson River, the cables would now be buried along an overland route. From Whitehall, the cables would transition from the Route 22 right-of-way (ROW) to enter the originally proposed route in existing railroad ROW owned by Canadian Pacific Railway (CP) and would remain buried for approximately 65 miles in and along the railroad ROW from Whitehall to Schenectady, NY. The proposed route would enter Erie Boulevard just north of the railroad crossing at Nott Street and continue along Erie Boulevard to a point south of State Street where it would again enter the railroad ROW. Along this portion of the route there are various alternative routings that include both the railroad ROW and public ways for transitioning from the railroad to city streets. The public ways include Nott Street, North Jay Street, Green Street, North Center Street, Pine Street, Union Street, Liberty Street and State Street as well as private property (a parking lot) located at approximately 160 Erie Boulevard. The route would follow the railroad ROW for a short distance, and would then deviate west of the railroad property, pass under Interstate 890 then turn south, running approximately parallel with the CSX Transportation (CSX) railroad ROW, and would re-enter the CP railroad ROW just north of Delaware Avenue.

From this point in Schenectady, the proposed route would follow the CP railroad ROW to the Town of Rotterdam, NY. In Rotterdam, the route would transfer from the CP railroad ROW to the CSX railroad ROW and would proceed southeast for approximately 24 miles before entering the Town of Selkirk, NY. The cables would then travel south for approximately 29 miles generally in and along CSX railroad ROW through the municipalities of Ravena, New Baltimore, Coxsackie, the Town of Athens, and the Town of Catskill, NY. As originally proposed the cables would have entered the Hudson River at the Town of Coeymans, NY. Now, the cables would enter the Hudson River at the Town of Catskill

(hamlet of Cementon), via horizontal direction drilling (HDD). The HVDC underwater cables would be located within the Hudson River for approximately 67 miles until reaching a point north of Haverstraw Bay. As part of the revised project route, the cables would then exit the Hudson River at the Town of Stony Point in Rockland County, NY, to allow for a 7.7 mile bypass of Haverstraw Bay; this portion of the route would include three HDD installations under the Stony Point State Historic Park Site and Rockland Lake State Park. After the HDD under the parks, the cables would enter the Hudson River via HDD and be buried in the river for approximately 20.7 miles to the Spuyten Duyvil, where it would now extend south-easterly within the Harlem River for approximately 6.6 miles before exiting the water to a location along an existing railway ROW in the borough of the Bronx, NY. The cables would then continue along that ROW for approximately 1.1 miles.

At this point, the revised route would enter the East River via HDD, cross the East River and make land-fall at Astoria, Queens, NY. The cables would terminate at a new converter station proposed to be located near Luyster Creek, north of 20th Avenue, for a total length of approximately 330 miles from the U.S. border with Canada. The converter station would be installed on properties owned by Con Edison located in an industrial zone in Astoria and is proposed to have a total footprint of approximately five acres. The converter station would interconnect via underground circuit with the NYPA substation near the site of the Charles Poletti Power Project in Queens, NY. The substation would be connected to Con Edison's Rainey Substation, located in Astoria, via HVAC cables installed under New York City streets. A map of the proposed Champlain Hudson transmission line project route can be found at *http://chpexpresseis.org.*

Previous Public Scoping

A public scoping period for the CHPE EIS began with the publication of DOE's NOI in the **Federal Register** on June 18, 2010. The 45-day public scoping period closed on August 2, 2010. DOE received scoping comments in the form of 22 written letters or emails from private citizens, government agencies, and nongovernmental organizations. DOE held public scoping meetings from July 8, through July 16, 2010, in Bridgeport, Connecticut and Manhattan, Yonkers, Kingston, Albany, Queensbury, and Plattsburg, NY. A total of 33 people gave verbal comments at the meetings, and their comments were transcribed by court stenographers.

Commenters requested that the EIS establish evidence that the Champlain Hudson project is necessary to meet electricity demands (either current or future) in the project region, as well as address concerns over the impact of construction on existing transmission infrastructure. Commenters expressed concerns with regard to sediment disturbance and the potential impacts of contaminants in the water column on humans and wildlife from burying the transmission line in Lake Champlain and the Hudson River. Commenters also requested that the EIS specifically analyze potential thermal effects and effects of electromagnetic fields on aquatic ecosystems, and noted concern over impacts to visually important resources from construction of the transmission line. Commenters noted potential environmental and socioeconomic impacts from a proposed electric converter station in Yonkers, NY. Finally, commenters identified additional alternatives that they believed should be analyzed in the EIS. A copy of the Scoping Summary Report (December 2010) is available at *http://chpexpresseis.org.* DOE will address these comments, to the extent they are still relevant, as well as those submitted during the public comment period for this Amended NOI, in the CHPE EIS.

Public Scoping for the Revised Applicant Proposal

Pursuant to the submittal of the Joint Proposal, the NY State Public Service Commission is holding six public statement hearings in April 2012 in a variety of locations along the revised Champlain Hudson project route, including the municipalities of Whitehall, Catskill, Ravena, Schenectady, Garnerville, and Astoria, NY. While DOE does not currently intend to hold further public scoping meetings, it recognizes that comments provided by the public during the Commission's public statement hearings may be relevant to DOE's NEPA process. Therefore, DOE intends to review the April public statement hearing transcripts, in addition to scoping comments submitted directly to DOE, and will consider them, to the extent matters relevant to the federal environmental review process arise, as scoping comments for purposes of the EIS.

Agency Purpose and Need, Proposed Action, and Alternatives

The purpose and need for DOE's action is to decide whether to grant a Presidential permit for the Champlain Hudson project.

The proposed Federal action is the granting of the Presidential permit for the construction, operation, maintenance, and connection of the proposed new electric transmission line across the U.S.-Canada border in northeastern New York State. The EIS will analyze potential environmental impacts from the proposed action and the No Action Alternative. Because the proposed action may involve actions in floodplains and wetlands, and in accordance with 10 CFR part 1022, *Compliance with Floodplain and Wetland Environmental Review Requirements,* the draft EIS will include a floodplain and wetland assessment as appropriate, and the final EIS or record of decision will include a floodplain statement of findings. If granted, the Presidential permit would authorize only that portion of the line that would be constructed, operated and maintained wholly within the U.S.

DOE is seeking comment on the scope of the alternatives proposed and potential environmental impacts for analyses in the EIS and currently proposes to analyze the following alternatives in detail: (1) the Champlain Hudson project, as proposed by the Applicant in the Joint Proposal filed with the New York Public Service Commission on February 24, 2012 and submitted to DOE on February 28, 2012 as an amended application for a Presidential permit, and (2) the No Action Alternative, which assumes that DOE would not grant a Presidential permit for the Champlain Hudson project and that the proposed line and associated facilities would not be constructed.

Issued in Washington, DC, on April 24, 2012.

Brian Mills,

Deputy Assistant Secretary, Permitting, Siting and Analysis, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2012–10304 Filed 4–27–12; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9665–2]

Cross-Media Electronic Reporting: Authorized Program Revision Approval, State of Florida

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of the State of Florida's request

to revise/modify certain of its EPA-authorized programs to allow electronic reporting.

DATES: EPA's approval is effective May 30, 2012 for the State of Florida's National Primary Drinking Water Regulations Implementation program, if no timely request for a public hearing is received and accepted by the Agency, and on April 30, 2012 for the State of Florida's other authorized programs.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566–1697, *huffer.evi@epa.gov,* U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, or Karen Seeh, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566–1175, *seeh.karen@epa.gov.*

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Subpart D of CROMERR requires that state, tribal or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D provides standards for such approvals based on consideration of the electronic document receiving systems that the State, Tribe, or local government will use to implement the electronic reporting. Additionally, § 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the State, Tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable subpart D requirements.

On February 22, 2011, the Florida Department of Environmental Protection (FDEP) submitted an application titled ''e-Reporting System Electronic Document Receiving System'' for revisions/modifications of its EPA-authorized programs under title 40 CFR. EPA reviewed FDEP's request to revise/modify its EPA-authorized programs and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions/modifications set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve Florida's request to modify/revise its following EPA-authorized programs to allow electronic reporting under 40 CFR parts 51, 60, 70, 141, 144, 146, 257–258, 262–265, 268, and 270–271 is being published in the **Federal Register**:

Part 52—Approval and Promulgation of State Implementation Plans;

Part 61—National Emission Standards for Hazardous Air Pollutants, Subpart M—National Emission Standard for Asbestos;

Part 70—State Operating Permit Programs;

Part 142—National Primary Drinking Water Regulations Implementation;

Part 147—State, Tribal, and EPA–Administered Underground Injection Control Programs; and

Part 272—Approved State Hazardous Waste Management Programs.

FDEP was notified of EPA's determination to approve its application with respect to the authorized program listed above.

Also, in today's notice, EPA is informing interested persons that they may request a public hearing on EPA's action to approve the State of Florida's request to revise its authorized public water system program under 40 CFR part 142, in accordance with 40 CFR 3.1000(f). Requests for a hearing must be submitted to EPA within 30 days of publication of today's **Federal Register** notice. Such requests should include the following information:

(1) The name, address and telephone number of the individual, organization or other entity requesting a hearing;

(2) A brief statement of the requesting person's interest in EPA's determination, a brief explanation as to why EPA should hold a hearing, and any other information that the requesting person wants EPA to consider when determining whether to grant the request;

(3) The signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

In the event a hearing is requested and granted, EPA will provide notice of the hearing in the **Federal Register** not less than 15 days prior to the scheduled hearing date. Frivolous or insubstantial requests for hearing may be denied by EPA. Following such a public hearing, EPA will review the record of the hearing and issue an order either affirming today's determination or rescinding such determination. If no timely request for a hearing is received and granted, EPA's approval of the State of Florida's request to revise its Part 142—National Primary Drinking Water Regulations Implementation program to allow electronic reporting will become effective 30 days after today's notice is published, pursuant to CROMERR section 3.1000(f)(4).

Dated: April 16, 2012.

Andrew Battin,

Director, Office of Information Collection.

[FR Doc. 2012–10322 Filed 4–27–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2012–0331; FRL–9666–9]

Inquiry To Learn Whether Businesses Assert Business Confidentiality Claims Regarding Waste Import and Export

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for comment.

SUMMARY: The Environmental Protection Agency (EPA) receives from time to time Freedom of Information Act (FOIA) requests for documentation received or issued by EPA or data contained in EPA database systems pertaining to the export and import of Resource Conservation and Recovery Act (RCRA) hazardous waste from/to the United States, the export of cathode ray tubes (CRTs) and spent lead acid batteries (SLABs) from the United States, and the export and import of RCRA universal waste from/to the United States. These documents and data may identify or reference multiple parties, and describe transactions involving the movement of specified materials in which the parties propose to participate or have participated. The purpose of this notice is to inform ''affected businesses'' about the documents or data sought by these types of FOIA requests in order to provide the businesses with the opportunity to assert claims that any of the information sought that pertains to

them is entitled to treatment as confidential business information (CBI), and to send comments to EPA supporting their claims for such treatment. Certain businesses, however, do not meet the definition of ''affected business,'' and are not covered by today's notice. They consist of any business that actually submitted to EPA any document at issue pursuant to applicable RCRA regulatory requirements and did not assert a CBI claim as to information that pertains to that business in connection with the document at the time of its submission; they have waived their right to do so at a later time. Nevertheless, other businesses identified or referenced in the documents that were submitted to EPA by the submitting business may have a right to assert a CBI claim concerning information that pertains to them and may do so in response to this notice.

DATES: Comments must be received on or before May 30, 2012. The period for submission of comments may be extended if, before the comments are due, you make a request for an extension of the comment period and it is approved by the EPA legal office. Except in extraordinary circumstances, the EPA legal office will not approve such an extension without the consent of any person whose request for release of the information under the FOIA is pending.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OECA–2012–0331, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: kreisler.eva@epa.gov.*
- *Address:* Eva Kreisler, International Compliance Assurance Division, Office of Federal Activities, Office of Enforcement and Compliance Assurance, Environmental Protection Agency, Mailcode: 2254A, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OECA–2012–0331. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. Instructions about how to submit comments claimed as CBI are given later in this notice.

The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment. Please include your name and other contact information with any disk or CD–ROM you submit by mail. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index.

Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the HQ EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the docket for this notice is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: Eva Kreisler, International Compliance Assurance Division, Office of Federal Activities, Office of Enforcement and Compliance Assurance, Environmental Protection Agency, Mailcode: 2254A, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–8186; email address: *kreisler.eva@epa.gov.*

SUPPLEMENTARY INFORMATION: Today's notice relates to any documents or data in the following areas: (1) Export of Resource Conservation and Recovery Act (RCRA) hazardous waste, during calendar year 2011 or before, under 40 CFR part 262, subparts E and H; (2) import of RCRA hazardous waste, during calendar year 2011 or before, under 40 CFR part 262, subparts F and H; (3) transit of RCRA hazardous waste, during calendar year 2011 or before, under 40 CFR part 262, subpart H, through the United States and foreign countries; (4) export of cathode ray tubes, during calendar year 2011 or before, under 40 CFR part 261, subpart E; (5) exports of non-crushed spent lead acid batteries with intact casings, during calendar year 2011 or before, under 40 CFR part 266 subpart G; (6) export and import of RCRA universal waste, during calendar year 2011 or before, under 40 CFR part 273, subparts B, C, D, and F; (7) submissions from transporters, during calendar year 2011 or before, under 40 CFR part 263, or from treatment, storage or disposal facilities under 40 CFR parts 264 and 265, related to exports or imports of hazardous waste which occurred during calendar year 2011 or before, including receiving facility notices under 40 CFR 264.12(a)(1) and 265.12(a)(1) and import consent documentation under 40 CFR 264.71(a)3) and 265.71(a)(3).

I. General Information

EPA has previously published notices similar to this one in the **Federal Register**, the latest one being at 76 FR 362, January 4, 2011 that address issues similar to those raised by today's notice. The Agency did not receive any comments on the previous notices. Since the publication of the January 3, 2012 notice, the Agency has continued to receive FOIA requests for documents and data contained in EPAs database related to hazardous waste exports and imports.

II. Issues Covered by This Notice

Specifically, EPA receives FOIA requests from time to time for documentation or data related to hazardous waste exports and imports that may identify or reference multiple parties, and that describe transactions involving the movement of specified materials in which the parties propose to participate or have participated. This notice informs ''affected businesses,'' [1] which could include, among others, ''transporters'' [2] and ''consignees,'' [3] of

[1] The term ''affected business'' is defined at 40 CFR 2.201(d), and is set forth in this notice, below.

[2] The term ''transporter'' is defined at 40 CFR 260.10.

[3] The term ''consignee'' is defined, for different purposes, at 40 CFR 262.51 and 262.81(c).

the requests for information in EPA database systems and/or contained in one or more of the following documents: (1) Documents related to the export of Resource Conservation and Recovery Act (RCRA) hazardous waste, during calendar year 2011 or before, under 40 CFR part 262, subparts E and H, including but not limited to the ''notification of intent to export,''[4] ''manifests,''[5] ''annual reports,''[6] ''EPA acknowledgements of consent,''[7] ''any subsequent communication withdrawing a prior consent or objection,''[8] ''responses that neither consent nor object,'' ''exception reports,''[9] ''transit notifications,''[10] and ''renotifications;''[11] (2) documents related to the import of hazardous waste, during calendar year 2011 or before, under 40 CFR part 262, subparts F and H, including but not limited to notifications of intent to import hazardous waste into the U.S. from foreign countries; (3) documents related to the transit of hazardous waste, during calendar year 2011 or before, under 40 CFR part 262, subpart H, including notifications from U.S. exporters of intent to transit through foreign countries, or notifications from foreign countries of intent to transit through the U.S.; (4) documents related to the export of cathode ray tubes (CRTs), during calendar year 2011 or before, under 40 CFR part 261, subpart E, including but not limited to notifications of intent to export CRTs; (5) documents related to the export of non-crushed spent lead acid batteries (SLABs) with intact casings, during calendar year 2011 or before, under 40 CFR part 266 subpart G, including but not limited to notifications of intent to export SLABs; (6) submissions from transporters under 40 CFR part 263, or from treatment, storage or disposal facilities under 40 CFR parts 264 and 265, related to exports or imports of hazardous waste which occurred during calendar year 2011 or before, including receiving facility notices under 40 CFR 264.12(a)(1) and 265.12(a)(1) and import consent documentation under 40 CFR 264.71(a)(3) and 265.71(a)(3), and (7) documents related to the export and import of RCRA ''universal waste''[12] under 40 CFR part 273, subparts B, C, D, and F.

Certain businesses, however, do not meet the definition of ''affected business,'' and are not covered by today's notice. They consist of any business that actually submitted information responsive to a FOIA request, under the authority of 40 CFR parts 260 through 266 and 268, and did not assert a claim of business confidentiality covering any of that information at the time of submission. As set forth in the RCRA regulations at 40 CFR 260.2(b), ''if no such [business confidentiality] claim accompanies the information when it is received by EPA, it may be made available to the public without further notice to the person submitting it.'' Thus, for purposes of this notice and as a general matter under 40 CFR 260.2(b), a business that submitted to EPA the documents at issue, pursuant to applicable regulatory requirements, and that failed to assert a claim as to information that pertains to it at the time of submission, cannot later make a business confidentiality claim.[13] Nevertheless, other businesses identified or referenced in the same documents that were submitted to EPA by the submitting business may have a right to assert a CBI claim concerning information that pertains to them and may do so in response to this notice.

In addition, EPA may develop its own documents and organize into its database systems information that was originally contained in documents from submitting businesses relating to exports and imports of hazardous waste. If a submitting business fails to assert a CBI claim for the documents it submits to EPA at the time of submission, not only does it waive its right to claim CBI for those documents, but it also waives its right to claim CBI for information in EPA's documents or databases that is based on or derived from the documents that were originally submitted by that business.[14]

In accordance with 40 CFR 2.204(c) and (e), this notice inquires whether any affected business asserts a claim that any of the requested information constitutes CBI, and affords such business an opportunity to comment to EPA on the issue. This notice also informs affected businesses that, if a claim is made, EPA would determine under 40 CFR part 2, subpart B, whether any of the requested information is entitled to business confidential treatment.

1. Affected Businesses

EPA's FOIA regulations at 40 CFR 2.204(c)(1) require an EPA office that is responsible for responding to a FOIA request for the release of business information (''EPA office'') ''to determine which businesses, if any, are affected businesses * * *.'' ''Affected business'' is defined at 40 CFR 2.201(d) as, ''* * * with reference to an item of business information, a business which has asserted (and not waived or withdrawn) a business confidentiality claim covering the information, or a business which could be expected to make such a claim if it were aware that disclosure of the information to the public was proposed.''

2. The Purposes of This Notice

This notice encompasses two distinct steps in the process of communication with affected businesses prior to EPA's making a final determination concerning the business confidentiality of the information at issue: the preliminary inquiry and the notice of opportunity to comment.

a. Inquiry To Learn Whether Affected Businesses (Other Than Those Businesses That Previously Asserted a CBI Claim) Assert Claims Covering Any of the Requested Information

Section 2.204(c)(2)(i) provides, in relevant part:

If the examination conducted under paragraph (c)(1) of this section discloses the existence of any business which, although it has not asserted a claim, might be expected to assert a claim if it knew EPA proposed to disclose the information, the EPA office shall contact a responsible official of each such business to learn whether the business asserts a claim covering the information.

b. Notice of Opportunity To Submit Comments

Sections 2.204(d)(1)(i) and 2.204(e)(1) of Title 40 of the Code of Federal Regulations require that written notice be provided to businesses that have made claims of business confidentiality for any of the information at issue,

[4] The term ''notification of intent to export'' is described at 40 CFR 262.53.

[5] The term ''manifest'' is defined at 40 CFR 260.10.

[6] The term ''annual reports'' is described at 40 CFR 262.56.

[7] The term ''EPA acknowledgement of consent'' is defined at 40 CFR 262.51.

[8] The requirement to forward to the exporter ''any subsequent communication withdrawing a prior consent or objection'' is found at 42 U.S.C. 6938(e).

[9] The term ''exception reports'' is described at 40 CFR 262.55.

[10] The term ''transit notifications'' is described at 40 CFR 262.53(e).

[11] The term ''renotifications'' is described at 40 CFR 262.53(c).

[12] The term ''universal waste'' is defined at 40 CFR 273.9.

[13] However, businesses having submitted information to EPA relating to the export and import of RCRA universal waste are not subject to 40 CFR 260.2(b) since they submitted information in accordance with 40 CFR part 273, and not parts 260 through 266 and 268, as set forth in 40 CFR 260.2(b). They are therefore affected businesses that could make a claim of CBI at the time of submission or in response to this notice.

[14] With the exception, noted above, of the submission of information relating to the export and import of RCRA universal waste.

stating that EPA is determining under 40 CFR part 2, subpart B, whether the information is entitled to business confidential treatment, and affording each business an opportunity to comment as to the reasons why it believes that the information deserves business confidential treatment.

3. The Use of Publication in the Federal Register

Section 2.204(e)(1) of Title 40 of the Code of Federal Regulations requires that this type of notice be furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact and date of receipt. EPA, however, has determined that in the present circumstances the use of a **Federal Register** notice is the only practical and efficient way to contact affected businesses and to furnish the notice of opportunity to submit comments. The Agency's decision to follow this course was made in recognition of the administrative difficulty and impracticality of directly contacting potentially thousands of individual businesses.

4. Submission of Your Response in the English Language

All responses to this notice must be in the English language.

5. The Effect of Failure To Respond to This Notice

In accordance with 40 CFR 2.204(e)(1) and 2.205(d)(1), EPA will construe your failure to furnish timely comments in response to this notice as a waiver of your business's claim(s) of business confidentiality for any information in the types of documents identified in this notice.

6. What To Include in Your Comments

If you believe that any of the information contained in the types of documents which are described in this notice and which are currently, or may become, subject to FOIA requests, is entitled to business confidential treatment, please specify which portions of the information you consider business confidential. Information not specifically identified as subject to a business confidentiality claim may be disclosed to the requestor without further notice to you.

For each item or class of information that you identify as being subject to your claim, please answer the following questions, giving as much detail as possible:

1. For what period of time do you request that the information be maintained as business confidential, e.g., until a certain date, until the occurrence of a specified event, or permanently? If the occurrence of a specific event will eliminate the need for business confidentiality, please specify that event.

2. Information submitted to EPA becomes stale over time. Why should the information you claim as business confidential be protected for the time period specified in your answer to question no. 1?

3. What measures have you taken to protect the information claimed as business confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information still be considered business confidential?

4. Is the information contained in any publicly available material such as the Internet, publicly available data bases, promotional publications, annual reports, or articles? Is there any means by which a member of the public could obtain access to the information? Is the information of a kind that you would customarily not release to the public?

5. Has any governmental body made a determination as to the business confidentiality of the information? If so, please attach a copy of the determination.

6. For each category of information claimed as business confidential, explain with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the specific nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

7. Do you assert that the information is submitted on a voluntary or a mandatory basis? Please explain the reason for your assertion. If the business asserts that the information is voluntarily submitted information, please explain whether and why disclosure of the information would tend to lessen the availability to EPA of similar information in the future.

8. Any other issue you deem relevant.

Please note that you bear the burden of substantiating your business confidentiality claim. Conclusory allegations will be given little or no weight in the determination. If you wish to claim any of the information in your response as business confidential, you must mark the response ''BUSINESS CONFIDENTIAL'' or with a similar designation, and must bracket all text so claimed. Information so designated will be disclosed by EPA only to the extent allowed by, and by means of, the procedures set forth in, 40 CFR part 2, subpart B. If you fail to claim the information as business confidential, it may be made available to the requestor without further notice to you.

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

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or email. Please submit this information by mail to the address identified in the **ADDRESSES** section of today's notice for inclusion in the non-public CBI docket. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. Information so marked will not be disclosed except in accordance with the procedures set forth in 40 CFR part 2, subpart B. In addition to the submission of 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.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the notice by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Describe any assumptions and provide any technical information and/or data that you used.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Make sure to submit your comments by the comment period deadline identified.

Dated: April 20, 2012.

Susan E. Bromm,

Director, Office of Federal Activities.

[FR Doc. 2012–10328 Filed 4–27–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9667–1]

Notification of a Public Meeting of the Science Advisory Board (SAB); Exposure and Human Health Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public meeting of the SAB Exposure and Human Health Committee to develop a work plan for advancing the EPA's application of Computational Toxicology (CompTox) data into the development of EPA hazard and risk assessments.

DATES: The meeting will be held on Wednesday, May 30, 2012 from 10:00 a.m. to 5:00 p.m. (Eastern Time) and Thursday, May 31, 2012 from 8:30 a.m. to 12:30 p.m. (Eastern Time).

ADDRESSES: The public meeting will be held at The Embassy Row Hotel, 2015 Massachusetts Ave. NW., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning the public meeting may contact Dr. Sue Shallal, Designated Federal Officer (DFO), via telephone at (202) 564–2057 or email at *shallal.suhair@epa.gov.* General information concerning the SAB can be found on the EPA Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act, codified at 42 U.S.C. 4365 to provide independent scientific and technical advice to the EPA Administrator on the technical basis for EPA actions. The SAB is undertaking an initiative to develop advice to assist EPA in advancing the application of ORD's Computational CompTox research for human health risk assessment to meet its programmatic needs. ORD's CompTox Research Program conducts innovative research that integrates advances in molecular biology, chemistry and innovative computer science to more effectively and efficiently rank chemicals based on risks. The goal of the CompTox Research Program is to provide high-throughput chemical screening data and decision support tools for assessing chemical exposure, hazard, and risk to human health and the environment. Pursuant to Federal Advisory Committee Act (FACA) and EPA policy, notice is hereby given that the SAB Exposure and Human Health Committee, along with liaison members from the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) Scientific Advisory Panel (SAP), will hold a public meeting to receive briefings from EPA offices and develop a work plan for this advisory activity. The SAB Exposure and Human Health Committee will provide advice through the chartered SAB and will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Availability of Meeting Materials: Prior to the meeting, the review documents, agenda and other materials will be accessible through the calendar link on the blue navigation bar at *http://www.epa.gov/sab/.*

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office. Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Interested members of the public may submit relevant written or oral information on the topic of this advisory activity, and/or the group conducting the activity, for the SAB to consider during the advisory process. Input from the public to the SAB will have the most impact if it provides specific scientific or technical information or analysis for SAB committees to consider or if it relates to the clarity or accuracy of the technical information. Members of the public wishing to provide comment should contact the DFO directly. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public meeting will be limited to five minutes. Interested parties should contact Dr. Sue Shallal, DFO, in writing (preferably via email) at the contact information noted above by May 23, 2012, to be placed on the list of public speakers for the meeting. *Written Statements:* Written statements should be supplied to the DFO via email at the contact information noted above by May 23, 2012 for the meeting so that the information may be made available to the Committee members for their consideration. Written statements should be supplied in one of the following electronic formats: Adobe Acrobat PDF, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format. It is the SAB Staff Office general policy to post written comments on the Web page for the advisory meeting or teleconference. Submitters are requested to provide an unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its Web sites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the SAB Web site. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Sue Shallal at (202) 564–2057 or *shallal.suhair@epa.gov.* To request accommodation of a disability, please contact Dr. Shallal preferably at least ten days prior to the meeting to give EPA as much time as possible to process your request.

Dated: April 19, 2012.

Thomas H. Brennan,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2012–10327 Filed 4–27–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, 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 the renewal of an existing information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comment on renewal of the information collection described below.

DATES: Comments must be submitted on or before June 29, 2012.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@fdic.gov* Include the name of the collection in the subject line of the message.
- *Mail:* Gary A. Kuiper (202.898.3877), Counsel, Room NY–

5046, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

• *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Gary A. Kuiper, at the FDIC address above.

SUPPLEMENTARY INFORMATION:

Proposal To Renew the Following Currently-Approved Collection of Information

Title: Notice Regarding Assessment Credits.

OMB Number: 3064–0151.

Frequency of Response: On occasion.

Affected Public: FDIC-insured institutions.

Estimated Number of Respondents: 4.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden: 8 hours.

General Description of Collection: FDIC-insured institutions must notify the FDIC if deposit insurance assessment credits are transferred, e.g., through a sale of the credits or through a merger, in order to obtain recognition of the transfer.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 25th day of April 2012.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2012–10347 Filed 4–27–12; 8:45 am]

BILLING CODE P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update Listing of Financial Institutions in Liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as ''of record'' notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: April 23, 2012.

Federal Deposit Insurance Corporation.

Pamela Johnson,

Regulatory Editing Specialist.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
10433	Fort Lee Federal Savings Bank, FSB	Fort Lee	NJ	4/20/2012

[FR Doc. 2012–10330 Filed 4–27–12; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Corporation To Do Business Under the Federal Reserve Act

The companies listed in this notice have applied to the Board for approval, pursuant to Section 25A of the Federal Reserve Act (Edge Corporation) 12 U.S.C. Sec. 611 *et seq.,* and all other applicable statutes and regulations to establish an Edge Corporation. The Edge Corporation will operate as a subsidiary of the applicant, Lake Forest Bank and Trust Company, Lake Forest, Illinois. The factors that are to be considered in acting on the application are set forth in the Board's Regulation K (12 CFR 211.4).

The applications below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in Section 25 of the Federal Reserve Act.

Unless otherwise noted, comments regarding each of these applications may be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 15, 2012.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Lake Forest Bank and Trust Company,* Lake Forest, Illinois; to establish FIFC Edge International Corp., Lake Forest, Illinois, as an Edge Corporation.

Board of Governors of the Federal Reserve System, April 25, 2012.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2012–10345 Filed 4–27–12; 8:45 am]

BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0221; Docket 2011–0016; Sequence 11]

Civilian Board of Contract Appeals; Submission for OMB Review; Civilian Board of Contract Appeals Rules of Procedure

AGENCY: Civilian Board of Contract Appeals, GSA.

ACTION: Notice of request for comments regarding a reinstatement to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding the Civilian Board of Contract Appeals (CBCA) Rules of Procedure. A notice was published in the **Federal Register** at 77 FR 5020, on February 1, 2012. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: May 30, 2012.

Submit comments identified by Information Collection IC 3090–0221, Civilian Board of Contract Appeals Rules of Procedure, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection IC 3090–0221, Civilian Board of Contract Appeals Rules of Procedure''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–0221, Civilian Board of Contract Appeals Rules of Procedure'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 3090–0221, Civilian Board of Contract Appeals Rules of Procedure.

Instructions: Please submit comments only and cite Information Collection 3090–0221, Civilian Board of Contract Appeals Rules of Procedure, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: J. Gregory Parks, Chief Counsel, Civilian Board of Contract Appeals, 1800 F Street NW., Washington, DC 20405, telephone (202) 606–8800 or via email to *Greg.Parks@cbca.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

The CBCA requires the information collected in order to conduct proceedings in contract appeals and petitions, and cost applications. Parties include those persons or entities filing appeals, petitions, cost applications, and government agencies.

B. Annual Reporting Burden

Respondents: 85.
Responses per Respondent: 1.
Hours per Response: .108.
Total Burden Hours: 9.2.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 3090–0221, Civilian Board of Contract Appeals Rules of Procedure, in all correspondence.

Dated: April 17, 2012.

Casey Coleman,

Chief Information Officer.

[FR Doc. 2012–10278 Filed 4–27–12; 8:45 am]

BILLING CODE 6820–AL–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0248; Docket 2011–0001; Sequence 13]

General Services Administration Acquisition Regulation; Submission for OMB Review; Solicitation Provisions and Contract Clauses; Placement of Orders Clause; and Ordering Information Clause

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding solicitation provisions and contract clauses, placement of orders clause, and ordering information clause. A notice was published in the **Federal Register** at 77 FR 3476, on January 24, 2012. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: May 30, 2012.

FOR FURTHER INFORMATION CONTACT: Deborah Eble, Procurement Analyst, General Services Acquisition Policy Division, GSA, (215) 446–5823 or via email at *Deborah.eble@gsa.gov.*

ADDRESSES: Submit comments identified by Information Collection 3090–0248, GSAR 516–506, Solicitation Provisions and Contract Clauses, 552.216–72 Placement of Orders Clause, and 552.216–73, Ordering Information Clause, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 3090–0248, GSAR 516–506, Solicitation Provisions and Contract Clauses; 552.216–72, Placement of Orders Clause, and 552.216–73, Ordering Information Clause''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–0248, GSAR 516–506, Solicitation Provisions and Contract Clauses; 552.216–72, Placement of Orders Clause, and 552.216–73, Ordering Information Clause'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 3090–0248, GSAR 516–506, Solicitation Provisions and Contract Clauses; 552.216–72, Placement of Orders Clause, and 552.216–73, Ordering Information Clause.

Instructions: Please submit comments only and cite Information Collection 3090–0248, GSAR 516–506, Solicitation Provisions and Contract Clauses; 552.216–72, Placement of Orders Clause, and 552.216–73, Ordering Information Clause, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

SUPPLEMENTARY INFORMATION:

A. Purpose

The General Services Administration (GSA) has various mission responsibilities related to the acquisition and provision of the Federal Acquisition Service's (FAS's) Stock, Special Order, and Schedules Programs. These mission responsibilities generate requirements that are realized through the solicitation and award of various types of FAS contracts. Individual solicitations and resulting contracts may impose unique information collection and reporting requirements on contractors, not required by regulation, but necessary to evaluate particular program accomplishments and measure success in meeting program objectives. As such, GSAR 516.506, Solicitation provision and clauses, specifically directs contracting officers to insert 552.216–72, Placement of Orders, when the contract authorizes FAS and other activities to issue delivery or task orders and 552.216–73, Ordering Information, directs the Offeror to elect to receive orders placed by FAS by either facsimile transmission or computer-to-computer Electronic Data Interchange (EDI).

B. Annual Reporting Burden

Respondents: 7,143.

Responses per Respondent: 1.

Annual Responses: 7,143.

Hours per Response: .25.

Total Burden Hours: 1785.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 3090–0248, GSAR 516–506, Solicitation Provisions and Contract Clauses; 552.216–72, Placement of Orders Clause, and 552.216–73, Ordering Information Clause, in all correspondence.

Dated: April 16, 2012.

Joseph A. Neurauter,

Director, Office of Acquisition Policy & Senior Procurement Executive.

[FR Doc. 2012–10303 Filed 4–27–12; 8:45 am]

BILLING CODE 6820–61–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Presidential Advisory Council on HIV/AIDS

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Service (DHHS) is hereby giving notice that the Presidential Advisory Council on HIV/AIDS (PACHA) will hold a meeting. The meeting will be open to the public.

DATES: The meeting will be held Wednesday, May 16, 2012 and Thursday, May 17, 2012. The meeting will be held from 9:00 a.m. to approximately 5:00 p.m. on Wednesday, May 16, 2012 and 9:00 a.m. to approximately 5:00 p.m. on Thursday, May 17, 2012.

ADDRESSES: L'Enfant Plaza Hotel, 480 L'Enfant Plaza SW., Washington, DC, Ballroom C and D.

FOR FURTHER INFORMATION CONTACT: Mr. Melvin Joppy, Committee Manager, Presidential Advisory Council on HIV/AIDS, Department of Health and Human Services, 200 Independence Avenue SW., Room 443H, Hubert H. Humphrey Building, Washington, DC 20201; (202) 690–5560. More detailed information about PACHA can be obtained by accessing the Council's Web site *www.aids.gov/pacha.*

SUPPLEMENTARY INFORMATION: PACHA was established by Executive Order 12963, dated June 14, 1995 as amended by Executive Order 13009, dated June 14, 1996. The Council was established to provide advice, information, and recommendations to the Secretary regarding programs and policies intended to promote effective prevention of HIV disease and AIDS. The functions of the Council are solely advisory in nature.

The Council consists of not more than 25 members. Council members are selected from prominent community leaders with particular expertise in, or knowledge of, matters concerning HIV and AIDS, public health, global health, philanthropy, marketing or business, as well as other national leaders held in high esteem from other sectors of society. Council members are appointed by the Secretary or designee, in consultation with the White House Office on National AIDS Policy. The agenda for the upcoming meeting will be posted on the Council's Web site at *www.aids.gov/pacha.*

Public attendance at the meeting is 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 designated contact person. Pre-registration for public attendance is advisable and can be accomplished by contacting the PACHA Committee Manager at *melvin.joppy@hhs.gov.*

Members of the public will have the opportunity to provide comments at the meeting. Any individual who wishes to participate in the public comment session must register with Melvin Joppy at *melvin.joppy@hhs.gov;* registration for public comment will not be accepted by telephone. Public comment will be limited to two minutes per speaker. Any members of the public who wish to have printed material distributed to PACHA members at the meeting should submit, at a minimum, 1 copy of the materials to the Committee Manager, PACHA, no later than close of business Wednesday, May 9, 2012. Contact information for the PACHA Committee Manager is listed above.

Dated: April 23, 2012.

B. Kaye Hayes,

Executive Director, Presidential Advisory Council on HIV/AIDS.

[FR Doc. 2012–10279 Filed 4–27–12; 8:45 am]

BILLING CODE 4150–43–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-12–0842]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects.

To request more information on the proposed projects or to obtain a copy of

the data collection plans and instruments, call 404–639–7570 and send comments to Kimberly S. Lane, at CDC, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

STD surveillance Network (SSuN)—Division of STD Prevention (DSTDP); (OMB No. 0920–0842 Exp: 1/31/2013)—Revision—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The STD Surveillance Network (SSuN) project is an active STD sentinel surveillance network comprised of 12 surveillance sites including Alabama State Health Department, Baltimore City Health Department, Chicago City Health Department, Colorado State Health Department, Connecticut State Health Department, Los Angeles City Health Department, Louisiana State Health Department, New York City Health Department, Philadelphia city Health Department, San Francisco City Health Department, Virginia State Health Department, Washington State Health Department. The objectives of the SSuN Project are (1) to establish an integrated network of sentinel STD clinics and health departments to inform and guide national programs and policies for STD control in the U.S.; (2) to improve the capacity of national, state and local STD programs to detect, monitor and respond to established and emerging trends in STDs, HIV, and viral hepatitis; and (3) to identify and evaluate the effectiveness of public health interventions to reduce STD morbidity. This project collects data using two surveillance strategies; enhanced surveillance in participating STD clinics and enhanced gonorrhea surveillance on a random sample of persons diagnosed with gonorrhea in participating jurisdictions of these 12 local and state health departments.

For the clinic-based surveillance, participating sites have developed common protocols stipulating which data elements would be collected, including demographic, clinical, risk and sexual behaviors. The specified data elements are abstracted on a quarterly basis from existing electronic medical records for all patient visits to participating clinics and transmitted to CDC through a secured channel. Each SSuN site will spend 2 hours to transmit the data to CDC each quarter. At CDC, data will be aggregated with data from all participating sites in a common language and formatted for analysis.

For the population-based surveillance, a random sample of individuals reported with gonorrhea residing within participating jurisdictions are interviewed using locally designed interview templates. Enhanced data collection includes detailed information on demographic characteristics, behavioral risk factors and clinical history of persons with gonorrhea. Each of the 12 sites will interview 60 persons each quarter and each interview is expected to take about 8 minutes per person. Data for the population-based component will continue to be collected through telephone-administered or in-person interviews conducted by trained interviewers in the 12 SSuN sites. The survey results will be entered into the existing information systems at each health department and sent to CDC through a secure data network on a quarterly basis.

This information is being collected to establish (1) an integrated network of sentinel STD clinics and (2) state and local health departments to inform and guide national programs and policies for STD control in the US.

The Centers for Disease Control and Prevention request approval for a revision and a 3 year approval for the previously approved STD Surveillance Network (SSuN) project 0920–0842 (exp. 1/31/2013). The interview template has been revised to include four additional questions related to insurance status, but these changes will have minimal effect on the burden per respondent. Information on insurance and health care access are expected to have implications for program at the state/local and national level and can be used by state and local programs. Otherwise, the project activities and methods will remain the same as those used in the previously approved data collection period.

Participation of respondents is voluntary. There is no cost to the respondents other than their time.

There is no cost to the respondents other than their time.

Respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
STD Surveillance Clinics	12	4	2	96
Gonorrhea patients	2880	1	8/60	384
Total				480

Kimberly S. Lane,

Deputy Director, Office of Science Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–10325 Filed 4–27–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-12–12IN]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call (404) 639–7570 and send comments to Kimberly S. Lane, at CDC, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Developing a Responsive Plan for Building the Capacity of Community Based Organizations (CBOs) to Implement HIV Prevention Services—New—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) estimates that over 1 million people in the United States are living with HIV. Each year, approximately 50,000 people in the United States become newly infected. Some groups are disproportionately affected by this epidemic. For example, between 2006 and 2009, there was an almost 50% increase in the number of new HIV infections among young Black men who have sex with men (MSM). In order to address these health disparities, the CDC funded 34 community-based organizations via cooperative agreement PS11–1113 to implement HIV prevention programs targeting young MSM of color and young transgender persons of color.

Building the capacity of community based organizations (CBOs) is a priority to ensure effective and efficient delivery of HIV prevention services. Since the late 1980s, CDC has been working with CBOs to broaden the reach of HIV prevention efforts. Over time, the CDC's program for HIV prevention has grown in size, scope, and complexity, responding to changes in approaches to addressing the epidemic, including the introduction of new guidances; effective behavioral, biomedical, and structural interventions; and public health strategies. The Capacity Building Branch within the Division of HIV/AIDS Prevention (D provides national leadership and support for capacity building assistance (CBA) to help improve the performance of the HIV prevention workforce. One way that it accomplishes this task is by funding CBA providers via cooperative agreement PS09–906 to work with CBOS, health departments, and communities to increase their knowledge, skills, technology, and infrastructure to implement and sustain science-based, culturally appropriate interventions and public health strategies.

CBA providers will conduct face-to-face field visits with the CBOs utilizing a structured organizational needs assessment tool that was developed in collaboration with CDC. This comprehensive tool offers a mixed-methods data collection approach consisting of checklists, close-ended (quantitative) questions, and open-ended (qualitative) questions. CBOs will be asked to complete the tool prior to the field visits in order to maximize time during the visits for discussion and strategic planning.

Findings from this project will be used by the participating CBOs, the CBA providers, and the Capacity Building Branch. By the end of the project, the participating CBOs will have tailored CBA strategic plans that they can use to help sustain their programs across and beyond the life of their five-year cooperative agreements. Based on these plans, the CBA providers (in collaboration with CDC) will be able to better identify and address those needs most reported by CBOs. Finally, the Capacity Building Branch will be able to refine its approach to conceptualizing and providing CBA on a national level in the most cost-effective manner possible.

There is no cost to respondents other than their time. The CBA providers will complete their field visits in one day (8 hours). Eighteen of the participating CBOs are dually funded under both PS11–1113 and PS10–1003; they participated in a similar process under the earlier cooperative agreement. Therefore, they will not need to complete the full tool nor participate in a full-day field visit; the burden will be reduced for these respondents.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average Burden per response (in hours)	Total burden (in hours)
CBOs only funded under PS11–1113	CBO/CBA Needs Assessment.	16	1	3	48
Dually funded CBOs (funded under both PS11–1113 and PS10–1003).	CBO/CBA Needs Assessment.	18	1	1.5	27
Total					75

Kimberly S. Lane,

Deputy Director, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–10324 Filed 4–27–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Research Grants for Preventing Violence and Violence Related Injury, Funding Opportunity Announcement (FOA) CE12–002, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

DATES: Time and Date: 8:30 a.m.–5:00 p.m., May 15, 2012 (Closed).

Place: The Georgian Terrace Hotel, 659 Peachtree Street NE., Atlanta Georgia 30308.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters to be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Research Grants for Preventing Violence and Violence Related Injury, FOA CE12–002, initial review.''

Contact Person for More Information: Donald Blackman, Ph.D., M.P.H., Scientific Review Officer, CDC, 4770 Buford Highway, NE., Mailstop F63, Atlanta, Georgia 30341, Telephone (770)488–0641.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: April 20, 2012.

Catherine Ramadei,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2012–10257 Filed 4–27–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Developmental Disabilities Protection & Advocacy Program Statement of Goals and Priorities.

OMB No.: 0980–0270.

Description: Federal statute and regulation require each State Protection and Advocacy (P&A) System to prepare and submit to public comment a Statement of Goals and Priorities (SGP) for the P&A for Developmental Disabilities (PADD) program for each coming fiscal year. While the P&A is mandated to protect and advocate under a range of different Federally authorized disabilities programs, only the PADD program requires an SGP. Following the required public input for the coming fiscal year, the P&As submit the final version of this SGP to the Administration on Developmental Disabilities (ADD). ADD will aggregate the information in the SGPs into a national profile of programmatic emphasis for P&A Systems in the coming year. This aggregation will provide ADD with a tool for monitoring of the public input requirement. Furthermore, it will provide an overview of program direction, and permit ADD to track accomplishments against goals/targets, permitting the formulation of technical assistance and compliance with the Government Performance and Results Act of 1993.

Respondents: State and Territory Protection and Advocacy Systems.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
P&A SGP	57	1	44	2,508

Estimated Total Annual Burden Hours: 2,508.

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 (e) 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. 2012–10309 Filed 4–27–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Developmental Disabilities Annual Protection and Advocacy Systems Program Performance Report.

OMB No.: 0980–0160.

Description: This information collection is required by federal statute. Each State Protection and Advocacy System must prepare and submit a program Performance Report for the preceding fiscal year of activities and accomplishments and of conditions in the State. The information in the Annual Report will be aggregated into a national profile of Protection and Advocacy Systems. It will also provide the Administration on Developmental Disabilities (ADD) with an overview of program trends and achievements and will enable ADD to respond to administration and congressional requests for specific information on program activities. This information will also be used to submit a Centennial Report to Congress as well as to comply with requirements in the Government Performance and Results Act of 1993.

Respondents: Protection & Advocacy Systems.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Developmental Disabilities Protection and Advocacy Program Performance Report	57	1	44	2,508

Estimated Total Annual Burden Hours: 2,508:

Additional Information: Copies of the proposed collection may be obtained 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. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7285, Email: *OIRA_SUBMISSION@OMB.EOP.GOV.* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–10312 Filed 4–27–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Lung Fibrosis Conflict Applications.

Date: May 24–25, 2012.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: George M Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4220, MSC 7818, Bethesda, MD 20892, 301–435–0696, *barnasg@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–10–112: Hearing Health Care Outcomes.

Date: May 24, 2012.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person:, Lynn E Luethke, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5166, MSC 7844, Bethesda, MD 20892, (301) 806–3323, *luethkel@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–12–001: Lasker Clinical Research Scholars Program (SI2).

Date: May 25, 2012.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Syed M. Quadri, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6210, MSC 7804, Bethesda, MD 20892, 301–435–1211, *quadris@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: April 23, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–10341 Filed 4–27–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; 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 Biomedical Imaging and Bioengineering Special Emphasis Panel; MSM Program Review.

Date: June 12, 2012.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Manana Sukhareva, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Boulevard, Suite 959, Bethesda, MD 20892, 301–451–3397, *sukharem@mail.nih.gov.*

Dated: April 23, 2012.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–10338 Filed 4–27–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; 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 Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications.

Date: May 24, 2012.

Time: 12:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Room 3121, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Paul A. Amstad, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–402–7098, *pamstad@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: April 23, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–10335 Filed 4–27–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR—09–214: NHLBI Systems Biology.

Date: May 23–24, 2012.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ai-Ping Zou, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–435–1777, *zouai@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Prevention Therapeutics.

Date: May 24, 2012.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Careen K Tang-Toth, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, (301) 435–3504, *tothct@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Cancer Therapeutics AREA Grant Applications.

Date: May 24, 2012.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Denise R Shaw, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7804, Bethesda, MD 20892, 301–435–0198, *shawdeni@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Molecular Genetics B Study Section.

Date: May 26–27, 2012.

Time: 7:00 p.m. to 5:00 p.m.

To review and evaluate grant applications.

Place: Admiral Fell Inn, 888 South Broadway, Baltimore, MD 21231.

Contact Person:Richard A Currie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7840, Bethesda, MD 20892, (301) 435–1219, *currieri@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: April 24, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–10333 Filed 4–27–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Ancillary Studies to major ongoing Clinical Research to advance areas of scientific interest in NIDDK.

Date: May 22, 2012.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6706 Democracy Blvd. Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Najma Begum, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 749, 6707 Democracy Boulevard Bethesda, MD 20892–5452, (301) 594–8894, *begumn@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: April 24, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–10331 Filed 4–27–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Amended Notice of Meeting

Notice is hereby given a change in the meeting of the National Advisory Council for Biomedical Imaging and Bioengineering, May 21, 2012, 9:00 a.m. to 3:00 p.m., Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, Maryland 20817 which was published in the **Federal Register** on April 2, 2012, 77 FR 19675.

The meeting location has been changed to The Bolger Center, 9600 Newbridge Drive, Stained Glass Hall, Potomac, Maryland 20854. The time remains the same.

Dated: April 24, 2012.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–10329 Filed 4–27–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2012–0298]

Cooperative Research and Development Agreement: Federally Integrated Communications System

AGENCY: Coast Guard, DHS.

ACTION: Notice of intent; request for public comments.

SUMMARY: The Coast Guard is announcing its intent to enter into a Cooperative Research and Development Agreement (CRADA) with General Dynamics C4 Systems, Inc. to lab demonstrate, field test, evaluate, and document at least one technical approach to show interoperability, with end-to-end encryption, for disparate Federal communications systems at the Internet Protocol level. The Coast Guard invites public comment on the proposed CRADA, and also invites other potential non-Federal participants, who have the interest and capability to bring similar contributions to this type of research, to consider submitting proposals for consideration in similar CRADAs.

DATES: Comments and related material on the proposed CRADA must either be submitted to our online docket via *http://www.regulations.gov* on or before May 30, 2012, or reach the Docket Management Facility by that date.

Notifications from parties interested in participating as a non-Federal participant in a CRADA similar to the one described in this notice must reach the Docket Management Facility on or before May 30, 2012.

ADDRESSES: You may submit written comments on this notice identified by docket number USCG–2012–0298 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, contact Ms. Octavia Ashburn, U.S. Coast Guard Research and Development Center, 1 Chelsea Street, New London, CT 06320, telephone: 860–271–2882, email: *Octavia.D.Ashburn@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to submit comments and related material on this notice. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Do not submit detailed proposals for future CRADAs to the Docket Management Facility. Potential non-Federal CRADA participants should submit these documents to Ms. Octavia Ashburn, U.S. Coast Guard Research and Development Center, 1 Chelsea Street, New London, CT 06320 (email *Octavia.D.Ashburn@uscg.mil*).

Submitting Comments

If you submit a comment, please include the docket number for this notice (USCG–2012–0298), and provide a reason for each suggestion or recommendation. You may submit your comments and material online via *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be

considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and type ''USCG–2012–0298'' in the ''Keyword'' box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Viewing Comments and Related Material

To view the comments and related material, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box, insert ''USCG–2012–0298'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of 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 a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Cooperative Research and Development Agreements

Cooperative Research and Development Agreements (CRADAs), are authorized by the Federal Technology Transfer Act of 1986 (Pub. L. 99–502, codified at 15 U.S.C. 3710(a)). A CRADA promotes the transfer of technology to the private sector for commercial use as well as specified research or development efforts that are consistent with the mission of the Federal parties to the CRADA. The Federal party or parties agree with one or more non-Federal parties to share research resources, but the Federal party does not contribute funding. The Department of Homeland Security (DHS), as an executive agency under 5 U.S.C. 105, is a Federal agency for purposes of 15 U.S.C. 3710(a) and may enter into a CRADA. The Secretary of DHS (Secretary) delegated authority to the Commandant of the Coast Guard to carry out the functions vested in the Secretary by section 2 of the Federal Technology Transfer Act of 1986, which authorizes agencies to permit their laboratories to enter into CRADAs (see DHS Delegation No. 0160.1, para. 2.B(34)). The Commandant of the Coast Guard has delegated authority in this regard to the Coast Guard's Research and Development Center (RDC).

CRADAs are not procurement contracts. Care is taken to ensure that CRADAs are not used to circumvent the contracting process. CRADAs have a specific purpose and should not be confused with other types of agreements such as procurement contracts, grants, and cooperative agreements.

Goal of Proposed CRADA

Under the proposed CRADA, the Coast Guard's RDC would collaborate with non-Federal participants. Together, the RDC and the non-Federal participants would conduct lab demonstrations, field tests and evaluations, and document at least one technical approach to show interoperability, with end-to-end encryption, for disparate communications systems at the Internet Protocol (IP) level. The systems will be comprised of the current Coast Guard Rescue 21 (R21 or Rescue 21) conventional Land Mobile Radio (LMR) network and a Federal wireless system partner. This integrated communications system should provide for interoperability among the different Federal agency heterogeneous radio systems, without changing the functionality of each existing system.

We anticipate that the Coast Guard's contributions under the proposed CRADA will include the following:

(1) Support network architecture and security discussions on the work to be accomplished under the CRADA;

(2) Lead the development of the test objectives and test plan for the specific work to be accomplished under the CRADA;

(3) Facilitate interactions between USCG, the non-Federal participants, and a Federal wireless system partner to gain approval for support during the test period of the CRADA test plan;

(4) Provide Coast Guard resources, and conduct the field test and evaluation in accordance with the CRADA test plan; and

(5) Develop the CRADA Final Report, which documents the methodologies, findings, conclusions, and recommendations of this CRADA work.

We anticipate that the non-Federal participants' contributions under the proposed CRADA will include the following:

(1) Provide an R21 gateway to work with current Commercial Off-the-Shelf configuration used during this CRADA investigation;

(2) Provide an Inter Subsystem Interface (ISSI) Gateway to work with a Federal wireless system partner interface;

(3) Test the R21 gateway with R21 system in lab demonstration;

(4) Test the Federal wireless system partner gateway in lab demonstration;

(5) Conduct system level test for both gateways in lab demonstration;

(6) Develop configuration process to execute field test and evaluation;

(7) Provide input into the Coast Guard-developed, CRADA test objectives and CRADA test plan;

(8) Provide equipment and software, and participate in equipment installation and training for field test and evaluation;

(9) Following field test and evaluation, remove equipment and software and restore to R21 original configuration;

(10) Provide technical report describing system configuration and system performance of equipment and gateway;

(11) Provide input into the Coast Guard-developed, CRADA Final Report.

Selection Criteria

The Coast Guard reserves the right to select for CRADA participants all, some, or none of the proposals in response to this notice. The Coast Guard will provide no funding for reimbursement of proposal development costs. Proposals (or any other material) submitted in response to this notice will not be returned. Proposals submitted are expected to be unclassified and have no more than four single-sided pages (excluding cover page and resumes). The Coast Guard will select proposals at its sole discretion on the basis of:

(1) How well they communicate an understanding of, and ability to meet, the proposed CRADA's goal; and

(2) How well they address the following criteria:

(a) Technical capability to support the non-Federal party contributions described; and

(b) Resources available for supporting the non-Federal party contributions described.

Currently, the Coast Guard is considering General Dynamics for participation in this CRADA. This consideration is based on: (1) General Dynamics' expertise, experience, and interest with the design, development, maintenance, and operations of the Coast Guard's Rescue 21 system; (2) General Dynamics' capability to provide the significant contributions required for the CRADA work; and (3) the Coast Guard's Rescue 21 system, which includes a General Dynamics product containing restricted rights software code. However, we do not wish to exclude other viable participants from this or future similar CRADAs.

This is a technology transfer/development effort. Presently, the Coast Guard has no plan to procure a new LMR network. The goal of this CRADA is to conduct lab demonstrations, field tests and evaluations, and to document at least one technical approach to show interoperability, with end-to-end encryption, for disparate communications systems at the Internet Protocol (IP) level, and not to set future Coast Guard acquisition requirements for the same. Therefore, non-Federal CRADA participants will not be excluded from any future Coast Guard procurements based solely on their participation in this CRADA.

Special consideration will be given to small business firms/consortia, and preference will be given to business units located in the U.S.

Authority

This notice is issued under the authority of 15 U.S.C. 3710(a), 5 U.S.C. 552(a), and 33 CFR 1.05–1.

Dated: April 19, 2012.

Alan N. Arsenault,

Commanding Officer, U.S. Coast Guard Research and Development Center.

[FR Doc. 2012–10320 Filed 4–27–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2012–0003; Internal Agency Docket No. FEMA–B–1249]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Title 44, Part 65 of the Code of Federal Regulations (44 CFR part 65). The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will become effective on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Deputy Associate Administrator for Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository

address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Alabama: Baldwin	City of Gulf Shores. (12–04–0183P)	The Honorable Robert S. Craft, Mayor, City of Gulf Shores, P.O. Box 299, Gulf Shores, AL 36547.	Community Development Department, 1905 West 1st Street, Gulf Shores, AL 36547.	*http:// www.bakeraecom.com/ index.php/alabama/baldwin/.*	June 4, 2012	015005
Arizona:						
Coconino	City of Flagstaff .. (11–09–3783P)	The Honorable Sara Presler, Mayor, City of Flagstaff, 211 West Aspen Avenue, Flagstaff, AZ 86001.	City Hall Stormwater Management Section, 211 West Aspen Avenue, Flagstaff, AZ 86001.	*http:// www.bakeraecom.com/ index.php/arizona/ coconino-county/.*	May 15, 2012	040020
Coconino	City of Flagstaff .. (11–09–3785P)	The Honorable Sara Presler, Mayor, City of Flagstaff, 211 West Aspen Avenue, Flagstaff, AZ 86001.	City Hall Stormwater Management Section, 211 West Aspen Avenue, Flagstaff, AZ 86001.	*http:// www.bakeraecom.com/ index.php/arizona/ coconino-county/.*	May 15, 2012	040020
Coconino	City of Flagstaff .. (11–09–3787P)	The Honorable Sara Presler, Mayor, City of Flagstaff, 211 West Aspen Avenue, Flagstaff, AZ 86001.	City Hall Stormwater Management Section, 211 West Aspen Avenue, Flagstaff, AZ 86001.	*http:// www.bakeraecom.com/ index.php/arizona/ coconino-county/.*	May 9, 2012	040020
Coconino	Unincorporated areas of Coconino County. (11–09–3785P)	The Honorable Lena Fowler, Chair, Coconino County Board of Supervisors, P.O. Box 948, Tuba City, AZ 86045.	2500 North Fort Valley Road, Building 1, Flagstaff, AZ 86001.	*http:// www.bakeraecom.com/ index.php/arizona/ coconino-county/.*	May 15, 2012	040019
Maricopa	Town of Wickenburg. (11–09–3523P)	The Honorable Kelly Blunt, Mayor, Town of Wickenburg, 155 North Tegner Street, Suite A, Wickenburg, AZ 85390.	155 North Tegner Street, Suite A, Wickenburg, AZ 85390.	*http:// www.bakeraecom.com/ index.php/arizona/maricopa-county/.*	May 4, 2012	040056
Maricopa	Unincorporated areas of Maricopa County (11–09–3523P).	Mr. Don Stapley, District 2 Supervisor, 301 West Jefferson, 10th Floor, Phoenix, AZ 85003.	301 West Jefferson, 10th Floor, Phoenix, AZ 85003.	*http:// www.bakeraecom.com/ index.php/arizona/maricopa-county/.*	May 4, 2012	040037
Arkansas:						
Benton	City of Bentonville (11–06–3059P)	The Honorable Bob McCaslin, Mayor, City of Bentonville, 117 West Central Avenue, Bentonville, AR 72712.	117 West Central Avenue, Bentonville, AR 72712.	*http://www.rampp-team.com/lomrs.htm.*	April 27, 2012	050012
Benton	Unincorporated areas of Benton County. (11–06–3059P)	The Honorable Robert Clinard, Benton County Judge, 215 East Central Avenue, Bentonville, AR 72712.	215 East Central Avenue, Bentonville, AR 72712.	*http://www.rampp-team.com/lomrs.htm.*	April 27, 2012	050419
California: Placer ...	Unincorporated areas of Placer County. (12–09–0102P)	The Honorable Jennifer Montgomery, Chair, Placer County Board of Supervisors, 175 Fulweiler Avenue, Auburn, CA 95603.	Department of Public Works, 11444 B Avenue, Auburn, CA 95603.	*http:// www.bakeraecom.com/ index.php/california/placer-county/.*	June 4, 2012	060239
Colorado:						
Boulder	City of Lafayette (11–08–0913P)	The Honorable Carolyn Cutler, Mayor, City of Lafayette, 1290 South Public Road, Lafayette, CO 80026.	Planning Department, 1290 South Public Road, Lafayette, CO 80026.	*http:// www.bakeraecom.com/ index.php/colorado/boulder/.*	April 27, 2012	080026
Boulder	City of Louisville (11–08–0913P)	The Honorable Bob Muckle, Mayor, City of Louisville, 749 Main Street Louisville, CO 80027.	Community Development, 749 Main Street Louisville, CO 80027.	*http:// www.bakeraecom.com/ index.php/colorado/boulder/.*	April 27, 2012	085076
Boulder	Town of Erie ..... (11–08–0866P)	The Honorable Joe Wilson, Mayor, Town of Erie, P.O. Box 750 Erie, CO 80516.	1739 Broadway, Suite 300, Boulder, CO 80306.	*http:// www.bakeraecom.com/ index.php/colorado/boulder/.*	May 15, 2012	080181
Boulder	Unincorporated areas of Boulder County. (11–08–0866P)	The Honorable Ben Pearlman, Chairman, Boulder County Board of Commissioners, P.O. Box 471, Boulder, CO 80306.	1739 Broadway, Suite 300, Boulder, CO 80306.	*http:// www.bakeraecom.com/ index.php/colorado/boulder/.*	May 15, 2012	080023
Jefferson	City of Lakewood (12–08–0106P)	The Honorable Bob Murphy, Mayor, City of Lakewood, Lakewood Civic Center South, 480 South Allison Parkway, Lakewood, CO 80226.	Civic Center North—Engineering, 480 South Allison Parkway, Lakewood, CO 80226.	*http:// www.bakeraecom.com/ index.php/colorado/jefferson-5/.*	June 8, 2012	085075
Florida:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Charlotte	Unincorporated areas of Charlotte County. (12–04–0206P)	The Honorable Bob Starr, Chairman, Charlotte County Board of Commissioners, 18500 Murdock Circle, Port Charlotte, FL 33948.	18500 Murdock Circle, Port Charlotte, FL 33948.	*http://www.bakeraecom.com/index.php/florida/charlotte/.*	June 1, 2012	120061
Leon	Unincorporated areas of Leon County. (11–04–5515P)	The Honorable John E. Dailey, Chairman, Leon County Board of Commissioners, 301 South Monroe Street, 5th Floor, Tallahassee, FL 32301.	Leon County Courthouse, 301 South Monroe Street, Tallahassee, FL 32301.	*http://www.bakeraecom.com/index.php/florida/leon/.*	May 21, 2012	120143
Monroe	Unincorporated areas of Monroe County. (12–04–0072P)	The Honorable Kim Wigington, Mayor Pro Tem, Monroe County, 500 Whitehead Street, Suite 102, Key West, FL 33040.	Monroe County Department of Planning and Environmental Resources, 2798 Overseas Highway, Marathon, FL 33050.	*http://www.bakeraecom.com/index.php/florida/monroe-3/.*	May 31, 2012	125129
Monroe	Unincorporated areas of Monroe County. (12–04–0205P)	The Honorable Kim Wigington, Mayor Pro Tem, Monroe County, 500 Whitehead Street, Suite 102, Key West, FL 33040.	Monroe County Department of Planning and Environmental Resources, 2798 Overseas Highway, Marathon, FL 33050.	*http://www.bakeraecom.com/index.php/florida/monroe-3/.*	May 7, 2012	125129
Orange	City of Orlando (11–04–8127P)	The Honorable Buddy Dyer, Mayor, City of Orlando, P.O. Box 4990, Orlando, FL 32808.	Permitting Services, 400 South Orange Avenue, Orlando, FL 32801.	*http://www.bakeraecom.com/index.php/florida/orange-2/.*	May 9, 2012	120186
Polk	Unincorporated areas of Polk County. (11–04–6001P)	The Honorable Sam Johnson, Chairman, Polk County Board of Commissioners, Drawer BC01, P.O. Box 9005, Bartow, FL 33831.	Polk County Engineering Division, 330 West Church Street, Bartow, FL 33830.	*http://www.bakeraecom.com/index.php/florida/polk/.*	June 7, 2012	120261
Idaho:						
Blaine	City of Hailey (11–10–1694P)	The Honorable Rick Davis, Mayor, City of Hailey, 115 Main Street South, Suite H, Hailey, ID 83333.	115 Main Street Hailey, ID 83333.	*http://www.starr-team.com/starr/LOMR/Pages/RegionX.aspx.*	May 10, 2012	160022
Latah	Unincorporated areas of Latah County. (11–10–1485P)	The Honorable Jennifer Barrett, Chair, Latah County Board of Commissioners, 522 South Adams Street, Moscow, ID 83843.	522 South Adams Street, Moscow, ID 83843.	*http://www.starr-team.com/starr/LOMR/Pages/RegionX.aspx.*	May 11, 2012	160086
Illinois:						
McHenry	City of Crystal Lake. (11–05–7872P)	The Honorable Aaron T. Shepley, Mayor, City of Crystal Lake, 100 West Woodstock Street, Crystal Lake, IL 60014.	100 West Woodstock Street, Crystal Lake, IL 60014.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 21, 2012	170476
Will	Village of Romeoville. (11–05–7401P)	The Honorable John Noak, Mayor, Village of Romeoville, 13 Montrose Drive, Romeoville, IL 60446.	1050 West Romeo Road, Romeoville, IL 60446.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	June 1, 2012	170711
Kansas: Johnson	City of Leawood (12–07–0114X)	The Honorable Peggy J. Dunn, Mayor, City of Leawood, 4800 Town Center Drive, Leawood, KS 66211.	4800 Town Center Drive, Leawood, KS 66211.	*http://www.starr-team.com/starr/LOMR/Pages/RegionVII.aspx.*	May 23, 2012	200167
Minnesota:						
Dakota	City of Inver Grove Heights. (11–05–5362P)	The Honorable George Tourville, Mayor, City of Inver Grove Heights, 8150 Barbara Avenue, Inver Grove Heights, MN 55077.	8150 Barbara Avenue, Inner Grove Heights, Minnesota, 55077.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 21, 2012	270106
Washington	City of Newport (11–05–5362P)	The Honorable Tim Geraghty, Mayor, City of Newport, 596 7th Avenue, Newport, MN 55055.	596 7th Avenue, Newport, MN 55055.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 21, 2012	270510
Washington	City of St. Paul Park. (11–05–5362P)	The Honorable John Hunziker, Mayor, City of St. Paul Park, 600 Portland Avenue, St. Paul Park, MN 55071.	600 Portland Avenue, St. Paul Park, MN 55071.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 21, 2012	270514

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Washington	Unincorporated areas of Washington County. (11–05–5362P)	The Honorable Gary Kriesel, Chair, Washington County Board of Commissioners, 14949 62nd Street North, Stillwater, MN 55082.	14949 62nd Street North, Stillwater, MN 55082.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 21, 2012	270499
Nevada:						
Clark	City of North Las Vegas. (11–09–2931P)	The Honorable Shari L. Buck, Mayor, City of North Las Vegas, 2250 Las Vegas Boulevard North, North Las Vegas, NV 89030.	Public Works Department, 2200 Civic Center Drive, North Las Vegas, NV 89030.	*http://www.bakeraecom.com/index.php/nevada/clark-county/.*	June 4, 2012	320007
Clark	Unincorporated areas of Clark County. (11–09–2931P)	The Honorable Susan Brager, Chair, Clark County Commissioners, 500 South Grand Central Parkway, Las Vegas, NV 89155.	Office of the Director of Public Works, 500 Grand Central Parkway, Las Vegas, NV 89155.	*http://www.bakeraecom.com/index.php/nevada/clark-county/.*	June 4, 2012	320003
New Mexico: Sandoval.	Unincorporated areas of Sandoval County. (11–06–0073P)	The Honorable Darryl Madalena, Chairman, Sandoval County Commission, 1500 Idalia Road, Building D Bernalillo, NM 87004.	711 Camino Del Pueblo, Bernalillo, NM 87004.	*http://www.rampp-team.com/lomrs.htm.*	May 4, 2012	350055
Ohio:						
Franklin	City of Reynoldsburg. (11–05–8753P)	The Honorable Brad McCloud, Mayor, City of Reynoldsburg, 7232 East Main Street, Reynoldsburg, OH 43068.	7232 East Main Street, Reynoldsburg, OH 43068.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	June 4, 2012	390177
Licking	Unincorporated areas of Licking County. (11–05–5165P)	The Honorable Timothy Bubb, President, Licking County Commissioners, 20 South Second Street, Newark, OH 43055.	20 South Second Street, Newark, OH 43055.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 4, 2012	390328
Licking	Village of Granville. (11–05–5165P)	The Honorable Melissa Hartfield, Mayor, Village of Granville, 141 East Broadway, Granville, OH 43023.	141 East Broadway, Granville, OH 43023.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 4, 2012	390330
Oklahoma:						
Oklahoma	City of Oklahoma City. (11–06–3061P)	The Honorable Mick Cornett, Mayor, City of Oklahoma City, 200 North Walker Avenue, 3rd Floor, Oklahoma City, OK 73102.	420 West Main Street, Suite 700, Oklahoma City, OK 73012.	*http://www.rampp-team.com/lomrs.htm.*	May 9, 2012	405378
Oklahoma	City of Oklahoma City. (10–06–2593P)	The Honorable Mick Cornett, Mayor, City of Oklahoma City, 200 North Walker Avenue, 3rd Floor, Oklahoma City, OK 73102.	420 West Main Street, Suite 700, Oklahoma City, OK 73012.	*http://www.rampp-team.com/lomrs.htm.*	May 17, 2012	405378
Tulsa	City of Tulsa (11–06–2274P)	The Honorable Dewey F. Bartlett, Jr., Mayor, City of Tulsa, 175 East 2nd Street, Suite 690, Tulsa, OK 74103.	Stormwater Design Office, Engineering Services Department, 2317 South Jackson, Suite 302, Tulsa, OK 74103.	*http://www.rampp-team.com/lomrs.htm.*	May 18, 2012	405381
Jackson	City of Medford (11–10–1732P)	The Honorable Gary H. Wheeler, Mayor, City of Medford, 411 West 8th Street, Medford, OR 97501.	411 West 8th Street, Medford, OR 97501.	*http://www.starr-team.com/starr/LOMR/Pages/RegionX.aspx.*	May 2, 2012	410096
Jackson	Unincorporated areas of Jackson County. (11–10–1732P)	The Honorable Dennis C.W. Smith, Chair, Board of Commissioners, Jackson County Courthouse, 10 South Oakdale Avenue, Room 214 Medford, OR 97501.	Jackson County Courthouse, 10 South Oakdale Avenue, Room 214, Medford, OR 97501.	*http://www.starr-team.com/starr/LOMR/Pages/RegionX.aspx.*	May 2, 2012	415589
Pennsylvania: Bucks.	Township of Lower Southampton. (11–03–2022P)	Mr. Ted Taylor, Manager, Township of Lower Southampton, 1500 Desire Avenue, Feasterville, PA 19053.	Township of Lower Southampton Zoning Department, 1500 Desire Avenue, Feasterville, PA 19053.	*http://www.rampp-team.com/lomrs.htm.*	May 4, 2012	420192
South Carolina:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Charleston	City of Charleston (11–04–0520P)	The Honorable Joseph P. Riley, Jr., Mayor, City of Charleston, P.O. Box 652, Charleston, SC 29402.	Engineering Department, 75 Calhoun Street, Division 301, Charleston, SC 29401.	*http://www.bakeraecom.com/index.php/southcarolina/charleston/.*	May 9, 2012	455412
Charleston	Unincorporated areas of Charleston County. (11–04–0520P)	The Honorable Teddie E. Pryor, Sr., Chairman, Charleston County Council, Lonnie Hamilton, III Public Services Building, 4045 Bridge View Drive, North Charleston, SC 29405.	Charleston County Building Services, 4045 Bridge View Drive, North Charleston, SC 29405.	*http://www.bakeraecom.com/index.php/southcarolina/charleston/.*	May 9, 2012	455413
Greenville	City of Greenville (11–04–4629P)	The Honorable Knox White, Mayor, City of Greenville, 206 South Main Street, Greenville, SC 29601.	City Hall, 206 South Main Street, Greenville, SC 29602.	*http://www.bakeraecom.com/index.php/southcarolina/greenville/.*	May 21, 2012	450091
South Dakota:						
Lake	City of Madison (11–08–0817P)	The Honorable Gene Hexom, Mayor, City of Madison, 116 West Center Street, Madison, SD 57042.	116 West Center Street, Madison, SD 57042.	*http://www.bakeraecom.com/index.php/south-dakota/lake-2/.*	May 15, 2012	460044
Lake	Unincorporated areas of Lake County. (11–08–0817P)	The Honorable Scott Pedersen, Chairman, Lake County Board of Commissioners, 200 East Center Street, Madison, SD 57042.	200 East Center Street, Madison, SD 57042.	*http://www.bakeraecom.com/index.php/south-dakota/lake-2/.*	May 15, 2012	460276
Texas:						
Collin	City of McKinney (11–06–1798P)	The Honorable Brian S. Loughmiller, Mayor, City of McKinney, 222 North Tennessee Street, McKinney, TX 75069.	222 North Tennessee Street, McKinney, TX 75069.	*http://www.rampp-team.com/lomrs.htm.*	May 3, 2012	480135
Guadalupe	City of Cibolo (11–06–2370P)	The Honorable Jennifer Hartman, Mayor, City of Cibolo, 200 South Main Street, Cibolo, TX 78108.	200 South Main Street, Cibolo, TX 78108.	*http://www.rampp-team.com/lomrs.htm.*	May 4, 2012	480267
Guadalupe	City of Seguin (11–06–2342P)	The Honorable Betty Ann Matthies, Mayor, City of Seguin, 210 East Gonzales Street, Seguin, TX 78155.	City Hall, 205 North River Street, Seguin, TX 78155.	*http://www.rampp-team.com/lomrs.htm.*	April 25, 2012	485508
Guadalupe	Unincorporated areas of Guadalupe County. (11–06–2342P)	The Honorable Mike Wiggins, Guadalupe County Judge, 211 West Court Street, Seguin, TX 78155.	Guadalupe County Environmental Health Department, 2605 North Guadalupe Street, Seguin, TX 78155.	*http://www.rampp-team.com/lomrs.htm.*	April 25, 2012	480266
Guadalupe	Unincorporated areas of Guadalupe County. (11–06–2370P)	The Honorable Mike Wiggins, Guadalupe County Judge, 211 West Court Street, Seguin, TX 78155.	Guadalupe County Environmental Health Department, 2605 North Guadalupe Street, Seguin, TX 78155.	*http://www.rampp-team.com/lomrs.htm.*	May 4, 2012	480266
Hays	Unincorporated areas of Hays County. (11–06–3956P)	The Honorable Bert Cobb, M.D., Hays County Judge, 111 East San Antonio Street, Suite 300, San Marcos, TX 78666.	1251 Civic Center Loop, San Marcos, TX 78666.	*http://www.rampp-team.com/lomrs.htm.*	May 24, 2012	480321
Hays	Village of Wimberley. (11–06–3956P)	The Honorable Bob Flocke, Mayor, City of Wimberley, 221 Stillwater Road, Wimberley, TX 78676.	13210 Ranch Road 12, Wimberley, TX 78676.	*http://www.rampp-team.com/lomrs.htm.*	May 24, 2012	481694
Johnson	City of Burleson (11–06–2745P)	The Honorable Ken D. Shetter, Mayor, City of Burleson, 141 West Renfro Street, Burleson, TX 76028.	141 West Renfro Street, Burleson, TX 76028.	*http://www.rampp-team.com/lomrs.htm.*	May 24, 2012	485459
Utah: Davis	City of Kaysville (11–08–0022P)	The Honorable Steve A. Hiatt, Mayor, City of Kaysville, 697 North 240 East, Kaysville, UT 84037.	23 East Center, Kaysville, UT 84037.	*http://www.bakeraecom.com/index.php/utah/davis-county/.*	June 4, 2012	490046
Virginia: Stafford	Unincorporated areas of Stafford County. (10–03–2108P)	The Honorable L. Mark Dudenhefer, Chairman, Stafford County Board of Supervisors, 1300 Courthouse Road, Stafford, VA 22554.	Stafford County Administration Center, 1300 Courthouse Road, Stafford, VA 22555.	*http://www.rampp-team.com/lomrs.htm.*	May 17, 2012	510154

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
West Virginia:						
Jefferson	City of Ranson (11–03–1484P).	The Honorable A. David Hamill, Mayor, City of Ranson, 312 South Mildred Street, Ranson, WV 25438.	312 South Mildred Street, Ranson, WV 25438.	*https://www.rampp-team.com/lomrs.htm.*	May 23, 2012	540068
Jefferson	Unincorporated areas of Jefferson County. (11–03–1484P)	The Honorable Patsy Noland, President, Jefferson County Commission, 124 East Washington Street, Charles Town, WV 25414.	124 East Washington Street, Charles Town, WV 25414.	*https://www.rampp-team.com/lomrs.htm.*	May 23, 2012	540065
Wisconsin:						
Barron	Unincorporated areas of Barron County. (12–05–0299P)	The Honorable James A. Miller, Barron County Board Supervisor, 330 East LaSalle Avenue, Barron, WI 54812.	330 East LaSalle Avenue, Barron, WI 54812.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 10, 2012	550568
Columbia	City of Columbus (11–05–4519P)	The Honorable Bob Link, Mayor, City of Columbus, 103 Wildwood Drive, Columbus, WI 53925.	105 North Dickason Boulevard Columbus, WI 53925.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 29, 2012	550058
Columbia	Unincorporated areas of Columbia County. (11–05–4519P)	The Honorable Robert Westby, Columbia County Board Chairman, 400 DeWitt Street, Portage, WI 53901.	400 DeWitt Street, Portage, WI 53901.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 29, 2012	550581
Dunn	Village of Boyceville. (11–05–9039P)	The Honorable Gilbert Krueger, President, Village of Boyceville, P.O. Box 368, Boyceville, WI 54725.	903 Main Street, Boyceville, WI 54725.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	April 26, 2012	550119
Outagamie	City of Appleton (11–05–7670P)	The Honorable Timothy Hanna, Mayor, City of Appleton, 100 North Appleton Street, Appleton, WI 54911.	100 North Appleton Street, Appleton, WI 54911.	*http://www.starr-team.com/starr/LOMR/Pages/RegionV.aspx.*	May 9, 2012	555542

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

Dated: April 17, 2012.

Sandra K. Knight,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2012–10281 Filed 4–27–12; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2012–0003; Internal Agency Docket No. FEMA–B–1250]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

DATES: Comments are to be submitted on or before July 30, 2012.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–1250, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *www.fema.gov/pdf/media/factsheets/2010/srp_fs.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

Community	Community map repository address
New London County, Connecticut (All Jurisdictions)	
Maps Available for Inspection Online at: *http://www.starr-team.com/starr/RegionalWorkspaces/RegionI/NewLondonCTcoastal/SitePages/Home.aspx*	
Borough of Stonington	Borough Hall, 26 Church Street, Stonington, CT 06378.
City of Groton	Municipal Building, 295 Meridian Street, Groton, CT 06340.
City of New London	City Hall, 181 State Street, New London, CT 06320.
Groton Long Point Association	44 Beach Road, Groton Long Point, CT 06340.
Noank Fire District	Noank Fire District and Fire Station, 10 Ward Avenue, Noank, CT 06340.
Town of East Lyme	East Lyme Town Hall, 108 Pennsylvania Avenue, Niantic, CT 06357.
Town of Groton	Town Hall, 45 Fort Hill Road, Groton, CT 06340.
Town of Old Lyme	Memorial Town Hall, 52 Lyme Street, Old Lyme, CT 06371.
Town of Stonington	Town Hall, 152 Elm Street, Stonington, CT 06378.
Town of Waterford	Town Hall, 15 Rope Ferry Road, Waterford, CT 06385.
Androscoggin County, Maine (All Jurisdictions)	
Maps Available for Inspection Online at: *http://www.starr-team.com/starr/RegionalWorkspaces/RegionI/AndroscogginMEriverine/SitePages/Home.aspx*	
City of Auburn	Auburn Hall, 60 Court Street, Auburn, ME 04210.
City of Lewiston	City Hall, 27 Pine Street, Lewiston, ME 04240.
Town of Durham	Town Office, 630 Hallowell Road, Durham, ME 04222.
Town of Greene	Town Office, 220 Main Street, Greene, ME 04236.
Town of Leeds	Town Office, 8 Community Drive, Leeds, ME 04263.
Town of Lisbon	Town Office, 300 Lisbon Street, Lisbon, ME 04250.
Town of Livermore	Town Office, 10 Crash Road, Livermore, ME 04253.
Town of Livermore Falls	Town Office, 2 Main Street, Livermore Falls, ME 04254.
Town of Mechanic Falls	Town Office, 108 Lewiston Street, Mechanic Falls, ME 04256.
Town of Minot	Town Office, 329 Woodman Hill Road, Minot, ME 04258.
Town of Poland	Town Office, 1231 Maine Street, Poland, ME 04274.
Town of Sabattus	Town Office, 190 Middle Road, Sabattus, ME 04280.
Town of Turner	Town Office, 11 Turner Center Road, Turner, ME 04282.
Town of Wales	Town Office, 302 Centre Road, Wales, ME 04280.
Tate County, Mississippi, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.geology.deq.ms.gov/floodmaps/Projects/FY2009/*	
City of Senatobia	City Hall, 133 North Front Street, Senatobia, MS 38668.
Town of Coldwater	Coldwater Town Hall, 444 Court Street, Senatobia, MS 38618.
Unincorporated Areas of Tate County	Tate County Courthouse, 201 South Ward Street, Senatobia, MS 38668.

Community	Community map repository address
Medina County, Ohio, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.starr-team.com/starr/RegionalWorkspaces/RegionV/MedinaOH/Preliminary%20Maps/Forms/AllItems.aspx*	
City of Brunswick	City Engineer's Office, 4095 Center Road, Brunswick, OH 44212.
City of Medina	Planning Department, 132 North Elmwood Avenue, Medina, OH 44256.
Unincorporated Areas of Medina County	Medina County Engineering Center, 791 West Smith Road, Medina, OH 44256.
Village of Chippewa Lake	Medina County Engineering Center, 791 West Smith Road, Medina, OH 44256.
Village of Gloria Glens Park	Gloria Glens Park Village Hall, 7966 Lake Road, Chippewa Lake, OH 44215.
Village of Lodi	Village Hall, 108 Ainsworth Street, Lodi, OH 44254.
Village of Seville	Village Hall, 120 Royal Crest Drive, Seville, OH 44273.
Village of Westfield Center	Village Hall, 6701 Greenwich Road, Westfield Center, OH 44251.
Lackawanna County, Pennsylvania (All Jurisdictions)	
Maps Available for Inspection Online at: *https://www.rampp-team.com/pa.htm*	
Borough of Archbald	Municipal Building, 400 Church Street, Archbald, PA 18403.
Borough of Blakely	Blakely Borough Office, 1439 Main Street, Peckville, PA 18452.
Borough of Clarks Green	Borough Hall, 104 North Abington Road, Clarks Green, PA 18411.
Borough of Clarks Summit	Borough Office, 304 South State Street, Clarks Summit, PA 18411.
Borough of Dalton	Borough Office, 109 South Turnpike Road, Dalton, PA 18414.
Borough of Dickson City	Borough Building, 801 Boulevard Avenue, Dickson City, PA 18519.
Borough of Dunmore	Borough Building, 400 South Blakely Street, Dunmore, PA 18512.
Borough of Jermyn	Community Center, 440 Jefferson Avenue, Jermyn, PA 18433.
Borough of Jessup	Municipal Building, 395 Lane Street, Jessup, PA 18434.
Borough of Mayfield	Borough Building, 739 Penn Avenue, Mayfield, PA 18433.
Borough of Moosic	Borough Office, 715 Main Street, Moosic, PA 18507.
Borough of Moscow	Borough Building, 123 Van Brunt Street, Moscow, PA 18444.
Borough of Old Forge	Municipal Building, 310 South Main Street, Old Forge, PA 18518.
Borough of Olyphant	Municipal Building, 113 Willow Avenue, Olyphant, PA 18447.
Borough of Taylor	Borough Building, 122 Union Street, Taylor, PA 18517.
Borough of Throop	Municipal Building, 436 Sanderson Street, Throop, PA 18512.
Borough of Vandling	Vandling Borough Hall, 634 Main Street, Forest City, PA 18421.
City of Carbondale	City Hall, 1 North Main Street, Carbondale, PA 18407.
City of Scranton	City Hall, 340 North Washington Avenue, Scranton, PA 18503.
Township of Benton	Benton Township Municipal Building, Route 107, Fleetville, PA 18420.
Township of Carbondale	Carbondale Township Municipal Building, 103 School Street, Childs, PA 18407.
Township of Clifton	Municipal Building, 361 State Route 435, Clifton, PA 18424.
Township of Covington	Municipal Office, 20 Moffat Drive, Covington Township, PA 18444.
Township of Elmhurst	Municipal Building, 176 Main Street, Elmhurst, PA 18416.
Township of Fell	Fell Township Municipal Building, 1 Veterans Road, Simpson, PA 18407.
Township of Glenburn	Glenburn Township Municipal Building, 3110 Waterford Road, Dalton, PA 18414.
Township of Greenfield	Municipal Building, 424 Route 106, Greenfield Township, PA 18407.
Township of Jefferson	Jefferson Township Municipal Building, 487 Cortez Road, Lake Ariel, PA 18436.
Township of LaPlume	LaPlume Township Municipal Building, Route 611, 2080 Hickory Ridge Road, Factoryville, PA 18419.
Township of Madison	Municipal Building, 3200 Madisonville Road, Madison Township, PA 18444.
Township of Newton	Newton Township Municipal Building, 1528 Newton Ransom Boulevard, Clarks Summit, PA 18411.
Township of North Abington	North Abington Township Building, 100 Windmere Circle, Dalton, PA 18414.
Township of Ransom	Ransom Township Office, 2435 Hickory Lane, Clarks Summit, PA 18411.
Township of Roaring Brook	Township Office, 430 Blue Shutters Road, Roaring Brook Township, PA 18444.
Township of Scott	Joe Terry Civic Center, 1038 Montdale Road, Scott Township, PA 18447.
Township of South Abington	South Abington Township Office, 104 Shady Lane Road, Chinchilla, PA 18410.
Township of Springbrook	Township Building, 966 State Route 307, Spring Brook Township, PA 18444.
Township of Thornhurst	Township Building, River Road, Thornhurst, PA 18424.
Township of Waverly	Township Office, 1 Lake Henry Drive, Waverly, PA 18471.

Community	Community map repository address
Township of West Abington	West Abington Township Building, RR 3, Locust Road, Dalton, PA 18414.
Harrison County, Texas, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.riskmap6.com*	
City of Hallsville	City Hall, 115 West Main Street, Hallsville, TX 75650.
City of Longview	Development Services and Engineering Department, 410 South High Street, Longview, TX 75601.
City of Marshall	City Hall, 401 South Alamo Street, Marshall, TX 75670.
City of Waskom	City Hall, 430 West Texas Avenue, Waskom, TX 75692.
Town of Scottsville	Harrison County Environmental Health Department, Road and Bridge Building, 3800 Five Notch Road, Marshall, TX 75670.
Town of Uncertain	City Hall, 199 Cypress Drive, Uncertain, TX 75661.
Unincorporated Areas of Harrison County	Harrison County Environmental Health Department, Road and Bridge Building, 3800 Five Notch Road, Marshall, TX 75670.

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

Dated: April 18, 2012.

Sandra K. Knight,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2012–10280 Filed 4–27–12; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5610–N–07]

Notice of Proposed Information; Public Housing Agency Burden Reduction Survey

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Department is looking at ways to reduce Public Housing Agency (PHA) burden through a wide range of activities from resident recertification and PHA unit inspection activities to improving access to HUD systems and information. The purpose of the survey is to determine whether the burden reduction activities have been effective.

DATES: *Comment Due Date:* June 29, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control number and should be sent to: Colette Pollard., Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4160, Washington, DC 20410–5000; telephone 202.402.3400 (this is not a toll-free number) or email Ms. Pollard at *Colette_Pollard@hud.gov.* Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339. (Other than the HUD USER information line and TTY numbers, telephone numbers are not toll-free.)

FOR FURTHER INFORMATION CONTACT: Arlette Mussington, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW., (L'Enfant Plaza, Room 2206), Washington, DC 20410; telephone 202–402–4109, (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Public Housing Agency Burden Reduction Survey.

OMB Control Number, if applicable: New.

Description of the need for the information and proposed use: The Department is looking at ways to reduce Public Housing Agency (PHA) burden through a wide range of activities from resident recertification and PHA unit inspection activities to improving access to HUD systems and information. The purpose of the survey is to determine whether the burden reduction activities have been effective.

Agency form numbers, if applicable: N/A, the data will be collected utilizing a web-based application.

Members of Affected Public: Public Housing Agencies.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated number of respondents is 4074 annually with one response per respondent. The average number for each response is 1.5 hours, for a total reporting burden of 2851 hours.

Status of the proposed information collection: New.

Authority: section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: April 20, 2012.

Merrie Nichols-Dixon,

Deputy Director, Office of Policy, Program and Legislative Initiatives.

[FR Doc. 2012–10310 Filed 4–27–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5607–N–14]

Notice of Proposed Information Collection: Comment Request; Personal Financial and Credit Statement

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

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* June 29, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Daniel J. Sullivan, Acting Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 402–6130 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Personal Financial and Credit Statement.

OMB Control Number, if applicable: 2502–0001.

Description of the need for the information and proposed use: The information collection is legally required to collect information to evaluate the character, ability, and capital or the sponsor, mortgagor, and general contractor for mortgage insurance.

Agency form numbers, if applicable: HUD–92417.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 16,000. The number of respondents is 2,000, the number of responses is 2,000, the frequency of response is on occasion, and the burden hour per response is once for each application submitted for mortgage insurance.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: April 24, 2012.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Acting General Deputy Federal Housing Commissioner.

[FR Doc. 2012–10311 Filed 4–27–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Natural Resource Damages Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on April 24, 2012, a proposed Consent Decree in *United States and State of Arizona* v. *Freeport-McMoRan Corp. et al.* (''Freeport-McMoRan Morenci Consent Decree''), Civil Action No. 4:12–cv–00307–HCE (D. Ariz.), was lodged with the United States District Court for the District of Arizona.

The Complaint in this case was filed against Freeport-McMoRan Corporation and Freeport-McMoRan Morenci Inc. (collectively ''Freeport-McMoRan'') on April 23, 2012. The cause of action is based on Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. 9607(a). The Complaint alleges that Freeport-McMoRan is civilly liable for payment of damages for injuries to natural resources belonging to, managed by, or controlled by the United States and the State of Arizona that resulted from hazardous substance releases at and from Freeport-McMoRan's Morenci Mine in southeastern Arizona. The Complaint further alleges that surface waters, terrestrial habitat and wildlife, and migratory birds have been injured, destroyed, or lost as a result of releases of hazardous substances at and from the mine site.

Under the settlement, Freeport-McMoRan will pay $6.8 million to the United States Department of the Interior's Natural Resource Damage Assessment and Restoration Fund, which can be used to restore, rehabilitate, replace, or acquire the equivalent of wildlife and wildlife habitat injured, destroyed, or lost as a result of releases at the mine sites. Included in this amount is $98,138.70, which is designated as reimbursement of the Department of the Interior's remaining unpaid past natural resource damage assessment costs.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Freeport-McMoRan Morenci Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees-enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States and State of Arizona* v. *Freeport-McMoran Corp. et al.,* Case No. 4:12–cv–00307–HCE (D. Ariz.), D.J. Ref. 90–11–3–08069/1.

During the public comment period, the Freeport-McMoRan Morenci Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Freeport-McMoRan Morenci Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or emailing a request to ''Consent Decree Copy'' (*EESCDCopy.ENRD@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–5271. If requesting a copy from the Consent Decree Library by mail, please enclose a check in the amount of $8.75 (25 cents per page reproduction cost) payable to the U.S.

Treasury or, if requesting by email or fax, forward a check in that amount to the Consent Decree Library at the address given above.

Ronald Gluck,

Assistant Section Chief, Environmental Enforcement Section Environment and Natural Resources Division.

[FR Doc. 2012–10289 Filed 4–27–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0862]

Standard on Hazardous Waste Operations and Emergency Response (HAZWOPER); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified by the Hazardous Waste Operations and Emergency Response (HAZWOPER) Standard (29 CFR 1910.120).

DATES: Comments must be submitted (postmarked, sent, or received) by June 29, 2012.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2011–0862, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number (OSHA–2011–0862) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download from the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accord with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The HAZWOPER Standard specifies a number of collection of information (paperwork) requirements. Employers can use the information collected under the HAZWOPER rule to develop the various programs the Standard requires and to ensure that their workers are trained properly about the safety and health hazards associated with hazardous waste operations and emergency response to hazardous waste releases. OSHA will use the records developed in response to this Standard to determine adequate compliance with the Standard's safety and health provisions. The employer's failure to collect and distribute the information required in this Standard will affect significantly OSHA's effort to control and reduce injuries and fatalities. Such failure would also be contrary to the direction Congress provided in the Superfund Amendments and Reauthorization Act (SARA).

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

The Agency is requesting an adjustment in the burden hours of 1,381 hours from 1,199,954 to 1,198,573 hours. The adjustment in burden hours is primarily due to a decrease in the number of sites covered by the Standard.

The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the Standard.

Type of Review: Extension of a currently approved collection.

Title: Hazardous Waste Operations and Emergency Response (HAZWOPER) Standard (29 CFR 1910.120).

OMB Control Number: 1218–0202.

Affected Public: Business or other for-profits; Not-for-profit organizations; Federal Government; State, Local, or Tribal Government.

Number of Respondents: 30,125.

Total Responses: 1,205,700.

Frequency: On occasion.

Average Time per Response: Varies from one minute (.02 hour) to maintain a certification record to 24 hours for initial employee training.

Estimated Total Burden Hours: 1,198,573.

Estimated Cost (Operation and Maintenance): $3,059,864.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2011–0862). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627). Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, 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. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on April 25, 2012.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2012–10348 Filed 4–27–12; 8:45 am]

BILLING CODE 4510–26–P

MERIT SYSTEMS PROTECTION BOARD

Agency Information Collection Activities; Proposed Collection

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA), the U.S. Merit Systems Protection Board (MSPB) announces that it is planning to submit a request for a three-year extension of an Information Collection Request (ICR) to the Office of Management and Budget (OMB). Before submitting this ICR to OMB for review and approval, MSPB is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Written comments must be received on or before June 29, 2012.

ADDRESSES: Submit written comments on the collection of information to William D. Spencer, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Dr. DeeAnn Batten at (202) 254–4495 or *deeann.batten@mspb.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. The MSPB intends to ask for a three-year renewal of its Generic Clearance Request for Voluntary Customer Surveys, OMB Control No. 3124–0012. Executive Order 12862, ''Setting Customer Service Standards,'' mandates that agencies identify their customers and survey them to determine the kind and quality of services they want and their level of satisfaction with existing services and products.

In this regard, we are soliciting comments on the public reporting burden. The reporting burden for the collection of information on this request is estimated to vary from 5 minutes to 45 minutes, with an average of 30 minutes, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. In the estimated annual reporting burden listed below, the reason that the annual number of respondents differs from the number of total annual responses is that our experience shows that only about 50% of those invited to participate in our voluntary customer surveys avail themselves of that opportunity.

In addition, the MSPB invites comments on (1) Whether the proposed collection of information is necessary for the proper performance of MSPB's functions, including whether the information will have practical utility; (2) the accuracy of MSPB's estimate of 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 or other forms of information technology.

ESTIMATED ANNUAL REPORTING BURDEN

5 CFR Parts	Annual number of respondents	Frequency per response	Total annual responses	Hours per response (average)	Total hours
1200–1216	3,000	1	1,500	0.50	50

William D. Spencer,

Clerk of the Board.

[FR Doc. 2012–10349 Filed 4–27–12; 8:45 am]

BILLING CODE 7401–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (12–030)]

Aerospace Safety Advisory Panel; Meeting

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announce a forthcoming meeting of the Aerospace Safety Advisory Panel.

DATES: Friday, May 25, 2012, 10:00–11:00 a.m. CST.

ADDRESSES: Marshall Space Flight Center, Building 4200, Room P110, Marshall Space Flight Center, AL 35812–0001. (Note that visitors will first need to go to the Redstone/Marshall Space Flight Center Joint Visitor Control Center to gain access.)

FOR FURTHER INFORMATION CONTACT: Ms. Harmony Myers, Aerospace Safety Advisory Panel Executive Director, National Aeronautics and Space Administration, Washington, DC 20546, (202) 358–1857.

SUPPLEMENTARY INFORMATION: The Aerospace Safety Advisory Panel will hold its 2nd Quarterly Meeting for 2012. This discussion is pursuant to carrying out its statutory duties for which the Panel reviews, identifies, evaluates, and advises on those program activities, systems, procedures, and management activities that can contribute to program risk. Priority is given to those programs that involve the safety of human flight.

The agenda will include:

- Updates on the Space Launch System.
- Multi-Purpose Crew Vehicle.
- Commercial Crew Program.
- NASA Responses to ASAP Recommendations.

The meeting will be open to the public up to the seating capacity of the room. Seating will be on a first-come basis. Visitors will be requested to sign a visitor's register. Photographs will only be permitted during the first 10 minutes of the meeting. During the first 30 minutes of the meeting, members of the public may make a 5-minute verbal presentation to the Panel on the subject of safety in NASA. To do so, please contact Ms. Susan Burch at *susan.burch@nasa.gov* at least 48 hours in advance. Any member of the public is permitted to file a written statement with the Panel at the time of the meeting. Verbal presentations and written comments should be limited to the subject of safety in NASA. All U.S. citizens desiring to attend the Aerospace Safety Advisory Panel meeting at the Marshall Space Flight Center must provide their full name, company affiliation (if applicable), driver's license number and state, citizenship, place of birth, and date of birth to the Marshall Space Flight Center Protective Services Office no later than close of business on May 17, 2012. All non-U.S. citizens must submit their name; current address; driver's license number and state (if applicable); citizenship; company affiliation (if applicable) to include address, telephone number, and title; place of birth; date of birth; U.S. visa information to include type, number, and expiration date; U.S. Social Security Number (if applicable); Permanent Resident card number and expiration date (if applicable); place and date of entry into the U.S.; and Passport information to include Country of issue, number, and expiration date to the Marshall Space Flight Center Security Office no later than close of business on May 10, 2012. If the above information is not received by the noted dates, attendees should expect a minimum delay of two (2) hours. All visitors to this meeting will be required to process in through the Redstone/Marshall Space Flight Center Joint Visitor Control Center located on Rideout Road, north of Gate 9, prior to entering Marshall Space Flight Center. Please provide the appropriate data, via fax at (256) 544–2101, noting at the top of the page ''Public Admission to the ASAP Meeting at MSFC.'' For security questions, please call Becky Hopson at (256) 544–4541. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2012–10272 Filed 4–27–12; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

Submission for OMB Review; Comment Request

AGENCY: National Endowment for the Humanities, National Foundation on the Arts and Humanities.

ACTION: Notice.

SUMMARY: The National Endowment for the Humanities (NEH) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval as required by the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling Susan G. Daisey, Director, Office of Grant Management, the National Endowment for the Humanities (202–606–8494) or may be requested by email to *sdaisey@neh.gov.* Comments should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the National Endowment for the Humanities, Office of Management and Budget, Room 10235, Washington, DC 20503 (202–395–7316), within 30 days from the date of this publication in the **Federal Register**.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (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, e.g., permitting electronic submissions of responses.

Agency: National Endowment for the Humanities.

Title of Proposal: Generic Clearance Authority for the National Endowment for the Humanities.

OMB Number: 3136–0134.

Frequency of Collection: On occasion.

Affected Public: Applicants to NEH grant programs, reviewers of NEH grant applications, and NEH grantees.

Total Respondents: 6,978.

Average Time per Response: varied according to type of information collection.

Estimated Total Burden Hours: 68,375 hours.

Total Annualized capital/startup costs: 0.

Total annual costs (operating/maintaining systems or purchasing services): 0.

Description: This submission requests approval from OMB for a three year extension of NEH's currently approved generic clearance authority for all NEH information collections other than one-time evaluations, questionnaires and surveys. Generic clearance authority would include approval of forms and instructions for application to NEH grant programs, reporting forms for NEH grantees, panelists and reviewers and for program evaluation purposes.

FOR FURTHER INFORMATION CONTACT: Ms. Susan G. Daisey, Director, Office of Grant Management, National Endowment for the Humanities, 1100 Pennsylvania Avenue NW., Room 311, Washington, DC 20506, or by email to: *sdaisey@neh.gov.* Telephone: 202–606–8494.

Carole Watson,

Deputy Chairman, National Endowment for the Humanities.

[FR Doc. 2012–10196 Filed 4–27–12; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Site visit review of the Materials Research Science and Engineering Center (MRSEC) at the University of Nebraska Lincoln by the Division of Materials Research (DMR) #1203.

Dates & Times: May 21, 2012; 7:15 a.m.–8:30 p.m., May 22, 2012; 7:15 a.m.–3:00 p.m.

Place: University of Nebraska Lincoln, Lincoln, NE.

Type of Meeting: Part open.

Contact Person for More Information: Dr. Sean L. Jones, Program Director, Materials Research Science and Engineering Centers Program, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–2986.

Purpose of Meeting: To provide advice and recommendations concerning further support of the MRSEC at the University of Nebraska.

Agenda

Monday, May 21, 2012

7:15 a.m.–4:30 p.m. Open—Review of the MRSEC
5 p.m.–6:45 p.m. Closed—Executive Session
6:45 p.m.–8:30 p.m. Open—Dinner

Tuesday, May 22, 2012

7:15 a.m.–9:50 a.m. Closed—Executive Session
9:50 a.m.–3 p.m. Closed—Executive Session, Draft and Review Report

Reason for Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the MRSEC. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: April 24, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–10273 Filed 4–27–12; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2012–0081]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* Request for Information Pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) 50.54(f), Regarding Recommendations 2.1, 2.3 and 9.3, of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Event.

2. *Current OMB approval number:* 3150–0211.

3. *How often the collection is required:* Once.

4. *Who is required or asked to report:* 104 power reactor licensees, 2 reactors in the process of resuming licensing, and 2 Combined License applicants (with 2 units each).

5. *The number of annual respondents:* 110.

6. *The number of hours needed annually to complete the requirement or request:* 369,960 hours.

7. *Abstract:* Following events at the Fukushima Dai-ichi nuclear power plant resulting from the March 11, 2011, earthquake and subsequent tsunami, and in response to requirements contained in Section 402 of the Consolidated Appropriations Act (Pub. L. 112–074), the NRC sought an expedited clearance from OMB to allow the collection of information from power reactor licensees pursuant to 10 CFR 50.54(f). OMB approved this clearance, which will expire on September 30, 2012. The NRC is currently preparing to resubmit the collection to OMB under normal clearance processes. The information requested includes seismic and flooding hazard reevaluations to determine if further regulatory action is necessary, walkdowns to confirm compliance with the current licensing basis and provide input to the hazard reevaluations, and analysis of the Emergency Preparedness capability with respect to staffing and communication ability during a prolonged multiunit event.

Submit, by June 29, 2012, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

The public may examine and have copied for a fee publicly available documents, including the draft supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

The OMB clearance requests are available at the NRC's Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/*. The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2012–0081.

You may submit your comments by any of the following methods: Electronic comments: Go to *http://www.regulations.gov* and search for Docket No. NRC–2012–0081. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6258, or by email to *INFOCOLLECTS.Resource@nrc.gov.*

Dated at Rockville, Maryland, this 24th day of April 2012.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2012–10276 Filed 4–27–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0098]

Draft Emergency Preparedness Frequently Asked Questions

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability and opportunity for public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is making available for comment Emergency Preparedness (EP) frequently asked questions (EPFAQs). These EPFAQs will be used to provide clarification of guidance documents related to the development and maintenance of EP program elements. The NRC staff developed these EPFAQs from feedback obtained through numerous public meetings. The NRC is publishing these preliminary results to inform the public and solicit comments.

DATES: Submit comments by May 30, 2012. Comments submitted after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except for comments received on or before this date.

ADDRESSES: You may access information and comment submissions related to this document by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0098.

You may submit comments by the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0098. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov*.
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: James R. Anderson, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6615 or by email at: *james.anderson@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0098 when contacting the NRC about the availability of information regarding this document. You may access information related to this document by the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0098.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search*''. For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. The draft Emergency Preparedness Frequently Asked Questions is available electronically under ADAMS Accession Number ML12108A151, and it is also available on the NRC's Web site at *http://www.nrc.gov/about-nrc/emerg-preparedness/faq/faq-contactus.html*.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0098 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed. The NRC posts all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS, and the NRC does not edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information in their comment submissions that they do not want to be publicly disclosed. Your request should state that the NRC will not edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Background

The NRC has developed the EPFAQ program for the staff to provide clarification of guidance [ADAMS Accession Number for the EPFAQ process is ML112650253]. This process is intended to describe the manner in which the NRC may provide interested outside parties an opportunity to share their individual views with NRC staff regarding the appropriate response to questions raised on the interpretation or applicability of EP guidance issued or endorsed by the NRC, before the NRC

issues an official response to such questions.

Dated at Rockville, Maryland, this 20th day of April 2012.

For the Nuclear Regulatory Commission.

Mark Thaggard,

Deputy Director for Emergency Preparedness, Division of Preparedness and Response, Office of Nuclear Security and Incident Response.

[FR Doc. 2012–10313 Filed 4–27–12; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Locating and Paying Participants

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intent to request OMB approval of modifications to information collection.

SUMMARY: The Pension Benefit Guaranty Corporation (''PBGC'') intends to request that the Office of Management and Budget (''OMB'') approve modifications to a collection of information under the Paperwork Reduction Act. The purpose of the information collection is to enable the PBGC to pay benefits to participants and beneficiaries. This notice informs the public of PBGC's intent and solicits public comment on the collection of information, as modified.

DATES: Comments should be submitted by June 29, 2012.

ADDRESSES: Comments may be submitted by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the Web site instructions for submitting comments.

Email: paperwork.comments@pbgc.gov.

Fax: 202–326–4224.

Mail or Hand Delivery: Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005–4026. PBGC will make all comments available on its Web site at *www.pbgc.gov.*

Copies of the collection of information may be obtained without charge by writing to the Disclosure Division of the Office of the General Counsel of PBGC at the above address or by visiting that office or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.) The regulations relating to this collection of information are available on PBGC's Web site at *www.pbgc.gov.*

FOR FURTHER INFORMATION CONTACT: Jo Amato Burns, Attorney, or Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005–4026, 202–326–4024. (For TTY and TDD, call 800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC intends to request that OMB approve modifications to a collection of information needed to pay participants and beneficiaries who may be entitled to pension benefits under defined benefit plans that have terminated. The collection consists of information participants and beneficiaries are asked to provide in connection with an application for benefits. In addition, in some instances, as part of an effort to identify participants and beneficiaries who may be entitled to benefits, PBGC requests individuals to provide identifying information that the individual would provide as part of an initial contact with PBGC. All requested information is needed to enable PBGC to determine benefit entitlements and to make appropriate payments.

The information collection includes My Pension Benefit Account (My PBA), an application on PBGC's Web site, *http://www.pbgc.gov,* through which plan participants and beneficiaries may conduct electronic transactions with PBGC, including applying for pension benefits, designating a beneficiary, granting a power of attorney, electing monthly payments, electing to withhold income tax from periodic payments, changing contact information, and applying for electronic direct deposit.

PBGC intends to add two new forms to the information collection and modify several existing forms to conform to recent changes in PBGC and Treasury regulations. The new forms are Form 710C (application for payment by check) and Form 721T (tax election for non-rollover eligible payment to beneficiary or estate).

PBGC intends to modify the following forms:

- Form 718 (installment payment agreement). The modifications will conform to changes in PBGC's regulation on debt collection, 29 CFR part 4903.
- Forms 700, 705, and 706 (benefit application forms for participants and beneficiaries) and Form 710 (application for electronic direct deposit). The modifications will conform to the Department of Treasury's regulation on electronic funds transfer, 31 CFR part 208.
- Form 721 (application for lump-sum payment for non-spouse beneficiary or estate). The modification results from the introduction of Form 721T.

In addition, PBGC is making clarifying, simplifying, editorial, and other changes to other forms in the information collection.

The existing collection of information under the regulation was approved under OMB control number 1212–0055 (expires September 30, 2013). The PBGC intends to request that OMB extend its approval (with modifications) for three years. 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.

PBGC estimates the total annual burden associated with this collection of information is 87,491 hours and $2,303 for the fiscal years 2013–2015. The burden estimate includes 84,101 hours for participants in plans covered by the PBGC insurance program. The remaining hourly burden is attributable to participants that will be covered by the expanded Missing Participants program under Pension Protection Act of 2006 amendments to ERISA, once final regulations are issued to implement the program. The cost burden for FY2013 when the expanded program is not in effect is estimated to be $2,222; for fiscal years 2014 and 2015 when the expanded program is expected to be in effect, $2,319 and $2,368, respectively.

PBGC is soliciting public comments to—

- 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;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Issued in Washington, DC, this 23rd day of April 2012.

John H. Hanley,

Director, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation.

[FR Doc. 2012–10306 Filed 4–27–12; 8:45 am]

BILLING CODE 7709–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Expiring Information Collection, Interview Survey Form, INV 10

AGENCY: U.S. Office of Personnel Management.

ACTION: 30-Day Notice and request for comments.

SUMMARY: Federal Investigative Services (FIS), U.S. Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on an expiring information collection request (ICR), Office of Management and Budget (OMB) Control No. 3206–0106, for the Interview Survey Form, INV 10. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget (OMB) is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until May 30, 2012. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@opm.eop.gov* or faxed to (202) 395–6974; and FIS, OPM, 1900 E. Street NW., Washington, DC 20415, Attention: Donna McLeod or sent via electronic mail to *FISFormsComments@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting FIS, OPM, 1900 E Street NW., Washington, DC 20415, Attention: Donna McLeod or sent via electronic mail to *FISFormsComments@opm.gov.*

SUPPLEMENTARY INFORMATION: The Interview Survey Form, INV 10, is a questionnaire that OPM mails to a random sampling of record and personal sources contacted during background investigations when investigators have performed fieldwork. The INV 10 is used as a quality control instrument designed to ensure the accuracy and integrity of the investigative product, as it inquires of the sources about the investigative procedure employed by the investigator, the investigator's professionalism, and the information discussed and reported. In addition to the preformatted response options, OPM invites the recipients to respond with any other relevant comments or suggestions. It is estimated that 63,869 individuals will respond annually. The INV 10 takes approximately 6 minutes to complete. The annual estimated burden is 6,387 hours.

The 60-day **Federal Register** Notice was published in the **Federal Register** on February 3, 2012 (**Federal Register** Notices/Vol. 77, Number 23, page 5581). One (1) recommendation was received from the Department of Interior, suggesting that OPM provide a survey link, via the internet, to provide the INV 10 recipient an alternative, response option that would also support the Paperwork Reduction Act efforts. OPM did not accept the recommendation at this time but will consider the recommendation for future versions.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–10295 Filed 4–27–12; 8:45 am]

BILLING CODE 6325–35–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This notice identifies Schedule A, B, and C appointing authorities applicable to a single agency that were established or revoked from November 1, 2011 to November 30, 2011.

FOR FURTHER INFORMATION CONTACT: Phyllis Proctor, Senior Executive Resource Services, Executive Resources and Employee Development, Employee Services, 202–606–2246.

SUPPLEMENTARY INFORMATION: In accordance with 5 CFR 213.103, Schedule A, B, and C appointing authorities available for use by all agencies are codified in the Code of Federal Regulations (CFR). Schedule A, B, and C appointing authorities applicable to a single agency are not codified in the CFR, but the Office of Personnel Management (OPM) publishes a notice of agency-specific authorities established or revoked each month in the **Federal Register** at *www.gpo.gov/fdsys/.* OPM also publishes annually a consolidated listing of all Schedule A, B, and C appointing authorities current as of June 30 as a notice in the **Federal Register**.

Schedule A

Schedule A authorities to report during November 2011.

11. Department of Homeland Security (Sch. A, 213.3111)

(e) Papago Indian Agency—Not to exceed 25 positions of Immigration and Customs Enforcement (ICE) Tactical Officers (Shadow Wolves) in the Papago Indian Agency in the state of Arizona when filled by the appointment of persons of one-fourth or more Indian blood. (Formerly 213.3105(b)(9)).

Schedule B

No Schedule B authorities to report during November 2011.

Schedule C

The following Schedule C appointments were approved during November 2011.

Agency name	Organization name	Position title	Authorization No.	Effective date
DEPARTMENT OF AGRICULTURE.	Office of the Assistant Secretary for Civil Rights.	Senior Advisor	DA120004	11/4/2011
	Farm Service Agency	Special Assistant	DA120008	11/3/2011
	Rural Utilities Service	Staff Assistant	DA120009	11/7/2011
	Foreign Agricultural Service	Confidential Assistant	DA120010	11/7/2011
	Office of the Under Secretary for Rural Development.	Special Assistant	DA120011	11/4/2011
	Office of the Assistant Secretary for Administration.	Special Assistant	DA120015	11/4/2011
	Rural Housing Service	Special Assistant	DA120016	11/10/2011
DEPARTMENT OF COMMERCE	Office of Public Affairs	Press Secretary and Senior Communications Advisor.	DC120011	11/1/2011
	Office of the Assistant Secretary for Economic Development.	Director, Office of Innovation and Entrepreneurship.	DC120012	11/1/2011
	International Trade Administration	Deputy Director of Public Affairs	DC120013	11/1/2011
	Office of Legislative and Intergovernmental Affairs.	Legislative Assistant	DC120015	11/18/2011
	Office of the Assistant Secretary for Manufacturing and Services.	Senior Advisor	DC120019	11/29/2011
DEPARTMENT OF DEFENSE	Office of the Secretary	Advance Officer	DD110132	11/28/2011
	Office of the Secretary	Special Assistant	DD110135	11/3/2011
	Office of the Assistant Secretary of Defense (Asian and Pacific Security Affairs).	Special Assistant (East Asia)	DD120004	11/1/2011
	Office of Assistant Secretary of Defense (Legislative Affairs).	Special Assistant	DD120010	11/18/2011
DEPARTMENT OF THE ARMY	Office Assistant Secretary Army (Civil Works).	Special Assistant (Civil Works)	DW120005	11/10/2011
DEPARTMENT OF THE NAVY	Office of the Under Secretary of the Navy.	Special Assistant	DN110041	11/8/2011
DEPARTMENT OF EDUCATION	Office of the Secretary	Director, Strategic Partnerships	DB110120	11/2/2011
	Office of Legislation and Congressional Affairs.	Deputy Assistant Secretary	DB120005	11/3/2011
	Office of Planning, Evaluation and Policy Development.	Special Assistant	DB120006	11/15/2011
	Office of the Under Secretary	Confidential Assistant	DB120009	11/7/2011
	Office of Innovation and Improvement.	Special Assistant	DB120010	11/2/2011
	Office for Civil Rights	Senior Counsel	DB120012	11/4/2011
	Office of Planning, Evaluation and Policy Development.	Confidential Assistant	DB120013	11/4/2011
	Office of the General Counsel	Confidential Assistant	DB120017	11/10/2011
	Office of the Under Secretary	Special Assistant	DB120021	11/18/2011
DEPARTMENT OF ENERGY	Office of Management	Special Assistant	DE120014	11/4/2011
ENVIRONMENTAL PROTECTION AGENCY.	Office of the Administrator	Deputy White House Liaison	EP120008	11/22/2011
FEDERAL COMMUNICATIONS COMMISSION.	Office of Legislative Affairs	Deputy Director, OLA	FC120001	11/3/2011
GENERAL SERVICES ADMINISTRATION.	The Heartland Region	Special Assistant	GS120002	11/7/2011
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Office of the Assistant Secretary for Public Affairs.	Communications Director for Public Health.	DH120004	11/1/2011
	Office of the Assistant Secretary for Legislation.	Special Assistant for Discretionary Health Programs.	DH120010	11/8/2011
	Office of the Assistant Secretary for Legislation.	Confidential Assistant for Mandatory Health Programs.	DH120011	11/10/2011
DEPARTMENT OF HOMELAND SECURITY.	Federal Emergency Management Agency.	Senior Advisor	DM120019	11/4/2011
	Office of the Assistant Secretary for Public Affairs.	Speechwriter	DM120020	11/2/2011
	U.S. Customs and Border Protection.	Senior Advisor for Strategic Communications and Response.	DM120023	11/9/2011
	Federal Emergency Management Agency.	Director of Public Affairs	DM120024	11/9/2011
	Office of the Secretary	Advance Representative	DM120025	11/9/2011
	Office of the Assistant Secretary for Public Affairs.	Director of Special Projects	DM120026	11/9/2011
	Office of the Under Secretary for Science and Technology.	Special Assistant for Science and Technology.	DM120027	11/9/2011
	Office of the Under Secretary for Management.	Senior Advisor	DM120034	11/30/2011
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of Public Affairs	Press Secretary	DU120002	11/8/2011

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of Congressional and Intergovernmental Relations.	Congressional Relations Officer	DU120005	11/30/2011
	Office of Congressional and Intergovernmental Relations.	Congressional Relations Specialist	DU120006	11/9/2011
	Office of Congressional and Intergovernmental Relations.	Senior Legislative Advisor	DU120007	11/8/2011
	Office of the Secretary	Deputy Chief of Staff	DU120009	11/15/2011
	Office of Congressional and Intergovernmental Relations.	Congressional Relations Officer	DU120011	11/30/2011
DEPARTMENT OF THE INTERIOR.	Secretary's Immediate Office	Program Coordinator	DI120008	11/1/2011
	Secretary's Immediate Office	White House Liaison	DI120009	11/10/2011
DEPARTMENT OF JUSTICE	Office of the Attorney General	White House Liaison	DJ120008	11/9/2011
	Office of Public Affairs	Deputy Director	DJ120009	11/1/2011
	Office of the Deputy Attorney General.	Deputy Chief of Staff and Senior Counsel.	DJ120012	11/29/2011
	Foreign Claims Settlement Commission.	Special Assistant	DJ120013	11/30/2011
DEPARTMENT OF LABOR	Office of Congressional and Intergovernmental Affairs.	Legislative Assistant	DL120009	11/3/2011
	Employee Benefits Security Administration.	Special Assistant	DL120011	11/3/2011
	Office of the Secretary	Staff Assistant	DL120013	11/18/2011
	Office of the Secretary	Special Assistant	DL120015	11/21/2011
OFFICE OF MANAGEMENT AND BUDGET.	Office of the Director	Senior Advisor	BO120001	11/10/2011
OFFICE OF SCIENCE AND TECHNOLOGY POLICY.	Office of Science and Technology Policy.	Confidential Assistant	TS120001	11/21/2011
PRESIDENTS COMMISSION ON WHITE HOUSE FELLOWSHIPS.	Presidents Commission on White House Fellowships.	Communication Associate	WH120001	11/2/2011
DEPARTMENT OF STATE	Office of the Chief of Protocol	Protocol Officer (Dpd)	DS120004	11/8/2011
	Office of the Under Secretary for Management.	Staff Assistant	DS120011	11/3/2011
DEPARTMENT OF THE TREASURY.	Assistant Secretary (Public Affairs)	Senior Advisor	DY120016	11/15/2011
	Secretary of the Treasury	Advance Specialist	DY120017	11/4/2011
	Assistant Secretary (Public Affairs)	Press Assistant	DY120028	11/30/2011

The following Schedule C appointment authorities were revoked during November 2011.

Agency name	Organization name	Position title	Authorization No.	Date revoked
DEPARTMENT OF AGRICULTURE.	Office of the Under Secretary Farm and Foreign Agricultural Service.	Special Assistant	DA090262	11/18/2011
	Office of Assistant Secretary for Congressional Relations.	Senior Advisor for Labor Affairs	DA100079	11/12/2011
DEPARTMENT OF COMMERCE	Office of Policy and Strategic Planning.	Senior Policy Advisor	DC100107	11/5/2011
	Office of Public Affairs	Confidential Assistant	DC110008	11/5/2011
CONSUMER PRODUCT SAFETY COMMISSION.	Office of Commissioners	Special Assistant (Legal)	PS100005	11/18/2011
COUNCIL ON ENVIRONMENTAL QUALITY.	Council on Environmental Quality	Special Assistant (Land and Water Ecosystems).	EQ100010	11/4/2011
DEPARTMENT OF DEFENSE	Office of the Under Secretary of Defense (Personnel and Readiness).	Special Assistant to UDSD WWCTP.	DD100192	11/5/2011
	Director for Communication Plans and Integration.	Associate Director for Communication, Plans and Integration.	DD110012	11/12/2011
	Office of the Secretary	Director, Travel Operations	DD090252	11/25/2011
DEPARTMENT OF JUSTICE	Office of Legislative Affairs	Confidential Assistant	DJ100110	11/4/2011
DEPARTMENT OF ENERGY	Office of Public Affairs	Press Secretary	DE090098	11/23/2011
	Director, Office of Scheduling and Advance.	Trip Coordinator	DE100129	11/8/2011
DEPARTMENT OF EDUCATION	Office of the Deputy Secretary	Special Assistant	DB100041	11/12/2011
	Office of the Under Secretary	Director, White House Initiative on Educational Excellence for Hispanic Americans.	DB110086	11/14/2011

Agency name	Organization name	Position title	Authorization No.	Date revoked
DEPARTMENT OF HOMELAND SECURITY.	Office of the Assistant Secretary for Policy.	Business Liaison	DM100004	11/18/2011
	Office of the Assistant Secretary for Policy.	Policy Analyst	DM110097	11/18/2011
	Office of the Assistant Secretary for Policy.	Special Assistant	DM100125	11/29/2011
	Office of the Assistant Secretary for Policy.	Senior Advisor	DM110112	11/5/2011
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of the Secretary	Senior Advisor	DU100052	11/4/2011
SMALL BUSINESS ADMINISTRATION.	Office of Field Operations	Senior Advisor to the Associate Administrator for Field Operations.	SB090063	11/4/2011
DEPARTMENT OF STATE	Office of the Secretary	Special Assistant	DS090137	11/14/2011
	Office of the Under Secretary for Arms Control and International Security.	Staff Assistant	DS110054	11/30/2011
DEPARTMENT OF TRANSPORTATION.	Public Affairs	Press Secretary	DT100005	11/10/2011
UNITED STATES TAX COURT	United States Tax Court	Chambers Administrator	JC080032	11/3/2011

Authority: 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–10334 Filed 4–27–12; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 15c2–8; OMB Control No. 3235–0481; SEC File No. 270–421.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in the following rule: Rule 15c2–8 (17 CFR 240.15c2–8), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 15c2–8 requires broker-dealers to deliver preliminary and/or final prospectuses to certain people under certain circumstances. In connection with securities offerings generally, including initial public offerings (IPOs), the rule requires broker-dealers to take reasonable steps to distribute copies of the preliminary or final prospectus to anyone who makes a written request, as well as any broker-dealer who is expected to solicit purchases of the security and who makes a request. In connection with IPOs, the rule requires a broker-dealer to send a copy of the preliminary prospectus to any person who is expected to receive a confirmation of sale (generally, this means any person who is expected actually to purchase the security in the offering) at least 48 hours prior to the sending of such confirmation. This requirement is sometimes referred to as the ''48 hour rule.''

Additionally, managing underwriters are required to take reasonable steps to ensure that all broker-dealers participating in the distribution of or trading in the security have sufficient copies of the preliminary or final prospectus, as requested by them, to enable such broker-dealer to satisfy their respective prospectus delivery obligations pursuant to Rule 15c2–8, as well as Section 5 of the Securities Act of 1933.

Rule 15c2–8 implicitly requires that broker-dealers collect information, as such; the collection facilitates compliance with the rule. There is no requirement to submit collected information to the Commission. In order to comply with the rule, broker-dealers participating in a securities offering must keep accurate records of persons who have indicated interest in an IPO or requested a prospectus, so that they know to whom they must send a prospectus.

The Commission estimates that broker-dealers will spend a total of 74,010 hours complying with the collection of information required by the rule. The Commission estimates that the total number of responses required by the rule is 6,909. The Commission estimates that the total annualized cost burden (copying and postage costs) is $15,014,400 ($12,300,000 for IPOs + $2,714,400 for other offerings).

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

The public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: April 24, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–10291 Filed 4–27–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30044; File No. 812–13986]

GPS Funds I, et al.; Notice of Application

April 24, 2012.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 12(d)(1)(A) and (B) of the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (2) of the Act, and under section 6(c) of the Act for an exemption from rule 12d1–2(a) under the Act.

SUMMARY OF THE APPLICATION: The requested order would (a) permit certain registered open-end management investment companies that operate as ''funds of funds'' to acquire shares of certain registered open-end management investment companies and unit investment trusts (''UITs'') that are within and outside the same group of investment companies as the acquiring investment companies, and (b) permit funds of funds relying on rule 12d1–2 under the Act to invest in certain financial instruments.

APPLICANTS: GPS Funds I, GPS Funds II (each a ''Trust'' and together, the ''Trusts'') and Genworth Financial Wealth Management, Inc. (''Adviser'').

DATES: *Filing Dates:* The application was filed on December 5, 2011, and amended on March 9, 2012.

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 May 21, 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: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants: 2300 Contra Costa Boulevard, Suite 425, Pleasant Hill, CA 94523–3967.

FOR FURTHER INFORMATION CONTACT: Laura L. Solomon, Senior Counsel, at (202) 551–6915 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 for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations

1. Each Trust is an open-end management investment company registered under the Act and organized as a Delaware statutory trust. Each Trust is comprised of separate series that pursue distinct investment objectives and strategies.[1] The Adviser, a California corporation and a wholly-owned subsidiary of Genworth Financial, Inc., is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') and serves as investment adviser for each of the Funds.

2. Applicants request an order to permit (a) a Fund that operates as a ''fund of funds'' (each a ''Fund of Funds'') to acquire shares of (i) registered open-end management investment companies that are not part of the same ''group of investment companies,'' within the meaning of section 12(d)(1)(G)(ii) of the Act, as the Fund of Funds (''Unaffiliated Investment Companies'') and UITs that are not part of the same group of investment companies as the Fund of Funds (''Unaffiliated Trusts,'' together with the Unaffiliated Investment Companies, ''Unaffiliated Funds'')[2] or (ii) registered open-end management companies or UITs that are part of the same group of investment companies as the Fund of Funds (collectively, ''Affiliated Funds,'' together with the Unaffiliated Funds, ''Underlying Funds'') and (b) each Underlying Fund, any principal underwriter for the Underlying Fund, and any broker or dealer registered under the Securities Exchange Act of 1934 (''Broker'') to sell shares of the Underlying Fund to the Fund of Funds.[3] Applicants also request an order under sections 6(c) and 17(b) of the Act to exempt applicants from section 17(a) to the extent necessary to permit Underlying Funds to sell their shares to Funds of Funds and redeem their shares from Funds of Funds.

3. Applicants also request an exemption under section 6(c) from rule 12d1–2 under the Act to permit any existing or future Fund that relies on section 12(d)(1)(G) of the Act (''Same Group Investing Fund'') and that otherwise complies with rule 12d1–2 to also invest, to the extent consistent with its investment objective, 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'').

4. Consistent with its fiduciary obligations under the Act, the board of trustees (''Board'') of each Same Group Investing Fund will review the advisory fees charged by the Same Group Investing Fund's investment 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 Same Group Investing Fund may invest.

Applicants' Legal Analysis

Investments in Underlying Funds

A. Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act, in relevant part, prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, and any Broker from selling the investment company's shares to another investment company if the sale will cause the acquiring company

[1] Applicants request that the relief apply to each existing and future series of the Trusts and to each existing and future registered open-end management investment company or series thereof (each a ''Fund'' and collectively, ''Funds'') that is advised by the Adviser or any entity controlling, controlled by or under common control with the Adviser and which is part of the same group of investment companies (as defined in section 12(d)(1)(G)(ii)) as the Trusts.

[2] Certain of the Unaffiliated Funds may be registered under the Act as either UITs or open-end management investment companies and have received exemptive relief to permit their shares to be listed and traded on a national securities exchange at negotiated prices (''ETFs'').

[3] All entities that currently intend to rely on the requested order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

to own more than 3% of the acquired company's total outstanding voting stock, or if the sale will cause more than 10% of the acquired company's total outstanding voting stock to be owned by investment companies generally.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Applicants seek an exemption under section 12(d)(1)(J) of the Act to permit a Fund of Funds to acquire shares of the Underlying Funds in excess of the limits in section 12(d)(1)(A), and an Underlying Fund, any principal underwriter for an Underlying Fund, and any Broker to sell shares of an Underlying Fund to a Fund of Funds in excess of the limits in section 12(d)(1)(B) of the Act.

3. Applicants state that the terms and conditions of the proposed arrangement will not give rise to the policy concerns underlying sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees, and overly complex fund structures. Accordingly, applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

4. Applicants believe that the proposed arrangement will not result in the exercise of undue influence by a Fund of Funds or a Fund of Funds Affiliate over the Unaffiliated Funds.[4] To limit the control that a Fund of Funds may have over an Unaffiliated Fund, applicants propose a condition prohibiting the Adviser, any person controlling, controlled by, or under common control with the Adviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by the Adviser or any person controlling, controlled by, or under common control with the Adviser (the ''Advisory Group'') from controlling (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any other investment adviser within the meaning of section 2(a)(20)(B) of the Act to a Fund of Funds (''Subadviser''), any person controlling, controlled by or under common control with the Subadviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Subadviser or any person controlling, controlled by or under common control with the Subadviser (the ''Subadvisory Group''). Applicants propose other conditions to limit the potential for undue influence over the Unaffiliated Funds, including that no Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in an offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting''). An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, trustee, advisory board member, investment adviser, Subadviser, or employee of the Fund of Funds, or a person of which any such officer, director, trustee, member of an advisory board, investment adviser, Subadviser, or employee is an affiliated person. An Underwriting Affiliate does not include any person whose relationship to an Unaffiliated Fund is covered by section 10(f) of the Act.

5. To further assure that an Unaffiliated Investment Company understands the implications of an investment by a Fund of Funds under the requested order, prior to a Fund of Funds' investment in the shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute an agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order (''Participation Agreement''). Applicants note that an Unaffiliated Investment Company (other than an ETF whose shares are purchased by a Fund of Funds in the secondary market) will retain its right at all times to reject any investment by a Fund of Funds.[5]

6. Applicants state that they do not believe that the proposed arrangement will involve excessive layering of fees. The Board of each Fund of Funds, including a majority of the trustees who are not ''interested persons'' (within the meaning of section 2(a)(19) of the Act) (''Independent Trustees''), will find that the advisory fees charged under investment advisory or management contract(s) are based on services provided that will be in addition to, rather than duplicative of, the services provided under such advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. In addition, the Adviser will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company under rule 12b-1 under the Act) received from an Unaffiliated Fund by the Adviser or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any sales charges and/or service fees charged with respect to shares of the Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in Rule 2830 of the Conduct Rules of the NASD (''NASD Conduct Rule 2830'').[6]

7. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Underlying Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except in certain circumstances identified in condition 11 below.

B. Section 17(a)

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of the company. Section 2(a)(3) of the Act defines an ''affiliated person'' of another person to include (a) Any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are

[4] A ''Fund of Funds Affiliate'' is the Adviser, any Subadviser (as defined below), promoter or principal underwriter of a Fund of Funds, as well as any person controlling, controlled by, or under common control with any of those entities. An ''Unaffiliated Fund Affiliate'' is an investment adviser, sponsor, promoter, or principal underwriter of an Unaffiliated Fund, as well as any person controlling, controlled by, or under common control with any of those entities.

[5] An Unaffiliated Investment Company, including an ETF, would retain its right to reject any initial investment by a Fund of Funds in excess of the limit in section 12(d)(1)(A)(i) of the Act by declining to execute the Participation Agreement with the Fund of Funds.

[6] Any references to NASD Conduct Rule 2830 include any successor or replacement FINRA rule to NASD Conduct Rule 2830.

directly or indirectly owned, controlled, or held with power to vote by the other person; and (c) any person directly or indirectly controlling, controlled by, or under common control with the other person.

2. Applicants state that a Fund of Funds and the Affiliated Funds might be deemed to be under common control of the Adviser and therefore affiliated persons of one another. Applicants also state that a Fund of Funds and the Unaffiliated Funds might be deemed to be affiliated persons of one another if the Fund of Funds acquires 5% or more of an Unaffiliated Fund's outstanding voting securities. In light of these and other possible affiliations, section 17(a) could prevent an Underlying Fund from selling shares to and redeeming shares from a Fund of Funds.

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) The terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of 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 policy and provisions of the Act.

4. Applicants submit that the proposed transactions satisfy the standards for relief under sections 17(b) and 6(c) of the Act.[7] Applicants state that the terms of the transactions are reasonable and fair and do not involve overreaching. Applicants state that the terms upon which an Underlying Fund will sell its shares to or purchase its shares from a Fund of Funds will be based on the net asset value of the Underlying Fund.[8] Applicants state that the proposed transactions will be consistent with the policies of each Fund of Funds and each Underlying Fund and with the general purposes of the Act.

Other Investments by Same Group Investing Funds

1. Section 12(d)(1)(G) of the Act provides that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquiring company and acquired 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 of 1934 (''Exchange Act'') or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end management investment companies or registered unit investment trusts in reliance on section 12(d)(1)(F) or (G) of the Act.

2. 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: (1) 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; (2) securities (other than securities issued by an investment company); and (3) 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.

3. Applicants state that the proposed arrangement would comply with the provisions of rule 12d1–2 under the Act, but for the fact that a Same Group Investing Fund may invest a portion of its 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 Same Group Investing Funds to invest in Other Investments. Applicants assert that permitting Same Group Investing 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' Conditions

Investments by Funds of Funds in Underlying Funds

Applicants agree that the relief to permit Funds of Funds to invest in Underlying Funds shall be subject to the following conditions:

1. The members of an Advisory Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The members of a Subadvisory Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of an Unaffiliated Fund, the Advisory Group or a Subadvisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of the Unaffiliated Fund, then the Advisory Group or the Subadvisory Group will vote its shares of the Unaffiliated Fund in the same proportion as the vote of all other holders of the Unaffiliated Fund's shares. This condition will not apply to a Subadvisory Group with respect to an Unaffiliated Fund for which the Subadviser or a person controlling, controlled by, or under common control with the Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act (in the case of an Unaffiliated Investment Company) or as the sponsor (in the case of an Unaffiliated Trust).

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in shares of an Unaffiliated Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Unaffiliated Fund or an Unaffiliated Fund Affiliate.

3. The Board of each Fund of Funds, including a majority of the Independent Trustees, will adopt procedures

[7] Applicants acknowledge that receipt of any compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by a Fund of Funds of shares of an Underlying Fund or (b) an affiliated person of an Underlying Fund, or an affiliated person of such person, for the sale by the Underlying Fund of its shares to a Fund of Funds may be prohibited by section 17(e)(1) of the Act. The Participation Agreement also will include this acknowledgement.

[8] Applicants note that a Fund of Funds generally would purchase and sell shares of an Unaffiliated Fund that operates as an ETF through secondary market transactions rather than through principal transactions with the Unaffiliated Fund. To the extent that a Fund of Funds purchases or redeems shares from an ETF that is an affiliated person of the Fund of Funds in exchange for a basket of specified securities as described in the application for the exemptive order upon which the ETF relies, applicants also request relief from section 17(a) of the Act for those in-kind transactions. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where an ETF could be deemed an affiliated person, or an affiliated person of an affiliated person of a Fund of Funds, because an investment adviser to the ETF is also an investment adviser to the Fund of Funds.

reasonably designed to assure that its Adviser and any Subadviser(s) to the Fund of Funds are conducting the investment program of the Fund of Funds without taking into account any consideration received by the Fund of Funds or Fund of Funds Affiliate from an Unaffiliated Fund or an Unaffiliated Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, the Board of the Unaffiliated Investment Company, including a majority of the Independent Trustees, will determine that any consideration paid by the Unaffiliated Investment Company to a Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Unaffiliated Investment Company; (b) is within the range of consideration that the Unaffiliated Investment Company would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between an Unaffiliated Investment Company and its investment adviser(s) or any person controlling, controlled by, or under common control with such investment adviser(s).

5. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in any Affiliated Underwriting.

6. The Board of an Unaffiliated Investment Company, including a majority of the Independent Trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Unaffiliated Investment Company in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of the Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board of the Unaffiliated Investment Company will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Unaffiliated Investment Company. The Board of the Unaffiliated Investment Company will consider, among other things, (a) Whether the purchases were consistent with the investment objectives and policies of the Unaffiliated Investment Company; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Unaffiliated Investment Company in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board of the Unaffiliated Investment Company will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders.

7. Each Unaffiliated Investment Company shall maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and shall maintain and preserve for a period not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth the: (a) Party from whom the securities were acquired, (b) identity of the underwriting syndicate's members, (c) terms of the purchase, and (d) information or materials upon which the determinations of the Board of the Unaffiliated Investment Company were made.

8. Prior to its investment in shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute a Participation Agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. At the time of its investment in shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Unaffiliated Investment Company of the investment. At such time, the Fund of Funds will also transmit to the Unaffiliated Investment Company a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Unaffiliated Investment Company of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Unaffiliated Investment Company and the Fund of Funds will maintain and preserve a copy of the order, the Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

9. Before approving any advisory contract under section 15 of the Act, the Board of each Fund of Funds, including a majority of the Independent Trustees, shall find that the advisory fees charged under such advisory contract are based on services provided that are in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. Such finding and the basis upon which the finding was made will be recorded fully in the minute books of the appropriate Fund of Funds.

10. The Adviser will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company under rule 12b–1 under the Act) received from an Unaffiliated Fund by the Adviser, or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any Subadviser will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Fund of Funds in an amount at least equal to any compensation received by the Subadviser, or an affiliated person of the Subadviser, from an Unaffiliated Fund, other than any advisory fees paid to the Subadviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund made at the direction of the Subadviser. In the event that the Subadviser waives fees, the benefit of the waiver will be passed through to the Fund of Funds.

11. No Underlying Fund will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of

the limits contained in section 12(d)(1)(A) of the Act, except to the extent that such Underlying Fund: (a) Receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (b) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to (i) acquire securities of one or more investment companies for short-term cash management purposes, or (ii) engage in interfund borrowing and lending transactions.

12. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to fund of funds set forth in NASD Conduct Rule 2830.

Other Investments by Same Group Investing Funds

Applicants agree that the relief to permit Same Group Investing Funds to invest in Other Investments shall be subject to the following condition:

13. 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 Same Group Investing Fund from investing in Other Investments as described in the application.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–10290 Filed 4–27–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30045; 812–13868]

Northern Trust Investments, Inc., et al.; Notice of Application

April 24, 2012.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

APPLICANTS: Northern Trust Investments, Inc. (''Northern Trust''), FlexShares Trust (''Trust''), and Foreside Fund Services, LLC (''Foreside'').

SUMMARY OF APPLICATION: Applicants request an order that permits: (a) An actively managed series of the Trust to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days from the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares; and (f) certain series to perform creations and redemptions of Shares in-kind in a master-feeder structure.

DATES: *Filing Dates:* The application was filed on February 11, 2011, and amended on August 8, 2011, January 11, 2012, March 9, 2012, and April 23, 2012.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief 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 May 21, 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, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants, c/o Northern Trust Investments, Inc., 50 S. LaSalle Street, Chicago, IL 60603.

FOR FURTHER INFORMATION CONTACT: Courtney S. Thornton, Senior Counsel, at (202) 551–6812 or Mary Kay Frech, 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. The Trust is a statutory trust organized under the laws of the state of Maryland and is registered under the Act as an open-end management investment company. Subject to market conditions, the initial series of the Trust (''Initial Fund'') will be FlexShares Liquid Access Fund, which seeks to achieve its investment objective by investing in a non-diversified portfolio of fixed income instruments, including bonds, debt securities and other similar instruments issued by U.S. and non-U.S. public and private sector entities.

2. Northern Trust is an Illinois state bank registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act'') and will be the investment adviser to the Initial Fund. Subject to approval by the board of trustees (''Board'') of the Trust, Northern Trust, or any entity controlling, controlled by, or under common control with Northern Trust (collectively with Northern Trust, the ''Adviser'') will advise the Funds (as defined below). The Adviser may enter into subadvisory agreements with one or more investment advisers to serve as subadvisers to a Fund (each, a ''Subadviser''). Any Subadviser will be registered under the Advisers Act.

3. The Trust may enter into a distribution agreement with one or more distributors (each a ''Distributor''). Foreside, a Delaware limited liability company, is expected to serve as Distributor of the Initial Fund. Foreside is, and each Distributor will be, a broker-dealer (''Broker'') registered under the Securities Exchange Act of 1934 (''Exchange Act''). No Distributor is or will be affiliated with any national securities exchange as defined in section 2(a)(26) of the Act (''Stock Exchange''). A Distributor may be an ''affiliated person,'' within the meaning of section 2(a)(3) of the Act, of the Adviser or any Subadviser.

4. Applicants are requesting relief to permit the Trust to create and operate certain actively managed series of the Trust that offer Shares with limited redeemability (''ETF Relief'') and to operate certain series in a master-feeder

structure. Applicants request that the ETF Relief also apply to future series of the Trust and to other open-end management companies that (a) utilize active management investment strategies, (b) are advised by the Adviser, and (c) comply with the terms and conditions of the order (''Future Funds,'' together with the Initial Fund, ''Funds''). Each Fund will operate as an exchanged-traded fund (''ETF'').[1]

5. Applicants also request that the order permit certain investment companies registered under the Act to acquire Shares of Funds beyond the limitations in section 12(d)(1)(A) and permit certain Funds, and any Distributor for the Funds, and any Broker to sell Shares beyond the limitations in section 12(d)(1)(B) (''Fund of Funds Relief''). Applicants request that any exemption under section 12(d)(1)(J) from sections 12(d)(1)(A) and (B) for Fund of Funds Relief apply to any Fund and each management investment company or unit investment trust registered under the Act that is not part of the same ''group of investment companies'' as the Funds within the meaning of section 12(d)(1)(G)(ii) of the Act and that enters into an FOF Participation Agreement (as defined below) with a Fund (such management investment companies are referred to as ''Purchasing Management Companies,'' such unit investment trusts are referred to as ''Purchasing Trusts,'' and Purchasing Management Companies and Purchasing Trusts are collectively referred to as ''Purchasing Funds'').[2] Purchasing Funds do not include the Funds. The Fund of Funds Relief would not apply to any Fund that is, either directly or through a master-feeder structure, acquiring securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits in section 12(d)(1)(A) of the Act.

6. Applicants further request that the order permit the Funds to acquire shares of other registered investment companies managed by the Adviser having substantially the same investment objectives as the Fund (''Master Funds'') beyond the limitation in section 12(d)(1)(A) and permit the Master Funds, and any principal underwriter for the Master Funds, to sell shares of the Master Funds to the Funds beyond the limitations in section 12(d)(1)(B) (''Master-Feeder Relief''). A Future Fund may invest in a Master Fund instead of directly holding underlying securities. Applicants may structure certain Funds as feeder funds in a master-feeder structure (''Feeder Funds'') to generate economies of scale and tax efficiencies for shareholders of all series of the Master Fund that could not otherwise be realized. There would be no ability by Fund shareholders to exchange Shares of Feeder Funds for shares of another feeder series of the Master Fund.

7. Future Funds may invest, either directly or through a Master Fund, in equity securities (''Equity Funds'') or fixed income securities[3] (''Fixed Income Funds'') traded in the U.S. or non-U.S. markets and also may hold short positions in securities (''Short Positions''). Funds that invest, either directly or through a Master Fund, in foreign equity and/or fixed income securities are ''Foreign Funds.'' Funds that invest, either directly or through a Master Fund, in foreign and domestic equity securities are ''Global Equity Funds.'' Funds that invest directly in foreign and domestic fixed income securities, either directly or through a Master Fund, are ''Global Fixed Income Funds'' (and together with the ''Global Equity Funds, ''Global Funds''). The term ''Domestic Funds'' includes any Equity Fund or Fixed Income Fund that invests, either directly or through a Master Fund, in domestic equity and/or fixed income securities.

8. Each Fund may invest in depositary receipts representing foreign securities in which they seek to invest (''Depositary Receipts''), including American Depositary Receipts (''ADRs'') and Global Depositary Receipts (''GDRs''). Depositary Receipts are typically issued by a financial institution (''Depositary'') and evidence ownership interests in a security or a pool or securities (''Underlying Securities'') that have been deposited with the Depositary.[4] A Fund will not invest in any Depositary Receipts that the Adviser or Subadviser deems to be illiquid or for which pricing information is not readily available. No Fund (or its respective Master Fund, if any) will invest in options contracts, futures contracts or swap agreements.

9. Shares of each Fund will be purchased from the Trust only in Creation Units through the Distributor on a continuous basis at net asset value (''NAV'') next determined after an order in proper form is received.[5] Creation Units will be separable upon issue into individual Shares, which will be listed and traded at negotiated prices on a Stock Exchange. The Funds will issue Shares in Creation Units of at least 25,000 Shares.

10. Orders to purchase or redeem Creation Units may be placed by or through an ''Authorized Participant,'' which is either (i) a Broker or other participant in the continuous net settlement system of the National Securities Clearing Corporation (''NSCC''), a clearing agency registered with the Commission, or (ii) a participant in the Depository Trust Company (''DTC''), which in either case has executed an agreement with the Trust and the Distributor with respect to creations and redemptions of Creation Units.

11. Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Accordingly, except where the purchase or redemptions will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments'') and shareholders redeeming their shares will receive an in-kind transfer of specified instruments (''Redemption Instruments'').[6] On any given Business

[1] All entities that currently intend to rely on the order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

[2] Each Purchasing Management Company will be advised by an investment adviser within the meaning of section 2(a)(20)(A) of the Act (''Purchasing Fund Adviser'') and may be sub-advised by investment adviser(s) within the meaning of section 2(a)(20)(B) of the Act (''Purchasing Fund Subadviser''). Any investment adviser to a Purchasing Management Company will be registered as an investment adviser or exempt from registration under the Advisers Act. Each Purchasing Trust will have a sponsor (''Sponsor'').

[3] Fixed income securities may include ''to-be-announced transactions'' (''TBA Transactions''). A TBA Transaction is a method of trading mortgage-backed securities. In a TBA Transaction the buyer and seller agree upon general trade parameters such as agency, settlement date, par amount, and price. The actual pools delivered generally are determined two days prior to the settlement date.

[4] With respect to ADRs, the Depositary is typically a U.S. financial institution and the Underlying Securities are issued by a foreign issuer. The ADR is registered under the Securities Act of 1933 (''Securities Act'') on Form F–6. ADR trades occur either on a Stock Exchange or off-exchange. Financial Industry Regulatory Authority (''FINRA'') Rule 6620 requires all off-exchange transactions in ADRs to be reported within 90 seconds and ADR trade reports to be disseminated on a real-time basis. With respect to GDRs, the Depositary may be a foreign or a U.S. entity, and the Underlying Securities may have a foreign or a U.S. issuer. All GDRs are sponsored and trade on a foreign exchange. No affiliated persons of applicants or any Subadviser will serve as the depositary bank for any Depositary Receipts held by a Fund.

[5] While the NAV of each Fund will normally be determined as of the close of the regular trading session on the New York Stock Exchange on each day that a Fund is open, including as required by section 22(e) of the Act (''Business Day''), the NAV of each Fixed Income Fund and Foreign Fund may be determined prior to 4:00 p.m. Eastern Time on each Business Day.

[6] In the case of a Fund that is part of a master-feeder structure, the Fund will redeem shares from

Continued

Day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and these instruments may be referred to, in the case of either a purchase or a redemption, as the ''Creation Basket.'' In addition, the Creation Basket will correspond *pro rata* to the positions in the Fund's portfolio (including cash positions),[7] except: (a) In the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots;[8] or (c) TBA Transactions, Short Positions or other positions that cannot be transferred in kind[9] will be excluded from the Creation Basket.[10] If there is a difference between the NAV attributable to a Creation Unit and the aggregate market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (''Cash Amount'').

12. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Cash Amount, as described above; (b) if, on a given Business Day, the Fund announces before the open of trading that all purchases, all redemptions, or all purchases and redemptions on that day will be made entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant (as defined below), the Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash; (d) if, on a given Business Day, the Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are not eligible for transfer through either the NSCC or the DTC; or (ii) in the case of Foreign or Global Funds, such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or (e) if the Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of a Foreign or Global Fund would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.[11]

13. Each Business Day, before the open of trading on the Stock Exchange, the Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Cash Amount (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following Business Day, and there will be no intra-day changes to the Creation Basket except to correct errors in the published Creation Basket. The Stock Exchange will disseminate every 15 seconds during its regular trading hours an amount representing the sum of the estimated Cash Amount plus the current value of the Deposit Instruments, on a per Share basis.

14. Purchasers of Shares in Creation Units may hold such Shares or may sell such Shares into the secondary market. Shares will be listed and traded on a Stock Exchange. The price of Shares trading on a Stock Exchange will be based on a current bid/offer market. Transactions involving the sale of Shares on a Stock Exchange will be subject to customary brokerage commissions and charges.

15. Applicants expect that purchasers of Creation Units will include arbitrageurs and the lead market makers and/or designated liquidity providers. Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.[12] Applicants state that arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV should ensure that the Shares will not trade at a material discount or premium in relation to their NAV. Beneficial owners of Shares may sell their Shares in the secondary market, but must accumulate enough Shares to constitute a Creation Unit in order to redeem through a Fund.

16. Each Fund may impose a purchase or redemption transaction fee (''Transaction Fee'') to protect existing shareholders from the dilutive costs associated with the purchase or redemption of Creation Units.[13] The Distributor will be responsible for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it. The Distributor will deliver a confirmation and prospectus (''Prospectus'') to the purchaser.

17. Neither the Trust nor any Fund will be advertised or marketed or otherwise held out as a traditional open-end investment company or a mutual fund. Instead, each Fund will be marketed as an ''actively-managed exchange-traded fund.''[14] All marketing materials that describe the features or method of obtaining, buying or selling Creation Units, or Shares traded on the Stock Exchange, or refer to

the appropriate master portfolio and then deliver to the redeeming shareholder the Redemption Instruments and Cash Amount (as defined below). The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act. In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to rule 144A under the Securities Act, the Funds will comply with the conditions of rule 144A.

[7] The portfolio used for this purpose will be the same portfolio used to calculate the Fund's NAV for that Business Day.

[8] A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

[9] This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

[10] Because these instruments will be excluded from the Creation Basket, their value will be reflected in the determination of the Cash Amount (as defined below).

[11] A ''custom order'' is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

[12] Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or DTC participants (''DTC Participants'').

[13] Where a Fund permits a purchaser to substitute cash in lieu of depositing a portion of the requisite Deposit Instruments, the purchaser may be assessed a higher Transaction Fee to offset the cost to the Fund of purchasing such Deposit Instruments. In all cases, such Transaction Fees will be limited in accordance with requirements of the Commission applicable to management investment companies offering redeemable securities.

[14] As noted above, certain Funds may operate as Feeder Funds in a master-feeder structure. Under such circumstances, the Funds would operate, and would be marketed, as ETFs. The respective Master Funds would operate as mutual funds, but would not be publicly offered or marketed. Applicants do not believe the master-feeder structure would be confusing to investors because any additional feeder fund that is a traditional mutual fund or other pooled investment vehicle would be marketed separately. Applicants state that they will take steps to ensure that investors will understand the differences between the Funds and any feeder funds.

redeemability, will prominently disclose that Shares are not individually redeemable shares and will disclose that the owners of Shares may acquire those Shares from the Fund, or tender those Shares for redemption to the Fund in Creation Units only. The same approach will be followed in connection with shareholder reports and investor educational materials issued or circulated in connection with the Shares. Each Fund will provide copies of its semi-annual and annual shareholder reports to DTC Participants for distribution to beneficial owners of Shares.

18. The Trust will maintain a Web site that will be publicly available and free of charge. The Web site will include each Fund's Prospectus and other information about each Fund that is updated on a daily basis, including the prior Business Day's NAV, closing market price or reported midpoint of ''bid and ask'' at the time of calculation of such NAV (''Bid/Ask Price''), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV. Prior to the opening of the Stock Exchange on each Business Day, the Trust will disclose on its Web site the identities and quantities of the securities (''Fund Securities'') and other assets held by each Fund, or its respective Master Fund,[15] that will form the basis of each Fund's NAV at the end of the Business Day.[16]

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately a proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order to permit the Trust to register as an open-end management investment company and each Fund to issue and redeem Shares in Creation Units only.[17] Applicants state that investors may purchase Shares in Creation Units and redeem Creation Units from each Fund and that Creation Units are always redeemable in accordance with the provisions of the Act. Applicants further state that because the market price of Shares will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary materially from their NAV.

Section 22(d) of the Act and Rule 22c–1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, rather than at the current offering price described in the Prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) Prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers resulting from sales at different prices, and (c) assure an orderly distribution of investment company shares by eliminating price competition from Brokers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares would not cause dilution of an investment in Shares because such transactions do not involve the Funds as parties, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity should ensure that the difference between NAV and the market price of Shares remains narrow.

Section 22(e)

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of

[15] For Funds that are part of a master-feeder structure, the Fund will disclose information about the securities and other assets held by the Master Fund.

[16] Under accounting procedures followed by the Funds, trades made on the prior Business Day (''T'') will be booked and reflected in NAV on the current Business Day (''T+1''). Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

[17] The Master Funds will not require relief from sections 2(a)(32) and 5(a)(1) because the Master Funds will issue individually redeemable securities.

a security for redemption. Applicants observe that the settlement of redemptions of Creation Units of the Foreign Funds is contingent not only on the settlement cycle of the U.S. securities markets but also on the delivery cycles present in foreign markets in which Foreign or Global Funds may invest. Applicants have been advised that, under certain circumstances, the delivery cycles for transferring Redemption Instruments to redeeming investors, coupled with local market holiday schedules, will require a delivery process of up to 14 calendar days. Applicants therefore request relief under section 6(c) of the Act from section 22(e) in order to provide payment or satisfaction of redemptions within the maximum number of calendar days required for such payment or satisfaction in the principal local markets where transactions in the Fund Securities of each Foreign or Global Fund customarily clear and settle, but in all cases no later than 14 days following the tender of a Creation Unit.[18] At all other times and except as disclosed in the relevant Statement of Information (''SAI''), applicants expect that each Foreign or Global Fund will be able to deliver redemption proceeds within seven days. Applicants do not believe the master-feeder structure would have any impact on the delivery cycle.

8. Applicants submit that Congress adopted section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds. Applicants state that allowing in-kind redemption payments for Creation Units of a Foreign or Global Fund, and any respective Master Fund, to be made within the number of days indicated above would not be inconsistent with the spirit and intent of section 22(e).[19] Applicants state that the SAI for each Foreign or Global Fund will disclose those local holidays (over the period of at least one year following the date of the SAI), if any, that are expected to prevent the delivery of in-kind redemption proceeds in seven calendar days and the maximum number of days, up to 14 calendar days, needed to deliver the proceeds for each affected Foreign or Global Fund. Applicants are not seeking relief from section 22(e) with respect to Foreign Funds or Global Funds effecting redemptions on a cash basis.

Section 12(d)(1)

9. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, or any other broker or dealer from selling its shares 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 if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

10. Applicants request relief to permit Purchasing Funds to acquire Shares of a Fund beyond the limits of section 12(d)(1)(A) of the Act. Applicants also seek an exemption to permit the Funds and/or a Broker to sell Shares to Purchasing Funds beyond the limits of section 12(d)(1)(B).

11. Applicants assert that the proposed transactions will not lead to any of the abuses that section 12(d)(1) was designed to prevent. Applicants submit that the proposed conditions to the requested relief address the concerns underlying the limits in section 12(d)(1), which include concerns about undue influence, excessive layering of fees and overly complex structures.

12. Applicants submit that their proposed conditions address any concerns regarding the potential for undue influence. A Purchasing Fund or Purchasing Fund Affiliate[20] will not cause an investment in a Fund to influence the terms of services or transactions between a Purchasing Fund or a Purchasing Fund Affiliate and the Fund or Fund Affiliate.[21] A Purchasing Fund's Advisory Group or a Purchasing Fund's Sub-Advisory Group will not control a Fund within the meaning of section 2(a)(9) of the Act.[22]

13. Applicants also propose a condition to ensure that no Purchasing Fund or Purchasing Fund Affiliate will cause a Fund to purchase a security from an Affiliated Underwriting. An ''Affiliated Underwriting'' is an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate. An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Purchasing Fund Adviser, Purchasing Fund Subadviser, employee or Sponsor of the Purchasing Fund, or a person of which any such officer, director, member of an advisory board, Purchasing Fund Adviser, Purchasing Fund Subadviser, employee or Sponsor is an affiliated person, except any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate.

14. Applicants propose several conditions to address the potential for layering of fees. Applicants note that the board of directors or trustees of a Purchasing Management Company, including a majority of the directors or trustees who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act (''disinterested directors or trustees''), will be required to find that the advisory fees charged under the contract are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract of any Fund in which the Purchasing Management Company may invest. Applicants state that any sales charges and/or service fees charged with respect to shares of a Purchasing Fund will not exceed the limits applicable to a fund of

[18] Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations that applicants may otherwise have under rule 15c6–1 under the Exchange Act. Rule 15c6–1 requires that most securities transactions be settled within three business days of the trade date.

[19] Other feeder funds invested in any Master Fund are not seeking, and will not rely on, the section 22(e) relief requested herein.

[20] A ''Purchasing Fund Affiliate'' is defined as the Purchasing Fund Adviser, Purchasing Fund Subadviser, Sponsor, promoter and principal underwriter of a Purchasing Fund and any person controlling, controlled by or under common control with any of these entities.

[21] A ''Fund Affiliate'' is defined as an investment adviser, promoter or principal underwriter of a Fund, or its respective Master Fund, and any person controlling, controlled by or under common control with any of these entities.

[22] A ''Purchasing Fund's Advisory Group'' is the Purchasing Fund Adviser, or Sponsor, any person controlling, controlled by or under common control with the Purchasing Fund Adviser or Sponsor, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act, that is advised or sponsored by the Purchasing Fund Adviser, the Sponsor, or any person controlling, controlled by or under common control with the Purchasing Fund Adviser or Sponsor. A ''Purchasing Fund's Sub-Advisory Group'' is any Purchasing Fund Subadviser, any person controlling, controlled by, or under common control with the Purchasing Fund Subadviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Purchasing Fund Subadviser or any person controlling, controlled by or under common control with the Purchasing Fund Subadviser.

funds set forth in NASD Conduct Rule 2830.[23]

15. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that a Fund (and its respective Master Fund, if any) will be prohibited from acquiring securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that (i) the Fund (or its respective Master Fund) acquires securities of another investment company pursuant to certain exemptive relief from the Commission, or (ii) the Fund acquires shares of its respective Master Fund.

16. To ensure that a Purchasing Fund is aware of the terms and conditions of the requested order, the Purchasing Fund must enter into an agreement with the respective Fund (''FOF Participation Agreement''). The FOF Participation Agreement will include an acknowledgment from the Purchasing Fund that it may rely on the order only to invest in the Funds and not in any other investment company.

17. Applicants also are seeking relief from sections 12(d)(1)(A) and (B) of the Act to permit the Funds in a master-feeder structure to perform creations and redemptions of Shares in-kind. Applicants assert that this structure is substantially identical to traditional master-feeder structures permitted pursuant to the exception provided in section 12(d)(1)(E) of the Act. Section 12(d)(1)(E) provides that the percentage limitations of sections 12(d)(1)(A) and (B) will not apply to a security issued by an investment company (in this case, the shares of the applicable master portfolio) if, among other things, that security is the only investment security held by the Fund. Applicants believe the proposed master-feeder structure complies with section 12(d)(1)(E) because each Fund will hold only investment securities issued by its corresponding Master Fund; however, the Funds may receive securities other than securities of its corresponding Master Fund if a Fund accepts an in-kind creation. To the extent that a Fund may be deemed to be holding both shares of the master portfolio and other securities, applicants request relief from sections 12(d)(1)(A) and (B). The Funds would operate in compliance with all other provisions of section 12(d)(1)(E).

Sections 17(a)(1) and (2) of the Act

18. Sections 17(a)(1) and (2) of the Act generally prohibit an affiliated person of a registered investment company, or an affiliated person of such a person (''second tier affiliate''), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities. The Funds may be deemed to be controlled by the Adviser or an entity controlling, controlled by or under common control with the Adviser and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by the Adviser or an entity controlling, controlled by or under common control with the Adviser (an ''Affiliated Fund'').

19. Applicants request an exemption from section 17(a) under sections 6(c) and 17(b) to permit in-kind purchases and redemptions by persons that are affiliated persons or second tier affiliates of the Funds solely by virtue of one or more of the following: (i) Holding 5% or more, or more than 25%, of the Shares of the Trust or one or more Funds; (ii) an affiliation with a person with an ownership interest described in (i); or (iii) holding 5% or more, or more than 25%, of the shares of one or more Affiliated Funds. Applicants also request an exemption in order to permit each Fund to sell Shares to and redeem Shares from, and engage in the transactions that would accompany such sales and redemptions with, any Purchasing Fund of which the Fund is an affiliated person or a second tier affiliate.[24]

20. Applicants contend that no useful purpose would be served by prohibiting these affiliated persons or second tier affiliates of a Fund from making in-kind purchases or in-kind redemptions of Shares of a Fund in Creation Units. The value of the Deposit Instruments and corresponding Cash Amount delivered by a purchaser or Redemption Instruments and corresponding Cash Amount given to a redeeming investor will be the same regardless of the investor's identity, and will be valued under the same objective standards applied to valuing the Fund Securities. The method of valuing Fund Securities held by a Fund is the same as that used for calculating in-kind purchase or redemption values. Therefore, applicants state that the in-kind purchases and redemptions will afford no opportunity for the specified affiliated persons and second tier affiliates of a Fund to effect a transaction detrimental to other holders of Shares. Applicants do not believe that in-kind purchases and redemptions will result in abusive self-dealing or overreaching of the Fund.

21. Applicants also submit that the sale of Shares to and redemption of Shares from a Purchasing Fund satisfies the standards for relief under sections 17(b) and 6(c) of the Act. Any consideration paid for the purchase or redemption of Shares directly from a Fund will be based on the NAV of the Fund.[25] The FOF Participation Agreement will require any Purchasing Fund that purchases Shares directly from a Fund to represent that its purchases are permitted under its investment restrictions and consistent with the investment policies described in its registration statement.

22. To the extent that a Fund operates in a master-feeder structure, applicants also request relief permitting the Funds to engage in in-kind creations and redemptions with the applicable master portfolio. Applicants state that the customary section 17(a)(1) and 17(a)(2) relief would not be sufficient to permit such transactions because the Funds and the applicable master portfolio could also be affiliated by virtue of having the same investment adviser. However, applicants believe that in-

[23] Any references to NASD Conduct Rule 2830 include any successor or replacement rule that may be adopted by FINRA.

[24] Applicants believe that a Purchasing Fund generally will purchase Shares in the secondary market, which would not require relief from section 17(a), and will not purchase or redeem Creation Units directly from a Fund. Nonetheless a Purchasing Fund could seek to transact in Creation Units directly with a Fund, and the relief requested pursuant to section 17(a) is intended to cover the transactions that would accompany such sales and redemptions. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person, or an affiliated person of an affiliated person, of a Purchasing Fund because the Adviser or an entity controlling, controlled by, or under common control with the Adviser is also an investment adviser to the Purchasing Fund.

[25] Applicants acknowledge that the receipt of compensation by (a) an affiliated person of a Purchasing Fund, or an affiliated person of such person, for the purchase by the Purchasing Fund of Shares or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Shares to a Purchasing Fund, may be prohibited by section 17(e)(1) of the Act. The FOF Participation Agreement also will include this acknowledgment.

kind creations and redemptions between a Fund and a master portfolio advised by the same investment adviser do not involve ''overreaching'' by an affiliated person. Such transactions will occur only at the Fund's proportionate share of the master portfolio's net assets, and the distributed securities will be valued in the same manner as they are valued for the purposes of calculating the applicable master portfolio's NAV. Further, all such transactions will be effected with respect to pre-determined securities and on the same terms with respect to all investors. Finally, such transactions would only occur as a result of, and to effectuate, a creation or redemption transaction between the Fund and a third-party investor. Applicants believe that the terms of the proposed transactions are reasonable and fair and do not involve overreaching on the part of any person concerned and that the transactions are consistent with the general purposes of the Act.

Applicants' Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

ETF Relief

1. As long as the Funds operate in reliance on the requested order, the Shares of the Funds will be listed on a Stock Exchange.

2. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that the Shares are not individually redeemable and that owners of the Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only.

3. The Web site for the Funds, which is and will be publicly accessible at no charge, will contain, on a per Share basis, for each Fund the prior Business Day's NAV and the market closing price or Bid/Ask Price of the Shares, and a calculation of the premium or discount of the market closing price or Bid/Ask Price of the Shares against such NAV.

4. On each Business Day, before commencement of trading in Shares on the Stock Exchange, the Fund (or its respective Master Fund) will disclose on its Web site the identities and quantities of the Fund Securities and other assets held by the Fund that will form the basis for the Fund's calculation of NAV at the end of such Business Day.

5. The Adviser or Subadviser, directly or indirectly, will not cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Instrument for the Fund through a transaction in which the Fund could not engage directly.

6. The requested relief, other than the section 12(d)(1) relief and the section 17 relief related to a master-feeder structure, will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively-managed exchange-traded funds.

Fund of Funds Relief

7. The members of the Purchasing Fund's Advisory Group will not control (individually or in the aggregate) a Fund (or its respective Master Fund) within the meaning of section 2(a)(9) of the Act. The members of the Purchasing Fund's Sub-Advisory Group will not control (individually or in the aggregate) a Fund (or its respective Master Fund) within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Fund, the Purchasing Fund's Advisory Group or the Purchasing Fund's Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its Shares of the Fund in the same proportion as the vote of all other holders of the Fund's Shares. This condition does not apply to the Purchasing Fund's Sub-Advisory Group with respect to a Fund (or its respective Master Fund) for which the Purchasing Fund Subadviser or a person controlling, controlled by or under common control with the Purchasing Fund Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

8. No Purchasing Fund or Purchasing Fund Affiliate will cause any existing or potential investment by the Purchasing Fund in a Fund to influence the terms of any services or transactions between the Purchasing Fund or a Purchasing Fund Affiliate and the Fund (or its respective Master Fund) or a Fund Affiliate.

9. The board of directors or trustees of a Purchasing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to assure that the Purchasing Fund Adviser and any Purchasing Fund Subadviser are conducting the investment program of the Purchasing Management Company without taking into account any consideration received by the Purchasing Management Company or a Purchasing Fund Affiliate from a Fund (or its respective Master Fund) or a Fund Affiliate in connection with any services or transactions.

10. Once an investment by a Purchasing Fund in the securities of a Fund exceeds the limit in section 12(d)(1)(A)(i) of the Act, the Board of a Fund (or of its respective Master Fund), including a majority of the disinterested Board members, will determine that any consideration paid by the Fund (or its respective Master Fund) to the Purchasing Fund or a Purchasing Fund Affiliate in connection with any services or transactions: (i) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund (or its respective Master Fund); (ii) is within the range of consideration that the Fund (or its respective Master Fund) would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund (or its respective Master Fund) and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

11. The Purchasing Fund Adviser, or trustee (''Trustee'') or Sponsor, as applicable, will waive fees otherwise payable to it by the Purchasing Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund (or its respective Master Fund) under rule 12b–1 under the Act) received from a Fund (or its respective Master Fund) by the Purchasing Fund Adviser, or Trustee or Sponsor, or an affiliated person of the Purchasing Fund Adviser, or Trustee or Sponsor, other than any advisory fees paid to the Purchasing Fund Adviser, or Trustee, or Sponsor, or its affiliated person by the Fund (or its respective Master Fund), in connection with the investment by the Purchasing Fund in the Fund. Any Purchasing Fund Subadviser will waive fees otherwise payable to the Purchasing Fund Subadviser, directly or indirectly, by the Purchasing Management Company in an amount at least equal to any compensation received from a Fund (or its respective Master Fund) by the Purchasing Fund Subadviser, or an affiliated person of the Purchasing Fund Subadviser, other than any advisory fees paid to the Purchasing Fund Subadviser or its affiliated person by the Fund (or its respective Master Fund), in connection with any investment by the Purchasing Management Company in the Fund made at the direction of the

Purchasing Fund Subadviser. In the event that the Purchasing Fund Subadviser waives fees, the benefit of the waiver will be passed through to the Purchasing Management Company.

12. No Purchasing Fund or Purchasing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund (or its respective Master Fund)) will cause a Fund (or its respective Master Fund) to purchase a security in an Affiliated Underwriting.

13. The Board of the Fund (or of its respective Master Fund), including a majority of the disinterested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund (or its respective Master Fund) in an Affiliated Underwriting, once an investment by a Purchasing Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Purchasing Fund in the Fund. The Board will consider, among other things: (i) Whether the purchases were consistent with the investment objectives and policies of the Fund (or its respective Master Fund); (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Fund (or its respective Master Fund) in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders.

14. Each Fund (or its respective Master Fund) will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings, once an investment by a Purchasing Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

15. Before investing in a Fund in excess of the limit in section 12(d)(1)(A), a Purchasing Fund will execute a FOF Participation Agreement with the Fund stating that their respective boards of directors or trustees and their investment advisers, or Trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), a Purchasing Fund will notify the Fund of the investment. At such time, the Purchasing Fund will also transmit to the Fund a list of the names of each Purchasing Fund Affiliate and Underwriting Affiliate. The Purchasing Fund will notify the Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Fund and the Purchasing Fund will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

16. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Purchasing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund (or its respective Master Fund) in which the Purchasing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Purchasing Management Company.

17. Any sales charges and/or service fees charged with respect to shares of a Purchasing Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

18. No Fund (or its respective Master Fund) will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that (i) the Fund (or its respective Master Fund) acquires securities of another investment company pursuant to exemptive relief from the Commission permitting the Fund (or its respective Master Fund) to acquire securities of one or more investment companies for short-term cash management purposes, or (ii) the Fund acquires securities of the Master Fund pursuant to the Master-Feeder Relief.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–10299 Filed 4–27–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, May 3, 2012 at 2:00 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, May 3, 2012 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please

contact: The Office of the Secretary at (202) 551–5400.

Dated: April 26, 2012

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–10512 Filed 4–26–12; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66853; File No. SR–ICC–2012–02]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change to Provide for a T+1 Settlement of the Initial Payment Related to the CDS Contracts Cleared by ICE Clear Credit LLC

April 24, 2012.

I. Introduction

On March 1, 2012, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–ICC–2012–02 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] The proposed rule change was published for comment in the **Federal Register** on March 12, 2012.[2] The Commission received no comment letters. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

ICC proposed rule amendments that were intended to modify the terms of each of the various CDS Contracts cleared by ICC (CDX.NA Untranched Contracts, Standard North American Corporate (''SNAC'') Single Name Contracts and Standard Emerging Sovereign (''SES'') Single Name Contracts) to make the Initial Payment[3] date the first business day immediately following the trade date, provided that with respect to CDS Contracts that are accepted for clearing after the trade date, the Initial Payment date will be the date that is the first business day following the date when the CDS Contract is accepted for clearing. The Initial Payment under a CDS Contract is established at the time the contract is executed and may be payable from either the protection buyer to the protection seller or vice versa. Under the current ICC Rules (by way of the incorporated ISDA Credit Derivatives Definitions), and consistent with practice in the market for uncleared credit default swaps, the Initial Payment is required to be made on the third business day following the trade date (the execution date). ICC proposed to add the definition of Initial Payment Date to its Clearing Rules to provide instead that the Initial Payment is to be made on the first business day following the trade date (or, if the transaction is accepted for clearing after the trade date, the Initial Payment is to be made on the first business day following the date of acceptance for clearing). ICC believes that this change from ''T+3'' settlement to ''T+1'' settlement for the Initial Payment will facilitate customer-related clearing. In addition, this change will improve margin efficiency (as margin requirements will no longer need to take into account the additional risk from a T+3 as opposed to a T+1 settlement rule).

The other proposed changes in the ICC Rules reflect updates to cross-references and defined terms and similar drafting clarifications, and do not affect the substance of the ICC Rules or cleared products.

III. Discussion

Section 19(b)(2)(B) of the Act[4] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act[5] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions.

Because the proposed rule change will accelerate the Initial Payment date, it will improve margin efficiency (as margin requirements will no longer need to take into account the additional risk from a T+3 as opposed to a T+1 settlement rule) thereby promoting the prompt and accurate clearance and settlement of derivative agreements, contracts, and transactions, and therefore is consistent with the requirements of Section 17A(b)(3)(F) of the Act.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[6] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (File No. SR–ICC–2012–02) be, and hereby is, approved.[8]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin O'Neill,

Deputy Secretary.

[FR Doc. 2012–10307 Filed 4–27–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 34–66517 (March 6, 2012), 77 FR 14578 (March 12, 2012).

[3] The Initial Payment is an obligation by either counterparty to make an upfront payment established at the time the contract is executed. *See* ICE Clear Credit Clearing Rules, Section 301(b).

[4] 15 U.S.C. 78s(b)(2)(B).

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] 15 U.S.C. 78q–1.

[7] 15 U.S.C. 78s(b)(2).

[8] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66856; File No. SR–FICC–2012–02]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving Proposed Rule Change Relating To Remove Functionality in the Government Securities Division's Rules That Is No Longer Utilized by Participants

April 25, 2012.

I. Introduction

On February 29, 2012, the Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–FICC–2012–02 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4[2] thereunder. The proposed rule change was published for comment in the **Federal Register** on March 16, 2012.[3] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description

This rule change revises certain rules of the Government Securities Division (''GSD'') to eliminate references to functions or classifications that are either technologically obsolete or no longer utilized by GSD's participants.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 15822 (March 12, 2012), 77 FR 15822 (March 16, 2012).

1. ''Non-Conversion Participants''/ ''Conversion Participants''

When first implemented, the DVP System required all participants that submitted when issued trades to resubmit those trades with final money calculations on the night of Auction Date, after the Treasury auction results were announced. Subsequent to the initial implementation, enhancements were incorporated such that the DVP System recalculated trades (repriced) based on auction results. FICC also incorporated an option whereby participants could decide if they wanted to resubmit their trades (participants who elected this option were known as ''Non-Conversion Participants'') or take FICC's repricing notification (participants who elected this option were known as ''Conversion Participants''). With the implementation of Interactive Messaging in 2000, the few remaining Non-Conversion Participants agreed to take FICC's calculations, rather than resubmit their trades to FICC. As such, FICC proposed to remove references in the rules to Non-Conversion Participants. Given that all participants who submit when-issued transactions for matching/netting are subject to accepting FICC's calculations for their trades based on Treasury auction results, the proposed rule changes replace references to ''Conversion Participants'' with ''Participants.''

2. Auction Priority Delivery Requests and Customer Delivery Requests (''CDR''s)

Auction Priority Delivery Requests, also known as CDRs, were originally built for FICC's batch file transfer, which was the initial proprietary method that participants used to submit trade activity to FICC. This functionality allowed the dealer to instruct FICC to withhold certain auction trades from the net to ensure that a priority client received its auction allotment so the trade could not be netted out during FICC's end of day netting process. However, when Interactive Messaging was implemented in 2000, this instruction type was not supported as it was no longer used. As a result, FICC proposed to remove references in the rules to Auction Priority Delivery Requests and CDRs.

3. Repo Substitution Criteria

FICC initially provided optional fields for Repo Substitution Criteria for trade submissions. However, over the years, participants generally have not used these fields. Because the fields were provided as an informational courtesy that has not been used by participants, FICC is deleting references to those fields in its rules.

In addition to the above-referenced changes, FICC proposed to make the following additional technical corrections to the GSD rules:

—Terminal interfaces and video display terminals are currently referenced in the rules. The terminals became obsolete when FICC replaced them with a web browser interface. Because the terminals are no longer in existence, FICC proposed to remove references to these methods from the GSD rules.

—Currently, the ''Schedule of Required and Other Data Submission Items from GCF Repo Transactions'' refers to ''Reverse dealer Exec. Id'' and a ''Repo dealer Exec Id.'' When FICC began using the GSD RTTM web format, these fields were eliminated because they did not have any significance for GCF repo trades. As a result, FICC proposed to remove these references from the rules.

III. Discussion

Section 19(b)(2)(B) of the Act [4] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act requires that the rules of a registered clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions.[5] The proposed rule change clarifies GSD's rules by removing references to functions or classifications that are either technologically obsolete or no longer utilized by GSD's participants. The Commission believes that these clarifications will promote the prompt and accurate clearance and settlement of securities transactions for which FICC is responsible by ensuring that GSD's rules describe only functions and classifications that are actually offered by GSD.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act [6] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) [7] of the Act, that the proposed rule change (File No. SR–FICC–2012–02) be, and hereby is, approved.[8]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–10308 Filed 4–27–12; 8:45 am]

BILLING CODE 8011–01–P

[4] 15 U.S.C. 78s(b)(2)(B).

[5] 15 U.S.C. 78a–1(b)(3)(F).

[6] 15 U.S.C. 78q–1.

[7] 15 U.S.C. 78s(b)(2).

[8] In approving this proposed rule change the Commission has considered the proposed rule's impact of efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Semi-Annual Workforce Management Conference

AGENCY: U.S. Department of Transportation, Office of the Secretary of Transportation.

ACTION: Notice of Conference.

SUMMARY: The Department of Transportation, Office of the Secretary, announces the second Semi-Annual Workforce Management Conference. The Conference will be hosted by the Secretary of Transportation, Ray LaHood. It will be held in Washington, DC. This conference was recommended by the former Future of Aviation Advisory Committee (FAAC).

DATES: The Conference will be held June 21, 2012, from 9:00 a.m. to 12:30 p.m. (EDT).

ADDRESSES: The Conference will be held at the Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, in the atrium on the ground floor of the West Building located across the street from the Navy Yard (Green Line) Metro station.

Public Access: Members of the public and members of the aviation community are invited to attend. Pre-registration is required of all attendees. (See below for registration instructions)

SUPPLEMENTARY INFORMATION: The agenda will include aviation workforce development issues that focus on the need for a future workforce with solid foundations in the STEM disciplines, best practices for addressing labor/management issues, and safety.

Registration

• Space is limited. Registration will be available on a first-come, first-serve

basis. Once the maximum number of 300 registrants has been reached, registration will close. All requests to attend this Conference must be received by close of business Tuesday, June 19.

- All foreign nationals must provide their date of birth and passport number by Monday, June 18.
- Persons with disabilities who require special assistance should advise the Department at *FAAC@dot.gov,* under the subject line of ''Special Assistance'' of their anticipated special needs as early as possible.
- To register: Send an email to *FAAC@dot.gov* under the subject line ''Registration'' with the following information:
  - Last name, First name
  - Title
  - Company or affiliation
  - Postal Address
  - Phone number
  - Email address in order for us to confirm your registration
- DOT Headquarters is a secure Federal building. All attendees will be escorted to and from the meeting area.
- Due to security requirements, leaving and reentering the building during the Conference is discouraged.
- An email will be sent to you confirming your registration along with details on security procedures for entering the U.S. Department of Transportation building.
- Entering the U.S. Department of Transportation Building:
  - A picture ID is required.
  - Admission will be at the New Jersey Avenue entrance only.
  - Registration is from 7:30 to 9:00 a.m.
  - Only pre-registered attendees may attend the meeting.
  - Attendees must be screened and pass through a metal detector.
  - No firearms are allowed in the building, including with protection detail.
  - Special accessibility requirements should be noted at time of email registration.
  - There is no facility parking and parking at public parking lots is extremely limited.
  - For convenience, we recommend use of public transportation. The Navy Yard metro stop on the Green Line (at M Street and New Jersey Ave. SE.) is across the street from DOT's New Jersey Ave. entrance. There are several buses with stops nearby. See *www.wmata.com* for more information on trip planning.
- There is no internet access and laptop computers are discouraged as additional security procedures are required.

FOR FURTHER INFORMATION CONTACT: Richard Pittaway, at 202–366–8856, or by email at *FAAC@dot.gov*.

Issued on: April 24, 2012.

Susan L. Kurland,

Assistant Secretary of Aviation and International Affairs.

[FR Doc. 2012–10298 Filed 4–27–12; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Sixth Meeting: RTCA, NextGen Advisory Committee

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Notice of a meeting of RTCA, NextGen Advisory Committee.

SUMMARY: The FAA is issuing this notice to advise the public of the sixth meeting of RTCA, NextGen Advisory Committee.

DATES: The meeting will be held May 24, 2012, from 9:00 a.m.–3:00 p.m.

ADDRESSES: The meeting will be held at The Boeing Company, TA Wilson Meeting Room 1301 SW 16th St., Renton, WA. Special Facility Access Instructions: The meeting is being held at the secured facilities of The Boeing Company. All members of the public are required to register in advance by contacting Ms. Debbie Ridgway via email *Debbie.ridgway@boeing.com* and provide the following information: Name (as it appears on your identification), Company, Phone number, Country of origin.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036: or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a NextGen Advisory Committee meeting. The agenda will include the following:

May 24, 2012

- 9:00–9:05 Opening of Meeting
  - Chairman Dave Barger, President & CEO JetBlue Airways
- 9:05–9:15 Welcome & Facility Overview
  - Sherry Carbary, Vice President Flight Services Commercial Aviation Services Boeing Commercial Airplanes, NAC Meeting Host
- 9:15–9:17 Official Statement of Designated Federal Official
  - Michael Huerta, FAA Acting Administrator
- 9:17–9:20 Review and Approval of February 3, 2012 Meeting Summary/NAC and NACSC TORs Revisions
- 9:20–9:30 Chairman's Report—Chairman Barger
- 9:30–10:00 FAA Report—Mr. Huerta
- 10:00–10:45 Review and Approve Recommendation for Submission to FAA NextGen Implementation Metrics—a recommendation for an executive-level set of metrics that capture an overall status of NextGen implementation
- 10:45–11:15 Break
- 11:15–12:15 Best Equipped Best Served
  - A facilitated discussion of an important principle for NextGen implementation
- 12:15–1:00 Lunch Break
- 1:00–1:20 Review and Approve Recommendation for Submission to FAA
  - Metroplex Mapping Results—a recommendation completing the mapping of integrated capabilities to the remaining 20 Metroplexes. This mapping fulfills the Tasking and enables an assessment of the benefits and feasibility of these site specific capabilities. Review and Approve Recommendations for Submission to FAA
- 1:20–2:45 Non-technical Barriers to Implementing NextGen
  - Anticipated Issues for NAC consideration and action at the next meeting, October 4, 2012, Dayton, Ohio
- 2:55–3:00 Other Business
- 3:00 Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on April 24, 2012.

John Raper,

Manager, Business Operations Branch, Federal Aviation Administration.

[FR Doc. 2012–10368 Filed 4–27–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Thirteenth Meeting: RTCA Special Committee 224, Airport Security Access Control Systems.

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Meeting Notice of RTCA Special Committee 224, Airport Security Access Control Systems.

SUMMARY: The FAA is issuing this notice to advise the public of the thirteenth meeting of RTCA Special Committee 224, Airport Security Access Control Systems

DATES: The meeting will be held May 30, 2012, from 10:00 a.m.–4:00 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1150 18th Street NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 203. The agenda will include the following:

May 30, 2012

- Welcome/Introductions/Administrative Remarks
- Review/Approve Summary—Twelfth Meeting
- Updates from the TSA (as required)
- Workgroup Reports
- Industry Solicitation Progress Report
- Time and Place of Next Meeting
- Any Other Business
- Adjourn
- Other Business
- Date, Place, and Time for Plenary Twenty-Two
- Plenary Adjourns

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on April 24, 2012.

John Raper,

Manager, Business Operations Branch, Federal Aviation Administration.

[FR Doc. 2012–10363 Filed 4–27–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Requirements and Registration for the U.S. DOT Motorcoach Safety Data Utilization Student Challenge

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice.

SUMMARY: FMCSA announces the U.S. DOT Motorcoach Safety Data Utilization Student Challenge. The purpose of the Challenge is to facilitate the development of mobile Web sites and applications to make FMCSA's motorcoach safety data more accessible and user-friendly. The Challenge is open to students currently enrolled at a fully-accredited higher education institution, or who plan to enroll in the fall of 2012 or the winter of 2013. The eligibility requirements and rules can be found below.

DATES: *Submission period: Start:* April 30, 2012 12:00 p.m. EDT, *end:* August 1, 2012 11:59 p.m. EDT. *Judging period: Start:* August 2, 2012 12:00 a.m. EDT, *end:* September 15, 2012 11:59 p.m. EDT. *Winner(s) announced:* September 20, 2012.

FOR FURTHER INFORMATION CONTACT: Katherine Sinrud, Office of Research and Information Technology, telephone (202) 366–3843, or email *katherine.sinrud@dot.gov.*

Award Approving Official: Dr. Kelly Leone, Associate Administrator for Research and Information Technology, FMCSA.

SUPPLEMENTARY INFORMATION:

I. Background

The Agency believes that developers, small businesses, and the general public would make better use of FMCSA-collected data if it were available in a more versatile and user-friendly format. To that end, FMCSA announces the U.S. DOT Motorcoach Safety Data Utilization Student Challenge, pursuant to the America COMPETES Act (15 U.S.C. 3719), to engage student developers to create methods for the traveling public to more meaningfully make use of motorcoach safety data. Up to two winning student-developed applications or Web sites for mobile devices will be showcased at a U.S. DOT or industry event. FMCSA will release motorcoach safety data in the form of Application Programming Interfaces (APIs) to facilitate participation.

The goal of the Challenge is to make FMCSA's motorcoach safety data easier to understand and to promote wider use among consumers, stakeholders, and policy-makers across the country. Through increased accessibility and use, the Agency seeks to help the traveling public make more informed decisions when choosing motorcoach carriers.

II. Subject of Challenge Competition

The goal of the U.S. DOT Motorcoach Safety Data Utilization Student Challenge is to showcase the potential benefits of online or mobile applications that present motorcoach safety data to the public in an innovative way resulting in improved traveler safety.

III. Eligibility Rules for Participating in the Competition

To be eligible to enter and win this Challenge, an individual or group of individuals must meet all eligibility requirements listed in the Official Rules (provided below) and have registered to participate in the competition through Challenge.gov. In addition, all entries must meet Submission Requirements listed in the Official Rules.

IV. Registration Process for Participants

Contestants must register for the contest on the Challenge.gov Web site by creating an account. Registrants will receive an email to verify their account and may then enter their submissions via the ''Enter a Submission'' tab. More information governing submissions and their content can be found in the Official Rules, which are provided below.

V. Winner Recognition/Award

Up to two winning entries will be recognized. Depending on the number of entries, the U.S. DOT may also identify submissions as honorable mentions through the U.S. DOT FMCSA Web site. The winner(s) will be recognized at a U.S. DOT or industry event to be determined. Authorized travel expenses will be paid for up to two members of each team being recognized to attend the event.

VI. Basis Upon Which Winner Will Be Selected

Challenge submissions will be scored in each of four criteria, as listed below:

1. Creativity and aesthetics of data utilization.

2. Success in translating multiple data sets into relevant information.

3. Relevance to the goal area of crafting a marketplace that better accesses and utilizes motorcoach safety data.

4. Demonstrated value in assisting people or entities who use the data to make decisions.

The product submissions will be judged by a qualified panel of FMCSA employees selected by the U.S. DOT at its sole discretion.

VII. Official Rules

Introduction: The U.S. DOT Motorcoach Safety Data Utilization Student Challenge (the ''Challenge'') is an initiative of the U.S. DOT Federal Motor Carrier Safety Administration (FMCSA). The Challenge is intended to showcase the potential benefits of online or mobile applications that present motorcoach safety data to the public in an innovative way resulting in improved traveler safety. Products may be submitted by individual students or teams of individual students (collectively, ''Contestants'').

Any elements of the Challenge described in the ''details'' section of this Challenge posting on challenge.gov are wholly incorporated as part of the rules of this contest.

Eligibility: In order to be eligible to enter and win the Challenge, individuals or groups of individuals must meet all of the following requirements:

1. Must be at least 18 years old and a citizen or permanent resident of the United States; holders of student visas that do not otherwise have permanent residency are not eligible to compete.

2. Must be currently enrolled at a higher education institution defined as an accredited public or private university or college (including community, junior, or vocational college) or plan to enroll in either the Fall of 2012 or Winter of 2013.

3. Must not be a Federal employee (including U.S. DOT employees) acting within the scope of his/her employment or working on his/her applications or submissions during assigned duty hours.

4. Must not be a Federal contractor(s) or use Federal funds from a contract to develop COMPETES Act Challenge applications or to fund efforts in support of a COMPETES Act Challenge submission.

5. Must have complied with all the Submission Requirements listed below.

In addition, each individual member in a team must be independently eligible to win. All winners or all members of the winning team must be able to certify that they have not been convicted of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act. An individual may join more than one team. An individual or group of individuals shall not be deemed ineligible because the individual or entity used Federal facilities or consulted with Federal employees during a competition if the facilities and employees are made available to all individuals and entities participating in the competition on an equitable basis.

The Challenge is subject to all applicable federal laws and regulations. Participation constitutes Contestant's full and unconditional agreement to these Official Rules and administrative decisions, which are final and binding in all matters related to the Challenge. Eligibility to be recognized as a winner is contingent upon fulfilling all requirements set forth herein.

Challenge Submission Period: The Challenge Submission Period begins on April 30, 2012, at 12 p.m. Eastern Daylight Time (EDT) and ends on August 1, 2012, at 11:59 p.m. (EDT).

How to Enter and Submission Requirements: Interested persons should read the Official Rules before entering the Competition. All Contestants must submit their product through the Challenge.gov portal. Please note, in order to submit a product, Contestants will first need to register and create an account with Challenge.gov.

Submission Format: There are two basic steps for entry:

1. *Create an interesting online or mobile application product (product) and accompanying summary:* Select a topic that addresses the goal area of Motorcoach Safety Data Utilization and create an interesting product that demonstrates an innovative method of using FMCSA data to inform the general public about motorcoach safety. Access to FMCSA data is described below under Data Sources. Entries must include the use of all 5 Behavior Analysis and Safety Information Categories (BASICs) described below. Data from additional government and/or other appropriate sources may be used in creating the product. You must identify specific data sources used. Entries may not rank motorcoach companies using any number, letter, color or icon system. Develop a summary of the product that explains your topic, how the entry improves a decision based on the general public's understanding of your topic, and what conclusions can be drawn from the application. The summary must not exceed 650 words.

2. *Submit your entry:* Prior to submitting a product, register on Challenge.gov. Registration is free. From the Competition Web page on Challenge.gov, use the ''Enter a Submission'' tab to submit the description of the online or mobile application, and provide a link to a fully functioning application hosted outside of Challenge.gov. Submissions may be updated by the submitter until the Challenge Submission Period ends.

After submission, all products may be screened by FMCSA for malicious code or other security issues. Screened submissions will be posted on the Challenge.gov competition Web page on a rolling basis. Products failing to meet Submission Requirements or other Submission screenings will be deemed ineligible to win. Posting a product to the Competition Web site does not constitute FMCSA's determination of Contestant or the online or mobile app's eligibility.

An entry into the Challenge consists of your product and accompanying summary to the U.S. DOT (together, the ''Entry Materials''). All Entry Materials must be in English. All requested information must be provided for your entry to be valid.

Submission Content: Using data sets including those provided by the U.S. DOT, create a product that provides information to motorcoach travelers and addresses one or more of FMCSA's core priorities.

1. Raise the bar for motorcoach carriers to enter the industry

2. Maintain high safety standards to remain in the motorcoach industry

3. Remove high-risk motorcoach operators from our roads and highways

Data Sources: FMCSA is providing access through Application Programming Interfaces (APIs) to data from its License and Insurance (L&I) system and the Motor Carrier Management Information System (MCMIS). The FMCSA API is available at *https://mobile.fmcsa.dot.gov/developer.*

The L&I system is a client-server and web-based application used to enter and display licensing and insurance information regarding authorized for-hire motor carriers, freight forwarders, and property brokers. It is the authoritative source for FMCSA licensing and insurance data. The MCMIS includes data from FMCSA's Safety Management System (SMS). The data provided in SMS uses all safety violations discovered at roadside, weights each one based on its crash risk,

and measures safety performance in different unsafe behavioral areas called Behavior Analysis Safety Improvement Categories (BASICs). Access to the five publicly available BASICs is available through this challenge. They are:

1. Unsafe Driving
2. Fatigued Driving
3. Driver Fitness
4. Controlled Substances/Alcohol
5. Vehicle Maintenance

Alternative/Additional Data Sources: In addition to the provided data sources, you may also use other data sources such as:

1. The National Highway Traffic Safety Administration's (NHTSA) Fatality Analysis Reporting System (FARS) database: *http://www.nhtsa.gov/FARS.*
2. U.S. Census database: *http://www.census.gov/.*
3. State and local department of transportation data.
4. Mapping information.
5. Other publicly-available and verifiable data sources as appropriate.

Any data sources outside of the provided FMCSA APIs, including those listed above, must be disclosed in your 650 word description of your product.

Submission Requirements: In order for an entry to be eligible to be recognized as a winner of this Competition, the entry must meet the following requirements:

1. *General*—Contestants must host their own online or mobile application during the submission and judging process and ensure FMCSA has continued access to the online or mobile product throughout the judging process.

2. *Availability*—Contestants must make their submissions available free to the public during the Competition and for at least one year after. In addition, each Contestant grants to the U.S. DOT and others acting on behalf of the U.S. DOT (including FMCSA), a royalty-free, non-exclusive, unlimited worldwide license to use, copy for use, perform publicly, and display publicly all parts of the Submission for the purposes of the Challenge. This license includes posting or linking to the Submission on the official U.S. DOT Web site and making it available for use by the public for an unlimited timeframe.

3. *Acceptable Platforms*—The application must be designed for the Web, a personal computer, a mobile handheld device, console, or any platform broadly accessible on the open internet.

4. *Data*—The online or mobile application must utilize, at a minimum, the Federal government data provided in the API. Information available from any publicly available Federal source or other data source (e.g. industry or map data) may be used though not all data fields or information available in these additional resources must be included. Contestants agree not to use the data or information obtained through participation in the Challenge for purposes of invasion of privacy (under appropriation, intrusion, public disclosure of private facts, false light in the public eye or other legal theory), defamation, slander, libel, violation of right of publicity, infringement of trademark, copyright or other intellectual property rights, property damage, or causing personal injury or death.

5. *Accessibility*—The app must be accessible to a wide range of users, including users with disabilities (see Federal standards under Section 508 of the Rehabilitation Act, *http://www.section508.gov/index.cfm?fuseAction=stdsdoc*).

6. *Deadlines and Modifications*—All Competition submissions must be submitted through the Challenge.gov portal by August 1, 2012 at 11:59 p.m. EDT. After the Challenge submission period closes on August 1, 2012, a submitted app must remain unchanged and unaltered until after the judging period.

7. *Intellectual Property*—The Submission must not infringe any copyright or any other rights of any third party.

8. *No U.S. DOT logo*—The online or mobile application must not use U.S. DOT's logo or official seal in the Submission, and must not claim U.S. DOT endorsement. The recognition of a winning entry in this Competition does not constitute an endorsement of a specific product by U.S. DOT or the Federal government.

9. *Functionality/Accuracy*—A Submission may be disqualified if the application fails to function as described in the description provided by the Contestant, or if the application provides inaccurate information.

10. *Security*—Submissions must be free of malware. Contestant agrees that FMCSA may screen the application to determine whether malware or other security threats may be present. FMCSA may disqualify the online or mobile application if, in FMCSA's judgment, the entry may damage government or others' equipment or operating environment.

11. *Standards of Conduct*—All Competition submissions must also adhere to the Challenge.gov Standards of Conduct at *http://challenge.gov/terms#standards.*

Judging: Prior to judging, all submitted products will be screened for Contestant eligibility, completeness of submission and malicious code. The members of the Judging panel will be selected by FMCSA at its sole discretion and will be comprised of up to ten federal employees. Judges will be screened by FMCSA to ensure they do not: (1) Have personal or financial interests in any Contestant; or (2) have a familial relationship with a Contestant. The panel will judge the Entry Materials (product and summary text) on the judging criteria identified below in order to select the awardees. Judges have the right to withdraw without advance notice in the event of circumstances beyond their control.

Challenge submissions will be scored in each of four criteria, as listed below:

1. Creativity and aesthetics of application. Like artwork, products should be designed to capture the attention of the user through creative use of visuals, layout, and animations (if applicable). How original and attractive is the product?

2. Success in translating data sets into relevant information. One aspect of the application is its potential to synthesize multiple, large datasets to deliver relevant and actionable information to the user in an innovative compelling way. How well does the product accomplish this? Does the product accomplish the goal while including data from each of the 5 BASICs?

3. Relevance to the goal area of crafting a marketplace that can better access and utilize motorcoach safety data. Does the author's submission contribute to crafting a marketplace that can better access and utilize available bus safety data? Does the product accomplish the goal without creating a ranking system?

4. Demonstrated value in assisting decision makers. Does the information presented in the product and summary shed new light on a transportation issue that would otherwise not been known?

All Decisions by the U.S. DOT are Final and Binding in All Matters Related to the Challenge.

Verification of Potential Winners: Potential winners must continue to comply with all terms and conditions of these Official Rules and winning is contingent upon fulfilling all requirements. The potential winners will be notified by email, telephone, or mail after the date of the judging. The potential winners will be required to sign and return to U.S. DOT, within ten (10) days of the date notice is sent, an Affidavit of Eligibility (certifying that they meet all of Challenge's eligibility requirements) and a Liability/Publicity Release in order to claim any recognition. In the event that a potential

winner of a Challenge is disqualified for any reason, U.S. DOT may award the applicable recognition to an alternate winner from the remaining eligible entries.

Awards: Up to two entries will be recognized as winners. Depending on the number of entries, the U.S. DOT may also give honorable mention recognition to several submissions through the U.S. DOT FMCSA Web site.

Following the announcement of the award(s), up to two winning awardees will be recognized at a U.S. DOT or industry event to be determined. Authorized travel expenses will be paid for an individual contestant who wins or up to two members of each winning team to attend the event. If a winning team consists of more than two individuals, the team must designate the two individuals who will represent the team at the event. The individuals designated to attend the event must be included in the entry package. Travelers will need to provide receipts to document travel expenses and the travel expenses will be reimbursed according to Federal Government travel rules and regulations, including 41 CFR 300–3.1 (Invitational Travel). Maximum reimbursement rates for are published by the General Services Administration at *http://www.gsa.gov/portal/category/100120;* these limits apply to the invitational travel granted to the winners of this Challenge. Travel will only be purchased, reimbursed or otherwise covered through this Challenge from origins or to destinations within the United States and U.S. Territories. No cash equivalent or substitute compensation will be made in place of the authorized travel expenses.

Entry Conditions and Release: By entering, each Contestant agrees to: (a) Comply with and be bound by these Official Rules and the decisions of the U.S. DOT and/or the Challenge judges which are binding and final in all matters relating to this Challenge; (b) release and hold harmless the U.S. DOT and any other organizations responsible for sponsoring, fulfilling, administering, advertising or promoting the Challenge, and all of their respective past and present officers, directors, employees, agents and representatives (collectively, the ''Released Parties'') from and against any and all claims, expenses, and liability, including but not limited to negligence and damages of any kind to persons and property, including but not limited to invasion of privacy (under appropriation, intrusion, public disclosure of private facts, false light in the public eye or other legal theory), defamation, slander, libel, violation of right of publicity, infringement of trademark, copyright or other intellectual property rights, property damage, or death or personal injury arising out of or relating to a Contestant's entry, creation of an entry or submission of an entry, participation in the Challenge, acceptance or use or misuse of any travel or activity related thereto and/or the broadcast, transmission, performance, exploitation or use of entry; and (c) indemnify, defend and hold harmless the U.S. DOT against any and all claims, expenses, and liabilities (including reasonable attorneys' fees) arising out of or relating to a Contestant's participation in the Challenge and/or Contestant's acceptance, use or misuse of recognition or travel expenses.

Publicity: Except where prohibited, participation in the Challenge constitutes Contestant's consent to U.S. DOT's and its agents' use of Contestant's name, likeness, photograph, voice, opinions, and/or hometown and state for promotional purposes in any media, worldwide, without further payment or consideration.

General Conditions: The U.S. DOT reserves the right to cancel, suspend and/or modify the Challenge, or any part of it, if any fraud, technical failures or any other factor beyond the U.S. DOT's reasonable control impairs the integrity or proper functioning of the Challenge, or any other reason as determined by the U.S. DOT in its sole discretion. The U.S. DOT reserves the right in its sole discretion to disqualify any individual or Contestant it finds to be tampering with the entry process or the operation of the Challenge or to be acting in violation of these Official Rules or any other promotion or in an unsportsmanlike or disruptive manner. Any attempt by any person to deliberately undermine the legitimate operation of the Challenge may be a violation of criminal and civil law, and, should such an attempt be made, the U.S. DOT reserves the right to seek damages from any such person to the fullest extent permitted by law. The U.S. DOT's failure to enforce any term of these Official Rules shall not constitute a waiver of that provision.

Limitations of Liability: The Contestant shall be liable for, and shall indemnify and hold harmless the Federal government against, all action or claims, including but not limited to those for loss of or damage to property (such as damage that may results from a virus, malware, etc. to DOT computer systems or those of the end-users of the software and/or applications), resulting from the fault, negligence, or wrongful act or omission of the Contestant.

However, based on the subject matter of the Competition, the type of work that it will possibly require, and the likelihood of any claims for death, bodily injury, or property damage, or loss potentially resulting from contest participation, Contestants are not required to obtain liability insurance or demonstrate fiscal responsibility in order to participate in this Competition.

The Released Parties are not responsible for: (1) Any incorrect or inaccurate information, whether caused by Contestants, printing errors or by any of the equipment or programming associated with or utilized in the Challenge; (2) technical failures of any kind, including, but not limited to malfunctions, interruptions, or disconnections in phone lines or network hardware or software; (3) unauthorized human intervention in any part of the entry process or the Challenge; (4) technical or human error which may occur in the administration of the Challenge or the processing of entries; or (5) any injury or damage to persons or property which may be caused, directly or indirectly, in whole or in part, from Contestant's participation in the Challenge or receipt of recognition or travel funds. If for any reason a Contestant's entry is confirmed to have been erroneously deleted, lost, or otherwise destroyed or corrupted, Contestant's sole remedy is another entry in the Challenge. No more than the stated number of winners will be recognized.

Original Work, Plagiarism, and Copyright: Contestant or teams warrants that he, she, or they are the sole author(s) and owner(s) of the Submission, and that the Submission is wholly original with the Contestant or team, and that it does not infringe any copyright or any other rights of any third party of which Contestant or team members is aware. The U.S. DOT reserves the right to not accept any entry which it believes infringes on the intellectual property rights of others.

Privacy: Any personal information provided to the U.S. DOT by submitting an entry to this Challenge is used only to communicate on matters regarding the submission and/or the Challenge. Information is not collected for commercial marketing.

Issued on: April 24, 2012.

Kelly Leone,

Associate Administrator, Research and Information Technology.

[FR Doc. 2012–10302 Filed 4–27–12; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Over-the-Road Bus Accessibility Program Grants

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Availability of Fiscal Year 2012 Funds: Solicitation of Grant Proposals.

Funds: Notice of funding availability: Solicitation of project proposals.

SUMMARY: The U.S. Department of Transportation's (DOT) Federal Transit Administration (FTA) announces the availability of funds in Fiscal Year (FY) 2012 for the Over-the-Road Bus Accessibility (OTRB) Program, initially authorized by Section 3038 of the Transportation Equity Act for the 21st Century (TEA–21). The OTRB program makes funds available to private operators of over-the-road buses to finance the incremental capital and training costs of complying with DOT's over-the-road bus accessibility regulation. The authorizing legislation calls for national solicitation of proposals, with grantees to be selected on a competitive basis. Program funds are available to intercity fixed-route providers and other OTRB providers at up to 90 percent of the project cost.

The Surface and Air Transportation Programs Extension Act of 2011, Public Law 112–30, continues the authorization of the Federal transit programs of the U.S. Department of Transportation (DOT) through March 31, 2012, and provides contract authority for this program equal to approximately one half of the amounts available in FY 2011. Approximately $8.8 million is expected to be available for the OTRB program discretionary allocation and may include other discretionary program funds that become available. The total amount of funding available will be contingent on Congressional authorization and appropriation prior to the selection of awardees, and based on the timing of such funding becoming available, may also include funding appropriated for Fiscal Year 2013.

DATES: Complete proposals for the OTRB program announced in this Notice must be submitted by 11:59 p.m. EDT on June 7, 2012. All proposals must be submitted electronically through the APPLY function at *http://www.grants.gov.* Any applicant intending to apply should initiate the process of registering on the GRANTS.GOV site immediately to ensure completion of registration before the submission deadline. Instructions for applying can be found on FTA's Web site at *http://www.fta.dot.gov/otrb* and in the ''FIND'' module of GRANTS.GOV. FTA may announce grant selections in the **Federal Register** when the competitive selection process is complete.

FOR FURTHER INFORMATION CONTACT: Contact the appropriate FTA Regional Office found at *http://www.fta.dot.gov* for proposal-specific information and issues. For general program questions, contact Blenda Younger, Office of Program Management, (202) 366–4345, email: *blenda.younger@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION:

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I. Overview

A. Authority

The program is authorized under Title 49, United States Code, Section 5338(a)(1)(c)(ii), as amended.

B. Background

OTRBs are used in intercity fixed-route service as well as other services, such as commuter, charter, and tour bus services. These services are an important element of the U.S. transportation system. TEA–21 authorized the OTRB program to assist OTRB operators in complying with the Department's OTRB Accessibility regulation, ''Transportation for Individuals with Disabilities'' (49 CFR part 37, subpart H).

Under the OTRB Accessibility regulation, all new buses obtained by large (Class I carriers, i.e., those with gross annual transportation revenues of $8.7 million or more) fixed-route carriers after October 30, 2000, must be accessible, with wheelchair lifts and tie-downs that allow passengers to ride in their own wheelchairs. The rule required 50 percent of the fixed-route operators fleets to be accessible by 2006, and 100 percent of the vehicles in their fleets to be accessible by October 29, 2012. New buses acquired by small (gross transportation revenues of less than $8.7 million annually) fixed-route operators after October 29, 2001, also are required to be lift-equipped, although they do not have a deadline for total fleet accessibility. Small operators also can provide equivalent service in lieu of obtaining accessible buses. Starting in 2001, charter and tour companies must provide service in an accessible bus on 48 hours advance notice. Fixed-route operators must also provide this kind of service on an interim basis until their fleets are completely accessible.

Operators should consult 49 CFR part 37, subpart H, regarding the acquisition of accessible vehicles and the provision of accessible service to determine the applicable section that best describes their operating characteristics. Specifications describing the design features of an accessible over-the-road bus are listed in 49 CFR part 38, subpart G.

II. Program Purpose

The purpose of the OTRB program is to improve mobility by ensuring that the transportation system is accessible, integrated, and efficient, and offers flexibility of choices. OTRB projects will improve mobility for individuals with disabilities by providing financial assistance to help make vehicles accessible. The program will also provide training to ensure drivers and others are properly trained to use accessibility features. Sensitivity training for serving patrons with disabilities is also included.

Vehicle and Service Definitions

An ''over-the-road bus'' is defined in 49 CFR 37.3 as a bus characterized by an elevated passenger deck located over a baggage compartment.

Intercity, fixed-route over-the-road bus service is regularly scheduled bus service for the general public, using an OTRB that operates with limited stops over fixed routes connecting two or more urban areas not in close proximity or connecting one or more rural communities with an urban area not in close proximity; has the capacity for transporting baggage carried by passengers; and makes meaningful connections with scheduled intercity bus service to more distant points. The application includes six factors that will be reviewed to determine eligibility for a portion of the funding available to operators that qualify under this definition.

''Other'' OTRB service means any other transportation using OTRBs, including local fixed-route service, commuter service, and charter or tour service (including tour or excursion service that includes features in addition to bus transportation such as meals, lodging, admission to points of

interest or special attractions). While some commuter service may also serve the needs of some intercity fixed-route passengers, the statute includes commuter service in the definition of ''other'' service. Commuter service providers may apply for these funds, even though the services designed to meet the needs of commuters may also provide service to intercity fixed-route passengers on an incidental basis. If a commuter service provider can document that more than 50 percent of its passengers are using the service as intercity fixed-route service, the provider may apply for the funds designated for intercity fixed-route operators.

III. Program Information

A. Award Information

Federal transit funds are available to intercity fixed-route providers and other OTRB providers at up to 90 percent of the project cost. A total of $8,800,000 is expected to be available for the program in FY 2012. Successful applicants will be awarded grants. Typical grants under this program range from $25,000 to $180,000, with most grants being less than $40,000, for lift equipment for a single vehicle.

B. Eligible Applicants

Grants will be made directly to operators of over-the-road buses. Intercity, fixed-route OTRB service providers may apply for the funds appropriated for intercity fixed-route providers in FY 2012. Applicants must establish eligibility as intercity fixed-route providers by meeting six factors identified in the application. Other OTRB service providers, including operators of local fixed-route service, commuter service, and charter or tour service may apply for the funds that were appropriated in FY 2012 for these providers. OTRB operators who provide both intercity, fixed-route service and another type of service, such as commuter, charter or tour, may apply for both categories of funds with a single application. Private for-profit operators of over-the-road buses are eligible to be direct applicants for this program. This is a departure from most other FTA programs for which the direct applicant must be a State or local public body. FTA does not award grants to public entities under this program.

Section 50 of FTA's Master Agreement, titled ''Special Provisions for Over-the-Road Bus Accessibility Projects,'' incorporates the U.S. Department of Transportation's regulations implementing the Americans with Disabilities Act of 1990 (49 CFR part 37). Section 37.213 of the implementing regulation requires private OTRB operators to file annual submissions with the Federal Motor Carrier Safety Administration's (FMCSA) Office of Data Analysis and Administration. Because compliance with all applicable Federal laws is a term and condition of grant eligibility, applicants who are not in compliance with the FMCSA filing requirements will be ineligible to participate in this program.

C. Eligible Projects

Projects to finance the incremental capital and training costs of complying with DOT's OTRB accessibility rule (49 CFR Part 37) are eligible for funding. Incremental capital costs eligible for funding include adding lifts, tie-downs, moveable seats, doors and training costs associated with using the accessibility features and serving persons with disabilities. Retrofitting vehicles with such accessibility components is also an eligible expense. Please see Buy America section for further conditions of eligibility.

FTA may award funds for costs already incurred by the applicants. Any new wheelchair accessible vehicles delivered after June 8, 1998, the date that the TEA–21 became effective, are eligible for funding under the program. Vehicles of any age that have been retrofitted with lifts and other accessibility components after June 8, 1998, are also eligible for funding.

Eligible training costs are those required by the final accessibility rule as described in 49 CFR 37.209. These activities include training in proper operation and maintenance of accessibility features and equipment, boarding assistance, securement of mobility aids, sensitive and appropriate interaction with passengers with disabilities, and handling and storage of mobility devices. The costs associated with developing training materials or providing training for local providers of OTRB services for these purposes are also eligible expenses.

FTA will not fund the incremental costs of acquiring used accessible OTRBs that were previously owned, as it may be impossible to verify whether or not FTA funds were already used to make the vehicles accessible. Also, it would be difficult to place a value on the accessibility features based upon the depreciated value of the vehicle. The legislative intent of this grant program is to increase the number of wheelchair accessible OTRBs available to persons with disabilities throughout the country. The purchase of previously-owned accessible vehicles, whether or not they were funded by FTA, does not further this objective.

FTA has sponsored the development of accessibility training materials for public transit operators. FTA-funded Project ACTION is a national technical assistance program to promote cooperation between the disability community and the transportation industry. Project ACTION provides training, resources and technical assistance to thousands of disability organizations, consumers with disabilities, and transportation operators. It maintains a resource center with up-to-date information on transportation accessibility. Project ACTION may be contacted at: Project ACTION, 1425 K Street NW., Suite 200, Washington, DC 20005, Phone: 1–800–659–6428 (TDD: (202) 347–7385), Internet address: *http://www.projectaction.org/*.

D. Cost Sharing and Matching

Federal transit funds are available to intercity fixed-route providers and other OTRB providers at up to 90 percent of the project cost. A 10 percent local match is required.

IV. Proposal and Submission Information

A. Proposal Submission Process

Project proposals must be submitted electronically through *http://www.GRANTS.GOV* by 11:59 p.m. EDT on June 7, 2012. Mail and fax submissions will not be accepted.

A complete proposal submission will consist of at least two files: (1) The SF 424 Mandatory form (downloaded from GRANTS.GOV) and (2) the OTRB supplemental form found on the FTA Web site at *http://www.fta.dot.gov/otrb*.

The supplemental form provides guidance and a consistent format for proposers to respond to the criteria outlined in this Notice of Funding Availability (NOFA). Once completed, the supplemental form must be placed in the attachments section of the SF 424 Mandatory form. Proposers must use the supplemental form and attach it to their submission in GRANTS.GOV to successfully complete the application process. A proposal submission may contain additional supporting documentation as attachments.

Within 24–48 hours after submitting an electronic application, the applicant should receive three email messages from GRANTS.GOV: (1) Confirmation of successful transmission to GRANTS.GOV, (2) confirmation of successful validation by GRANTS.GOV and (3) confirmation of successful validation by FTA. If confirmations of

successful validation are not received and a notice of failed validation or incomplete materials is received, the applicant must address the reason for the failed validation or incomplete materials, as described in the notice, and resubmit before the submission deadline. If making a resubmission for any reason, include all original attachments regardless of which attachments are updated, and check the box on the supplemental form indicating this is a resubmission.

Complete instructions on the application process can be found at *http://www.fta.dot.gov/otrb*. Important: FTA urges proposers to submit their proposals at least 72 hours prior to the due date to allow time to receive the validation message and to correct any problems that may have caused a rejection notification. Submissions after the stated submission deadlines will not be accepted. GRANTS.GOV scheduled maintenance and outage times are announced on the GRANTS.GOV Web site *http://www.GRANTS.GOV*. The deadline will not be extended due to scheduled maintenance or outages.

Proposers may submit one proposal for each project or one proposal containing multiple projects. Proposers submitting multiple projects in one proposal must be sure to clearly define each project by completing a supplemental form for each project. Supplemental forms must be added within the proposal by clicking the ''add project'' button in Section II of the supplemental form.

B. Application Guidelines

The proposal should provide information on all items for which you are requesting funding in FY 2012. If you use another company's previous proposal as a guide, remember to modify all elements as appropriate to reflect your company's situation. The proposal must include a brief project narrative in the Standard Form 424, ''Application for Federal Assistance'', and a more substantive narrative, in the Project Executive Summary, in the Supplemental FTA form. The following information *must* be included in the supplemental forms for all requests for OTRB funding.

C. Proposal Content

1. Applicant Information

This addresses basic identifying information, including:

i. Company name.

ii. Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number.

iii. Contact information for notification of project selection: Contact name, address, email address, fax and phone number.

iv. Description of services provided by company, including areas served.

v. For fixed-route carriers, whether you are a large (Class I, with gross annual transportation revenues of $8.7 million or more) or small (gross transportation revenues of less than $8.7 million annually) carrier.

vi. Existing fleet and employee information, including number of over-the-road buses used for (1) intercity fixed-route service, and (2) other service, and number of employees.

vii. If you provide both intercity fixed-route service and another type of service, such as commuter, charter or tour service, please provide an estimate of the proportion of your service that is intercity.

viii. Description of your technical, legal, and financial capacity to implement the proposed project. Include evidence that you currently possess appropriate operating authority (e.g., DOT number if you operate interstate or identifier assigned by State if you do not operate interstate service).

2. Project Information

Every proposal must:

i. Provide the Federal amount requested for each purpose for which funds are sought.

ii. Document matching funds, including amount and source.

iii. Describe project, including components to be funded (e.g., lifts, tie-downs, moveable seats, or training).

iv. Provide project timeline, including significant milestones such as date or contract for purchase of vehicle(s), and actual or expected delivery date of vehicles.

v. Address each of the five statutory evaluation criteria described in Section V.

vi. If requesting funding for intercity service, provide evidence that:

a. The applicant provides scheduled, intercity, fixed route, over-the-road bus service that interlines with one or more scheduled, intercity bus operators. (Such evidence includes applicant's membership in the National Bus Traffic Association or participation in separate interline agreements, and participation in interline tariffs or price lists issued by, or on behalf of, scheduled, intercity bus operators with whom the applicant interlines); and

b. The applicant has obtained authority from the Federal Motor Carrier Safety Administration or the Interstate Commerce Commission to operate scheduled, intercity, fixed route service; and as many of the following as are applicable;

c. The applicant is included in Russell's Official National Motor Coach Guide showing that it provides regularly scheduled, fixed route OTRB service with meaningful connections with scheduled intercity bus service to more distant points.

d. The applicant maintains a Web site showing routes and schedules of its regularly scheduled, fixed route OTRB service and its meaningful connections to other scheduled, intercity bus service.

e. The applicant maintains published schedules showing its regularly scheduled, fixed route OTRB service and its meaningful connections to other scheduled, intercity bus service.

f. The applicant participates in the International Registration Plan (IRP) apportionment program.

3. Labor Information

The Applicant agrees to comply with the terms and conditions of the Special Warranty for the Over-the-Road Bus Accessibility program that is most current as of the date of execution of the Grant Agreement or Cooperative Agreement for the project, and any alternative comparable arrangements specified by U.S. Department of Labor (DOL) for application to the Applicant's project, in accordance with DOL guidelines, ''Section 5333(b), Federal Transit Law,'' 29 CFR part 215, and any revisions thereto. Any DOL Special Warranty that may be provided and any documents cited therein are incorporated by reference and made part of the Grant Agreement. Additional information regarding grants that require referral can be found on DOL's Web site: *https://www.dol.gov/esa/olms/regs/compliance/redesign_2006/redesign2006_transitemplprotect.htm*.

D. Intergovernmental Review

This program is not generally subject to Executive Order (EO) 12372, ''Intergovernmental Review of Federal Programs.'' For more information, contact the State's Single Point of Contact (SPOC) to find out about and comply with the State's process under EO 12372. The names and addresses of the SPOCs are listed in the Office of Management and Budget's homepage at *http://www.whitehouse.gov/omb/grants/spoc.html*.

E. Funding Restrictions

Only proposals from eligible recipients for eligible activities will be considered for funding. Due to funding limitations, applicants that are selected for funding may receive less than the amount requested. FTA intends to fund as many meritorious projects as possible. In addition, geographic

diversity may be considered in FTA's award decisions. FTA may also consider other factors, such as the size of the applicant's fleet and the level of FTA funding previously awarded to applicants in prior years. Applicants will not be considered for funding as intercity fixed-route operators unless they satisfy, at a minimum, the first two factors and at least one of factors three through six listed in the Project Information section of the application; these factors are applicable to intercity fixed-route applicants.

V. Evaluation Criteria

Projects will be evaluated according to the following criteria:

1. The identified need for OTRB accessibility for persons with disabilities in the areas served by the applicant.
2. The extent to which the applicant demonstrated innovative strategies and financial commitment to providing access to OTRBs to persons with disabilities.
3. The extent to which the OTRB operator acquired equipment required by DOT's over-the-road bus accessibility rule prior to the required time-frame in the rule.
4. The extent to which financing the costs of complying with DOT's rule presents a financial hardship for the applicant.
5. The impact of accessibility requirements on the continuation of OTRB service with particular consideration of the impact of the requirements on service to rural areas and for low-income individuals.

VI. Award Administration Information

A. Review and Selection Process

In addition to other FTA staff that may review the proposals, a technical evaluation committee will review proposals under the project evaluation criteria. Members of the technical evaluation committee and other involved FTA staff reserve the right to screen and rate the proposals it receives and to seek clarification from any applicant about any statement in its application that FTA finds ambiguous and/or request additional documentation to be considered during the evaluation process to clarify information contained within the proposal.

After consideration of the findings of the technical evaluation committee, the FTA Administrator will determine the final selection and amount of funding for each project. FTA expects to announce the selected projects and notify successful applicants in August 2012.

Once successful applicants are announced, they will work with the appropriate Regional office to develop a grant application consistent with the selected proposal in FTA's Transportation Electronic Award Management System (TEAM).

Incomplete or non-responsive applications will be disqualified. Applicants that do not qualify as intercity-fixed route operators may be considered for funding in the ''other'' category using the same application. FTA will make an effort to award every qualified applicant at least one lift, and, may consider the percentage of fleet currently accessible when reviewing proposals.

B. Administrative and National Policy Requirements

1. Grant Requirements

Applicants selected for funding must include documentation necessary to meet the requirements of FTA's Nonurbanized Area Formula program (Title 49, United States Code, Section 5311). Technical assistance regarding these requirements is available from each FTA regional office. The regional offices will contact those applicants selected for funding regarding procedures for making the required certifications and assurances to FTA before grants are made.

The authority for these requirements is provided by TEA–21, Public Law 105–178, June 9, 1998, as amended by the TEA–21 Restoration Act 105–206, 112 Stat. 685, July 22, 1998; 49 U.S.C. Section 5310, note; and DOT and FTA regulations and FTA Circulars.

2. Buy America

Under the OTRB Accessibility Grant Program, FTA's Buy America regulations, 49 CFR part 661, apply to the incremental capital costs of making vehicles accessible.

Generally, Buy America applies to all accessibility equipment acquired with FTA funds, i.e., all of the manufacturing processes for the product take place in the United States. The lift, the moveable seats, and the securement devices will each be considered components for purposes of this program; accordingly, as components, each must be manufactured in the United States regardless of the origin of its respective subcomponents.

It should also be noted that FTA has issued a general public interest waiver for all purchases under the Federal ''small purchase'' threshold, which is currently $100,000. (See 49 CFR 661.7, Appendix A (e)). Because Section 3038(b) of TEA–21, limited FTA financing to the incremental capital costs of compliance with DOT's OTRB accessibility rule, the small purchase waiver applies only to the incremental cost of the accessibility features. Where more than one bus is being made accessible, the grantee must calculate the incremental cost increase of the entire procurement when determining if the small purchase waiver applies. For example, if $30,000 is the incremental cost for the accessibility features eligible under this program per bus (regardless of the Federal share contribution), then a procurement of three buses with a total such cost of $90,000, would qualify for the small purchase waiver. No special application to FTA would be required.

The grantee must obtain a certification from the bus or component manufacturer that all items included in the incremental cost for which the applicant is applying for funds meet Buy America requirements. The Buy America regulations can be found at *http://www.fta.dot.gov/buyamerica*.

3. Labor Protection

Section 3013(h) of SAFETEA–LU amended 49 U.S.C. Section 5311(j)(1) to permit the Secretary of Labor to utilize a special warranty that provides a fair and equitable arrangement to protect the interest of employees as set forth in 49 U.S.C. 5333(b). Pursuant to this authorization, the DOL amended its implementing regulations at 29 CFR part 215 (73 FR 47046, Aug. 13, 2008). On October 1, 2008, DOL began using a revised special warranty for the Section 5311 program which is appropriate for use with OTRB grants. All OTRB grants awarded after October 1, 2008 will be subject to the special warranty for labor protective arrangements under the Section 5311 program, which will be incorporated by reference in the grant agreement.

4. Planning

Applicants are encouraged to notify the appropriate State Departments of Transportation and Metropolitan Planning Organizations (MPO) in areas likely to be served by equipment made accessible through funds made available in this program. Those organizations, in turn, should take appropriate steps to inform the public, and individuals requiring fully accessible services in particular, of operators' intentions to expand the accessibility of their services. Incorporation of funded projects in the plans and transportation improvement programs of states and metropolitan areas by States and MPOs also is encouraged, but is not required.

5. Standard Assurances

The Applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The Applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The Applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and affect the implementation of the project. The Applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise. Certifications and Assurances for grants to be awarded under this program in FY 2012 are included in the FTA Certifications and Assurances for FY 2012 which were published in the **Federal Register** of November 1, 2011, and made available for electronic signature in FTA's grants system. Every applicant must submit Certification 01, ''For Each Applicant.'' Each applicant for more than $100,000 must provide both Certification 01, and, 02, the ''Lobbying Certification.''

6. Reporting

Post-award reporting requirements include submission of final Federal Financial Report and milestone report, or annual reports for grants remaining open at the end of each Federal fiscal year (September 30). Documentation is required for payment.

VII. Agency Contact(s)

Contact the appropriate FTA Regional Office at *http://www.fta.dot.gov* for proposal-specific information and issues. For general program information, contact Blenda Younger, Office of Program Management, (202) 366–4345, email: *blenda.younger@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

Issued in Washington, DC, this 25th day of April 2012.

Peter Rogoff,

Administrator.

[FR Doc. 2012–10369 Filed 4–27–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2012–0046]

Agency Requests for Approval of a New Information Collection(s): Human Subjects Experiments Related to Keyless Ignition Controls, Gear Selection Controls, and Audible Warnings

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

ACTION: Notice and request for comments.

SUMMARY: The Department of Transportation (DOT) invites public comments about our intention to request Office of Management and Budget (OMB) approval for a new information collection. The collection involves recruitment of participants, balancing the subject sample and debriefing questionnaires. The information to be collected will be used to balance the participants between younger and older age groups, genders and previous driving experience with keyless ignition, or lack thereof. These observational experiments are being conducted in support of current agency regulatory efforts that contemplate revising Federal Motor Vehicle Safety Standard No. 114 (Docket No. NHTSA–2011–0174 RIN 2127–AK88). We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995, Public Law 104–13.

DATES: Written comments should be submitted by June 29, 2012.

ADDRESSES: You may submit comments [identified by Docket No. NHTSA–2012–0046] through one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1 (202) 493–2251
- *Mail or Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Gayle Dalrymple, NVS–123, National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590. Phone: 202–366–5559. Email: *gayle.dalrymple@dot.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2127-New.

Title: Human Subjects Experiments Related to Keyless Ignition Controls, Gear Selection Controls and Audible Warnings.

Form Numbers: n/a.

Type of Review: New Information Collection.

Background: NHTSA has initiated research and rulemaking to address these issues related to consumer confusion when using ignition systems in which there is no physical key: Inability to shut off the engine and/or shift to neutral during unintended acceleration events, leaving the vehicle not in ''park'' and inadvertently leaving the vehicle without shutting off the propulsion system.[1] Evaluations of driver use of push-button start/stop controls and electronically shifted transmissions are required to support this rulemaking.

Human factors observational experiments are proposed to examine these issues. The Volpe National Transportation Systems Center (Volpe Center), which is a component of the U.S. DOT, Research and Innovative Technology Administration (RITA), has been funded to conduct this research under an Inter-Agency Agreement (IAA) with NHTSA. Under a task order contract with the Massachusetts Institute of Technology (MIT), these experiments will be conducted in a simulator at the Volpe Center by staff of the MIT Age Lab. The collection of information consists of: (1) Recruitment material and a brief eligibility questionnaire for applicants and (2) debriefing questionnaire for participants. Applicant responses to the eligibility questionnaire will be used to balance the subject sample demographically and between drivers who are naïve to keyless ignition, and those who are not. Subjects will be paid $20 to $75 depending on the required time commitment, and will be tested and debriefed individually. The purpose of the debriefing is to probe for insights into the factors that led to errors in the simulated driving and participant reactions to mitigation measures such as audible alarms.

Respondents: The Age Lab has conducted numerous experiments related to driving instrumented research vehicles and simulators, and has a panel of more than 7,000 persons in the Boston area who have indicated they would like to be participants in future experiments. Whenever the Age Lab has a new experiment, an email blast is sent to all members of this panel. The email

[1] Docket NHTSA–2011–0174 available at *www.regulations.gov.*

consists of a one-paragraph description of the experiment and the eligibility requirements, along with a reply button that connects respondents to the eligibility questionnaire. Typically, more persons apply than are needed. Staff members from the Age Lab then contact applicants individually by email to match them with available time slots. For these experiments, the subject pool will be balanced across age and gender. About two-thirds of the subjects will be naïve to cars with keyless ignition systems, while one-third will be owners of vehicles with keyless ignitions systems.

For evaluation of auditory warnings to prevent vehicle roll-away, a very short test (one response per subject) is proposed. This testing will be conducted in stationary vehicles in public parking lots using a convenience sample drawn from passers-by.

Estimated Number of Respondents: ~135 for keyless/PRNDL experiment. ~240 for roll-away warning experiment.

Estimated Number of Responses: One response per respondent to 7 to 10 questions

Estimated Total Annual Burden: Three minutes per respondent to consider and respond to recruiting questions (18.75 hours total for number of respondents needed for study, but a substantially larger and unknown number may respond).

Estimated Frequency: One time

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for the Department's performance, (b) the accuracy of the estimated burden, (c) ways for the Department to enhance the quality, utility and clarity of the information collection and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:48.

Issued on: April 24, 2012.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–10300 Filed 4–27–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Federal Motor Vehicle Motor Theft Prevention Standard; General Motors Corporation

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

ACTION: Grant of petition for exemption.

SUMMARY: This document grants in full the petition of General Motors Corporation (GM) for an exemption of the Buick Verano vehicle line in accordance with 49 CFR part 543, Exemption from the Theft Prevention Standard. This petition is granted, because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR part 541).

DATES: The exemption granted by this notice is effective beginning with the 2013 model year (MY).

FOR FURTHER INFORMATION CONTACT: Ms. Carlita Ballard, Office of International Policy, Fuel Economy, and Consumer Standards, NHTSA, W43–439, 1200 New Jersey Avenue SE., Washington, DC 20590. Ms. Ballard's phone number is (202) 366–5222. Her fax number is (202) 493–2990.

SUPPLEMENTARY INFORMATION: In a petition dated February 3, 2012, GM requested an exemption from the parts-marking requirements of the theft prevention standard (49 CFR part 541) for the Buick Verano vehicle line beginning with MY 2013. The petition requested an exemption from parts-marking pursuant to 49 CFR part 543, Exemption from Vehicle Theft Prevention Standard, based on the installation of an antitheft device as standard equipment for the entire vehicle line.

Under § 543.5(a), a manufacturer may petition NHTSA to grant an exemption for one vehicle line per model year. In its petition, GM provided a detailed description and diagram of the identity, design and location of the components of the antitheft device for the Buick Verano vehicle line. GM will install a passive, transponder-based, electronic immobilizer device (PASS-Key III+) as standard equipment on its Buick Verano vehicle line beginning with MY 2013. GM stated that the device will provide protection against unauthorized use (*i.e.,* starting and engine fueling), but will not provide any visible or audible indication of unauthorized vehicle entry (*i.e.,* flashing lights or horn alarm). GM stated that it will also offer a keyless ignition version of the PASS-Key III+ as optional equipment for the vehicle line.

The PASS-Key III+ device is designed to be active at all times without direct intervention by the vehicle operator. The device is fully armed immediately after the ignition has been turned off and the key removed. Components of the antitheft device include an electronically-coded ignition key, an antenna module, a controller module and a engine control module. The ignition key contains electronics molded into the key head, providing billions of possible electronic combinations. The electronics receive energy and data from the antenna module. Upon receipt of the data, the key will calculate a response using an internal encryption algorithm and transmit the response back to the vehicle. The antenna module translates the radio frequency signal received from the key into a digital signal and compares the received response to an internally calculated value. If the values match, the key is recognized as valid, and a password is then transmitted through a serial data link to the engine control module to enable fueling and vehicle starting. If an invalid key code is received, the PASS-Key III+ controller module will send a ''Disable Password'' to the engine control module and starting, ignition and fuel will be inhibited.

In addressing the specific content requirements of 543.6, GM provided information on the reliability and durability of its proposed device. To ensure reliability and durability of the device, GM conducted tests based on its own specified standards. GM provided a detailed list of the tests conducted to validate the device's integrity, durability and reliability, and stated that after each test, the components on the device must operate as designed. GM also stated that the design and assembly processes of the device and its components are validated for vehicle life and of performance.

GM stated that the PASS-Key III+ device has been designed to enhance the functionality and theft protection provided by its first, second and third generation PASS-Key, PASS-Key II and PASS-Key III devices. GM also referenced data provided by the American Automobile Manufacturers Association (AAMA) in support of the effectiveness of GM's PASS-Key devices in reducing and deterring motor vehicle theft. The AAMA's comments to the

agency's Preliminary Report on ''Auto Theft and Recovery Effects of the Anti-Car Theft Act of 1992 and the Motor Vehicle Theft Law Enforcement Act of 1984'', (Docket 97–042; Notice 1), showed that between MYs 1987 and 1993, the Chevrolet Camaro and Pontiac Firebird vehicle lines experienced a significant theft rate reduction after installation of a Pass-Key like antitheft device as standard equipment on the vehicle lines.

GM also stated that the theft data, as provided by the Federal Bureau of Investigation's National Crime Information Center (NCIC) and compiled by the agency, show that theft rates are lower for exempted GM models equipped with the PASS-Key systems than the theft rates for earlier models with similar appearance and construction. Based on the performance of the PASS-Key, PASS-Key II and PASS-Key III devices on other GM models, and the advanced technology utilized in PASS-Key III+ and the Keyless Access Device, GM believes that these devices will be more effective in deterring theft than the parts-marking requirements of 49 CFR part 541.

Additionally, GM stated that the PASS-Key III+ is installed as standard equipment on the Cadillac CTS vehicle line. GM was granted an exemption from the parts-marking requirements by the agency for the Cadillac CTS vehicle line beginning with the 2011 MY (See 74 FR 62385, November 27, 2009). The average theft rate using 3 MYs theft data (MYs 2007–2009) provided by the agency for the Cadillac CTS vehicle line is 1.5882.

GM believes that these devices will be more effective in deterring theft than the parts-marking requirements and that the agency should find that inclusion of the PASS-Key III+ device on the Buick Verano vehicle line is sufficient to qualify it for full exemption from the parts-marking requirements.

GM's proposed device lacks an audible or visible alarm. Therefore, this device cannot perform one of the functions listed in 49 CFR 543.6(a)(3), that is, to call attention to unauthorized attempts to enter or move the vehicle. Based on comparison of the reduction in the theft rates of Chevrolet Corvettes using a passive theft deterrent system along with an audible/visible alarm system to the reduction in theft rates for the Chevrolet Camaro and the Pontiac Firebird models equipped with a passive theft deterrent device without an alarm, GM finds that the lack of an alarm or attention-attracting device does not compromise the theft deterrent performance of a device such as PASS-Key III+ system. Theft data have indicated a decline in theft rates for vehicle lines equipped with comparable devices that have received full exemptions from the parts-marking requirements. In these instances, the agency has concluded that the lack of an audible or visible alarm has not prevented these antitheft devices from being effective protection against theft.

Pursuant to 49 U.S.C. 33106 and 49 CFR 543.7(b), the agency grants a petition for exemption from the parts-marking requirements of Part 541, either in whole or in part, if it determines that, based upon substantial evidence, the standard equipment antitheft device is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of Part 541. The agency finds that GM has provided adequate reasons for its belief that the antitheft device for the Buick Verano vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR part 541). This conclusion is based on the information GM provided about its device.

The agency concludes that the device will provide four of the five types of performance listed in § 543.6(a)(3): Promoting activation, preventing defeat or circumvention of the device by unauthorized persons, preventing operation of the vehicle by unauthorized entrants and ensuring the reliability and durability of the device.

Based on the evidence submitted by GM, the agency believes that the antitheft device for the Buick Verano vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR part 541).

For the foregoing reasons, the agency hereby grants in full GM's petition for exemption for the Buick Verano vehicle line from the parts-marking requirements of 49 CFR part 541, beginning with the 2013 model year vehicles. The agency notes that 49 CFR part 541, Appendix A–1, identifies those lines that are exempted from the Theft Prevention Standard for a given model year. 49 CFR 543.7(f) contains publication requirements incident to the disposition of all Part 543 petitions. Advanced listing, including the release of future product nameplates, the beginning model year for which the petition is granted and a general description of the antitheft device is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts marking requirements of the Theft Prevention Standard.

If GM decides not to use the exemption for this line, it shall formally notify the agency. If such a decision is made, the line must be fully marked according to the requirements under 49 CFR 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if GM wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Section 543.7(d) states that a Part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the antitheft device on which the line's exemption is based. Further, § 543.9(c)(2) provides for the submission of petitions ''to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption.''

The agency wishes to minimize the administrative burden that § 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting Part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis.* Therefore, NHTSA suggests that if the manufacturer contemplates making any changes, the effects of which might be characterized as *de minimis,* it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on: April 24, 2012.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–10301 Filed 4–27–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable On Federal Bonds: Pacific Employers Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 18 to the Treasury Department Circular 570, 2011 Revision, published July 1, 2011, at 76 FR 38892.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6850.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued under 31 U.S.C. 9305 to the following company: Pacific Employers Insurance Company (NAIC #22748). *Business Address:* 436 Walnut Street, P.O. Box 1000, Philadelphia, PA 19106. *Phone:* (215) 640–1000. *Underwriting Limitation b/:* $104,839,000. *Surety Licenses c/:* AL, AK, AZ, AR, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, VI, WA, WV, WI, WY. *Incorporated In:* Pennsylvania.

Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570 (''Circular''), 2011 Revision, to reflect this addition.

Certificates of Authority expire on June 30th each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (see 31 CFR part 223). A list of qualified companies is published annually as of July 1st in the Circular, which outlines details as to the underwriting limitations, areas in which companies are licensed to transact surety business, and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.*

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: April 10, 2012.

Laura Carrico,

Director, Financial Accounting and Services Division.

[FR Doc. 2012–10128 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable On Federal Bonds: Endurance American Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 17 to the Treasury Department Circular 570, 2011 Revision, published July 1, 2011, at 76 FR 38892.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6850.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued under 31 U.S.C. 9305 to the following company: Endurance American Insurance Company (NAIC #10641). *Business Address:* 333 Westchester Avenue, White Plains, New York 10604. *Phone:* (914) 468–8000. *Underwriting Limitation b/:* $23,566,000. *Surety Licenses c/:* AL, AK, AZ, AR, CO, DE, DC, GA, HI, ID, IL, IN, IA, KS, KY, LA, MD, MA, MI, MS, MO, MT, NE, NV, NH, NJ, NM, NY, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, WA, WV, WI, WY. *Incorporated In:* Delaware.

Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570 (''Circular''), 2011 Revision, to reflect this addition.

Certificates of Authority expire on June 30th each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (see 31 CFR part 223). A list of qualified companies is published annually as of July 1st in the Circular, which outlines details as to the underwriting limitations, areas in which companies are licensed to transact surety business, and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.*

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: April 10, 2012.

Laura Carrico,

Director, Financial Accounting and Services Division.

[FR Doc. 2012–10138 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to Executive Order 12978

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of nine individuals and three entities whose property and interests in property have been unblocked pursuant to Executive Order 12978 of October 21, 1995, ''Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers''.

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of the nine individuals and three entities identified in this notice whose property and interests in property were blocked pursuant to Executive Order 12978 of October 21, 1995, is effective on April 19, 2012.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

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

Background

On October 21, 1995, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 12978 (60 FR 54579, October 24, 1995) (the ''Order''). In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The foreign persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and the Secretary of State: (a) To play a significant role in international narcotics trafficking centered in Colombia; or (b) to materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to the Order; and (3) persons determined by the Secretary of the Treasury, in

consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated pursuant to the Order.

On April 19, 2012, the Director of OFAC removed from the SDN List the nine individuals and three entities listed below, whose property and interests in property were blocked pursuant to the Order:

Individuals

1. CORREAL GUZMAN, Gloria Ines, c/o GIAMX LTDA., Bogota, Colombia; Cedula No. 51678272 (Colombia) (individual) [SDNT].
2. GRUESO HURTADO, Ximena, c/o INCOMMERCE S.A., Cali, Colombia; DOB 19 Nov 1980; Cedula No. 66968767 (Colombia); Passport 66968767 (Colombia) (individual) [SDNT].
3. LEAL HERNANDEZ, Mauricio, c/o INCOMMERCE S.A., Cali, Colombia; DOB 24 Nov 1974; Cedula No. 94429420 (Colombia); Passport 94429420 (Colombia) (individual) [SDNT].
4. ORTIZ PALACIOS, Willington Alfonso (a.k.a. ORTIZ PALACIO, Willington Alfonso), Calle 5 No. 25–65, Cali, Colombia; Carrera 62 Bis No. 6A, Cali, Colombia; Avenida 5AN No. 23D–68 piso 2 L–113, Cali, Colombia; c/o CREACIONES DEPORTIVAS WILLINGTON LTDA., Cali, Colombia; Cedula No. 19159807 (Colombia); Passport AF582577 (Colombia) (individual) [SDNT].
5. PINZON CEDIEL, John Jairo, c/o TAURA S.A., Cali, Colombia; Cedula No. 13542013 (Colombia) (individual) [SDNT].
6. RODRIGUEZ CONRADO, Elmer Martin, c/o COPSERVIR LTDA., Bogota, Colombia; c/o LITOPHARMA, Barranquilla, Colombia; Cedula No. 8773134 (Colombia) (individual) [SDNT].
7. YEPES ALZATE, Milady, c/o OBURSATILES S.A., Cali, Colombia; DOB 9 Jan 1968; Cedula No. 31971236 (Colombia); Passport 31971236 (Colombia) (individual) [SDNT].
8. ARISTIZABAL ATEHORTUA, Jaime Alberto, c/o INVERSIONES MIGUEL RODRIGUEZ E HIJO, Cali, Colombia; c/o RADIO UNIDAS FM S.A., Cali, Colombia; c/o REVISTA DEL AMERICA LTDA., Cali, Colombia; c/o COLOR 89.5 FM STEREO, Cali, Colombia; c/o DERECHO INTEGRAL Y CIA. LTDA., Cali, Colombia; DOB 11 Oct 1968; Cedula No. 16756325 (Colombia) (individual) [SDNT].
9. AVILA DE MONDRAGON, Ana Dolores, c/o COMPAX LTDA., Cali, Colombia; c/o INVERSIONES Y CONSTRUCCIONES COSMOVALLE LTDA., Cali, Colombia; c/o INVERSIONES Y CONSTRUCCIONES ABC S.A., Cali, Colombia; DOB 22 Dec 1911; Cedula No. 29183223 (Colombia) (individual) [SDNT].

Entities

1. APOYOS DIAGNOSTICOS S.A. (a.k.a. APOYOS DIAGNOSTICOS DE OCCIDENTE S.A.; f.k.a. UNIDAD DE DIAGNOSTICO MEDICO ESPECIALIZADO LTDA.; f.k.a. ''UNIDES LTDA.''), Calle 26 No. 34–60, Tulua, Valle, Colombia; NIT #800118755–2 (Colombia) [SDNT].
2. CLINICA SAN FRANCISCO S.A. (f.k.a. CLINICA DE OCCIDENTE TULUA S.A.; f.k.a. CLINICA NUESTRA SENORA DE FATIMA S.A.), Calle 26 No. 34–60, Tulua, Valle, Colombia; NIT #800191916–1 (Colombia) [SDNT].
3. CREACIONES DEPORTIVAS WILLINGTON LTDA., Cosmocentro, Local 130, Cali, Colombia; Calle 5 No. 25–65, Cali, Colombia [SDNT].

Dated: April 19, 2012.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2012–9854 Filed 4–27–12; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2012–7

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 2012–7, New Iowa Low-Income Housing Relief Credit.

DATES: Written comments should be received on or before June 29, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Iowa Low-Income Housing Relief Credit.

OMB Number: 1545–2223.

Notice Number: Notice 2012–7.

Abstract: The Internal Revenue Service is suspending certain requirements under Section 42 of the Internal Revenue Code for low-income housing credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by flooding in Iowa between May 25, 2011 and August 1, 2011.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 500.

Estimated Average Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 125.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 24, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–10277 Filed 4–27–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Credit for Renewable Electricity Production, Refined Coal Production, and Indian Coal Production, and Publication of Inflation Adjustment Factors and Reference Prices for Calendar Year 2012; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to a publication of inflation adjustment factors and reference prices for calendar year 2012 as required by section 45(e)(2)(A) of the Internal Revenue Code (26 U.S.C. 45(e)(2)(A)), section 45(e)(8)(C)), and section 45(e)(10)(C) (26 U.S.C. 45(e)(10)(C)).

SUMMARY: This document contains corrections to a publication of inflation adjustment factors and reference prices for calendar year 2012 as required by section 45(e)(2)(A) of the Internal Revenue Code (26 U.S.C. 45(e)(2)(A)), section 45(e)(8)(C)), and section 45(e)(10)(C) (26 U.S.C. 45(e)(10)(C)), that was published in the **Federal Register** on Wednesday, April 11, 2012 (77 FR 21835). The 2012 inflation adjustment factors and reference prices are used in determining the availability of the credit for renewable electricity production.

FOR FURTHER INFORMATION CONTACT: Philip Tiegerman, or 202–622–3110 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The publication of inflation adjustment factors and reference prices for calendar year 2012 as required by section 45(e)(2)(A) of the Internal Revenue Code (26 U.S.C. 45(e)(2)(A), section 45(e)(8)(C)), and section 45(e)(10)(C) (26 U.S.C. 45(e)(10)(C)) that is the subject of this correction is under section 45 of the Internal Revenue Code.

Need for Correction

As published, the notice of the publication of inflation adjustment factors and reference prices for calendar year 2012 as required by section 45(e)(2)(A) of the Internal Revenue Code (26 U.S.C. 45(e)(2)(A), section 45(e)(8)(C)), and section 45(e)(10)(C) (26 U.S.C. 45(e)(10)(C)) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of inflation adjustment factors and reference prices for calendar year 2012 as required by section 45(e)(2)(A) of the Internal Revenue Code (26 U.S.C. 45(e)(2)(A), section 45(e)(8)(C)), and section 45(e)(10)(C) (26 U.S.C. 45(e)(10)(C)), that is the subject of FR Doc. 2010–8675, is corrected as follows:

On Page 21835, column 3, under the title ''Reference Prices'', line 9 from the bottom of the page, the language ''and $55.80 per ton for calendar year'' is corrected to read ''and $58.49 per ton for calendar year''.

On Page 21836, column 1, under the title ''Reference Prices'' line 7 from the top of the page, the language ''during calendar year 2011. Because the'' is corrected to read ''during calendar year 2012. Because the''.

LaNita VanDyke,

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

[FR Doc. 2012–10275 Filed 4–27–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Quarterly Publication of Individuals, Who Have Chosen To Expatriate

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: This notice is provided in accordance with IRC section 6039G of the Health Insurance Portability and Accountability Act (HIPPA) of 1996, as amended. This listing contains the name of each individual losing United States citizenship (within the meaning of section 877(a) or 877A) with respect to whom the Secretary received information during the quarter ending March 31, 2012. For purposes of this listing, long-term residents, as defined in section 877(e)(2), are treated as if they were citizens of the United States who lost citizenship.

Last name	First name	Middle name/initials
AABEL	NINA	
ABELANSKI	NATHALIE	CLAIRE LEVY
ACHARD	GEORGIA	EHRGOTT
ADAMSONS	GERHARD	DIETER
ADEGBESAN	BANDELE	KENNY
ADWAN	MOHAMMAD	A
AHMAD	SABEENA	
AHSANI	CYRUS	ALLEN
AICHER	MARCUS	CHRISTIAN
AKOI	GOBIND	SINGH
ALEXANDER	JOHN	LAURENCE
AMMANN	JURG	CHRISTIAN
ANDRES	DIETER	KLAUS
ANDREWS	STEVEN	JOHN
ARLEDTER	HANS	PETER
ARNAUT	DAMIR	
ARNOLD-SICKER	CHRISTINE	DENISE
ASNANI	VIMLA	ARJAN
BACHMANN-SOLDATI	PIERA	MARISA
BAHZAD	CHRISTOBEL	GRANT
BAHZAD	GEORGE	ALLEN
BARNSLEY	ALICE	KORNELIA
BARTOLO	CYNTHIA	MILVAINE
BASEHART	JOHN	ANTHONY
BATISTA	PABLO	
BECKMAN	JEREMY	JINGREN

Last name	First name	Middle name/initials
BECKWITH	THERESE	MARIE
BEDNARZ	ANN	M
BEDNARZ	ROBERT	WALTER
BEECROFT	THOMAS	LEONARD
BELOTTE	CHRISTOPHE	DAVID BENJAMIN
BELOTTE	GARRY	LUC
BELOTTE	MARIANNA	SARAH VICTORIA
BERCHTOLD	HANS	PETER
BERNATEK	BARBARA	JEAN
BERRIER	ALEXA	MARIE CHAMAY
BETTELS	CHERYL	CATE
BIERI	MARC	KEONI
BISSIG	ALEXANDRA	MARIA
BOBER	DAVID	CARL
BOLLMANN	MARIA	DEL CARMEN
BONNARD	VINCENT	DANIEL
BOUCHER	ANDREW	FRANKLIN
BOWDEN	GEORGENE	BROOKE
BOXER	VIRGINIA	ANNE
BRANCA	FLAVIO	CASTELLO
BRENNINKMEYER	THOMAS	ANTHONY
BRIDGMAN	WINSTON	ROMAINE FITZ
BRINKMANN	MARYANNE	ELIZABETH
BROECHIN	KATHARINA	ELISABETH OERTLI
BROWN	JONATHON	NOAH
BRUESTLE	URSULA	DECKER
BRUN	ERIC	CHRISTIAN
BULGARI	GIORGIO	DIMITRI
BURCKHARDT	DOMINIQUE	CLAUDINE
BURROWS	JULIANE	
BUSSMANN	ELISABETH	LANDA
CAAN	DOROTHEE	DOMENICA
CALHOUN	BRIAN	DOUGLAS
CALZAVARA	RICCARDO	BRUNO
CARRASCO	FRANCESCO	
CARRASCO	JAIME	
CARY	LISA	JANE
CHAMAY	EMILIE	MARISSA
CHAN	GLADYS	LO
CHANG	CHIAO-PO	
CHANG	JENNIFER	HYUN JEONG
CHANG	JESS	KIM
CHAPUISAT	SOPHIE	CLAIRE
CHARRON	LESLEY	JANE
CHEN	BENJAMIN	WEI JIE
CHIEW	KRISTIE	MICHELLE
CHOPDAR	ANIL	CHRISTOPHER
CHRISTENSEN	DEIDRE	
CLARK	ROBIN	
COMPARINI	JULIE	ANN
COUAILHAC	DIANNE	JOY
CRAWLEY	PETER	ALLEN
CRAWLEY	ROBERT	ALLEN
CUDDIHY	BASIL	ROBERT
DACK	SOFIE	ELIZABETH VAN T
DANIEL	MONIQUE	MERCEDES
DAYTON	GREGORY	FRANCIS
DE GLUCKSBIERG	MARIE	CAROLINE DECAZES
DE WAZIERS	ADELINE	VAN DER CRUISSE
DI RICCO	THEODOR	LOUIS
DIAZ	RALPH	JAMES
DIEZ	FERMIN	AUGUSTO
DING	NICOLE	SHANNON
DONNELLY	CLINTON	JOHN
DORSCH	KAROLINE	ELISABETH
DOSCH	PATRICK	JEAN-LOUIS
DU PASQUIER	SUZANNE	ELIZABETH
DUGDALE	JUDY	LEE
EATON	HOWARD	LESLIE
EBERT	GISELA	GERDA
EISENBERG	DENISE	
ERDIN-SORENSEN	RENEE	SUSANNE
FALCONER	JUDITH	ANN
FANG	GENG	SENG

Last name	First name	Middle name/initials
FANG	YI	CHING CHANG
FARAJ	SALEH	SULIMAN ETRAD
FARMER	STEPHEN	GEORGE
FINKELSTEIN	NATHAN	GARY
FISCHER	BERNHARD	BALTHASAR
FISLER	THOMAS	MATTHEW
FIVAZ	MATHIEU	CHARLES
FJELD	SONJA	NORENE
FLEMING	JAY	LYNNE
FLOUTY	ANTOINE	NICHOLAS
FOO	ANGELA	WEI-QIN
FORD	GLENORA	ESTHER
FOSTER	CRAIG	LITHGOW
FRANCOIS	JEAN-MARC	
FRIEDMAN	ALINDA	ROCHELLE
FRINGHIAN	CHRISTIAN	RICHARD ACHOD
FRINGHIAN	CORALINE	ISABELLE ROCHETTE
FRITZ	EVELYNE	CHARLOTTE NAVILLE
FULLERTON	ALAN	DEAN
FUREVOLD-BOLAND	ERIK	PAUL
FURLER	NICOLAS	SILVAN
FURRER	GAJA	MARIA
FURRER	JONAS	KEVIN
FURRER	SACHA	GABRIELLA
GAGNON	JOSEPH	THOMAS
GALLAGHER JR	THOMAS	JOHN
GALLO	CHRISTINA	MARIE
GANDY	JULLIE	ANN
GAY	ROLAND	HENRY
GIBBON III	ROBERT	
GILLESSEN	SILKE	
GLINES	MARGARETTA	VICTORIA
GLOMSETH	ELISABETH	ERIKSRUD
GRAHAM SR	JAMES	MICHAEL
GRAWE	KIMBERLY	LUISA
GREEN	ELLEN	HUGHES
GRETER	SUZANNE	BEATRICE
GRIEDER	CALVIN	
GRIEDER	KATHRYN	ANNE
GROB	NICOLE	ALEXANDRA
GROB	STEPHAN	ANDREAS
GROSSENBACHER	THIERRY	FABIEN
GROSSI	ANTONELLA	ILARIA
GROSSI	ELENA	FANTACCI
GROSSI	PIERFRANCESCO	LUIGI
GROSSI	PIETRO	GIUSEPPE
GROSSI	VALENTINA	GIULIA
GRUBB	STEPHANIE	DIANE
GRUBER	SEBASTION	
GRZEBINSKI	BERNARD	PETER
GUEISSAZ	MATTHIEU	PIERRE ELIE
GUJRAL	RAGNINI	
GUJRAL	VISHAL	
GUTOWSKI	JANET	ANN
GWON	KYUNG	HEE
HACKETT	WILLIAM	SHAW
HADLEY	MICHAEL	PATRICK
HAEFELI	STEPHANIE	
HAEFELI	THOMAS	HANS
HAHM	CLEMENT	TAEK
HALE	CHRISTIAN	WILLIAM LEAR
HALTER	STEFAN	FELIX
HANDELS	NANCY	PORTER FERGUSON
HANDLERY	KARINE	
HANDLERY	MARC	ANDRE
HARLOW	EDWARD	CHRISTOPHER
HART	MARTEN	RICHARD
HART	MARTEN	FOLKERT
HARTENECK	RALF	
HAY	ANASTASIA	
HERTACH	CASPAR	
HEUBACH	ISABELLE	FRANZISKA SOPHIE
HICKMAN	DOROTHY	ANNE
HIEBERT	MYRNA	FAYE

Last name	First name	Middle name/initials
HIRSHFELD	ALLEN	CHARLES
HO	RACHEL	HWEE HSIEN
HODGSON	KARIN	PETRA HAGEN
HOLST	MURIEL	ANN
HONG	CHONG-MIN	
HONG	SUE	BIN
HOPKINS	CAROLYN	MARGARET
HU JR	JEROME	SHAO-CHIANG
HUEMBELIN	SUSAN	CECILLE FLORES
HULL	ARTEMIS	HATZI
HYSJULIEN	BIRGITTA	HACKER
IORNS	SUSAN	GEBHART
ISELIN	ALEXANDRA	
JACOBS	MARGARIT	
JAMES	ROBERT	NEWTON
JAMIL	FADY	MOHAMMED
JAMIL	NADA	MOHAMMED
JANES	ROBERT	ROY
JANKOW	JOEL	CRAIG
JANSSEN	ROSEMARIE	RUTH
JENKINSON	SAMANTHA	EMMA
JEON	IKE	DOMINICUS
JEON	KAY	CHO
JERDEE	REGINA	ISOLDE
JOCHUM	ADRIENNE	GRACE
JOHNSTON	LANCE	KALLEN
JUGO	JULIE	MELINDA
KAFIE	TYARA	
KEILBAR	PETER	TIMOTHY
KELLER	PATRICIA	DORIS
KELLY	ALEXANDER	ANTHONY
KELLY	VIRGINIA	RAE
KEMPE	TOBY	NICHOLAS
KESSLER	CHRISTIAN	PATRICK
KESSLER	TOM	OLIVER
KIM	CHEOL	KYU
KIM	JAY	KYUN
KIM	SUN	POK
KIM	WON	IL
KLAINGUTI	FLORIAN	ALEXANDER
KNUP	SABRINA	
KOTHARI	VINAY	KUMAR
KREISEL	ARIK	
KRETZSCHMAR	RUBEN	MICHAEL MARTIN
KROEKER	WALTER	EDWIN
KUAN	CHUNG-MING	
KUCHLER	HANS-RUDOLF	
KUNZ	IRENE	KARIN
KUNZNER	STEFAN	VICTOR
KUO	EFFIE	LO
LAM	JASON	CHI CHUNG
LANDT	DELORES	MARIE
LANG	PETER	JEAN-PIERRE
LARAKI-SABRIER	MICHELE	GLORIA
LAU	CHERYL	MAY LING
LAWRENCE	HEATHER	BUNTING
LAY	DOROTHY	HON MAN
LE QUELLEC	FLEUR	MARIE
LEARY	DEBORAH	MAY
LEE	BENITA	YILING
LEE	JOSEPH	JAE
LEE	NAM	SOOK
LEE	RACHEL	INHAE
LEHMANN	DIETER	RENE
LEHMANN	MIGUEL	
LEIGH	RITA	CATHERINE LOUISE MICHELS
LEU	ALOIS	
LEVENE	JENNIFER	WINIFRED ANDRASKO
LEVONTIN	ETHAN	JOEL
LEWIN	ROBIN	LYNN
LEWIS	CHARLES	ALBERT
LEWIS	MARY	ELLEN
LI	ZHISHUN	

Last name	First name	Middle name/initials
LIANG	HSIAO-YUN	TANG
LIANG	PHILLIP	CHINCHIEN
LIM	FUNG	FUNG
LIN	HUIYAO	
LIN	IPANG	
LIN	RUEY	SHIUNG
LOREK	KEVIN	
LOW	BERNARD	YI-RUI
LOWTHER	JAMES	WILLIAM DOLFIN
LUBLINER	GARY	
LUEDERS	JOACHIM	HENRY TESSMAR
LUEDERS	KARIN	GABRIELE
LYBRAND	SEAN	GRADY
MACCABE	BERNARD	SHERIDAN
MAKOV	DAVID	
MAMIN	JEAN	ROBERT ALEXANDRE
MARCONI	JENNIFER	STUMP
MARINO	CLAUDIA	MARIE
MARLOW	SALLY	MILLAR
MARTIN	YASMINE	TRACY
MATTHEWS	MARCI	LORRAINE
MAZEL	JARMILA	
MCGAUGH	EDWARD	JAMES
MCGAUGH	MELANIE	AILEEN
MCKAY	DOUGLAS	MAXWELL
MCKAY	JAMES	ALEXANDER
MERTENS	DIANE	MARIE
MESSERLI	OLIVIER	JEAN-CLAUDE
MEVEL	SYLVIE	MADELEINE LOUISE
MEYER	NORMA	LESLIE SOLDATI
MILLER	BRUCE	LEE
MILLER	DAVID	ALAN
MILLET	BRUNO	
MILLET	CATHERINE	MARIE
MILNE	NATASHA	JANE
MIN	CHRIS	SHIK
MIN	STEVE	BAE
MIZRACHI	ELI	HAIM
MONTAGUE	ALEXANDRE	NICOLAS
MONTGOMERY	RONALD	PAUL
MORGAN	EDUARDO	ENRIQUE
MORRIS	LARRY	THOMAS
MORROW	LAURA	ANN
MUELLER-BLATTER	LYDIA	
MULANOVICH	CARLOS	
MULLER	CHRISTOPHER	HANS
MUNSCH	KIM	
NAGY	WILLIAM	NICHOLS
NALOS	PAUL	BERNARD
NANNESTAD	TAMMY	ANN DICKEY
NEMATI	YASHA	MEHDI
NG	JOEL	YUAN-MING
NIIMI	KEIKO	EUNICE
NO	DAVID	YOUNG SUNG
O'DONNELL	MICHAEL	J
OEHRI	ANN	MARGARET
OERTLI	BARBARA	REGULA
OERTLI	JOHANN	JAKOB
OLIVER	CHINUE	
OLIVER	MICHAEL	GEOFFEY
OUW	YINGTSE	CHEN
PAEK	KI	SON
PAHLSSON	SETH	HENRIK
PALLONE	JOSEPH	JOHN
PALLONE	RAFFAELA	ELVIA
PARK	ANDREW	QUE
PARK	GEORGE	THOMAS
PARK	MUN	SU
PATRICK	LEONA	JEAN
PAULI	JANET	ELIZABETH
PECK	NATHAN	
PEMPEK	THOMAS	KARL
PENNER	MEGAN	ELLA
PERREN-MARBACH	REGULA	SIMONE

Last name	First name	Middle name/initials
PETER	MARC	ANDREAS
PETERS	NANCY	GRETCHEN
PETIT	JEAN-FREDERICK	MARIE
PFENNINGER	ERNIE	
PFENNINGER	MONICA	BARBARA
PHEASEY	WILLIAM	EARL
PIEPER	NINA	CHRISTINA FREDERIKA
PITTMAN	CHARLENE	THEA
PLESKOT	VLASTA	DIANA
QUADERER	JEFFREY	JOSEPH
QUEK	VICTOR	EMMANUEL
QUIST	DAVID	ANDREW
RADZIWILL	PHILIP	CHARLES
RAUBER	EVELINE	KRAUS
REED-LEU	YVONNE	HELENE
REYMOND	KAREN	DORSAY
RICHNER	PHILIPP	
RIDLEY	MATTHEW	WHITE
RIETZ	MARK	PETER
RING	SEAN	ERIC
ROHR	LUKAS	
ROSSI	PAMELA	
ROUX	RICARDO	ANTONIO
RUDOLF	HANS-PETER	JOSEF
RUEGG	THOMAS	PETER
RUTH	MARTA	RENEE
RYAN	SARAH	ELIZABETH
RYU	JUNGWOON	
SAIF	ABDULLA	FAHED ABDULLA ALI
SALANT	STEPHANIE	LOUISE
SAUER	ANDREANA	MARLYSE SCANDERBEG
SAUVAGEOT	HELENE	MARIE-ANDREE
SAVERIN	EDUARDO	LUIZ
SCANDERBEG	MARCO	ANTONIO
SCHAEREN	HELEN	ADELA
SCHERRER	ROMILDA	
SCHINKEL	JULIA	SOPHIE
SCHOCH	SANDRA	EVELYN VON SALIS
SCHOLTZ	ANNA	BERTHA
SCHUETZ	BARBARA	ANTOINE
SCHUSTER	ANNETTE	HELENE
SCHWARTZ	ARIE	JACOB
SEAH	NICOLE	XIN-YUEN
SEE	ALEXANDER	
SEE	DARYL	JIAO-FU
SEEBERGER	CLAUDIA	MARINA
SEIDEL	MICHAEL	ANDREW MORITZ
SELF	DALTON	DEAN
SELF	SUZANN	CHRISTINA-HOPE
SENGER	PATRICIA	MARY
SHELL	SUSAN	LINDA
SIFRI	KHALED	CONSTANDI
SIMONS	EINAR	LOUIS ENRIQUE
SIROTA	GUEORGUI	V
SIVERS	DEREK	
SKITKA	SOOJEONG	
SLABOSZEWICZ	MARGUERITE	MARIE DECAZES
SLATER	ANDREW	WAYNE
SOOMG	SHIN	
SORG-BRODTBECK	KATHRIN	
SPAMPINATO	JOSEPH	ALBERT
STAPLETON	JAYSON	CHRISTOPHER
STENZLER	MARK	
STOJANOVSKI	EMIL	
STOLT-NIELSEN	NADIA	
STUBER	ANDREAS	PAUL
STUBER	KATRIN	
STUBER	LISA	RAE
STUMP	BEATRICE	
SUTER	MARTIN	KASPAR
SYZ	CHRISTIAN	MARTIN
SYZ	ISABEL	SUSAN
TAN	CHUAN	LIONG
TAN	WEI-EE	BEVERLY

Last name	First name	Middle name/initials
TANG	FRANK	CHIH YUAN
TANG	RACHEL	MAY HAY
TAYLOR	DUDLEY	ROBERT
TEMPESTINI	ANNA	LISA COMPERE
TEMPESTINI	CAMILLA	
TEO	RACHEL	LILING
THOMAS	ALISON	SIAN BUCHANAN
THOMAS	DAVID	MARK LAUGHARNE
THOMAS	ELIZABETH	ANN
THOMSON	ANDREW	DAVID
THRASHER	V	REBA MARTHA
TORNEY	MEGAN	ABIGAIL
TSCHURTSCHENTHALER	JOHN	MARY
TSCHURTSCHENTHALER	MARY	BETH
TURCK	MECHTHILD	
TYNDORF	EDWARD	JAN
ULRICH	WERNER	F
VAANDRAGER	SHARON	KAY
VAN CLEAF	CRAIG	THOMAS
VAN HOONACKER	GERRY	J
VAN HOONACKER	KARIN	MARIE
VAN HOONACKER	NATHALIE	CHRISTIANE
VANNOTTI	GIORGIO	ROBERTO
VEILLEUX	JULIE	GAIL
VELASQUEZ	KATHY	CATHLEEN
VELAY	AGATHE	GENEVIEVE
VELAY	AUGUSTE	MAXIME
VELAY	FELIX	DIDIER
VON CROY	CARL	PHILIPP EMANUEL PRINZ
VON GARSSEN	MARCUS	LUCAS
VON HURTER	MAXIMILIAN	LUDWIG MICHAEL
WADITSCHATKA	URSULA	
WANG	BARBARA	SHIUAN
WANG	NAN	ENG MARGARET
WANG	THOMAS	
WARTHE	JULIE	ANN
WEBER	KATJA	MONICA
WEBER	LILLIAN	ANNINA
WEDGE	WILLIAM	DAVID
WEE	WOON	SHAUN
WELLESLEY	GARRET	GRAHAM
WICK	FRANZISKA	JOAN
WIDMER	SUSAN	ELIZABETH
WIEMER	CHAD	CHRISTOPHER
WIESMANN	HANNES	THOMAS
WILDISEN-PLATTHY	ANDREA	CORINNA
WILD-SOLDATI	LIANA	LOUISA
WILHELMSEN	CATHERINE	LOVENSKIOLD
WOHLGENSINGER	DEBORAH	W. WALTON
WOHLGROTH	ALEC	ROBERT
WONG	KWOK	PING ALBERT
WONG	YEW	COLIN MUN
WOOD	MATTHEW	THOMAS
WOODS	KIRA	
WORMUS	RAPHAELLE	BRUNHELD
WU	WEN	YU
YAU	LUCY	LAU
YEW	JONATHON	
YOO	NANA	
YU	SHENG	HAU
ZAHM	JOHN	ALFRED
ZHANG	SHUJUN	
ZOESCH	CHRISTOPHER	E
ZUND	DANIEL	
ZUND	THOMY	

Dated: April 17, 2012.

Ann V. Gaudell,

Manager Team 103, Examinations Operations—Philadelphia Compliance Services.

[FR Doc. 2012–10274 Filed 4–27–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Veterans' Advisory Committee on Rehabilitation; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Veterans' Advisory Committee on Rehabilitation will be held on May 8–9, 2012, in Room 1046 at the Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC. The sessions will begin at 8 a.m. each day and adjourn at 5 p.m. on May 8 and at noon on May 9. The meeting is open to the public.

The purpose of the Committee is to provide advice to the Secretary on the rehabilitation needs of Veterans with disabilities and on the administration of VA's rehabilitation programs.

During the meeting, the Committee will receive briefing updates on various VA programs designed to enhance the rehabilitative potential of recently-discharged Veterans. Members will also begin consideration of potential recommendations to be included in the Committee's next annual report.

No time will be allocated at this meeting for oral presentations from the public. Interested parties should provide written comments for review by the Committee to Mrs. Teri Nguyen, Designated Federal Officer, VA, Veterans Benefits Administration (28), 810 Vermont Avenue NW., Washington, DC 20420, or via email at *Teri.Nguyen1@va.gov.* In the communication with the Committee, writers must identify themselves and state the organization, association or person(s) they represent. Individuals who wish to attend the meeting should contact Ms. Nguyen at (202) 461–9634.

Dated: April 24, 2012.

By Direction of the Secretary.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–10243 Filed 4–27–12; 8:45 am]

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FEDERAL REGISTER

Vol. 77 Monday,

No. 83 April 30, 2012

Part II

National Labor Relations Board

29 CFR Parts 101 and 102

Representation—Case Procedures; Final Rule

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101 and 102

RIN 3142—AA08

Representation—Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Final rule; separate concurring and dissenting statements.

SUMMARY: On June 22, 2011, the National Labor Relations Board (the Board) issued a notice of proposed rulemaking proposing various amendments of its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. Thereafter, on December 22, 2011, the National Labor Relations Board issued a final rule amending its regulations, taking effect on April 30, 2012. The final rule stated that any dissenting or concurring statements would be published separately in the **Federal Register** prior to the effective date of the rule. The purpose of this document is to publish the separate statements of Chairman Mark Gaston Pearce and Member Brian E. Hayes. Pursuant to the Board's order providing for publication of the rule and the separate statements, neither statement constitutes part of the rule or modifies the rule or the Board's approval of the rule in any way.

DATES: The effective date of the rule is unchanged. The final rule, published December 22, 2011, at 76 FR 80138, will be effective on April 30, 2012.

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570, (202) 273–1067 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The Final Rule issued on December 22, 2011, at 76 FR 80138, stated that any dissenting or concurring statements would be published separately in the **Federal Register** prior to the effective date of the rule. The concurring statement of Chairman Mark Gaston Pearce and the dissenting statement of Member Brian E. Hayes. are as follows:

Separate Concurring Statement by Chairman Pearce

Chairman Pearce, concurring:

Today the Board publishes these concurring and dissenting statements regarding the Board's final rule concerning representation-case procedures, 76 FR 80138 (Dec. 22, 2011).

Much of the dissent is a close paraphrase of the Chamber of Commerce's brief attacking this rule in federal court. See *Chamber of Commerce, et al.* v. *NLRB,* 11–2262, Docket 22 (D.D.C., brief filed Feb. 2, 2012). Counsel for the Board has already refuted those arguments in its responsive brief in that litigation. *Id.* at Docket 29 (filed Feb. 28, 2012). In light of this history, little new is said at this point.

However, for the convenience of readers who may not be familiar with that litigation, in this concurrence I will discuss the most salient flaws in the dissent. Primarily, this means recapitulating—often verbatim—the Board's papers in the litigation.

First, the rule provides an ''appropriate hearing'' under Section 9(c), and the argument to the contrary ignores the plain language, Supreme Court caselaw, and all the relevant legislative history. Next, the rule is also consistent with Section 3(b) of the Act, in letter and spirit, and preserves the opportunity to request a stay or appeal. The rulemaking process was fully consistent with all applicable legal requirements, and the Board gave the dissenter every opportunity to participate that was reasonably possible under the circumstances. Turning to the justification of the rule itself, the rule is not arbitrary and capricious. The Board considered and analyzed the relevant data, and the dissent's arguments otherwise are premised on a misunderstanding of the purpose of the rule. Finally, I reject the dissent's contentions that the public did not get a meaningful chance to comment on the issues in the rule because the rule is not a ''logical outgrowth'' of the proposal, and that employer speech rights are ''burdened'' by the rule.

Background

On June 22, 2011, the Board issued a Notice of Proposed Rulemaking (NPRM) by a 3–1 vote, with Member Hayes dissenting. 76 FR 36812. The views of the public were sharply divided, with tens of thousands of comments in favor of the proposals and comparable numbers opposing them. Other comments agreed or disagreed only in part. The Board reviewed all of the comments and testimony, and considered and deliberated on the issues for months. During the comment period, then-Chairman Liebman's term expired; the Board then faced the imminent end of the recess appointment of Member Becker and with it, the indefinite loss of a quorum.[1]

In light of this situation, on November 30, 2011, the Board held a public meeting to deliberate and vote on how to proceed with the rulemaking. At the meeting, I put forward for consideration Resolution No. 2011–1, which adopted eight of the NPRM proposals—to be published in a final rule before Member Becker's appointment ended—while deliberations continued for the rest of the proposals.

At the meeting, all Board Members discussed the resolution in depth. The resolution passed by a vote of 2–1, with Member Hayes voting against it. Pursuant to the resolution, the final rule was prepared and circulated on December 9, with revisions circulated as they were made. In circulating the draft rule, I invited all Board members to participate in the deliberations. On December 14 and 15, the Board voted, again 2–1, on a final order instructing the Board Solicitor to publish the final rule upon approval by a majority of the Board. The order provided that a dissent or other personal statement could be published separately at a later date.

Also on December 15, as Member Hayes had not yet circulated any dissent, my Chief Counsel sent an email asking what Member Hayes wished to do, and whether he would include any dissenting statement contemporaneously with the Final Rule. Member Hayes indicated that he could say whatever he needed to say in a single statement after the rule was published, and so would not be publishing a contemporaneous dissent.[2]

The rule was finalized shortly thereafter and published on December 22, 2011. In general, the rule grants regional directors greater discretionary authority, while simplifying and consolidating Board review. The primary purpose of these changes is to increase procedural efficiency by eliminating unnecessary litigation. In addition, there may be some resulting improvements in the timeliness of Board proceedings. For example, a stipulated election can typically be held in close to half the time it takes to hold the election in a fully litigated case, and it is reasonably likely that eliminating unnecessary litigation may help close

[1] 76 FR 80140–45. When the Board last lost its quorum (in 2007), it was years—816 days to be precise—until the Board was reconstituted. This time it turned out that only six days passed until three more Board members were appointed, but as discussed in greater detail below, there was no way to anticipate this development.

[2] These internal communications previously have been made public in connection with the pending litigation.

this gap. 76 FR 80155, 80149. But, again, and as discussed in greater detail below, the uselessness of a certain litigation procedure is, by itself, sufficient reason to eliminate it, and the primary purpose of the rule is to remove the most obviously unnecessary steps in the representation-case process.

Specifically, the former rules required litigation of individual eligibility issues that did not need to be decided before the election, and may in a given case not need to be decided at all. *Id.* at 80139–80140, 80164. This requirement was eliminated, and the regional offices can now control their own hearings to prevent litigation of any issue that need not be decided before the election.

The former rules provided for pre-election briefing on a fixed 7-day schedule after the hearing, even in simple cases where it was patently unnecessary. The new rule permits the regional office to choose between accepting briefing or hearing oral argument, and to determine the schedule and subject matter of any such briefing. *Id.* at 80140, 80170–71.

After the direction of election, the former rules required the parties to file an immediate interlocutory request for discretionary Board review in order to preserve their rights. *Id.* at 80140; 80172. The new rule eliminates this needless interlocutory interruption in most cases, permitting these issues to be raised instead at the conclusion of the regional proceeding. However, in ''extraordinary circumstances where it appears that the issue will otherwise evade review,'' the Board will hear an immediate special appeal. *Id.* at 80162.

The former rules suggested that the regional director should ''normally'' choose an election date at least 25 days (but no more than 30 days) after the direction of election. The express purpose of this waiting period was to give the Board an opportunity to rule on any interlocutory appeal that may be filed by a party, but even under the former rules, it did not serve this purpose: in many cases no appeal was filed, and, even where filed and granted, the election was usually held as scheduled while a ruling on the merits was pending. If the election is going to be held in any event, there is no reason to routinely wait 25 to 30 days for the election. The new rule gives the region broader discretion to select an appropriate election date. *Id.* at 80140, 80173.

Finally, the former rules generally provided for *mandatory* Board review of a ''report and recommendation'' by a *hearing officer,* without the benefit of any decision on the merits by the regional director. But the statute expressly contemplates *discretionary* Board review of decisions by the *regional director,* and the Board's experience with discretionary review has proven that it is perfectly satisfactory. The new rule provides that as to determinative challenges and objections there will always be a regional director's decision, with discretionary review by the Board. *Id.* at 80142, 80159–61, 80173–74.

I turn now to the specific points raised in the dissent.

1. Contrary to the Dissent, the Rule Provides for an ''Appropriate Hearing''

The Board has correctly and repeatedly stated that the rule provides for an ''appropriate hearing'' consistent with Section 9(c) of the statute. That section clearly states that the purpose of the pre-election hearing is to determine whether there is a question of representation:

> [T]he Board shall investigate [representation] petition[s] and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. 159(c). When is a hearing to be held? When there might be a ''question of representation.'' And what must the Board decide on the record of the hearing? Whether ''such a question of representation exists.''

That seems plain enough to me. The focus of the hearing is the existence of a question of representation. Other matters, which do not implicate the essential issue, are within the sound discretion of the Board and regional director to decide whether to hear.

The dissent is absolutely correct to state that ''the reference [in Section 9(c)] to an 'appropriate' hearing connotes a relative, flexible standard.'' As discussed below, the word ''appropriate'' was carefully chosen by Congress to grant the Board very broad discretion.

In the very next breath, however, the dissent concludes precisely the opposite, stating that ''appropriate'' means that the Board is required to hear—in each and every litigated case—evidence on a host of contested issues that do not need to be decided before the election.

That is not flexibility. To require litigation of such issues would tie the Board's hands, so that it could not adjust or control the issues litigated to fit the circumstances. By contrast, the Board's rule is explicitly discretionary, and frees the Board to take evidence on the appropriate issues and at the appropriate time for the particular case. It is the dissent, not the Board, that is trying to transform the word ''appropriate'' into an inflexible statutory limit on the form and contents of the hearing.

The statute's plain language should settle the matter. But, in case any doubt remained, the Supreme Court has already reviewed all the relevant legislative history and has expressly held that the whole point of the term ''an appropriate hearing'' in the 1935 Act is to ''confer[] broad discretion upon the Board as to the hearing [required].'' *Inland Empire Council* v. *Millis,* 325 U.S. 697, 706–710 (1945).

> [U]nder Public Resolution 44, which preceded § 9(c), the right of judicial hearing was provided. The legislative reports cited above show that this resulted in preventing a single certification after nearly a year of the resolution's operation and that one purpose of adopting the different provisions of the Wagner Act was *to avoid these consequences.* In doing so Congress accomplished its purpose *not only* by denying the right of judicial review at that stage *but also by conferring broad discretion upon the Board as to the hearing* which § 9(c) required before certification.

325 U.S. at 708 (emphases added).[3] Thus, the Board's investigation is ''informal'' and the language ''appropriate hearing'' is broad and general, designed to give ''great latitude'' to the Board. *Id.* at 706–708. As the Supreme Court stated, the purpose of this ''latitude'' is to help the Board keep its process timely, efficient, and free of the unnecessary litigation that bogged down the former process. That is precisely what the new rule is designed to do.

The dissent tries to twist *Inland Empire* to create an inflexible scheme for pre-election litigation of every issue, even if it will not be decided before the election.[4] But the Supreme Court's

[3] Public Resolution 44 (approved June 19, 1934, c. 677, 48 Stat. 1183), comprised the National Industrial Act's enforcement machinery.

[4] The language from *Inland Empire* quoted by the dissent does not answer the question in this matter. It is certainly true that the parties should have a ''full and adequate opportunity to present their objections before the * * * certification.'' *Inland Empire,* 325 U.S. at 708. But this does not answer the question here, because the overwhelming majority of such objections literally cannot be litigated until after the election: ''Objections relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly.'' Cf. *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 334 & fn.7 (1946).

Under the basic structure of Section 9(c), some issues must be litigated after the election (such as the fairness of the election campaign), and some issues must be litigated before the election (such as

Continued

opinion is squarely aimed at achieving the opposite result: increased Board flexibility in controlling the litigation.

In the quest to find some support for this inflexible view of ''appropriate,'' the dissent cites inapposite authority, including a statement by Senator Taft in 1947 and an irrelevant Third Circuit case. Then, the dissent cites a trio of terse Board decisions that have already been extensively discussed in the Board's final rule. These points are addressed in turn.

First, the dissent relies upon a passing comment in a 1947 statement by Senator Taft about a failed amendment to the NLRA. 93 Cong. Rec. 6858, 6860 (June 12, 1947). At the outset, it should be noted that such post-enactment history sheds no reliable light on the meaning of the word ''appropriate'' as used by Congress 12 years earlier. See *Huffman* v. *OPM,* 263 F.3d 1341, 1354 (Fed. Cir. 2001) and cases discussed therein.[5]

But even assuming this statement was relevant, it has been badly misinterpreted by the dissent. The dissent views Senator Taft as endorsing the litigation of eligibility questions, regardless of whether they would need to be decided. However, in the crucial words relied upon by the dissent, what Senator Taft actually said was that the Board would ''decide'' voter eligibility. Senator Taft made no mention of litigation:

> [T]he function of hearings * * * [is] to determine whether an election may properly be held at the time; and if so, to decide questions of unit and eligibility to vote.

Did Senator Taft mean that the Board must decide all questions of eligibility to vote before the election? Of course not. This would have been in conflict with the well-established challenge procedure for deciding voter eligibility post-election. The Supreme Court had expressly held—in 1946, the year before this statement was made—that the Board was allowed to wait to decide eligibility to vote via the challenge procedure. *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330–35.

So what did Senator Taft mean? He was generally describing the ''function,'' not the requirements, of hearings, and did not mean to suggest that the Board must resolve all such issues pre-election in every case.[6] And his mention of ''unit and eligibility to vote'' accurately reflected the reality that ''[b]ecause the representation election is held only within the approved unit'' (*Local 1325, Retail Clerks Intern. Ass'n* v. *NLRB,* 414 F.2d 1194, 1199 (D.C. Cir. 1969)), the designation of an appropriate unit largely determines who will vote in the election. Indeed, the definition of the unit, together with other voting eligibility formulae (such as the payroll period for eligibility), necessarily identifies the core group of eligible voters. See, e.g., *NLRB* v. *Hondo Drilling Company,* 428 F.2d 943 (5th Cir. 1970). Accordingly, Senator Taft's remarks are fully consistent with the new Rule. See 76 FR 80165 n.116.

Simply put, the dissent misinterprets Senator Taft. And, in any event, his statement—twelve years after the fact—sheds no reliable light on the intent of Congress in the Wagner Act.

Regarding *NLRB* v. *SW. Evans & Son,* 181 F.2d 427 (3d. Cir. 1950), the dissent claims that the ''inescapable inference'' is that the ''appropriate hearing * * * must permit litigation of all contested issues of substance.'' But, in fact, the Third Circuit expressly disclaimed any suggestion that it might be interpreting the ''appropriate hearing'' requirement of the statute, and relied explicitly and exclusively upon the language in the Board's regulations themselves. The court stated:

> Moreover, we need not determine whether we are presented with a situation in which the statute may be said to control on the issue of a pre-election hearing. For, in our view, the solution to the problem presented is to be found in the Rules and Regulations of the Board.

Id. at 429–30. Those rules required hearings on ''substantial issues.'' They did not and could not turn this standard into a statutory requirement of the 1935 Act.

The Board's vacated decision *Pacific Greyhound Lines,* 22 NLRB 111, 123–24 fn. 37 (1940), is also inapposite. Although the Board stated that the hearing ''may'' include many issues, this was not mandatory, and nothing in the decision suggests that the 1940 Board viewed Section 9 as mandating litigation of every voter eligibility issue prior to the election. Indeed, the focus of the litigation was actually the appropriate unit, and the Board decided to defer decision on these unit questions in part until after the ballots were opened and counted. *Id.* at 121–23.[7]

In any event, the Board is allowed to change its mind—particularly about something as irrational as a reading of the statute that would imply a requirement to litigate issues that will not be decided. Which leads to the final point in this discussion: the 1990's trio of Board cases, including *Barre-National,* regarding the pre-election hearing. Even assuming these cases rested upon the statute, rather than the regulations, the statutory analysis in these cases is non-existent. There is no meaningful discussion of the statutory language, no analysis of the legislative history or the plain language of Section 9(c), and no explanation for why it would make sense to require litigation of issues that will not be decided—in short, nothing whatsoever to substantively support the supposed interpretation of the statute. The persuasiveness of the ''analysis'' in these cases has already been fully addressed by the final rule.

The D.C. Circuit recently reiterated that ''the APA allows an agency to adopt an interpretation of its governing statute that differs from a previous interpretation and that such a change is subject to no heightened scrutiny.'' *Air Trans. Ass'n of Am.* v. *NMB,* 663 F.3d 476, 484 (D.C. Cir. 2011) (citing *FCC* v. *Fox Television Studios, Inc.,* 129 S.Ct. 1800, 1810 (2009)). The court proceeded to find that ''for purposes of APA review, the fact that the new rule reflects a change in policy matters not at all. [T]he [National Mediation] Board 'articulated a rational connection between the facts found and the choice

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the existence of a question of representation). The question here is what to do with the rest of the many and varied issues that can arise, which can be litigated either before or after the election. *Inland Empire* makes clear that the term ''appropriate'' is not designed to limit Board discretion on this issue. The dissent's efforts to read it to mean the opposite are unavailing.

Ever since *Inland Empire,* the courts have continued to take a very broad and accommodating view of what will satisfy the requirement of an ''appropriate'' pre-election hearing. In *Utica Mutual Ins. Co.* v. *Vincent,* 375 F.2d 129, 133–34 (2d Cir. 1967), for example, Judge Friendly followed the Supreme Court's statement that the ''appropriate'' hearing was within Board discretion. As the court noted, due process concerns were overblown: ''A representation hearing is simply a preliminary to an election which may or may not result in a certification; if it does, and the employer refuses to bargain, he is entitled to present in an unfair labor practice proceeding any material evidence he was prevented from introducing at a hearing under § 9(c).''

[5] For the same reason, none of the still later history cited by the dissent is relevant either.

[6] The same is true of the law review articles quoted by the dissent, none of which suggest that Section 9(c) requires litigation of issues that will not be decided. See Steven E. Abraham, *How the Taft-Hartley Act Hindered Unions,* 12 Hofstra Labor Law Journal 1, 12 (1994); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law,* 77 Minn. L. Rev. 495, 516 fn. 91, 519 fn. 102 (1993).

[7] *Pacific Greyhound Lines* also illustrates the dangers of lengthy litigation. Petitions were filed in June 1938. About 144 days later, in October 1938, a decision and direction of election was issued, which was later amended, and the election was not completed until 204 days after the petition, in late December 1938. *Id.* at 120–22. That the Board in one case from the 1930s chose to permit such lengthy proceedings does not tie the hands of all future Boards; rather, as *Inland Empire* established, the ''appropriate hearing'' is within Board discretion.

made.' '' *Id.* (quoting *City of Portland* v. *EPA,* 507 F.3d 706, 713 (D.C. Cir. 2007). So, too, here, *Barre-National* is entirely irrelevant to whether the current statutory interpretation of the Board is reasonable.[8]

Aside from *Inland Empire* (which undermines the dissent), there is no meaningful analysis of the statutory text in any of the cases cited by the dissent. Thus, there is no support for the dissent's interpretation of the statute.

2. Contrary to the Dissent, the Rule Is Consistent With Section 3(B) of the Act

The rule generally delays Board review until the conclusion of the regional proceeding. But, if a party wants immediate review or a stay, it can seek it, and it will be granted in extraordinary circumstances where the issue would otherwise evade review.

This result is not all that different from current procedures, under which pre-election review is rarely sought and very rarely granted. When the Board does grant review, it usually does not issue a decision on the merits until after the election has been held; meanwhile, pre-election stays are so rare as to be almost mythical creatures.

The rule's approach is very similar to procedures in the subpoena context, which the Supreme Court has already approved. See *NLRB* v. *Duval Jewelry Co. of Miami, Inc.,* 357 U.S. 1, 6–7 (1958). The Court held: ''One who is aggrieved by the ruling of the regional director or hearing officer can get the Board's ruling. The fact that special permission of the Board is required for the appeal is not important.'' The Court also noted that, even in meritorious special appeals, ''where an immediate ruling by the Board on a motion to revoke is not required, the Board defers its ruling until the entire case is transferred to it in normal course.'' *Id.* Here, too, special permission offers an avenue for requesting immediate review, but where immediate review is not required, the Board can simply address the issue upon completion of the regional office's processing of the case.

The dissent argues that the rule unlawfully eliminates a ''right to request'' a stay or Board review before the election. First, there is no such right in the statute. But even if there were, the rule plainly does not eliminate any such right.

The dissent argues that Section 3(b) implicitly suggests a right to request review before the election because it mentions the possibility of stays. But, by its plain terms, the statute does not speak to *when* a request for review must be decided by the Board, and the ''stay'' language reflects a grant of discretion to the Board, not a limit. Section 3(b) states in relevant part:

> The Board is [] authorized to delegate to its regional directors its powers [] to determine [issues arising in representation proceedings], except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him [], but such review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. 153(b). That the Board ''may review'' any action of a regional director does not mean that the Board must rule on requests for review at any particular point in time. Indeed, the Board sometimes decides such requests after the election. 76 FR 80168, 80172 (and cases cited therein). Nothing requires the Board to rule within a certain number of days of the regional director's action, or imposes any other time limit on review.

The ''stay'' language is not phrased as a limit on Board power. To the contrary, the language only clarifies that, whenever review is granted, either before or after the election, it will not automatically operate as a stay. The stay language of the statute expressly contemplates that the Board's failure to rule on a request for review would have no impact on the progress of ongoing regional election proceeding.[9] Nothing in the text of Section 3(b) prevents the regional director from continuing to process the election proceeding to completion while a request for review is pending.

But, even assuming that the statute somehow required an immediate opportunity to request a stay or Board review, both the former rules and the current rules provide that opportunity, through the special-appeal procedure. In a sense, the request-for-review procedure was always beside the point here, because it applied to the direction of election, whereas the request for a special appeal was available for any of the multitude of other regional office decisions made before the election.

So, if we assume that Section 3(b) required an immediate opportunity for review of ''any action'' of the region, it was always and only the special appeal that met that requirement. The dissent admits that special appeals are very rarely granted in current practice, and even admits that the special appeal will still exist under the rule. But, the dissent avers that this right to seek a stay and appeal is ''entirely illusory'' simply because it is granted under a ''severely narrow standard'' in the rule. This argument lacks merit.

Nothing in Section 3(b) even arguably speaks to the standard the Board is to apply in granting or denying review—whether pre-election or post-election. It says, again, that the Board ''may'' grant review, without imposing any limit on this discretion. As the Supreme Court has explained, ''Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination.'' *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137, 142 (1971). As the Board pointed out, ''extraordinary circumstances'' is not the same as ''no circumstances.'' 76 FR 80163. As a matter of common sense, pre-election review serves no purpose in the ordinary case, where final review is more than adequate.

3. Contrary to the Dissent, the Board Followed an Appropriate Rulemaking Procedure, and the Dissenter Had Adequate Opportunities To Participate

The dissent argues that the Board should not make rules without three affirmative votes, and that it should have waited 90 days for the dissent before publishing the rule. The dissent admits that these are discretionary choices, but contends that these choices were inadequately explained. However, under *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.,* 435 U.S. 519 (1978), the procedure that the Board follows in rulemaking is subject to only the most narrow review, and little if any explanation of these procedural choices is necessary. In any event, the Board's choices were fully explained: it makes no sense to require three affirmative votes for rulemaking,

[8] Because the dissent straightforwardly borrows the Chamber's arguments about *North Manchester* and the minority views in *Barre-National,* I would be remiss if I did not mention the shortcomings of these arguments already identified in the litigation. *North Manchester* is, at most, imprecise in its description of *Barre-National,* and there is absolutely no indication that *North Manchester* was intended to make any change to the rationale of *Barre-National.* See 328 NLRB 372, 372–73 (1999). Meanwhile, the view articulated in the concurrence and dissent of *Barre-National* demonstrates quite the opposite of Member Hayes' claims that the majority holding rests on the statute. That the concurrence was forced to make this point separately supports, rather than undermines, the Board's reading of *Barre-National* as resting on the regulations. The views of a minority of the Board about what the majority meant are not authoritative.

[9] Contrary to the dissent's reading, the stay language would not be ''render[ed] meaningless'' even if the rule completely prohibited stays (which it does not), because the statutory language is designed only to grant authority to the Board to routinely refuse to grant stays, and does not require the Board ever to exercise its power to issue specifically ordered stays.

and the Board gave the dissenter every reasonable opportunity to participate under the circumstances.

A. Rulemaking Procedure Is Within Board Discretion, and the Board Acted in Good Faith

The dissent appears to acknowledge that the legal standard for overturning the rule on a ground like this is supplied by *Vermont Yankee,* but, by also arguing that the rulemaking procedure was ''arbitrary and capricious,'' the dissent misunderstands the nature of *Vermont Yankee* review.

The ''formulation of procedures [i]s basically to be left within the discretion of the agencies.'' *Vermont Yankee,* 435 U.S. at 524. Otherwise, ''all the inherent advantages of informal rulemaking would be totally lost.'' *Id.* at 546–47 (rejecting ''Monday morning quarterbacking''); *Nat'l Classification Committee* v. *United States,* 765 F.2d 1146, 1149–52 (D.C. Cir. 1985).

Review under the arbitrary and capricious standard is not a loophole in this policy of extraordinary deference. To be sure, in some sense, arbitrary and capricious review ''imposes a general 'procedural' requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision.'' *Pension Ben. Guaranty Corp.* v. *LTV Corp.,* 496 U.S. 633, 653–55 (1990).

But, so long as the rule itself is adequately explained, the courts cannot prescribe ''specific procedural requirements that have no basis in the APA.'' *Id.;* see *Natural Res. Def. Council* v. *NRC,* 216 F.3d 1180, 1189–91 (D.C. Cir. 2000); *JEM Broadcasting Co.* v. *FCC,* 22 F.3d 320, 326–28 (D.C. Cir. 1994) (notice-and-comment rulemaking not required in agency's promulgation of ''hard-look'' rules intended to streamline license review process). Thus, it is irrelevant whether the agency explained its wholly discretionary choices about the procedure of rulemaking—that is not required by the APA. So long as the substance of this rule is adequately explained, it cannot be arbitrary and capricious.

The Supreme Court has hinted that there might be a narrow exception for ''a totally unjustified departure from well settled agency procedures of long standing,'' but such an exception—if it exists—has been applied rarely if at all. *Vermont Yankee,* 435 U.S. at 542. And, as in this case, where there are reasons to distinguish prior traditions—such as the imminent loss of an agency quorum—there is no ''totally unjustified'' departure. See *Consol. Alum. Corp.* v. *TVA,* 462 F.Supp. 464, 476 (M.D. Tenn. 1978). In the absence of extraordinary evidence of bad faith, the courts simply do not inquire into discretionary choices made regarding the rulemaking procedure. See *Air Trans. Assoc. of Am., Inc.* v. *NMB,* 663 F.3d 476, 487–88 (D.C. Cir. 2011).

Consider the contrast between the Board's procedure here and a very recent example considered by the D.C. Circuit involving National Mediation Board rulemaking. 75 FR 26062. The NMB majority, according to a letter written by the dissenter to members of Congress, at first refused to allow her to publish a dissent, and then gave the dissenter precisely 24 hours in which to consider the proposed rule and prepare her dissent—which she did. See *Air Trans. Assoc. of Am., Inc.* v. *NMB,* 663 F.3d at 487–88. If she had not met this timeline, the majority would have published without any opportunity for her to publicly express her views. *Id.*

Little if any explanation was given by the majority for this choice. But the court refused even to open discovery on the issue because, although the letter ''reflects serious intra-agency discord'' and the majority's ''treatment of their colleague fell well short of ideal,'' it did not meet the standard of a ''strong showing of bad faith or improper behavior'' and therefore was not enough to permit further inquiry. *Id.* Here, the Board's procedure was far more accommodating. If, as the D.C. Circuit held, the 24 hours provided by the NMB was enough, then the Board's procedure in this rulemaking was more than adequate. *Id.*

I have no desire to reexamine, in public, the internal details of the process leading up to the Board's issuance of the final rule. It is enough to say that a fair-minded student of the existing public record can only conclude that Member Hayes was given ample opportunity to participate in the rulemaking process and that, by his own choosing and for his own reasons, he chose to opt out for as long as possible.

There is clearly no legal requirement for three affirmative votes. The Supreme Court has held that a majority of the quorum is all the law requires. *FTC* v. *Flotill Prods., Inc.* 389 U.S. 179, 185 fn.9 (1967). So, too, as the dissent appears to concede, no law requires the Board to wait for a dissent. 76 FR 80146 & fn.26; see Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB,* 5 FIU L. Rev. 411, 431 fn.102 (2010) (observing that ''APA does not address the possibility of dissents in agency rulemakings''). Agencies can issue decisions without awaiting dissenting or other separate statements. See, e.g., *S. Cal. Edison Co.,* 124 FERC ¶ 61308, 2008 WL 4416776 at **8 (2008); Marshall J. Breger & Gary J. Edles, ''Established by Practice: the Theory and Operation of Independent Federal Agencies,'' 52 Admin. L. Rev. 1111, 1248–49, 1256–57, 1262–63, 1288 (2000) (noting that the Farm Credit Administration, the Federal Energy Regulatory Commission, the Federal Maritime Commission, and the Surface Transportation Board all allow this practice).

B. The Board had Good Reason To Issue the Final Rule Without Waiting for a Dissent

The dissent's suggestion that the Board should nonetheless be bound by past agency practice is also bad policy. Internal agency procedure is subject to extraordinary deference for good reason. Administrative efficiency demands that agencies be permitted to adapt internal procedures based on the particular circumstances in which they find themselves. *See FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940). To transform very limited past agency experience into rigid internal procedural requirements would deprive the agency of the essential ability to adapt its procedures to the differing needs imposed by differing circumstances.

The error of the dissent's suggestion becomes even more obvious when the agency experience and procedure at issue here are examined. In arguing that the final rule should not have issued without a contemporaneous dissent, the dissent relies on an ''unbroken 76-year practice.'' That cited ''practice'' consists of just two final rules that included a dissent, issued in 1989 and 2011, respectively, and only one in which Member Hayes was not the dissenter.[10] Board policy ES 01–01, upon which the dissent relies, is expressly limited to case adjudications, as evident in the terms ''full Board or Panel cases'' in the policy. See NLRB Executive Secretary's Memorandum No. 01–1, Timely Circulation of Dissenting/Concurring Opinions (January 19, 2001). Thus, even if a well-established internal practice could bind an agency in some instances, this would not be such an occasion.

It is also significant that the Board was facing unusual circumstances at the time that it ordered issuance of the rule with any dissent or concurrence to issue on a later date. The Supreme Court had recently ruled that the Board could not issue decisions without a quorum of at

[10] The dissent also cites two notices of proposed rulemaking that included a dissent, both published within the last year and a half, and both with Member Hayes as the lone dissenter.

least three members in place, *New Process Steel L.P.* v. *NLRB,* U.S., 130 S.Ct. 2635, 2639–42 (2010), and the appointment of one of the Board's three members was set to expire at the end of the congressional session, no later than January 3, 2012, and possibly weeks earlier. The last time that the Board's membership had fallen to two, it had taken over 27 months for additional members to be installed. The Board had expended significant resources in the rulemaking effort, resources that might very well have been wasted if the Board lost a quorum before the process reached fruition. Under these circumstances, it was perfectly reasonable for the Board to defer the publication of members' personal statements, rather than delay issuance of the rule beyond the date when the Board would lose its quorum in order to permit those personal statements to be published simultaneously with the rule.

We now know that the Board did lose its quorum, but only for a few days. Around noon on January 3, 2012, Member Becker's appointment ended. On January 9, 2012, three new members were sworn in pursuant to recess appointments by the President, bringing the Board to full strength.

The dissent argues—in hindsight—that these circumstances did not warrant any departure from procedures that would ordinarily have been followed. At the time, however, that was not how the Board, including Member Hayes, assessed the situation. In November and December 2011, the Board issued a series of orders and rules delegating some of the Board's functions in the absence of a quorum and creating a new Subpart X of the Board's Rules and Regulations contingently modifying some of the Board's procedures.[11] The orders recited that the Board ''anticipate[d] that in the near future it may, for a temporary period, have fewer than three Members of its full complement of five Members,'' specifically citing the approaching end of Member Becker's service.[12] Each of these measures was deemed to be necessary in order to ''assure that the Agency [would] be able to meet its obligations to the public to the greatest extent possible.'' [13] And each of these measures was approved by all of the members of the Board, including Member Hayes.[14]

The dissent also asserts that the December 14 announcement of the President's intention to nominate Sharon Block and Richard Griffin for seats on the Board was an indication that new member appointments were imminent. However, it ignores the facts that Terence Flynn's nomination had been pending for almost a year at the time of his appointment, and that the only other recess appointments to the Board by President Obama, those of Craig Becker and myself, had been made more than eleven months after the announcement of intent to nominate. In short, there was every reason to believe that the Board would be without a quorum for a substantial period of time.

Similar concerns were persuasive in *Consolidated Aluminum,* to give one example, where the TVA sped up its decision-making process because the resignation of one of its members threatened to deprive the agency of a quorum. 462 F.Supp. at 472. The court held that, even assuming that the TVA had deviated from a ''well settled'' tradition, the change was lawful for many reasons, including because the impending loss of a quorum was good reason to move quickly. *Id.* at 476. Thus, here, even if ES–01–1 were somehow binding and applicable to rulemaking (neither of which is true), departure is permitted on a ''case-by-case basis'' for ''good cause.'' NLRB Executive Secretary's Memorandum No. 01–1 at 2. The imminent loss of a quorum was good cause to give the dissenter 90 days to draft a dissent after publication of the rule, but before the effective date.

Justice Ginsburg's article cited by the dissent points out the value of dissenting opinions as a vehicle for the exchange of ideas among members of a collegial decision-making body. Dissents are not, however, the only such vehicle. Significantly, my colleague does not assert that he was in any way deprived of an opportunity to engage in a collegial decision-making process.

The procedure followed here accommodated the concerns addressed in Justice Ginsburg's article to the greatest extent possible while addressing the exigencies of the possibility of a loss of quorum. Indeed, the Supreme Court itself has issued a decision with dissent to follow when time constraints so required. *SEC* v. *Chenery Corp.,* 332 U.S. 194, 209 (1947) (releasing the majority opinion before the dissent, and stating that dissent would follow because there was ''not now opportunity for a response adequate to the issues raised * * * Accordingly, the detailed grounds for dissent will be filed in due course.'').

The dissenter has had ample opportunity to participate. My email to Member Hayes on December 9 was an open invitation to him to engage with his colleagues, and, if he so chose, draft a contemporaneous dissent. He had sufficient time to do so, and indeed could have drafted one dissent to accompany the rule, followed by the longer statement published today. He chose otherwise. On December 15th my Chief Counsel sent an email asking whether the dissenter wished to include any dissenting statement in the Final Rule. The dissenter indicated that he did not, because he could add a dissent at a later date, and could say whatever he needed to say in a single statement. It seems unfair to blame the Board for the loss of an opportunity that the dissenter deliberately chose not to take.[15]

Finally, the issues that are raised in Member Hayes' statement today show that the Board was fully aware of his policy concerns about the rule when it issued the final rule, and so would likely have gained little from a written dissent. That a draft dissent could, in some cases, have some influence on the majority is therefore of little consequence here.

The Board had good cause to move forward with the rule without waiting any longer.

C. The Board Explained Why There Is No Reason To Require Three ''Yes'' Votes for Rulemaking

The Board acted by a majority vote of the quorum, as authorized by statute. Requiring an additional, third ''yes'' vote makes no sense for rulemaking. 76 FR 80145–46. The Board has a tradition of requiring a third vote to overturn precedent in adjudication, but the whole point of the tradition is to provide stability to an inherently unstable adjudicatory process for making rules of law. *Id.* This purpose flows directly from the fact that ''[u]nlike other federal agencies, the NLRB promulgates nearly all of its legal rules through adjudication rather than rulemaking.'' *Local Joint Exec. Bd. of Las Vegas* v. *NLRB,* 657 F.3d 865, 872

[11] Order Contingently Delegating Authority to the General Counsel, 76 FR 69768 (Nov. 9, 2011); Order Contingently Delegating Authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge, 76 FR 73719 (Nov. 29, 2011); Special Procedural Rules Governing Periods When the National Labor Relations Board Lacks a Quorum of Members, 76 FR 77699 (Dec. 14, 2011).

[12] 76 FR 69768; 76 FR 73719.

[13] *Id.*

[14] A fourth measure, adding a fifth section to Subpart X concerning representation cases, was not approved by Member Hayes. 76 FR 82131, 82132 (Dec. 30, 2011). As recounted above in the ''Background'' section, Member Hayes also voted against the order providing for publication of the final rule with separate dissenting and concurring statements to be published at a later date.

[15] As previously explained, these internal Board communications were previously made public in connection with the litigation challenging the Rule.

(9th Cir. 2011); see also Samuel Estreicher, ''Policy Oscillation at the National Labor Relations Board: A Plea for Rulemaking,'' 37 Admin. L. Rev 163 (1985) (explaining in detail how ''overruling'' past cases through the rulemaking process would lead to greater certainty and consistency in the law). Thus, where the Board does utilize rulemaking, the basic purpose of the tradition is inapplicable.

The dissent apparently maintains that notice-and-comment rulemaking does not give the rule any added stability over adjudication. In this view, the Board could mechanically and rapidly issue ''another proposed rule revision, another notice-and-comment period, and a rationally justified rule.'' This is a curious supposition, particularly when countless commentators on Board practice, Congressional encouragement of rulemaking generally, the collective administrative experience of the federal government, past Board experience with rulemaking, hints from the Supreme Court, and basic common sense uniformly suggest that rulemaking is more stable than adjudication. The Board's decision here was reasonably explained.[16]

4. The Rule Was Adequately Explained

The dissent denounces a caricature of the rule as arbitrary and capricious, while ignoring the reasoned explanation that the Board actually provided for the rule. The structure of the dissent's argument appears to be as follows: (1) The sole purpose of the rule is to have faster representation proceedings; but (2) those proceedings are (generally) fast enough already; and, in any event, (3) the Board did not consider statistically whether each change in the rule will necessarily lead to faster proceedings. I will address the first two points in turn, then analyze the particular changes in the rule.

From the outset, the dissent fails to come to terms with the actual rule's principles of good administrative practice, focusing instead almost exclusively on how the rule will lessen delay. The dissent's focus on delay and time leads it further and further from adequately grappling with the Board's primary and clearly-articulated reason for propounding the rule: to ''reduce unnecessary litigation.'' [17] Unnecessary litigation, even when not accompanied by delay, can and should be eliminated. The dissent entirely misses this point. And so, the dissent wonders why the Board focuses on litigation, when there are other sources of delay. The answer is that this rule is primarily about reducing unnecessary litigation, with reducing delay as an important but collateral purpose. According to the dissent, the Board assumes that litigation always leads to undesirable delay. The Board does no such thing: It simply posits that litigation that is unnecessary is also undesirable.

In focusing on time, the dissent pretends that the rule's changes are designed solely to ensure a union's rapid certification, thus implicitly suggesting that the rule's purpose is improper. But the rule's improved procedures apply equally to decertification elections, thus helping employees to get the election they desire, whether to certify or decertify a bargaining representative, without wading through litigation that is unnecessary and costly to the parties and the Board. That other changes to the procedure might provide additional benefits is good reason to pursue further rulemaking, but it is not good reason to invalidate this rule.

The dissent then criticizes the Board for not adequately discussing the Board's time target statistics. Yet what the dissent primarily offers in response is the simplistic assertion that because the agency is meeting its current time targets for representation case processing, there can be no reason to make any changes. This is a disconcerting stance, to say the least. As explained in both the NPRM (76 FR 36813–14) and the final rule (76 FR 80155), for decades the Board has continually strived to process representation cases more quickly and efficiently, and the targets have accordingly been adjusted downward over time. Under the dissent's reasoning, in any given year when the agency was meeting its then-applicable time targets, the agency should have left well enough alone and should not have engaged in any analysis about how the process might be improved.

In my view, there is nothing magical about the time targets now or those that existed decades ago. As stressed in the rule, the existing time targets reflect the limits imposed by the Board's current rules. That the Board seeks to, and does, meet its current targets in most instances is commendable but irrelevant to whether additional improvements may be made by amending the rules. 76 FR 80148.

Nevertheless, even taking the dissent's misguided focus on current time targets at face value, it is easy to see a justification for the rule's efforts to make the process more timely. As the Board stressed, the changes in the rule focus on the subset of cases in which the parties do not enter into an election agreement and instead proceed to a pre-election hearing. And, as further discussed in the rule, the median time to process those cases has ranged from 64 to 70 days over the past five years. 76 FR 80155. Yet, as the dissent points out, the agency currently strives to move representation cases from petition to election in a median of 42 days, far faster than it takes the agency to process litigated cases. The agency also attempts to process 90% of cases from petition to election within 56 days. But the garden-variety litigated case misses even this generous goal. In short, under the current system of case processing, we have shown an inability to regularly move cases (whether in the context of initial certification or decertification) through the pre-election process within even the existing 56 day time target for the tail of our cases, unless we can somehow convince the parties not to exercise their right to litigate. This is not acceptable. The Board should be able to process litigated cases in a more timely fashion. As described below and in the final rule, some of the changes will in fact result in more timely processing of litigated cases.

In any event, the rule relies upon statistical evidence where appropriate. For example, in deciding to move the request for review process from before to after the election, the rule relies, in part, on data showing that in recent years review was granted pursuant to less than 12% of requests and that less than 5% of regional directors' decisions were reversed. 76 FR 80172 fn. 140. Notably, the dissent fails to meaningfully engage these statistics and instead offers a handful of cases that demonstrate only the uncontroversial proposition that the issues raised via requests for review are not always meritless. The ironies here are twofold. First, this is exactly what the dissent accuses the Board of: ''shooting ducks in a barrel'' through anecdotal identification of individual representation cases rather than identifying problematic patterns. Second, as discussed below, the cases picked by the dissent run directly counter to the dissent's assertion that eliminating the pre-election request for review will lead to unnecessary elections. For in each of the cited cases, by the time that the Board judged the regional director's decision to be in error, the election had already been run.

In sum, the dissent's focus on delay blinds it to every other principle of good

[16] Responses concerning the procedural nature of the rule, and whether *Barre-National* was ''overruled,'' are contained elsewhere in this statement.

[17] See, e.g., 76 FR 80138; Explanation of Election Process Changes, available at *http://www.nlrb.gov/node/3608.*

administrative practice. With that in mind, let us consider each of the changes discussed by the dissent, and show how the rule truly does eliminate needless litigation.

A. Evidence About Challenged Voters Is Irrelevant at the Pre-Election Hearing

The dissent correctly points out that pre-election hearings are often short under current rules. The dissent's conclusion, however, that there is therefore no reason to exclude irrelevant evidence simply does not follow.

Courts routinely refuse irrelevant evidence, see Fed. R. Evid. 401(b) (evidence must be ''of consequence in determining the action''); *Wood* v. *State of Alaska,* 957 F. 2d 1544, 1550 (9th Cir. 1992) (holding that there is no constitutional right to present irrelevant evidence), as do agencies, even in the far more rigorous APA adjudications, 5 U.S.C. 556(d) (''[T]he agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.'').

In representation cases, the Board and the General Counsel have long maintained that it is important to avoid a cluttered record at the pre-election hearing. Guidance documents are emphatic on this point. For example, consider the NLRB Hearing Officer's Guide: [18]

> The hearing officer must ensure that the * * * record is free of cumulative or irrelevant testimony.'' ''The hearing officer has the authority to seek stipulations, *confine the taking of evidence to relevant disputed issues* and exclude irrelevant and cumulative material.'' (emphasis added) ''The hearing officer's role is to guide, direct and control the presentation of evidence at the hearing * * * While the record must be complete, it is also the duty of the hearing officer to keep the record *as short as is commensurate with its being complete.''* (emphasis added) ''The hearing officer should guide, direct and control the hearing, excluding irrelevant and cumulative material and not allowing the record to be cluttered with evidence submitted 'for what it's worth.' '' ''Exhibits are not admissible unless relevant and material, even though no party objects to their receipt. Even if no party objects to an exhibit, the hearing officer should inquire about the relevancy of the document and what it is intended to show. *The hearing officer can exercise his or her discretion and determine whether the documents are material and relevant to the issues for hearing.''* (emphasis added).

The Board's interest here is in keeping ''the record as short as is commensurate with its being complete'' on the relevant questions. *Id.* at 1. That is unquestionably a legitimate rationale, and advanced statistical analysis is simply not necessary to support it.

This legitimate goal of administrative economy includes prohibiting litigation of issues that should instead be resolved through the challenge procedure. For example, the hearing officer routinely excludes evidence about the eligibility to vote of striking employees: ''Voting eligibility of strikers and strike replacements are not generally litigated at a pre-election hearing. They are more commonly disposed of through challenged ballot procedures.'' *Id.* at 20. As the Board noted in *Mariah, Inc.,* 322 NLRB 586, fn.1 (1996) (citations omitted):

> It is beyond cavil that the role of the hearing officer is to ensure a record that is both complete and concise. Here, the hearing officer, consistent with this duty, exercised her authority to exclude irrelevant evidence and to permit the Employer to make an offer of proof. Our consideration of that offer establishes the correctness of the hearing officer's decision to exclude the testimony. Thus, with particular respect to the issue of strikers, we note the Board's decision in *Universal Mfg. Co.,* 197 NLRB 618 (1972) [that] the issue of striker eligibility is best left to a postelection proceeding.

See 76 FR 80166 (citing *Mariah*). The amendments call for using precisely the same approach with other voter eligibility questions that will be resolved by challenge.

This is not just delaying litigation. Any post-election settlement, any mooted issue, is a clear and unqualified gain in efficiency—one less issue to litigate. There is no need to engage in speculation about the quantum of such gains. The answer is not clearly knowable: any statistics from current Board practice on this point will be cast into doubt by the fact that litigation costs will play into the post-election settlement calculus. And the dissent concedes that at least ''some issues will indeed be mooted.'' Nothing more is needed to justify the rule. The better question, for which there is no clear answer, is why did the Board ever embrace such useless litigation? It is *Barre-National* that is unjustified, not the Board's rule.

Aside from the timing issue, the bulk of the dissent on this point is aimed at the supposed benefits of identifying or deciding voter eligibility issues before the election. This is simply irrelevant here. There is every reason to believe that the regional offices will continue to try to identify and settle voter eligibility disputes sooner rather than later, if possible. The dissent discusses the ''discretionary case-by-case practice'' of figuring out what issues will be decided pre-election, and that practice is entirely unchanged by this rule.

The only issue here is whether those unresolved issues will nevertheless be litigated. There is no reason that they should be. For these reasons, the Board's evidentiary rule is adequately explained.

B. Written Briefing Is Not Required for Simple, Straightforward Cases

The Supreme Court has permitted administrative agencies a great deal of flexibility to choose between oral argument and written briefing. Compare *Mathews* v. *Eldridge,* 424 U.S. 319, 345 (1976) (written submission without oral hearing); with *Goss* v. *Lopez,* 419 U.S. 565, 581–82 (1974) (oral hearing without written submission). Although adjudication under the APA requires briefing, 5 U.S.C. 557(c), Congress specifically exempted Board representation cases from these provisions because of the ''simplicity of the issues, the great number of cases, and the exceptional need for expedition.'' Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. 554(a)(6)).

These very concerns motivate this amendment. 76 FR 80170–71. Although some cases are sufficiently complex that briefing is helpful, in others the issues are quite simple and oral argument is sufficient. Here, the Board authorized the hearing officer to choose whether to have full briefing, partial briefing, or oral argument, so that the hearing officer can ask for briefing only when it would be helpful in a given case. In addition, the parties retain the right to file briefs requesting Board review of the regional director's decision, so the parties will still have an adequate opportunity to present their arguments to the Board in writing.

Again, in focusing only on time, the dissent does not account for good administrative practice. It is indisputable that briefing is of little help, at least in some cases. The dissent's own reference to the drafting guide demonstrates that briefs are often of so little help that the drafting begins before the briefs arrive. And so there is no reason to prohibit hearing officers from taking oral argument or limited briefing in such cases.[19] There is no

[18] See Office of the General Counsel, NLRB, *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings,* at General Counsel's Statement, Forward, 1, 6, 34 (Sept. 2003).

[19] The dissent apparently interprets ''special permission'' as crafting a narrow substantive limit on Board review. This issue was not specifically addressed in the rule, and will be subject to interpretation. That said, it is unclear why the dissenter feels that special permission would be interpreted so narrowly. The term implies no

Continued

reason to put the Board and the parties to the expense and trouble of briefs when oral argument would suffice. That is a sufficient rationale for the rule.

In addition, there quite clearly is a delay caused by accepting briefs. Because the briefs are due in seven days, briefing, by itself, essentially guarantees that the decision will take at least a week from the hearing to be issued. No statistics are necessary on that point; it is a clear feature of the former rules: By simply insisting on briefs, the parties effectively have the power to prevent the decision and direction of election from issuing in the week or so after the hearing. In sufficiently straightforward cases, therefore, under the revised rules decisions may now issue more promptly.

The dissent says that the Board is ''totally dismissive of the potential value of post-hearing briefs.'' Not so. The Board simply feels that the potential value of post-hearing briefs depends on the particular litigation, and therefore regional personnel are in the best position to weigh, in each particular case, the relative benefits and costs of oral argument, briefing, partial briefing, etc. under the particular circumstances. The rule puts the power to make that decision in their capable hands. The rule eliminates the one-size-fits-all approach in favor of flexibility to tailor the briefing to the case.

C. It Is Reasonable for the Board To Hear All the Issues in a Single Post-Election Review Proceeding. Interlocutory Review Is Disfavored, and It Is Appropriate To Limit It to Issues That Would Otherwise Evade Review

The dissent is incorrect to claim that the request for review was eliminated in order to eliminate the ''companion'' time constraints on the election. Again, by focusing solely on timing the dissent fails to appreciate the administrative process improvement that drives the change.

The final judgment rule is omnipresent in administrative and judicial procedure for good reason: as Justice Story stated, ''causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses.'' *Canter* v. *Am. Ins. Co.,* 28 U.S. 307, 318 (1830); 76 FR 80163, 80172. The old rules were inconsistent with this practice, requiring interlocutory review to avoid waiver. It is perfectly reasonable, therefore, to limit interlocutory Board action to issues that ''would otherwise evade review.'' See *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546–47 (1949); cf. *Duval Jewelry,* 357 U.S. at 6 (''[W]here an immediate ruling by the Board on a motion to revoke is not required, the Board defers its ruling until the entire case is transferred to it in normal course.''). The amendments merely apply a commonsense final judgment rule to election proceedings, consolidating review after the regional proceedings have been completed.

In fact, the parties generally gain nothing from pre-election review. If the election was improper, the Board can simply invalidate the results, and, where appropriate, order the election to be rerun properly. This is the only remedy for post-election objections, and it is fully adequate in this context, as well. The Board reasonably concluded that, in most cases, post-election review is the more efficient method for addressing the matter, rather than to preemptively disrupt the process on the off-chance that the regional director might have erred. 76 FR 80172 fn.140 (discussing the low reversal rate).

It is important to point out that the new procedure for Board review is as generous as the old. Indeed, the former procedure was more burdensome to the parties in that unless a request for review was filed within two weeks of the direction of election, the issues would be forever waived. See former § 102.67(b) (requiring the request within 14 days). So the parties were burdened with the obligation to engage in protective interlocutory litigation to preserve issues that could ultimately be mooted out. Under the new rules, failure to seek pre-election special permission to appeal will not result in waiver. 76 FR 80162.[20]

The dissent contends that denial of an interlocutory request for review at least provides ''finality'' to the regional director's direction of election. The same could be said for every single interlocutory ruling. And yet no one maintains that the Board should hear an immediate appeal from every single act of the regional office. The Board should have discretion to say, ''this issue does not require our immediate attention, we will deal with it later,'' rather than being forced to issue a truly final decision on the matter immediately or risk sabotaging the smooth functioning of the regional process. In any event, court review always remains available, and so even the Board's decision cannot be said to be truly final.

The Board addressed the matter of the supposed ''unnecessary elections'' in its rule, and none of the examples cited by the dissent prove its point. In each, the regional office had already held the election when the Board decision was made. Truly, the risk of unnecessary elections is about the same under the former rules as the new rules, because it is—understandably—exceedingly rare for the Board to (1) fully consider the papers, (2) grant review, and (3) publish a final decision reversing the regional director, all in the slim window typical between the filing of briefs and the election.[21]

Thus, the request for review breaks up the regional proceeding, and for no purpose. This is sufficient justification for the rule.

D. The Regional Director Is in the Best Position To Decide an Appropriate Election Date

The regional director determines the election date—this is not new. But the former rules had included—as a general, non-binding guideline—a recommendation that ''normally'' regional directors should hold the vote within a five-day window 25 to 30 days after the pre-election decision, thereby creating at least a 25-day wait between the direction of the election and the election itself. 76 FR 80172. The former rules expressly stated that the purpose of this guideline was ''to permit the

particular standard, and in fact means different things in different contexts in the Board's regulations. For example, special permission to appeal to the regional director from decisions of the hearing officer is not subject to the same standard as special permission to appeal to the Board. Rather than speculating on the standard to be applied, I will simply focus on the fact that the purpose and text of the rule are designed to give hearing officers, in consultation with regional management, the authority to make, as the dissent terms it, a ''real case-by-case evaluation'' of the helpfulness of briefs.

[20] The dissent argues that some issues are not mooted, but that does not account for the inefficiency of protective interlocutory litigation. Before the election, the parties simply do not know what the electoral margin will be, and an issue involving just one voter must be appealed to the Board just to avoid the possibility that that vote will make the difference. This is an entirely unnecessary burden.

The dissent also argues that some cases will not involve post-election objections, thus ''giv[ing] the lie to my colleagues' characterization of the pre-election request for review as interlocutory.'' But simply because some parties do not choose to exercise their right to file objections, that does not convert an appeal in the middle of a proceeding into an appeal of a final judgment.

[21] Former § 102.67(b) and (d) provided that parties could file a request for review within 14 days following a decision and direction of election, and that a statement in opposition to any such request could be filed as late as 21 days following a decision and direction of election. Thus, given the instruction in former § 101.21(d) that regional directors should normally schedule an election between the 25th and 30th day following the decision and direction of election, the Board could be left with as little as 4 days between full briefing concerning the request for the review and the election itself.

Board to rule on any [interlocutory] request for review which may be filed,'' after the regional director's direction of election. Former 29 CFR 101.21(d).

But, even under the former rules, the window did not serve its stated purpose. It applied regardless of whether a request was filed. Furthermore, because a request for review does not operate as a stay unless specifically ordered by the Board, elections were usually conducted as scheduled after 25 days even if the Board had not ruled on a request to review. For these reasons, the amendments independently eliminate this recommended window (without respect to the availability of a pre-election request for review).

This basic analysis was seldom criticized in the comments. In fact, there was ''near consensus that this [25-day] period serves little purpose.'' 76 FR 80173. Moreover, enlarging the regional director's discretion to set the election date makes sense because the regional director is most familiar with the case, the area, the industry, and the parties, and is in the best position to know what election date to choose. Cf. *Vermont Yankee,* 435 U.S. at 525. Should an inappropriate election date be chosen in a particular case, the Board will be able to revisit that decision and re-run that election.

The dissent ignores all this. Without confronting the Board's stated justification for the rule, it views the issue as wholly subsumed within the change to the Board review procedure. However, the dissent does tentatively offer two alternative reasons to keep the recommended window: (1) ''there could well be both an agency administrative justification for at least some post-decisional time to arrange the details of election,'' and (2) ''in at least some instances it will be critically important to provide some post-decisional time for employers to exercise their free speech rights. * * *''

But these claims miss the mark. The regional director has discretion to choose an appropriate election date. Will 25 to 30 days define the only appropriate choice in each case? Certainly not. The dissent acknowledges that these interests will vary, and may only apply in ''at least some'' cases. Again, the better solution is to move away from the one-size-fits-all approach of the former rules, so that flexibility is available to deal sensibly with the ''at least some'' cases that merit it.

E. It Makes Sense for Regional Directors To Decide Objections and Challenges, and Certiorari-Like Review by the Board Is a Reasonable and Efficient Way To Oversee the Regions

In *Magnesium Casting,* the Supreme Court held that under the Act, the Board may engage in discretionary review of regional directors' decisions. The dissent considers it ''pretentious'' and an ''abdication'' of responsibility for the Board to do precisely what Congress contemplated, and exercise discretionary review. I disagree.

Congress entrusted the Board with the ultimate authority over labor policy, subject only to very limited review in the courts. We should not try to do more than we reasonably can, or thinly spread too much of our limited attention to cases that raise no substantial issues. Certainly, we should not be micro-managing regional directors.

The Board has recognized this in the context of unit determinations in directions of election, which have been only discretionarily reviewed for decades. And there have been no problems of the sort predicted by the dissent. No dearth of opportunities for clarification or dissent, no breakdown in uniformity of law and policy, no citing regional precedent, no swell in test-of-certification cases.

The rule merely applies precisely the same standard to post-election review.[22] The dissent does not explain why these fears should have any special salience in the post-election context that they have never had pre-election.

Consider the stipulation rate, for example. Under the current rules, except in the rare cases of regional director decisions, both stipulated and litigated cases are most often subject to mandatory review. Stipulations are not being signed by parties in order to secure Board review.[23] Under the new rules, again, the Board will apply the same standard for review regardless of whether a stipulation is entered into. And so, again, the choice between stipulation and litigation remains entirely unrelated to the availability of post-election review.

In sum, the amendments are adequately explained and reasonably address the problems presented. They are within the sound discretion of the Board to regulate its own procedures.

5. Other Points

A. The Opportunity To Comment

The dissent complains that the final rule is not a ''logical outgrowth'' of the June proposed rule. The ''logical outgrowth'' test is a creature of the notice-and-comment requirement. It is satisfied if the public had a meaningful opportunity to comment on the issues raised by the final rule.

The crux of the dissent's argument is that, without the proposed ''20% rule,'' the regional director will defer decision on more voter eligibility issues, a consequence that the comments were not able to meaningfully address. This is plainly not true, both because it mischaracterizes the rule, and because there was an opportunity to comment on this point. In any event, the question is irrelevant because notice and comment is not required for these procedural rules.

First, as the dissent posits elsewhere, under current practice, ''[u]sually, the number of such challenges does not exceed about 10–12% of the unit.''[24] And, because the proposed 20% rule has not been adopted at this time, the new rule does not change the current practice with respect to regional director discretion to defer deciding individual eligibility questions. Rather the rule contemplates that litigation will be permitted only of issues that will be decided prior to the election. The dissent's fear that the rule will result in massive and disproportionate numbers of challenges is, quite simply, not

[22] Nor is there any merit to the dissent's accusation that the majority has failed to rationalize the rule's standard of review for post-election litigation. The rule does not change the Board's standards for considering post-election requests for review of regional director decisions. It appears that the dissent fails to appreciate that under the rule, the Board will be applying a discretionary standard of review to regional directors' disposition of exceptions to hearing officers' factual findings following post-election hearings, not to the hearing officers' factual findings themselves. See 76 FR 80173–74. Although perhaps not the normal course under the former rules, this procedural option existed prior to the final rule, and when utilized, the Board applied exactly the same standard of review. See former § 102.69(c)(4) (providing that if a regional director chose to issue a decision disposing of election objections or determinative challenges, parties would subsequently have the same rights to request review by the Board as exist under the pre-election request for review standards in former § 102.67); see also 76 FR 80174, quoting Casehandling Manual section 11366.2; Casehandling Manual section 11396.2. It is unquestionably rational for the Board to continue to utilize the same standard of review that it currently applies to pre-election requests for review and post-election requests for review, when they arise.

[23] They were preferred to consent agreements for that reason, but that preference has nothing to do with the choice between stipulation and full litigation, where there is no meaningful difference in post-election Board review.

[24] See also Casehandling Manual 11084.3 (''As a general rule, the Regional Director should decline to approve an election agreement where it is known that more than 10 percent of the voters will be challenged, but this guideline may be exceeded if the Regional Director deems it advisable to do so.'').

grounded in the rule, and is rank speculation.

Second, it is perfectly appropriate to adopt only some of the proposals. As the Supreme Court recently explained in *Coke,* a proposed rule is ''simply a proposal,'' meaning that the agency is ''*considering* the matter,'' and thus its decision not to adopt part of the proposal is ''reasonably foreseeable'' and a logical outgrowth. *Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 175 (2007) (emphasis in original). Indeed, here, many commenters obviously foresaw that only parts of the rule might be adopted, and some urged the Board to use a different percentage or to eliminate the 20% rule altogether.[25] Clearly, the issue was reasonably presented by the proposal.

Finally, this is a procedural rule, and no opportunity to comment was required. The courts cannot impose the logical outgrowth test on the Board simply because it voluntarily undertook to provide an opportunity to comment on a proposal. The fact that the agency chose to engage in notice and comment ''does not carry the necessary implication that the agency felt it was required to do so.'' *United States* v. *Fla. E. Coast R.R. Co.,* 410 U.S. 224, 236 fn.6 (1973). None of the Board's prior election rules were substantive—even when they made dramatic changes—so what is different here? In fact, this is in many ways a textbook procedural rule: Rules of evidence, the manner of arguing (oral vs. written), the timing of Board review, etc. ''[A] judgment about procedural efficiency * * * cannot convert a procedural rule into a substantive one.'' *Public Citizen* v. *Dep't of State,* 276 F.3d 634, 641 (D.C. Cir. 2002).

For these reasons, the Board was not required to hold a new round of public comment to consider the November 30th resolution adopting parts of the proposed rule.

B. Employer Speech

At the end of the dissent, a First Amendment argument is thrown in. The central thrust of this argument appears to be that the secret purpose of timely elections is to unfairly tilt the campaign in favor of unions by quashing the opportunity for meaningful employer speech. This argument is puzzling for two reasons.[26]

First, it is not the purpose of the amendments to limit speech, but to limit unnecessary litigation. To the extent litigation results in delay that incidentally provides extra opportunities for speech, the Board fully considered the effect of the amendments and validly found the rules consistent with the policies of the Act and Constitution. All parties remain free to engage in as much or as little campaign speech as they desire. The content of such speech, of course, is entirely unregulated by these amendments.

To the extent the amendments eliminate delay, they do not do so unfairly. Time is a resource that is inherently equal for everyone: A day, a week, a month, is the same amount of time whether you are a union or employer. However long the time from petition to election, it is the same for both parties.

The Board's analysis does not play favorites between the parties. As the rule explains, if 10 days has always been enough for the union to campaign with the *Excelsior* list, then even 10 days from the petition would be enough for the employer (who needs no such list of employees) to campaign, too.[27] 76 FR 80156 fn.79. And employers remain free to say whatever they want whenever they want (within established legal limits), regardless of whether an election petition is pending.

The dissent mischaracterizes the discussion of employer speech in the rule. The rule does not discuss these employer speech opportunities in order to prove that faster elections would have some ''antidistortion'' effect—indeed, the Board expressly disclaimed that purpose—but to prove that even a very fast election would not deprive employers of a meaningful opportunity to speak. 76 FR 80148–50 (''The Board, having carefully considered these pointedly contrasting comments, adopts neither position.'').

Second, the dissent's argument is predicated on a basic misunderstanding of representation proceedings. Indeed, under the dissent's analysis, the entirety of Section 9 would have to be invalidated as unconstitutional in violation of the First Amendment.

After all, the very purpose the dissent criticizes here was expressly embraced by Congress in the NLRA. ''[U]nless an election can promptly be held to determine the choice of representation, [the union] *runs the risk of impairment of strength by attrition and delay* while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.'' H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 6–7.

If it would be unconstitutional for the Board to have considered the impairment of union strength caused by delay, then the Supreme Court in *Inland Empire* would not have cited this legislative history with such unqualified approval, nor would it have upheld the appropriate hearing of the Board in that case. Congress had foremost in its mind the intention to make representation proceedings more efficient so that elections could be held in a timely manner, with the ultimate goal of promoting collective bargaining and furthering the flow of commerce.

This should be reiterated: To avoid strikes and economic damage, Congress wanted to give unions an opportunity to prove their strength by peaceful means while it was at its height and without delay. Why? So that unions would not be forced into using their moment of strength destructively out of fear that delay would erode their power.

Again, to address this by crafting fair and timely representation procedures is a purpose that has been—repeatedly and expressly—approved by the Supreme Court in *A.J. Tower, Inland Empire, Magnesium Casting,* and countless other cases. Elsewhere, the dissent itself appears to agree with this purpose as well, stating that ''the efficient and expeditious exercise of our statutory

[25] See, e.g., Testimony of Peter Leff, General Counsel for the Graphic Communications Conference of the International Brotherhood of Teamsters; United Food & Commercial Workers International Union; U.S. Chamber of Commerce; National Association of Manufacturers; Coalition for a Democratic Workplace.

[26] Initially, it should be noted that this argument is in tension with the dissent's vehemently expressed doubts that the rule *will* result in a more timely process. If the stipulation rate drops dramatically and elections are dragged out, as the dissent contends, how can the rule be said to limit speech? In any event, whether faster or not, elections conducted under the new rule will not violate the First Amendment.

[27] Both *Chamber of Commerce* v. *Brown,* 554 U.S. 60 (2008), and *Citizens United* v. *Federal Election Commission,* 130 S.Ct. 876 (2010), involved regulation of campaign spending, not campaign time. The dissent's application of those cases to the resource of time would also have some very strange consequences. For example, many comments argued that it was unfair to hold elections too quickly because unions enjoy an intrinsic advantage in that they can organize in secret before the petition is filed. If the dissent's analysis of *Citizens United* were accepted, then it would be *unconstitutional* for the Board to deliberately prolong the campaign in order to give the employer a leg up in the campaign. After all, the ability to organize in secret is an ''advantage'' that the unions lawfully have in the ''open marketplace of ideas protected by the First Amendment.'' To compensatorily grant employers additional time in order to equalize the playing field would be granting special privileges to employer speech through an unlawful ''anti-distortion theory.''

Suffice to say, I am doubtful that any such analysis is meaningful in this context. Time is not, in fact, literally money: Some concrete election date must be chosen in every case.

mandate is an appropriate and important goal that is central to our mission.'' The about-face here, to argue that any effort at efficient and expeditious representation procedure is unconstitutional, remains unexplained.

As the D.C. Circuit recognized in a related context, ''the force of the First Amendment * * * var[ies] with *context,''* particularly in the sphere of labor relations. *US Airways, Inc.* v. *NMB,* 177 F.3d 985, 991 (D.C. Cir. 1999) (emphasis in original); see also *UAW–Labor Employment & Training Corp.* v. *Chao,* 325 F.3d 360, 365 (D.C. Cir. 2003) (noting that free speech rights are ''sharply constrained in the labor context''). The dissent runs roughshod over this principle and instead would twist the First Amendment into a strict limit on any constraint—implicit, explicit, or incidental—on the time given for employer speech before the employees make their choice. This impermissibly elevates employer speech interests above both industrial peace and ''the equal rights of the employees to associate freely.'' *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 617 (1969). To the extent that the rule removes unnecessary obstacles to the ''efficient, fair, uniform, and timely resolution of representation cases,'' 76 FR 80138, a modest reduction in the time between a petition and an election may result in some cases. To argue that this violates the Constitution is to ignore *Gissel's* teaching that ''the rights of employers to express their anti-union views must be balanced with the rights of employees to collectively bargain.'' *US Airways,* 177 F.3d at 991 (applying *Gissel*). Indeed, the D.C. Circuit has instructed that ''[n]ot only is a 'balancing' required, the NLRB calibrates the scales.'' *Id.* The Board's judgment here was reasonable.

For all of these reasons, I continue to agree with the Board's final rule.

Separate Dissenting Statement by Member Hayes

Member Hayes, dissenting.

Acting with imperious disdain for process, two members of what should be a five-member Board summarily concluded their own rulemaking deliberations on December 16, 2011, by adopting and issuing a rule overruling precedent and substantially revising longstanding Board election procedures.[28] The Rule contains some elements of the proposal made public in a June 22, 2011, Notice of Proposed Rulemaking (NPRM),[29] and reserves all others for further consideration. It eliminates the right to seek pre-election review of a regional director's decision and direction of election. It alters the role of the hearing officer in deciding what evidence may be introduced in a pre-election hearing. It generally prohibits the filing of briefs after a pre-election hearing. It eliminates the automatic right to seek Board review in post-election disputes, a right previously included in stipulated election agreements overwhelmingly favored by most parties to an election. Finally, the adopted Rule, founded on an impermissible interpretation of the Act, essentially eliminates the pre-election right to litigate *all* issues not deemed relevant to the question of representation. In this respect, the Rule significantly departs from the NPRM, which would at least have permitted pre-election litigation of genuine and material issues about the eligibility or unit placement of individuals who would constitute 20 percent or more of a bargaining unit.

Like a game show contestant with a parting gift, I was granted the opportunity to issue a post-deliberative ''personal statement'' of my views concerning the Rule, even as its validity is being contested in a Federal district court.[30] I do so now.

It is my personal view, shared by many of the thousands of commenters to the NPRM, that my colleagues' Rule contravenes the Act and the Constitution. In whole and in several parts, in substance and in the process used to adopt it, it also reflects arbitrary and capricious decisionmaking that requires invalidation on judicial review. Finally, as with recent adjudicatory actions,[31] this rulemaking action represents an abdication of the Board's representation case duties and reflects a compulsive effort by my colleagues to favor union organization over all opposition, no matter its legitimacy or statutory protection. Accordingly, I dissent.

I. Background

As described by my colleagues, publication of the NPRM was followed by a public hearing and a notice-and-comment period concluding on September 4, 2011. Before that, Chairman Liebman's term expired, leaving the Board with three sitting Members: newly-appointed Chairman Pearce, Member Becker, and myself.

In November, acknowledging that time was dwindling in which to issue a Rule before the potential loss of a Board quorum upon the expiration of Member Becker's recess appointment, Chairman Pearce announced his intention to put forth a resolution to proceed on a proposed ''scaled-back'' rule.''[32] Accordingly, on November 30, Chairman Pearce, Member Becker, and I attended a public Board meeting to discuss and vote on the Chairman's proposed ''Board Resolution No. 2011–1,'' which provided for the drafting, circulation and publication of a final rule containing eight elements from the original NPRM. The Resolution also provided that no final rule ''shall be published until it has been circulated among the members of the Board and approved by a majority of the Board.'' I voted against the Resolution, and my colleagues voted to approve it.

In the late afternoon of Friday, December 9, a draft of the Rule, consisting of 180 pages, was circulated by email to me and others by the Chairman.[33] A revised draft was circulated early in the next week, followed on December 14 by a draft order from the Chairman directing that the Solicitor publish a Final Rule immediately upon its approval by a Board majority. The Order also provided for subsequent publication in the **Federal Register** of the statement of any dissenting Board Member then serving—obviously meaning me—if a draft of the dissent was circulated no less than 30 days prior to the April 30, 2012, effective date of the Rule. Provision was also made for publication of a concurring statement, with the qualification that any separate dissent or concurrence ''shall represent the personal statement of the Member and shall in no way alter the Board's approval of the final rule or the final rule itself.''

Chairman Pearce and Member Becker approved a revised version of the Order on December 14. I voted against it in an email on December 15, noting in addition to my other reasons for opposition that the President had just announced two Board member nominations and that a third nomination was also pending. My email stated ''With the prospect of a full Board to address these proposed rule changes, I believe there is even less justification for proceeding on a divided 2–1 basis.''

[28] The Rule was published in the **Federal Register** on December 22, 2011. 76 FR 80138.

[29] 76 FR 36812.

[30] *Chamber of Commerce* v. *NLRB,* No. 11–2262 (D.D.C. filed Dec. 20, 2011).

[31] E.g., *Specialty Healthcare and Rehabilitation Center of Mobile,* 357 NLRB No. 83 (2011).

[32] Fact Sheet, National Labor Relations Board, ''Explanation of [R]esolution'' at *http://www.nlrb.gov/publications/rules-regulations/notice-proposed-rulemaking/proposed-amendments-nlrb-election-rules-an.*

[33] I discuss internal Board deliberations only to the extent that they have already been disclosed by the Acting General Counsel to parties in the current district court litigation challenging the Rule.

The draft Rule was further revised on December 15 and 16, then approved by the Chairman and Member Becker and issued on the later date without further action by me.[34]

II. The Rule Is Invalid Under Chevron Step One

My colleagues assert that the Rule is authorized by Section 6 of the Act, that it is a reasoned interpretation of Sections 9 and 3 of the Act, and that as such it is entitled to substantial deference under *Chevron USA Inc.* v. *Nat'l Resources Defense Council, Inc.,* 467 U.S. 837 (1984). I have no quarrel with the general proposition that the Board has express authority under Section 6 of the Act to make rules governing the conduct of representation elections. However, the rulemaking authority granted to the Board is not unlimited. It must be exercised in a manner consistent with the Act. *American Hospital Ass'n* v. *NLRB,* 499 U.S. 606 (1991) (rules enacted through the Board's rulemaking authority must not conflict with the Act).

Under step one of the *Chevron* analysis, a reviewing court first asks whether Congress has directly addressed the issue covered by agency action. *Chevron,* 467 U.S. at 842–43. If so, the court, and of course the Board, must give effect to Congress' intent. Id. In determining whether Congress has addressed the issue, the court employs traditional tools of statutory construction, including a review of legislative history. Id. at 843 n.9. Here, this inquiry leads inevitably to the conclusion that the Rule directly and substantially contravenes Congress' intent.

A. An Appropriate Pre-Election Evidentiary Hearing Under Section 9 Must Generally Include Litigation of Genuine and Material Unit Placement, Exclusion, and Eligibility Issues

Since its inception, the Act has provided for an ''appropriate hearing'' as part of the investigatory process attendant to Board elections. While the original and revised versions of the Act do not explicitly define what constitutes an ''appropriate hearing,'' the text of the Act, its legislative history, and prior Board and court interpretations demonstrate that an ''appropriate hearing'' should encompass all relevant election issues—including individual eligibility and unit placement issues—not just whether a ''question of representation'' exists. At least since the Taft-Hartley amendments in 1947, it is clear as well that Congress intended that the appropriate evidentiary hearing must be held before the election. Accordingly, the Rule's interpretation of the statute is impermissible under step one of the *Chevron* analysis and the Rule is invalid.

* * * * *

Section 9(c) of the Wagner Act provided:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

Although ''appropriate hearing'' was not explicitly defined, the natural reading is that it was intended to be part of the investigation of the electoral controversy and was not limited to the issue of whether an election should be held. Instead, the reference to an ''appropriate'' hearing connotes a relative, flexible standard, not rigid or limited as to the number and kind of issues to be litigated. Considered in the converse, the statutory language can certainly not be interpreted as dictating that litigation of unit eligibility and inclusion/exclusion issue is inappropriate.

Further, Congress generally saw the development of a complete evidentiary record in hearings pertaining to election issues as necessary due process protection for the parties. *See, e.g.,* S. Rep. 74–573, at 14 (May 1, 1935), reprinted in *2 Legislative History of the NLRA, 1935,* at 2314 (the ''entire election procedure becomes part of the record'' which provides a ''guarantee against arbitrary action by the Board''); H.R. Rep. 74–1147, at 23 (June 10, 1935), reprinted in *2 Legislative History of the NLRA, 1935,* at 3073 (''The [appropriate] hearing required to be held in any investigation provides an appropriate safeguard and opportunity to be heard.''). Consistent with this intent, the conduct of election hearings under the Wagner Act established a practice of developing a complete record in a nonadversarial proceeding on all pertinent issues which the Board must decide relevant to the conduct of the election. See e.g., *Pacific Greyhound Lines,* 22 NLRB 111, 123–124 fn. 37 (1940) (''The wide latitude such a hearing possibly may take is illustrated by the nature and number of issues with which the parties herein themselves were concerned and which were considered and decided by the Board in the Representation Proceedings.'').[35]

Indeed, prior to the Taft-Hartley Act, questions about an ''appropriate hearing'' dealt with whether it needed to be held before an election, not whether, if held pre-election, litigation of unit inclusion and eligibility should generally be foreclosed. In *Inland Empire Dist. Council* v. *Millis,* 325 U.S. 697 (1945), the Court concluded that, although the Wagner Act did not require the Board to hold a hearing *before* conducting an election (or that it even hold any election), if an election were to be conducted, the Board was required to hold an ''appropriate hearing'' as part of any investigation under Section 9(c). Id. at 706–707.

The Court explained that the statutory purpose of Section 9(c) is ''to provide for a hearing in which interested parties shall have full and adequate opportunity to present their objections before the Board concludes its investigation and makes its effective determination by the order of certification.'' Id. at 708. The Court concluded that the ''appropriate hearing'' requirement was met because, in a post-election hearing, the Board permitted evidence to be introduced on all issues—including the effects of a union's contractual relationships with the employer, voting eligibility of employees in the armed forces, exclusion of certain groups of employees, and the appropriate payroll date for voting eligibility.

Following *Inland Empire,* the Board amended its Rules and Regulations in 1945, and initiated a process of conducting some elections prior to any hearing ''in cases which present no substantial issues.'' Article III, Section 3 of the Board's Rules and Regulations (as amended, effective November 27, 1945). These pre-hearing elections were a specific target of the 1947 Taft-Hartley amendments, which eliminated the Board's option of holding them and

[34] Not surprisingly, having had months to participate in the preparation and revision of the draft rule before I ever saw it, the Chairman has nevertheless taken the self-created opportunity to issue a concurring opinion responding to this dissent. By the Chairman's own declaration, joined by Member Becker, this post hoc opinion cannot vary from or supplement the Rule and its justification, as issued on December 16. I therefore find little need to respond directly to his numerous mischaracterizations of my arguments and actions in this proceeding.

[35] As a result of a subsequent settlement agreement, the Board vacated the Decision and Order. See *Pacific Greyhound Lines,* 30 NLRB 439 (1941). The case nevertheless retains its precedential value and illustrates the Board's comprehensive approach to a hearing on election issues. See *Caterpillar Inc.,* 332 NLRB 1116, 1116–1117 (2000)(Board decision vacated pursuant to a settlement may be cited as controlling precedent with respect to the legal analysis therein).

made the ''appropriate hearing'' mandatory before the election. To this end, Section 9(c)(1) provides that:

> *Whenever a petition shall have been filed,* in accordance with such regulations as may be prescribed by the Board * * * *the Board shall investigate such petition* and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing* upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds *upon the record of such hearing* that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereto. (emphasis added).

Section 9(c)(4), also added in 1947, further provides that

> Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

Even those critical of the Taft-Hartley Act changes acknowledge that an ''appropriate hearing'' before the election is now mandatory. ''Section 9(c)(1) and Section 9(c)(4) of the Taft-Hartley Act, read in conjunction, require that an election hearing be held before the election takes place.'' Steven E. Abraham, *How the Taft-Hartley Act Hindered Unions,* 12 Hofstra Labor Law Journal 1, 12 (1994) (arguing for amending certain Taft-Hartley Act provisions considered to have contributed to the declining unionization rate). ''[T]he Board cannot run an election without first holding a hearing unless the parties consent * * *.'' Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law,* 77 Minn. L. Rev. 495, 519 fn. 102 (1993) (''Prior to the Taft-Hartley Act, the Board could postpone the hearing until after the election * * *. The Taft-Hartley Act stripped the Board of its discretion to conduct such 'pre-hearing elections.' '') (internal citations omitted).

While the amendments mandated that ''the hearing must invariably precede the election, neither the language of the statute nor the committee reports indicated that any change in its nature was intended.'' *Utica Mutual Ins. Co.* v. *Vincent,* 375 F.2d 129, 133–34 (2d Cir. 1967). See also Becker, supra, at 516 fn. 91 (describing Board procedures after the Taft-Hartley amendments: ''If the Board finds that the petition creates a 'question of representation,' it must hold a hearing * * * [where] the Board determines whether the unit * * * is appropriate * * *. [and] * * * also resolves individual eligibility questions.'') (internal citations omitted)

The ordinary and natural meaning of Sections 9(c)(1) and (4) is that once a regional director determines that there is reasonable cause to believe a question concerning representation exists, a hearing must be held on all issues relevant to the conduct of an election unless waived. Of course, confirmation of the regional director's preliminary determination that a question concerning representation existed is a necessary predicate to a post-hearing direction of election, but if Congress had intended that the mandatory ''appropriate hearing'' be limited to litigation of that question, it failed to say so.

The failure of Congress to impose that express limitation must be considered in light of the prior consistent interpretation by the Board and courts that an ''appropriate hearing'' under the Wagner Act required the Board to provide the parties an opportunity to raise and present evidence on all issues relevant to the election. As a matter of statutory interpretation, Congress is presumed to be aware of administrative or judicial interpretation of a statute's language, and if it amends the statute without changing that language, then Congress presumably intended to adopt that administrative interpretation. *Lorillard* v. *Pons,* 434 U.S. 575, 581 (1978). See also *NLRB* v. *Gullett Gin Co.,* 340 U.S. 361, 365–366 (1951) (by adopting Taft-Hartley amendments ''without pertinent modification'' of provision at issue ''Congress accepted the construction [of that provision] by the Board and approved by the courts.''). Nothing in the Taft-Hartley amendments to Section 9 changed the meaning of ''appropriate hearing,'' thus indicating Congress' intent to adopt that settled meaning of ''appropriate hearing'' but now requiring that it must be held before the election.

The legislative history of the Taft-Hartley Act confirms that Congress intended that the ''appropriate hearing'' be held before the election and that it continue to address all pertinent election issues. Some versions of the Taft-Hartley legislation included proposals permitting the Board's continuation of its prehearing elections procedures; Congress plainly rejected those proposals. After the House and Senate initially passed different versions of the legislation, the conference committee was appointed to resolve the differences, including in Section 9(c)(4). At the ''insistence'' of the House conferees, the resulting conference report recommended deleting the authority to conduct prehearing elections included in the Senate version of the legislation. 93 Cong. Rec. 6601 (June 5, 1947) (conference report) reprinted in *2 Legislative History of the LMRA, 1947,* at 1542. Both the House and the Senate adopted the conference report recommendation to delete the prehearing election option, thereby making ''appropriate hearings'' mandatory before an election in all cases. 93 Cong. Rec. 6549 (June 4, 1947) (House agreed to conference report) reprinted in*1 Legislative History of the LMRA, 1947,* at 899–900; 93 Cong. Rec. 6695 (June 6, 1947) (Senate agreed to conference report) reprinted in *2 Legislative History of the LMRA, 1947,* at 1620–1621.

In his analysis of the Act's provisions in the Congressional Record, Senator Taft explained the reason for changing Section 9(c)(4) and confirmed that Congress intended to preserve the Board's interpretation of an ''appropriate hearing'':

> The conferees dropped from [Section 9(c)(4)] a provision authorizing prehearing elections. That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. We have not changed the words of existing law providing a hearing in every case unless waived by stipulation of the parties. *It is the function of hearings in representation cases to determine whether an election may properly be held at the time; and if so, to decide questions of unit and eligibility to vote.* During the last year the *Board has tried out a device of holding the election first and then providing the hearing to which the parties were entitled by law.* Since its use has been confined to an inconsequential percentage of cases, and more often than not a subsequent hearing was still necessary and *because the House conferees strenuously objected to its continuance it was omitted from the bill.* 93 Cong. Rec. 7002 (June12, 1947), reprinted in *2 Legislative History of the LMRA, 1947,* at 1625. (emphasis added)

My colleagues attempt to minimize the significance of Senator Taft's statements as those of a single Senator made after the ''dispositive vote'' on the Taft-Hartley legislation. 76 FR 80165 fn.116. Although they were made after the initial Senate vote and passage of the legislation, Senator Taft's statements preceded further Senate debate and the crucial votes in the Senate and House to override President Truman's veto. 93 Cong. Rec. 7504 (June 20, 1947) reprinted in *1 Legislative History of the LMRA, 1947* at 922; 93 Cong. Rec. S–7692 (June 23, 1947), reprinted in *2 Legislative History of the LMRA, 1947* at 1656–1657. Moreover, Senator Taft's statements were not merely those of a single Senator. As the legislation's

principal Senate sponsor and Chairman of the Senate's Labor and Public Welfare Committee, Senator Taft had been instrumental in securing passage of the Act. His statements were to ''make clear the legislative intent,'' 93 Cong. Rec. 7000, reprinted in *2 Legislative History of the LMRA, 1947,* at 1622, that a pre-election hearing that includes all election issues was mandatory. 93 Cong. Reg. 7002, reprinted in *2 Legislative History of the LMRA, 1947,* at 1625. Senator Taft's analysis of the legislation is authoritative and compelling evidence of Congress's intent.[36]

The import of the Taft-Hartley amendments for determining the scope of an ''appropriate hearing,'' and whether it had to be held before the election, was discussed in *NLRB* v. *SW. Evans & Son,* 181 F.2d 427 (3d Cir. 1950). Although decided after the amendments had gone into effect, the case concerned the Board's pre-Taft-Hartley rule permitting a pre-hearing election ''in cases which present no substantial issues.'' Id. at 430 Preliminarily, the court observed that ''the instant problem [whether a pre-election hearing is required] is hardly apt to recur, since the [Taft-Hartley Act] now makes mandatory a pre-election hearing.'' Id. at 429. The court then concluded that issues related to ''unit, eligibility to vote, and timeliness of the election'' raised by the employer were ''substantial issues'' that the employer was entitled to litigate in a pre-election hearing under the extant rule. Id. at 430–31. The inescapable inference from the court's opinion is that under the amended Section 9(c)(1), an appropriate hearing, which now must take place before the election, must permit litigation of all contested issues of substance, not just those necessary to confirm a preliminary investigatory determination that a question of representation exists.

In 1959, Congress amended Section 3(b) of the Act to provide for Board delegation of its Section 9 representation case duties to regional directors in an effort to address a serious casehandling backlog at the Board level. During this legislative process, there were numerous unsuccessful proposals to revive the pre-hearing election that the Taft-Hartley Act eliminated.[37] Instead, as further discussed in the following section, Congress resolved upon the delegation language, with an express reservation of the right of parties to file pre-election requests for review of a regional director's post-hearing direction of election. The final language of Section 3(b), as an alternative to the pre-hearing elections proposals, was explained by Representative Barden, Chairman of the House Committee on Education and Labor in the Conference Report:

> There is one addition and that is this. The conferees adopted a provision that there should be some consideration given to expediting the handling of some of the representation cases. Therefore, the Board is authorized, but not commanded, to delegate to the regional directors certain powers which it has under section 9 of the act. Upon an appeal to the Board by any interested party the Board would have the authority to review and stay any action of a regional director, delegated to him under section 9. But the hearings have not been dispensed with. *There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out. The right to a formal hearing before an election can be directed is preserved without limitation or qualification.* 105 Cong. Rec. 16629 (September 4, 1959), reprinted in *2 Legislative History of the LMRDA, 1959* at 1714 (emphasis added), describing H.R. Rep. 86–1147, at 1 (September 3, 1959), reprinted in *1 Legislative History of the LMRDA, 1959,* at 934 (conference report).[38]

Thus, the amendment to Section 3(b) did not expressly or implicitly alter the scope of the pre-election ''appropriate hearing'' required to be held on contested issues. In 1961, when the Board amended its Rules and Regulations to delegate its powers pursuant to Section 3(b)'s authorization, the amended rules likewise remained consistent with the traditional broad view of an ''appropriate hearing.'' Section 101.20(c) stated, in relevant part: ''The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.'' Section 102.66(a) stated, in relevant part: ''Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence.'' Section 102.64(a) stated, in relevant part: ''It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the Act.''

Were there any doubt remaining about the required scope of a mandatory appropriate pre-election hearing—and there should have been none—it was put to rest in trio of Board decisions in the 1990s. First, the Board held in *Angelica Healthcare Services Group,* 315 NLRB 1320 (1995), that an acting regional director erred by denying a union a hearing on a contested contract bar issue before directing a decertification election to be held. The Board remanded the case for a hearing, but found no need to decide in advance ''the type of hearing that would be necessary to satisfy the Act's 'appropriate hearing' '' requirement. Id. at 1321 fn.6.

The question left unanswered in *Angelica Healthcare* was addressed in *Barre-National,* 316 NLRB 877 (1995). The regional director in that case precluded the employer from presenting evidence at a pre-election hearing about the supervisory status of a group of employees constituting 8 to 9 percent of the potential unit. Instead, the regional director only permitted the employer to make an offer of proof, then directed an election at which the disputed employees were allowed to vote subject to challenge. Resolution of their alleged supervisory status was deferred to the post-election challenge procedure. The Board held that the regional director erred by refusing to allow the employer to present the evidence of supervisory status and, therefore, the pre-election hearing ''did not meet the requirements of the Act and the Board's Rules and Statements of Procedure.'' Id. at 878. It thereby confirmed the longstanding statutory interpretation and Board practice requiring that an appropriate pre-election hearing must include full evidentiary litigation of contested issues, including those related to unit

[36] I note the blatant inconsistency between my colleagues' reliance, at 76 FR 80160, on the statement of Senator Goldwater, a single legislator, in support of their interpretation of the 1959 Sec. 3(b) amendments, and their dismissal, at 76 FR 80165 fn. 116., of the statement of Senator Taft as insignificant to the interpretation of Sec. 9(c)(1).

[37] See H.R. Rep. 86–741, at 24–25 (July 30, 1959), reprinted in *1 Legislative History of the LMRDA, 1959,* at 782–83. See S. Rep. 86–10, at 3 (January 28,1959), reprinted in *1 Legislative History of the LMRDA, 1959* at 82 (included in President Eisenhower's initial ''20-point program''). See also S. 1555, 86th Cong. § 705 (bill passed by the Senate on April 25, 1959), reprinted in *1 Legislative History of the LMRDA, 1959,* at 581.

[38] Senator Goldwater similarly described the new provision authorizing delegation of the Board's election powers to regional directors as a Conference Committee substitution adopted because of opposition by other conferees to any change in pre-election hearing procedure. 105 Cong. Rec. A8522 (October 2, 1959), reprinted in *2 Legislative History of the LMRDA, 1959* at 1856.

inclusion/exclusion and voter eligibility.[39]

In attempting to reconcile the Board's rationale in *Barre-National* with the new Rule's direction that pre-election hearing litigation should be limited to issues concerning whether a question concerning representation exists, my colleagues mischaracterize the Board's holding as resting only on the hearing requirements in Section 102.66(a) and 101.20(c) of the existing regulations, not the Act itself, because of the Board's use of the conjunctive ''and'' rather than ''or''. 76 FR 80165. They assert that their revision of Section 102.66(a) and the elimination of Section 101.20(c) thus ''removes the basis for the Board's holding in *Barre-National*'' and that they will ''no longer follow *Barre-National.*'' 76 FR 80164, 80165.

The majority's reliance on the use of ''and,'' rather than ''or'' in support of a claim that the Rule does not overrule *Barre-National* is semantic nonsense, and disingenuous to boot. Clearly and expressly, the Board relied on the requirements of Section 9(c)(1) of the Act and its implementation in the cited Rules in concluding that the regional director in *Barre-National* denied the employer a full pre-election evidentiary hearing on a unit inclusion/exclusion issue to which it was entitled. As the concurring and partial dissenting opinions make clear, the root source of that entitlement is the Act, not the implementing Rules.[40] A Board panel confirmed this view in *North Manchester Foundry, Inc,* 328 NRLB 372 (1999). The hearing officer, affirmed by the regional director, precluded litigation of contested unit placement issues, deferring any litigation and decision to post-election challenge and objection procedures. Relying on *Barre-National's* holding that such a limitation on litigation at the pre-election hearing ''did not meet the requirements of the Act *or* of the Board's Rules and Statements of Procedure,'' the Board remanded the proceeding to the regional director to reopen the hearing for the required presentation of evidence on disputed unit placement issues.[41]

Manifestly, the decisions in *Angelica Healthcare, Barre-National,* and *North Manchester Foundry,* despite resting in part on the Board's implementing regulations, all explicitly rely on the requirement in Section 9(c)(1) that an appropriate pre-election hearing must include full litigation of all legitimate contested election issues. Just as manifestly, my colleagues' Rule limiting pre-election litigation to issues relevant to questions concerning representation, leaving all else to the post-election stage of proceedings, overrules this precedent and flies in the face of the statutory language, legislative history, and decades of consistent Board practice and precedent. The Rule's restriction is an impermissible interpretation of the Act.

B. Elimination of Pre-Election Requests for Review Cannot Be Reconciled With the Language and Intent of Section 3(b)

> The Board is * * * authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

As set forth above, Section 3(b) of the Act permits the Board to ''delegate to its regional directors'' the Board's authority in representation cases, but is conditioned on the right of ''any interested person'' to seek Board review and a potential Board-ordered ''stay'' of ''any action.'' The inclusion in Section 3(b) of a potential Board ''stay of any action'' by the regional directors shows that Congress clearly intended that a party have the right to seek pre-election Board review following a hearing because it clearly preserved the right to request a Board ordered ''stay'' of the election. This was viewed as a necessary check on the exercise of delegated powers.[42] See, e.g., *Avon Prods.,* 262 NLRB 46, at 48 fn.8 (1982) (explaining that the Board should have stayed the election following the employer's request for review of unit inclusion of a large number of employees).

The statutory provision permitting the stay of an election will have no meaning if, as the Rule provides, a party is no longer able to obtain pre-election Board review of a regional director's direction of election. Obviously, the Board cannot stay an election if, as the Rule provides, the right to seek review is foreclosed until after the election.[43] Section 3(b) contemplates that the Board, in some cases, will exercise its discretion to order a stay of a direction of election where there are unresolved questions that could affect the results of the election. For purposes of a *Chevron* step one analysis, it does not matter whether the Board has rarely exercised this discretion or whether, in the absence of express statutory language, it is rational to permit pre-election requests for review.[44] The Rule impermissibly contravenes the Act by failing to give meaningful effect to an express term of Section 3(b). It is invalid to eliminate a party's right to seek pre-election review (and a potential ''stay'' of the election) simply because such requests are often denied.[45]

In sum, the Rule contravenes decades of Board practice consistent with the plain meaning of the language of the Act and Congressional intent manifested in

[39] At the same time, the Board confirmed the longstanding practice of deferring to the post-election stage a *decision* on issues involving the voting eligibility of a minimal number of individuals. 316 NLRB at 878 fn. 9.

[40] See *Barre-National,* 316 NLRB at 880 (Member Stephens, concurring) (''[I]n my view, the statute—even apart from our implementing rules and regulations—entitles parties to preelection testimonial hearings''); and (Member Cohen, dissenting) (''My colleagues concede, as they must, that the Regional Director violated the procedures of the Act, as well as the Rules of the Board, by not permitting the Employer to adduce evidence on the issue of supervisory status'').

[41] 328 NRLB at 372–373.

[42] Representative Barden clarified that the legislative intent was that ''the regional directors in making any decisions or rulings pursuant to a delegation permitted by that section would be subject to and bound by [established Board] precedents and rules and regulation [and that] * * * an appeal to the Board is provided to prevent and/or remedy any abuse of discretion or departure from Board precedent or Board rules and regulations by the regional directors.'' 105 Cong. Rec. A8061 (September 4, 1959) reprinted in *2 Legislative History of the LMRDA, 1959,* at 1812. See also Representative Kearns (''To make certain Board policy is followed by regional directors, provision is made for appeal to the Board.'') 105 Cong. Rec. A4307–4308 (May 21,1959*) reprinted in 2 Legislative History of the LMRDA, 1959,* at 1749–1750.

[43] Although the Rule ostensibly provides the possibility for an appeal by ''special permission'' in an ''extraordinary'' situation, that possibility is entirely illusory. The ''new, narrower standard'' my colleagues impose limits ''special permission'' to ''extraordinary circumstances *where* it appears that *the issue will otherwise evade review.*'' 76 FR 80162(emphasis added). This severely narrow standard offers no meaningful alternative to seek review that compensates for the Final Rule's elimination of Sec. 3(b)'s right to seek pre-election Board review. See, e.g., 76 FR 80141 (''the Board has decided * * * to eliminate the parties' right to file a pre-election request for review of a regional director's decision and direction of election, and instead to defer all requests for Board review until after the election''); 76 FR 80172 (final rule ''adopts'' proposals ''to eliminate the preelection request-for-review procedure'').

[44] As stated below, I find that the Rule's elimination of pre-election requests for review is also impermissibly arbitrary and capricious.

[45] There is no support for the view that the elimination of a party's right to seek pre-election review ''carr[ies] out 3(b)'s instruction that Board review shall not * * * operate as a stay unless specifically ordered by the Board.'' On the contrary, as set forth above, this language in 3(b) that, ''review shall not * * * operate as a stay'' will be rendered meaningless by the Final Rule's elimination of the right to pre-election review.

legislative history.[46] The Rule cannot be upheld under *Chevron* step one because it represents an impermissible limitation on the intended scope of an ''appropriate hearing'' that, since enactment of the Taft-Hartley Act, must be held prior to an election on all genuine and material contested issues. It is likewise contrary to Congressional intent that delegation to regional directors of duties in representation matters be conditioned on the right of parties to seek pre-election review by the Board of a regional director's action and to obtain an order from the Board staying an election while reviewing such action.

III. The Rule Is Arbitrary and Capricious

The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of ''reasoned decisionmaking.'' * * * Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce.[47]

Even if one were to find that Congress has not directly addressed issues in Section 9 and Section 3(b) of the Act in a manner contrary to the Rule's electoral revisions, the Rule in general and in several particulars still does not warrant deference under the Administrative Procedure Act (APA)[48] or *Chevron* step two[49] because the Rule is ''arbitrary or capricious.'' *United States* v. *Mead Corp.,* 533 U.S. 218, 227 (2001). *See also American Hosp. Ass'n,* 499 U.S. at 618–20 (applying arbitrary and capricious standard in its consideration of the Board's rule on acute care hospital bargaining units). ''Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'' *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Automobile. Ins. Co.,* 463 U.S. 29, 43 (1983). The Rule is arbitrary under multiple counts of the *State Farm* test.

A. What delay does the rule rationally address?

My colleagues repeatedly assert in both the NPRM and the Rule that their purpose is to address the problems of ''delay'' and ''unnecessary litigation'' in election case processing. As a general matter, who could quarrel with such a proposition? Further, anecdotal identification of representation cases which took too long to bring to conclusion is about as difficult as shooting ducks in a barrel. Yet my colleagues never meaningfully define the purported *systemic* problems they seek to address. Neither do they set forth any rational measures or standards by which one might understand the contours of the problems, much less evaluate whether their Rule is reasonably drawn to correct them. Instead, they reason in reverse, pronouncing solutions first, then identifying affected procedures as problems.

The Rule nominally addresses two types of delay: Delay from the time of the petition to an election, and delay from the time of an election until certification of results or representative. Notwithstanding the Acting General Counsel's characterization of the agency's performance as ''outstanding''[50] and ''excellent''[51] when measured by current agency median time targets, my colleagues implicitly find that the targets for these stages are too long. They never quite say why. Instead, they simply contend that it will take less time to process cases with their procedural revisions.

Implicit in their analysis, however, is the conviction that the primary contributor to delay is litigation, either in pre-election hearings, filing of briefs, pre-election requests for review, or nondiscretionary Board review of post-election contested issues. Eliminate this, they say, and the problem of delay is significantly lessened, subject of course to their further review of the remaining reserved proposals in the NPRM.

In sum, my colleagues view litigation as the devil's work, and the devil presumably works for those who oppose a rapid electoral process ending in a union's certification as employees' bargaining representative.[52] Not only does litigation cause delay per se, regardless of the merits of issues raised or their importance to the parties and employee voters, but it is susceptible to abuse. Further, at least prior to an election, delay from litigation affords more time for employers to go on an unfair labor practice rampage to eliminate union support as well as its union supporters, according to some commenters to the rulemaking, including pro-union authors of some highly questionable academic ''studies.''[53]

It cannot be disputed that the efficient and expeditious exercise of our statutory mandate is an appropriate and important goal that is central to our mission. But labeling litigation as a generic and principal cause of undefined delay and abuse, warranting immediate remediation over all other possible causes of delay, is an

[46] My colleagues, of course, may not rely on precedent holding that an administrative agency is ''not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation.'' *Good Samaritan Hosp.* v. *Shalala,* 508 U.S. 402, 417 (1993). That authority is good only so long as the new interpretation ''is otherwise legally permissible and is adequately explained.'' *Chem. Waste Mgmt., Inc.* v. *EPA,* 873 F.2d 1477, 1481 (D.C. Cir. 1989). The Rule is neither. Moreover, where as here, the rule overturns the Board's 65 year-old interpretation, little if any deference is due. ''An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.'' *INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 447 n. 30 (1987) (quoting *Watt* v. *Alaska,* 451 U.S. 259, 273 (1981)).

[47] *Allentown Mack Sales* and *Service, Inc.* v. *NLRB,* 522 U.S. 359, 374 (1998).

[48] 5 U.S.C. 706(2)(A).

[49] As the D.C. Circuit has observed, inquiry at the second step of *Chevron,* i.e., whether an agency has made a permissible statutory interpretation, overlaps with the APA's ''arbitrary and capricious standard.'' See *Shays* v. *FEC.* 414 F.3d 76, at 96–97 (2005), and cases cited there.

[50] NLRB General Counsel Memorandum 11–03, ''Summary of Operations Fiscal Year 2010'' at ''Introduction'' (Jan. 10, 2011), available at *http://www.nlrb.gov/publications/general-counsel-memos.*

[51] NLRB General Counsel Memorandum 12–03, ''Summary of Operations Fiscal Year 2011'' at ''Introduction'' (Mar. 3, 2012), available at *http://www.nlrb.gov/publications/general-counsel-memos.*

[52] There is, of course, an exception to this presumption. That is the contrary presumption of legitimacy in litigation of union unfair labor practice charges that support the Board's current blocking charge policy, with resultant delays of months or even years.

[53] John Logan, Erin Johansson, & Ryan Lamare, ''New Data: NLRB Process Fails to Ensure A Fair Vote'' (June 2011), *http://laborcenter.berkeley.edu/laborlaw/NLRB_Process_June2011.pdf.;* Kate Bronfenbrenner & Dorian Warren, ''The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence'' (2011), *http://iserp.columbia.edu/sites/default/files/working_papers/working_paper_cover_2011-final.pdf.;* and Kate Bronfenbrenner, ''No Holds Barred: The Intensification of Employer Opposition to Organizing'' (May 20, 2009), *http://www.epi.org/page/-/pdf/bp235.pdf?nocdn=1;* My colleagues tiptoe to the edge of endorsing these studies, but claim not to do so. They nevertheless clearly do share with the authors the presumption that employer representation case litigation is presumptively illegitimate, or an unnecessary impediment to elections, while union unfair labor practice charges are presumptively legitimate and, as such, an accurate reflection of unlawful employer interference with elections. The latter presumption informs and, alone, irreparably flaws the authors' studies.

impermissibly arbitrary way of meeting that goal.

B. Failure To Consider the Board's Own Statistical Evidence

''There are some propositions for which scant empirical evidence can be marshaled,'' [54] but that is certainly not the case in this rulemaking venture. The Board has access to a vast and detailed wealth of representation casehandling information that can readily be obtained through its own records. ''[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' '' *State Farm,* 463 U.S. at 43 (quoting *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962)). *See also Business Roundtable et al* v. *SE.C.,* 647 F.3d 1144 (D.C. Cir., 2011) (finding SEC acted arbitrarily and capriciously by relying on insufficient empirical data supporting its rule and by completely discounting contrary studies). No such effort was made here, evincing an arbitrary disregard for identifying the real problem areas in representation case processing.

First, there is the matter of the Agency's official performance goals. I find perplexing my colleagues' indifference to these published goals and statistical evidence of whether the Board meets or exceeds them. These are, after all, the reported standards by which we annually ask Congress and the public to evaluate how well we are doing our job of processing election petitions. They are also the measures by which the performance of senior agency managers is evaluated. In any case, in the absence of any standard or measure presented by my colleagues to replace the Agency's published goals as measures of efficiency, these measures would seem to be the rational starting point for an assessment of what cases took too long to process.

According to information in the Acting General Counsel's recent summary of operations for Fiscal Year (FY) 2011: [55]

—The Board closed 84.7% of all representation cases within 100 days, just short of the performance goal of 85%.

—The Regions conducted 1,423 initial representation elections, of which 89.0% were held pursuant to agreement of the parties. In FY 2010, 1,790 initial elections were held, with a 92.1% election agreement rate. The target election agreement rate is 85% of elections.

—The median time to proceed to an election from the filing of a petition was 38 days, the same rate achieved in FY 2010, and well below the target median of 42 days.

—91.7% of all initial representation elections were conducted within 56 days of the filing of the petition, above the target rate of 90%. In FY 2010, 95.1% of elections were conducted within 56 days.

—Regional directors issued 203 pre-election decisions in contested representation cases after hearing in a median of 33 days from the filing of the petition, well below the target median of 45 days. In FY 2010, regional directors issued 185 pre-election decisions in a median time of 37 days.

—In 45 cases, post-election objections and/or challenges were filed requiring the conduct of an investigative hearing. Decisions or Supplemental Reports were issued in those cases in a median of 62 days. The goal is a median of 80 days.

—Post-election objections and/or challenges that could be resolved without a hearing were filed in 70 cases. Decisions or Supplemental Reports in those cases issued in a median of 21 days. The goal is a 32-day median.

The foregoing statistics fail to disclose any widespread problem of delay in election case processing. They do invite inquiry into the approximately 15% of cases that took more than 100 days to close and the approximately 8% of those that took more than 56 days to move from petition to election. My colleagues made no such investigation. Commenter Samuel Estreicher did. Referring to a study of Board casehandling statistics for 2008, he said

> It is not clear, however, that the median [time from petition to election] can be significantly reduced without the agency also addressing the ''long tail'' of the distribution—the fact that in 2008, for example, 251 of 2024 (or 12.43% of) elections were held more than 56 days after the filing of the petition. The causes of delay in these cases warrant further study. There may well be a substantial overlap between these cases and the 284 petitions that were ''blocked'' in 2008 (pursuant to the Board's ''blocking charge'' policy) where the median time in 2008 between petition and election was 139 days compared to 38 days overall.

My colleagues' response to Professor Estreicher was effectively to say they would get to that study of blocking charges later, if at all, but the Rule's revisions should come first. They give a similar response to suggestions that the Board could effectively and immediately attack representation case delay, without any rule revisions, by cleaning its own house. Indeed, my review of the Board's internal computerized case information system indicated that on the date of the Rule's publication there were at least 20 election cases that had been pending before the Board for more than 100 days. The Board, not any systemic flaw in extant rules, is responsible for this clearly unacceptable delay. Nevertheless, rather than focusing on deciding these cases, my colleagues choose their Rule-first approach. They rationalize that the reduction of cases reaching the Board as a result of the Rule will give them more time to attend to such matters. I address that embarrassing rationale in a subsequent section.

I asked members of my staff to conduct a study of the Board's internal computerized case tracking information system maintained by the Acting General Counsel's personnel in order to ascertain the details of cases that took longer than the 56/100 day time targets to process. The results of that study, which is instructive even if concededly not exhaustive, indicate that the Rule may do little to speed up overall election case processing.

The staff study confirmed Professor Estreicher's observation that when cases take longer than 100 days to process, much of the ''delay'' can be attributed to the effects of post-election case processing, blocking charges, or delays in case deliberations by the Board itself. There is little evidence that, as a systemic matter, conducting pre-election hearings, permitting the filing of post-hearing briefs, and processing pre-election requests for review unreasonably delayed an election or the ultimate conclusion of cases. In some cases where there was arguable delay prior to the election, explanations for this had nothing to do with the hearing and its aftermath. Instead, the additional time before an election resulted from a post-hearing scheduling agreement by the parties or the need to accommodate a seasonal workforce pattern of employment.

The aforementioned statistical studies, as limited as they may be, are some evidence that my colleagues' Rule is misdirected if intended to achieve greater efficiency in representation election casehandling. But the more salient point underscoring the arbitrary nature of the Rule's substance is that my colleagues have made no effort themselves to examine such data and to establish a ''rational connection

[54] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 129 S.Ct. 1800, 1813 (2009).

[55] General Counsel Memorandum 12–03, supra at Introduction and p.2–3.

between the facts found and the choice made.'' [56]

C. The Pre-Election Rule Revisions

1. Stipulated Election Agreements

In recent years, about 90% or more of representation elections were expeditiously held pursuant to election agreements. The stipulated election agreement was by far the preferred alternative to the consent agreement.[57] The stipulated agreement resolved all pre-election disputes but preserved the automatic right to Board review of a regional director or hearing officer's disposition of post-election challenges and objections. The Rule now eliminates that right, substituting for mandatory review a discretionary request for review procedure that currently exists for the disposition of pre-election issues.[58] Without any empirical support, my colleagues contend that this will have no deterrent effect on the percentage of pre-election agreements.

This is a classic case of ''if it ain't broke, don't fix it.'' It seems natural that parties would negotiate resolution of known pre-election issues but at the same time assure the possibility of highest agency review of unforeseen election conduct and eligibility issues that arise during the critical election period. It also seems natural that the willingness of parties to compromise on pre-election issues would be adversely affected by the elimination of the right to agree to mandatory post-election Board review. Not so, claim my colleagues. In deciding whether to enter into an election agreement, parties will still prefer one that preserves even a limited right of Board review over one that provides for final disposition of post-election issues at the regional level.[59] In all other respects, they contend, parties will continue to consider the same factors previously considered when deciding whether to enter into an election agreement at all.

Of course, my colleagues could be wrong, and it was their rulemaking responsibility to give more than cursory thought, if that, to this possibility. The assurance of mandatory, as opposed to discretionary, Board review of challenge and objections issues *could* be a prime consideration to some employers in agreeing to forego what otherwise must be litigated pre-election issues, even under the Rule's limitations, *and,* perhaps more importantly, to resolve most eligibility and unit placement issues prior to an election rather than litigate them post-election as determinative challenges. If the percentage of election agreements diminishes by even a few points as a result of this changed calculus, the consequent increase in pre- and post-election litigation will almost certainly wipe out what little actual redress of perceived delay is effected by the Rule's implementation.

My colleagues' willingness to undertake such speculative risk without adequate consideration of its potential adverse consequences is at least partially explained by their apparent agreement with commenters who contend that employers use the election agreement process to extort unwarranted concessions from unions, who capitulate in order to avoid the delay attendant to litigation of disputed issues. Again, this view is based on the presumption that employers could not really have legitimate issues to raise in litigation. If there are legitimate disputes, and I dare to say this can be the case, then the process of negotiating an election agreement in which an employer waives such litigation rights in exchange for concessions about unit scope, unit placement, or election details, seems to fairly resemble the give-and-take bargaining that would ensue after a petitioning union wins an election and is certified.

In sum, apart from other reasons, discussed below, I find the Rule's elimination of mandatory Board review of post-election disputes to be arbitrary and capricious. The resultant elimination of a highly-favored process that encouraged the negotiated resolution of all pre-election issues is not only wholly unsubstantiated but also contrary to the purpose for which the Rule is purportedly drawn.

2. Pre-Election Hearings

As previously discussed, the Rule's limitation of issues that can be litigated in a pre-election hearing is impermissibly contrary to the language and Congressional intent for Section 9(c)(1). Even if the Board had the discretion to impose this limitation, it has failed to offer a rational justification for doing so.

Obviously, the length of the hearing itself is not a significant problem. Even under current rules permitting litigation of disputed issues other than those relevant to whether a question concerning representation exists, the average hearing lasts one day and few last more than two. Further, while hearing officers must currently create a complete record, they clearly have had the ability under existing procedures to limit the introduction of evidence on issues where a party bears the burden of proof and fails to take a position.[60]

My colleagues are essentially concerned with the time it takes to get to a hearing and the time it takes to get from a hearing to an election. Accordingly, they seek to limit the number of pre-election hearings by limiting the issues that can be litigated, and they eliminate the pre-election review process and the attendant recommended 25-day waiting period prior to the election.

Although it can take longer to get to an election when the Board conducts a pre-election hearing, an initial question is how much longer? My staff's review of agency statistics indicates that more than half of the pre-election hearing cases are closed within 100 days of the petition, thus meeting the agency performance goals.[61] Also, in recent years, the median days from petition to election in cases with pre-election hearings is about 64 days, just 8 days above the agency performance goal for elections where no hearing is held.

Nevertheless, my colleagues repeat as a mantra the claim that their revisions will alleviate unnecessary litigation and delay because ''the issues in dispute in such litigation are often rendered moot by the election results or resolved by the parties post-election.'' [62]

Once again, my colleagues offer no empirical support whatsoever for a stated premise, in this instance the premise that the now-deferred issues are *often* rendered moot.[63] One would think, at the very least, that they would want to examine case statistics from recent years to get an idea of what issues would still have to be litigated pre-election and what issues that will now be deferred would still have to be

[56] *Burlington Truck Lines,* supra, 371 U.S. at 168.

[57] In 2008, 1579 elections were held pursuant to stipulation, while only 75 consent elections were held. NLRB Annual Report FY 2008. In 2009, 1370 elections were held pursuant to stipulation, while only 41 consent elections were held. NLRB Annual Report FY 2009.

[58] Even in the absence of an election agreement, the Rule eliminates the automatic right of review in cases where a regional director makes the discretionary choice of issuing a report and recommendations on post-election issues.

[59] 76 FR 80161.

[60] See *Bennett Industries, Inc.,* 313 NLRB 1363 (1994).

[61] In FY 2010, 43% of cases that went to a pre-election hearing (68 of 158) closed in more than 100 days; in FY 2009, 45% (57 of 127), and 51% (78 of 152) in FY 2008.

[62] 76 FR 80141.

[63] My colleagues define mootness relative to a particular election. Of course, the failure to resolve a ''mooted'' issue may well contribute to what would be unnecessary uncertainty, litigation, and delay in the processing of a rerun election or an election following a new union campaign. The more individuals whose status is left in limbo by the Rule's revisions, the greater is the likelihood of this happening.

litigated in the post-election hearing. It seems logical that some issues will indeed be mooted by the election outcome. It seems just as logical that some issues will survive, particularly in light of the strong possibility that the deferral of unit eligibility and placement issues without limitation for the number of individuals involved will greatly increase the number of elections with a determinative number of challenged ballots. If so, then the Rule only backloads litigation, with no real shortening of the time to process a representation case from petition to closing.

In any event, balanced against any potential net gain in the time for election case processing is the need to resolve many, if not most, disputed election issues sooner rather than later. In other words, even if litigation means an election will be held at a later time, is the delay reasonably necessary and could it even expedite final resolution of the election process? See, e.g., *Excelsior Underwear, Inc.,* 156 NLRB 1236, 1243 (1966), reasoning the early identification of ''bona fide disputes between employer and union over voting eligibility'' may avoid resorting to ''the formal and time-consuming challenge procedures.''

My colleagues may not think so, but there are employees, employers, and unions who believe that there is value in the early resolution of individual issues that do not bear on whether an election should be held at all. In particular, employees quite reasonably would like to know if they are eligible to vote and will be part of a bargaining unit that the union seeks to represent. Telling them they can cast a challenged ballot, with their eligibility possibly to be resolved later, is hardly an inducement to participate in the electoral process. Further, individuals whose status as supervisors is disputed would reasonably like to have that issue resolved before an election, as would their employer and the participating union. It is unbecomingly blasé of my colleagues to state that, because resolution of this issue would in any event not undo the effect of antecedent actions taken in the election campaign, there is no problem with postponing such resolution until after the election, if then. They are aware, I believe, that an employer can lawfully discharge or discipline a statutory supervisor for engaging in union activity, even if the individual mistakenly believed he was an employee, or was told so by the union.

My colleagues also rely on the traditional Board practice of deferring final decision on some individual eligibility and unit status issues until after an election. They describe the Board's practice as ''regular'' and ''frequently'' used, but once again make no effort to provide statistical support for this characterization. It is certainly true that over the years, an informal guideline has evolved in Board law and practice that permits the holding of elections in appropriate circumstances when it remains unclear whether a small number of voters belong in the voting unit by permitting the disputed individuals to vote under challenge. Usually, the number of such challenges does not exceed about 10–12% of the unit. See, e.g., *Silver Cross Hospital,* 350 NLRB 114, 116 fn. 10 (2007) (the Board permitted two employees, which was about 11% of the unit, to vote under challenge.) This practice is not, however, per se. It merely informs the Board's consideration of individual cases when difficult issues or insufficient record evidence would otherwise tie up processing the case for some time. The Board considers whether there is a cognizable possibility that votes cast by a small percentage of a voting unit will make no difference in the outcome of the election, and the parties may have a final outcome regarding the question concerning representation sooner. This is not done without thought or without recognition of the risk that failing to resolve disputes before the election may lead to more litigation. By this discretionary case-by-case practice, the Board has recognized practical *exceptions* to its established standards of litigating and resolving all disputes before an election, including voter eligibility and unit placement questions.

The fact that the Board has deferred some pre-election issues for a limited number of individuals in an indeterminate number of cases hardly justifies doing so axiomatically for an unlimited number of individuals. Although decided under the pre-Taft Hartley ''substantial issue'' rule for pre-election hearings, the court's opinion in *SW. Evans & Son* speaks directly and critically to my colleagues' rationale for doing so.

> It is a simple matter, from the vantage point of hindsight, to determine the substantiality of issues raised, as the petitioner suggests, on the basis of election results which, fortuitously, may be such as could remain unaffected by the ultimate conclusion of those issues. But the problem of substantiality, in our view, is one to be determined prospectively. Indeed, were it otherwise, the very purpose of the amendment to the Rules and Regulations, to avoid delay, would be annulled. We are of the opinion that the respondent here raised substantial issues and under the Rules and Regulations of the Board it was entitled to a pre-election hearing.[64]

3. Post-Hearing Briefs

Under current rules, parties are afforded the opportunity to file post-hearing briefs within seven days after the pre-election hearing, or later with special permission. Whether or not required as a matter of minimum due process, the right to file post-hearing briefs has become an established Board practice. Yet, my colleagues now claim that this practice ''*often* delays issuance of the regional director's decision and direction of election, thereby delaying resolution of the question of representation even when the issue or issues in dispute can be accurately and fairly resolved without briefing.'' (emphasis added)[65] Accordingly, the Rule generally prohibits the filing of post-hearing briefs, except in the event of the hearing officer's ''special permission.''[66]

I need not belabor this issue. Recall that the Acting General Counsel's annual summary for FY 2011 stated that regional directors issued 203 pre-election decisions in contested representation cases after hearing in a median of 33 days from the filing of the petition, well below the target median of 45 days. Nevertheless, my colleagues once again proceed on a factually unsubstantiated premise that a particular, long-established feature of Board pre-election procedure ''often'' delays the issuance of a regional director's decision. Is there any comment in the record by a regional director, past or present, to this effect? Is there any apparent reason why, in cases where the issues litigated are straightforward and few, a regional director or regional staff could not commence the drafting of a decision prior to receipt of briefs?[67] For that matter, is there any comment in the record that parties routinely submit briefs in such simple cases?

On the other hand, my colleagues are totally dismissive of the potential value of post-hearing briefs in narrowing factual disputes, defining issues, and possibly creating grounds for settlement that would obviate the need for a regional director's decision and expedite the electoral process. Even if there is no settlement, is there any

[64] 181 F.2d at 431.

[65] 76 FR 80141.

[66] 76 FR 80185.

[67] In fact, the Agency's internal training program expressly instructs decision-writers to begin drafting pre-election regional directors' decisions before the briefs arrive. See NLRB Professional Development Program Module 5: Drafting Regional Director Pre-Election Decisions, last updated May 23, 2004, Participants Guide and Instructors Guide.

record support for my colleagues' view that post-hearing briefs are apparently so worthless that they should only be allowed in the rare case where a hearing officer gives special permission? [68]

It is obvious that my colleagues' real objective in generally eliminating the filing of post-hearing briefs has no rational relationship to whether such a practice unreasonably delays the electoral process. They are simply shortening the pre-election timeline wherever they can, without any real consideration of the merits of the practice eliminated.[69]

4. Pre-Election Requests for Review

I have previously discussed why the elimination of pre-election requests for review is impermissibly contrary to Section 3(b) of the Act and Congressional intent. The same action is indefensibly arbitrary and capricious.

This action is part and parcel of the backloading of representation case issues also mandated by the Rule's deferral of litigation of unit eligibility and placement issues, and it warrants the same criticisms. My colleagues again parrot the factually unsubstantiated claim that contested issues will ''often'' be mooted by the election results. If not, they say, rather than bifurcating the resolution of all contested issues in a representation case, final resolution of litigated pre-election issues can still wait and be decided in a single proceeding with post-election issues. Of course, the supposed bifurcation would only occur if there are post-election issues other than those for which a request for review will now be deferred.[70]

My colleagues also denigrate the pre-election request for review process as essentially useless, given how rarely the Board grants review, in which case a decision generally issues after the election, and even more rarely that it stays an election.[71] They miss the point that in those cases where review is denied, the Board action provides finality. They also fail to acknowledge that in cases where a regional director improperly directs an election and review would otherwise be granted, the Rule will result in such elections being run unnecessarily, See, e.g., *Sanctuary At Mcauley Employer,* Cases 7–RC–23402, et. al (April 8, 2011) (granting the employer's request for review of the regional director's direction of election which raised a substantial issue with respect to whether the unit managers were statutory supervisors); *State Bar of New Mexico,* 346 NLRB 674 (2006) (the Board determined that the employer, the State Bar of New Mexico, is exempt from the Boards jurisdiction, reversed the regional director's direction of election and dismissed the petition); *In re Canal Carting, Inc.,* 339 NLRB 969 (2003) (the Board granted the employer's request for review of the regional director's direction of election, finding a contract bar to the union's petition). It is illogical to go forward with an election if the regional director erred in finding a question concerning representation. Thus, whether or not the Board grants review, the pre-election request for review promotes efficiency by ensuring that the regional director has properly ruled on the existence of a question concerning representation, as well as on other issues under current pre-election procedure.

This is all of little matter to my colleagues. Their primary purpose in eliminating the pre-election request for review is to eliminate the companion recommended minimum 25-day waiting period for scheduling an election after a regional director's decision and direction of election. In their view, this delay is unwarranted because the request for review is unnecessary, and they reject any suggestion that there might be alternate justifications for a post-decisional waiting period. Inasmuch as I believe the pre-election request for review process is mandated by the Act and has substantial value in bringing final resolution to litigated issues as quickly as possible, and that my colleagues have failed to articulate a rational basis for its elimination, I need not posit an alternative justification for the process. However, I think there could well be both an agency administrative justification for at least some post-decisional time to arrange the details of election. More importantly, as discussed below, I believe that in at least some instances it will be critically important to provide some post-decisional time for employers to exercise their free speech rights to communicate their view on unionization to employees

D. The Post-Election Rule Revision

One justification for my colleagues' elimination of nondiscretionary Board review of post-election challenge and objections issues is jaw-droppingly pretentious. They claim that ''[t]he final rule will enable the Board to separate the wheat from the chaff, and to devote its limited time to cases of particular importance.'' [72] Shortly thereafter, my colleagues reason that ''the discretionary review provided for in the final rule parallels that used by the Supreme Court to ensure uniformity among the circuit courts of appeals.'' [73] I am afraid that my colleagues take their analogy to the Supreme Court's discretionary review far too literally. The Board is an administrative agency, and the Board members comprise the only forum for internal administrative review of regional actions. However mundane the supposed chaff of cases may seem to them, it is our duty to provide employees and parties in those cases the same decisional attention, guidance, and care as in ''cases of particular importance.''

Beyond that, how in common sense can my colleagues maintain that the Board has such limited time as to warrant departing from the current nondiscretionary review practice? This is not 1959, when Congress enacted Section 3(b)'s delegation authority to address the Board's undisputed inability to handle its pending caseload.[74] In 1959, there were 9,347 representation case filings, 8,840 case closings, and 2,230 cases pending at the end of the year. The Board itself decided 1880 cases.[75]

In Fiscal Year 2011, 2,634 representation case petitions were filed in the regions, a decrease of 11.2% from 2,969 in FY 2010. In addition, the Board's pending caseload is at a near-historical low.[76] According to statistics compiled by the Board's Executive Secretary, as of January 3, 2012, there were 137 pending unfair labor practice

[68] It is quite clear to me, as it will be to regional personnel, that a hearing officer's discretion to grant motions to file briefs is severely limited by the ''special permission'' language. Notably, my colleagues gave no apparent consideration to the alternative of a broad discretionary standard that would enable a hearing officer to make a real case-by-case evaluation of whether a post-hearing brief would benefit the regional director's decisionmaking.

[69] Indeed, my colleagues state that the ''temptation to use the threat of unnecessary litigation to gain * * * strategic advantage is heightened by * * * the right to take up to seven days to file a post-hearing brief * * *.''

[70] This not unlikely circumstance gives the lie to my colleagues' characterization of the pre-election request for review as interlocutory.

[71] As previously discussed, the right to petition for that rare stay is statutorily mandated.

[72] 76 FR 80159.

[73] 76 FR 80160.

[74] In any event, the delegation was primarily, if not exclusively concerned with permitting regional directors to make unit determinations prior to an election. See *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137, at 138, 141 (1971). See also *Meyer Dairy, Inc.* v. *NLRB,* 429 F.2d 697 (10th Cir. 1970) (the ''section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings * * *.'').

[75] Twenty-Fourth Annual Report of the National Labor Relations Board for Fiscal Year Ended June 30, 1959, Appendix A—Tables 1 and 3.

[76] GC Memorandum 12–03, supra at p. 2.

cases and 31 pending representation cases. That caseload is not likely to increase in light of the dramatic decline in regional intake. In these circumstances, I think it is clear that the Board has time and staff enough to handle both the wheat and chaff of post-election issues raised before us under the existing practice of mandatory review.

There is the additional problem of my colleagues' failure to rationalize the significant difference between the existing rule and the new Rule as to the review standard imposed for post-election issue litigation. Under the practice of mandatory review, the Board would engage in de novo review of the entire record with respect to factual findings, other than credibility findings, of the decision maker below.[77] Under the Rule's discretionary review standard, the Board will only grant review of regional factual finding based on a showing that the finding was clearly erroneous and prejudicial. This standard is not often likely to be met.

My colleagues assert that the change in review standards is of little consequence because the Board affirms the majority of post-election decisions made at the regional level. This may be true as to decisional outcome, but there have been numerous Board decisions reversing the hearing officer's or regional director's findings in post-election cases.[78] Also, in many cases, even if the Board has affirmed the decision below, it has modified or clarified the supporting findings.[79] There also have been many cases in which a Board member or members dissent to the factual findings below.[80] The Rule's discretionary review standard affords far less opportunity for reversal, clarification, or dissent with respect to such findings and their application to the controlling legal principles.[81]

The aforementioned Board decisions focusing on factual findings may not be of much import as to major legal issues, but they are of great significance in assuring the public and reviewing courts that the law is being uniformly and consistently applied. While the Board may delegate representation case duties under Section 3(b), it cannot abdicate its administrative responsibility as principal overseer of the exercise of those duties. That is exactly what it has done through the Rule's substitution of a post-election discretionary review process for a mandatory review process.

Discretionary Board review under a clearly erroneous and prejudicial standard greatly increases the possibility that individual regions will reach different nonreviewable results in factually identical or similar circumstances.[82] This decisional balkanization will introduce uncertainty and lack of uniformity in representation case law. It will effectively create a system in which parties have to litigate issues in light of regional precedent, in spite of the well-established Board doctrine that regional directors' decisions do not have precedential value.[83] It is particularly concerning that the Board will now be deciding few appeals involving election misconduct because the issues raised in such appeals go to the essence of employee free choice, and narrow factual distinctions have often made the difference in determining whether specific conduct has had an objectionable effect on that choice.

Finally, I note that the elimination of mandatory post-election Board review, coupled with the deferral of many issues to the post-election phase of proceeding, may well cause an increase in ''test of certification'' cases for employers denied discretionary review by the Board of issues that previously would entail mandatory de novo review. Whether or not any employer would be successful in securing judicial reversal of a regional director's decision is beside the point. Any test-of-certification delays final resolution of the representation procedure, and that delay can sometimes be substantial.

E. The Chairman and Member Becker Arbitrarily Departed From Well Settled Board Procedure in Promulgating the Rule

''Because the arbitrary and capricious standard focuses on the rationality of an agency's decisionmaking process rather than on the rationality of the actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.' ''[84] ''Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.''[85] In proceedings leading to adoption and issuance of the Rule, my colleagues abruptly departed from established Board decisonmaking practices and policies.[86]

1. *Departure from practice of not overruling precedent without the affirmative vote of at least three Board members.*

At least since the mid-1980s, it has been Board practice that the power to overrule precedent will be exercised only by the affirmative vote of three members of the Board. S*ee,* e.g., *Hacienda Resort Hotel & Casino,* 355 NLRB No. 154 (2010); *DaimlerChrysler Corp.,* 344 NLRB 1324 fn. 1 (2005); *International Transportation Service Inc.,* 344 NLRB 279, 279 fn. 2 (2005); *Tradesmen International,* 338 NLRB 460 (2002); *Temple Security,* 337 NLRB 372, 373 fn. 7 (2001); *G.H. Bass Caribbean, Inc.,* 306 NLRB 823, 833 fn. 2 (1992); *Atlantic Interstate Messengers, Inc.* 274 NLRB 1144 fn. 3 (1985); and *Redway Carriers, Inc.,* 274 NLRB 1359 fn. 4 (1985). This practice provides some degree of stability, predictability, and credibility in our agency

[77] My colleagues mistakenly rely on *Stretch-Tex,* 118 NLRB 1359 (1956), for the proposition that the Board's review of a hearing officer's factual findings is, in general, ''highly deferential.'' 76 FR 811059. The standard referred to, as in the unfair labor counterpart case of *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), is limited to contested credibility findings. Otherwise, the de novo review standard applies. Id. at 545.

[78] See, e.g., *Sweetwater Paperboard and United,* 357 NLRB No. 142 (2011); *Go Ahead North America,* LLC, 357 NLRB No. 18 (2011); *Rivers Casino,* 356 NLRB No. 142. (2011); *Trustees of Columbia University,* 350 NLRB 574 (2007); *Madison Square Garden CT, LLC,* 350 NLRB 117 (2007); *In re Woods Quality Cabinetry Co.* 340 NLRB 1355 (2003); *Manhattan Crowne Plaza,* 341 NLRB 619 (2004).

[79] See, e.g., *Automatic Fire Systems,* 357 NLRB No. 190 (2012); *Enterprise Leasing Company-Southeast, LLC,* 357 NLRB No. 159 (2011).

[80] See, e.g., *FJ Foodservice Employer,* Case 21–RC–21310 (December 30, 2011) 2011 WL 6936395; *Mastec DirectTV Employer,* 356 NLRB No. 110 (2011); *American Medical Response,* 356 NLRB No. 42 (2010).

[81] The majority cites to *Mental Health Association, Inc.,* 356 NLRB No. 151 (2011), as an example of a case which did not require Board review because it involved the application of settled precedent. However, the Board modified the hearing officer's findings because it disagreed with part of the hearing officer's analysis and found it unnecessary to rely on another part. Id. at slip op. 1, fn. 4

[82] I note that my critique of this aspect of the Rule has nothing to do with the expertise and competence of regional directors and hearing officers, for whom I have great respect. However, as with administrative law judges deciding unfair labor practice cases, expert and accomplished persons sitting in review of the same or similar set of facts can reach different conclusions of law. It is the Board's responsibility to reconcile those differences.

[83] E.g., *Rental Uniform Service, Inc.,* 330 NLRB 334, 336 fn.10 (1999), citing *S.H. Kress & Co.,* 212 NLRB 132 fn. 1 (1974).

[84] *Olenhouse* v. *Commodity Credit Corp.,* 42 F.3d 1560, 1575 (10th Cir. 1994), quoting from *State Farm,* 463 U.S. at 50.

[85] *Allentown Mack, 522 U.S. at 374.*

[86] I adhere to the view expressed in my dissent to the NPRM, and echoed by many commenters, that there were numerous procedural deficiencies in the overall rulemaking process that collectively evidence an arbitrary process inappropriate to the scale of proposed revision in election procedures. See 76 FR 36829–36830. However, in this dissent, I find it necessary to rely only on those arbitrary processes attendant to the published Rule from the time of its initial November 2011 proposal to its final approval by Chairman Pearce and Member Becker on December 16.

decisionmaking, even as Board membership changes and political winds shift accordingly. Individuals reliant on Board law are at least assured that the law will not be changed by a ''minority majority'' [87] consisting of only two members of the congressionally intended full body of five.

The three-affirmative-vote requirement has been consistently followed by both Republican and Democrat Board Members. *See Ryan Iron Works, Inc.,* 345 NLRB 893, 895 fn. 13 (2005) (Republicans), and *Ingram Barge, Co.,* 336 NLRB 1259, 1259 fn. 1 (2001) (Democrats).[88] Circuit courts have acknowledged the Board's practice as a reasonable institutional means of ensuring the stability of Board decisions. *See Local Joint Exec. Bd. of Las Vegas* v. *NLRB,* 657 F.3d 865, 872 (9th Cir. 2011); *Progressive Electric, Inc. v. NLRB,* 453 F.3d 538, 552 (D.C. Cir. 2006); and *International Transportation Service, Inc.* v. *NLRB,* 449 F.3d 160, 165 (D.C. Cir. 2006). Chairman Pearce and I both adhered to the practice in *Hacienda Resort Hotel & Casino,* supra, notwithstanding our acute awareness that the reviewing Ninth Circuit might disagree with the resultant Board decision that was based on extant precedent.[89]

In publishing the Rule, my colleagues readily acknowledge that they have failed to follow this established practice. As discussed below, none of the three arguments made in their defense provides a reasoned explanation for their action. Accordingly, the Rule is invalidly based on an arbitrary and capricious process.[90]

My colleagues first contend that they were not required to adhere to the three-affirmative-vote practice in this rulemaking proceeding because the Rule is ''purely procedural'' and thus does ''not implicate the sorts of reliance interests that underlie the Board's practice.'' [91] They further contend that, inasmuch as the Rule is procedural, it is exempt from the APA's notice-and-comment rulemaking requirements.

Putting aside the question whether, having chosen to engage in informal notice-and-comment rulemaking under the APA, my colleagues can even claim that the Rule is purely procedural, I find they have not provided a rational explanation for this claim. A procedural rule is ''one that does not itself 'alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.' '' *Chamber of Commerce of the United States* v. *United States Department of Labor,* 174 F.3d 206, 211 (D.C. Cir. 1999). A substantive rule, in contrast, ''has a 'substantial impact' upon private parties and 'puts a stamp of [agency] approval or disapproval on a given type of behavior.' '' *Id.* Courts have found that this ''distinction is often difficult to apply as even a purely procedural rule can affect the substantive outcome of an agency proceeding.'' *Id.* Because of this difficulty, courts apply the notice-and-comment exemption set forth in Section 553(b)(3)(A) of the APA ''with an eye toward balancing the need for public participation in agency decisionmaking with the agency's competing interest in 'retaining latitude in organizing its internal operations.' '' Id. ''[T]he question whether a rule is substantive or procedural for the purposes of § 553b is functional, not formal. That is why [courts] examine how the rule affects not only the 'rights' of aggrieved parties, but their 'interests' as well. Id. at 212,, citing *Batterton* v. *Marshall,* 648 F.2d 694, 707 (D.C. Cir. 1980).

The Rule here affects every party subject to the Board's jurisdiction in representation cases and alters the Board's representation case procedures in a sweeping manner. It substantially limits the right to a pre-election hearing, eliminates the right to pre-election Board review of a regional director's direction of election, eliminates the right to automatic Board review of post-election issues, changes the standard for Board review of many contested electoral issues, and substantially impacts the rights of employees and employers to engage in communications about election issues prior to the election. These changes represent more than ''incidental inconveniences.'' *Chamber of Commerce,* 174 F.3d at 211–212. They clearly affect the rights and interests of parties subject to the Board's representation case procedures and thus are of a substantive, not procedural, nature.

Accordingly, not only is the Rule substantive in impact, it also *does* implicate the same reliance interests that underlie the adjudicatory practice requiring three affirmative votes for change. Although not dispositive, I suggest that the filing of over 60,000 comments, pro and con, in response to the NPRM supports the conclusion that the Rule is something more than a modest procedural revision. The public perception is that something more is at stake here.

My colleagues next contend that they are not bound by the three-affirmative-vote practice because the concern for ''stability of legal rules'' that it addresses only applies in case adjudication, not rulemaking proceedings. In doing so, they note that the Administrative Conference of the United States (ACUS) has cited the greater stability inherent in notice and comment rulemaking in recommending its increased use by the Board.[92]

My colleagues fail to explain, however, how departing from the Board's established practice to permit a minority majority to conclude a sweeping, substantive rulemaking initiative does not raise concerns about the stability of Board law. Indeed, nothing in the ACUS recommendation suggests that rulemaking by the Board can or should be carried out on the vote of just two Board members or that the Board, when engaged in informal notice-and-comment rulemaking, should apply different voting practices than it does when engaged in rulemaking through case adjudication.

Assuming, arguendo, that a rule adopted pursuant to informal notice-and-comment rulemaking is likely to be more permanent than an adjudicated rule, that would seem to provide *greater* reason to require the affirmative votes of three Board members for such an undertaking. On the other hand, I venture that the product of rulemaking is now not much less vulnerable to reversal than an adjudicated rule as a consequence of change in Board membership and policy preference. All that is required is another proposed rule revision, another notice-and-comment period, and a rationally justified final rule.[93] My colleagues have now established that such action may be undertaken with the approval of only two of three sitting Board members, and so they cast doubt on the stability of the very Rule they endorse. Their

[87] I borrow this phrase from Jonathan Remy Nash, ''The Majority that Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements'' (August 11, 2008). U of Chicago, Public Law Working Paper No. 227. Available at SSRN: *http://ssrn.com/abstract=1217876* or *http://dx.doi.org/10.2139/ssrn.1217876.*

[88] In the 27 years of this practice, my colleagues cite only two 1997 cases where two members of a three-member Board did not adhere to it.

[89] That is, in fact, what happened. See *Local Joint Exec. Bd. of Las Vegas* v. *NLRB,* 657 F.3d at 870–876.

[90] I emphasize here that I am addressing an internal action requirement, not a statutory quorum requirement. I leave to others the question whether issuance of the rule runs afoul of the Board's quorum requirement, as discussed and defined by the Supreme Court in *New Process Steel L.P.* v. *NLRB,* 560 U.S. __, 130 S.Ct. 2635, 2639–42 (2010).

[91] 76 FR 80138, 80146.

[92] ACUS, Recommendation 91–5, *Facilitating the Use of Rulemaking by the National Labor Relations Board* (adopted June 14, 1991), 56 FR 33851 (July 24, 1991).

[93] Of course, according to my colleagues' reasoning, any subsequent rule revision of their Rule would be procedural and would be exempt from the APA notice-and-comment requirement.

reservation for further consideration of other elements of the NPRM just makes the state of representation case law even more uncertain, as does their simultaneous adjudicatory assault on extant law.[94] As a result, any way one looks at it, my colleagues have failed to provide a reasoned explanation for departing from the agency's three-affirmative-vote practice.

Lastly, my colleagues contend that they were not required to adhere to the three-affirmative-vote practice because the Rule does not overrule any Board decisions. In my view, the policy supporting this practice mandates its application to the revision of rules that have a substantive effect on the interests of those involved in representation case proceedings regardless of whether the revision overrules specific case precedent. However, even a cursory review of the Rule establishes that my colleagues misrepresent its effect on precedent as well.

In both *Barre-National, Inc.* and *North Manchester Foundry, Inc.,* discussed supra, the Board reversed regional director actions that denied employers the opportunity to present evidence on eligibility issues. As previously stated, my colleagues' defense of the Rule's narrow interpretation of Section 9(c)(1) misleadingly suggests that these cases are not to the contrary. The Rule clearly overrules this precedent.

2. Departure From Board Process With Respect to Dissenting Board Members

As stated in the Background section of this statement, the Rule was issued pursuant to the votes of Chairman Pearce and Member Becker on November 30 to proceed with drafting a final rule, and votes by the same two Board Members on December 15 to direct the Solicitor to issue the Final Rule upon its approval by a majority. I voted against each action. On December 16, my colleagues modified and approved the Rule. Without further action by me, the Rule issued and was forwarded by the Solicitor for publication in the **Federal Register**. This marked the first known instance in Board history in which Board members intentionally refused to provide a colleague a reasonable period of time in which to prepare and issue a dissenting statement simultaneously with the controlling decisional document.

My colleagues utterly fail to justify their ad hoc action. As an initial matter, they assert that nothing in law compelled them to wait to issue the Rule until after I had an opportunity to review and prepare my dissent to it. Indeed, I can cite to no statute or case expressly holding that they were required to do so. This does not, however, answer the question whether their action should be considered arbitrary and capricious.

As an initial matter, my colleagues ignore the importance of dissents in society, law, and federal administrative practice. In this regard, dissent is a bedrock principle of our democracy and has become deeply engrained in American culture. See *Lee* v. *Weisman,* 505 U.S. 577, 607 (1992) (Justice Blackmun concurring) (''Democracy requires the nourishment of dialog and dissent''); see also *Johnson* v. *Raemisch,* 557 F.Supp. 964, 969–970 (2008), citing Cass Sunstein, *Why Societies Need Dissent* 210–212 (2003) (''Dissents have contributed to American democracy by forcing the majority to articulate justifications for widespread practices and by exposing the weaknesses of long held beliefs'').

Specific to law, dissents are a useful tool in effecting well-reasoned legal decisions. Indeed, Supreme Court Justice Ruth Bader Ginsburg has stated that dissents are important because they can ''lead the author of the majority opinion to refine and clarify her initial circulation'' and may be persuasive enough to ''attract the votes necessary to become the opinion of the Court.'' See Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions,* 95 Minn.L.Rev. 1, 4 (2010). My experience as a Board Member confirms Justice Ginsburg's observation. On numerous occasions, circulated dissents have prompted substantial revision of prior draft majority opinions, and in some instances an initial dissent ultimately became the Board's final decision.

It is true, as my colleagues state, that the APA does not require permitting dissents to promulgated rules. It is also true that the APA does not prohibit or expressly endorse prohibition of dissent. Consistent with the above, dissents are common in the federal administrative decisionmaking processes. See, e.g., *United States Dept. of Homeland Security, Transportation Security Administration and AFGE,* 65 FLRA 242 (2010) (Member Beck dissenting); and *Chambers* v. *Dept. of the Interior,* 103 MSPR 375 (2006) (Member Sapin dissenting). And, in recent years, dissents have become a widely accepted practice in federal agency rulemaking proceedings. *See* Position Limits for Futures and Swaps, 76 FR 71626, 71699, 71700 (Nov. 18, 2011) (to be codified at 17 CFR part 151) (Commissioners Jill Sommers and Scott O'Malia dissenting); Demand Response Compensation in Organized Wholesale Energy Markets, 76 FR 16658, 16679 (March 15, 2011) (to be codified at 18 CFR part 35) (Commissioner Philip D. Moeller dissenting); Representation Election Procedure, 75 FR 26062, 26083 (May 11, 2010) (codified at 29 CFR part 1202, 1206) (Chairman Elizabeth Dougherty dissenting); and Market-based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities, 72 FR 39904, 40046 (July 20, 2007) (codified at 18 CFR part 35) (Commissioner Philip D. Moeller dissenting). Thus, while my colleagues may not have been legally required to accommodate my dissenting opinion in this matter, by failing to do so they removed an important component from the decisionmaking process and acted inconsistently with good federal administrative practice.

More to the point, my colleagues fail to identify a single instance in which the Board has for any reason issued a rule by adjudication or rulemaking without permitting prior circulation and simultaneous publication of a dissent. As they note, I previously dissented to the NPRM in this rulemaking,[95] and I dissented to both the Final Rule[96] and the Notice of Proposed Rulemaking[97] in the recent employee rights notice-posting rulemaking proceeding. There was also a dissent by Member Johansen to the Final Rule on appropriate bargaining units in the health care industry.[98] In other words, while the number of major Board rulemaking proceedings has been few, there has been a simultaneous dissent in every one.

My colleagues suggest that there is no imperative to permit dissent because notice-and-comment rulemaking, as opposed to case adjudication, is, ''in effect, a dialogue between the administrative agency and the public—not an intramural debate between or among agency officials.''[99] They also

[94] See, e.g., *2 Sisters Food Group,* 357 NLRB No. 168 (2011). In a decision issued only one week after publication of the Rule, Chairman Pearce and Member Becker articulated guidelines for exercise of a regional director's discretion to determine whether to hold an election away from an employer's premises, substantially increasing the likelihood that an election will be held off premise whenever a petitioning union objects to an on-site election. Id., slip op. at 4–8. Moreover, Member Becker's partial dissent advocated overruling precedent to hold that an employer cannot compel employee attendance in a captive audience meeting about unionization at any time during the critical pre-election period. Id. slip op. at 10–14. It requires no great prescience to surmise that this issue will soon be revisited.

[95] 76 FR 36812, 36829.

[96] 76 FR 54006, 54037 (Aug. 30, 2011).

[97] 75 FR 80410, 80415 (Dec. 22, 2010).

[98] 54 FR 16336, 16347 (Apr. 21, 1989).

[99] 76 FR 80107.

suggest that my participation in events prior to issuance of the Rule has been sufficient for purposes of expressing my view. With all due respect, that is utter nonsense, and my colleagues would say the same were they in my position. In adjudicated cases of major import, many of which involve adoption of rules in representation cases, the Board frequently invites and gets public comment well beyond the position statements of the particular parties involved.[100] I have never heard it suggested that this diminishes or defeats the right of a Board member to circulate a written dissent in advance of a final published decision and to have that dissent published simultaneously. Nor have I heard it said, for instance, that a Board member's participation in an oral argument obviates the need to accommodate a subsequent dissent by that member.

At least facially, my colleagues articulate a credible concern that an individual Board member not be allowed to veto a rule or adjudicated decision by inaction or delay. I agree. That is why the Board has since 2001 operated under ES Memo 01–01, a Board-approved procedural order concerning the ''Timely Circulation of Dissenting/Concurring Opinions.'' ES Memo 01–01 provides for issuance of a Board decision in an adjudicated case without a dissent if 90 days have passed following the majority approval of a draft without action by the remaining Board Member or Members.

Obviously, application of that order in this proceeding would have precluded issuance of the Rule until 90 days after its December 16, 2011, approval. Once again, however, my colleagues rely on the distinction without difference that this is a rulemaking proceeding to which ES Memo 01–01 does not expressly apply, as opposed to the Board's frequent rulemaking in adjudicatory proceedings, to which it clearly does apply. In the alternative, they suggest that ES Memo 01–01 is satisfied by my opportunity to circulate a post-issuance statement, which they have already declared in the December 15 Order to be a personal statement ''and shall in no way alter the Board's approval of the final rule or the final rule itself.'' I think not.

Nevertheless, suppose there were no ES Memo 01–01, only an unbroken 76-year practice in all published decisions and notice-and-comment rules giving no indication whatsoever that the Board has ever denied an individual member the reasonable opportunity to participate in the deliberative process by circulating a dissent prior to final action and to have that dissent published simultaneously. By what rational standard can my colleagues deny me that opportunity on delay grounds, where the nearly 200 page draft of the Rule was circulated in the late afternoon of Friday December 9 and approved for final issuance by my colleagues five working days later?

This brings me to my colleagues' final defense of their action. That is, they say they were entitled to issue the Rule out of apprehension that the rulemaking process would be indefinitely delayed or even derailed, not as any consequence of my action, but solely because Member Becker's term was about to expire. As they stated in the Rule, echoing earlier statements by the Chairman prior to and at the November 30 open meeting, ''The Board's decision in this regard is informed by the possibility that after Member Becker's service ends at the end of the current congressional session, no later than January 3, 2012, the Board will be reduced to two Members, and under the Supreme Court's recent *New Process* decision, supra, may be unable to act on the proposed rule for a considerable period of time.''[101]

As I noted in voting against the December 15 order, the apprehension expressed about a prolonged disruption of Board operations was somewhat allayed by the President's December 14 announcement of the intent to nominate two new Board members, Richard Griffin and Sharon Block. As it came to pass, they and pending nominee Terence Flynn received recess appointments on January 4, 2012. Even were that not the case, vacancies and turnover in agency membership do not generally qualify as a rational justification for departure from agency processes. In a case on point, the DC Circuit rejected the impending termination of a Securities and Exchange Commissioner's term as a ground for excusing compliance with APA notice-and-comment requirements. The court distinguished from truly exigent or emergency circumstances ''the not uncommon circumstance facing commissions when their membership changes during the course of a rulemaking, which may involve appeals and remands and thus extend for a period of years. Although the Commission's membership would change after June 30, 2005, and the even division among the remaining Commissioners could delay further action on the Rule, which the Commission considered necessary to redress 'a serious breakdown in management controls,' * * * the risk of such delay is hardly atypical and does not satisfy the narrow exception.''[102]

Further, my colleagues' determination to proceed with issuance of the Rule sharply contrasts with the practice of past Boards confronting the same situation. During the course of a rulemaking initiative in the mid-1990s, the Board considered the possibility of issuing a proposed Rule prior to the departure of one member, with dissenting opinions to follow, but ultimately decided to adhere to traditional agency decisionmaking practices. *See* William B. Gould IV, *Labored Relations* 85–88 (2000).

Again in December 2007, a five-member Board with a three-member Republican appointee majority faced the imminent expiration of the terms of Chairman Battista and Members Walsh and Kirsanow. As is well known, an attempt was made to provide for continued post-expiration decisionmaking by then-Members Liebman and Schaumber. That attempt was ultimately invalidated over two years later by the Supreme Court's *New Process* decision.[103] Even had the Court ruled differently, however, it was understood by all that the two

[100] See, e.g., *Specialty Healthcare,* supra; *Lamons Gasket,* 357 NLRB No. 72 (2011); *UGL UNICCO Service Co.,* 357 NLRB No. 76 (2011).

[101] 76 FR 80146 fn. 25. I note that for this same reason, the Chairman and Member Becker summarily proposed and approved a December 9 emergency memorandum that effectively suspended ES 01–01 in several adjudicatory proceedings by providing for issuance of decisions approved by them on and after December 16 with any dissent by me to follow. As it happened, there was no need to invoke this procedure in any of the subject cases.

The Chairman notes that I joined in approving several contingent rules to assure the maintenance of administrative routines, to the extent legally permissible, in the event the Board lost its quorum. The Chairman was fully aware at the time that these actions did not in any way imply that I endorsed the idea that a pending loss of quorum justified the suspension of customary decisional practices in contemplation of a major change in Board law and procedure, and it is unfortunate that he now suggests otherwise.

[102] *Chamber of Commerce of the United States* v. *SEC,* 443 F.3d 890, 908 (DC Cir. 2006).

Consolidated Alum. Corp. v. *TVA,* 462 F.Supp. 464, 476 (M.D. Tenn. 1978), is not to the contrary. In *Consolidated,* the court held that TVA's deviation from its well-settled traditions regarding rate adjustments was not ''totally unjustified'' because the impending loss of a quorum was a good reason to make a decision. But the court did not rely solely on the pending loss of a quorum as in finding the agency action was not arbitrary and capricious. Instead, the court found that the agency's action before its loss of a quorum was necessary for the agency to avoid a violation both of its statutory requirements and its covenants with the holders of its bonds. *See id.* at 476. The Board confronted no similar potential for statutory or contractual violations here.

[103] *New Process Steel L.P.* v. *NLRB,* U.S., 130 S.Ct. at 2639–42 (2010).

remaining Board members would only be able decide those routine cases in which they agreed on the disposition of all issues under extant precedent. In December 2007, there were cases of significance pending in which a majority had approved a consensus draft, but expected dissents were not finalized. Unlike Chairman Pearce and Member Becker, the choice was made not to issue decisions in those circumstances, even at the risk of prolonged delay or a different ultimate outcome.

* * * * *

Thus, not a single one of my colleagues' asserted reasons for abruptly departing from long-established Board procedural practices holds water here. Their actions in issuing the Rule and in approving the November 30 and December 15 orders were ''a totally unjustified departure from well settled agency procedures of long standing.'' [104] As such, they were arbitrary and capricious, requiring that the Rule be invalidated.

IV. The Rule Limiting a Pre-Election Evidentiary Hearing Is Not a Logical Outgrowth of the Notice of Proposed Rulemaking

In at least one critical respect, the Rule is also invalid because it differs too sharply from the proposed rule. The NPRM proposed revised rules that would have permitted litigation in pre-election hearings of individual eligibility and unit inclusion issues affecting 20 percent or more of the potential bargaining unit. The adopted Rule is far more restrictive, effectively eliminating the right to litigate *all* issues not deemed relevant to the question of representation.

In order for the required notice to be deemed adequate in notice-and-comment rulemaking under the APA, a final rule must relate back to the proposed rule published in the **Federal Register**.[105] To determine whether an agency has met these requirements, courts will consider whether the final rule is a ''logical outgrowth'' of the proposed rule. *Shell Oil Co.* v. *EPA,* 950 F.2d 741, 747, 750–51 (D.C. Cir. 1992) (*en banc*).[106] Although foreseeable differences between a proposed rule and a final rule will not normally cause notice to be deemed insufficient, the final rule is invalid if deviation from the proposal is too sharp. See *Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506, 547 (D.C. Cir. 1983); *American Federation of Labor* v. *Donovan,* 757 F.2d 330, 338–339 (D.C. Cir. 1985); and *Northwest Tissue Center* v. *Shalala,* 1 F.3d 522, 528 fn. 7 (7th Cir. 1993).

Here, the majority's final rule on pre-election evidentiary hearings is not a logical outgrowth of the proposed rule. For reasons previously stated, the proposed rule was invalid under a *Chevron* step one analysis because of its impermissibly restrictive interpretation of what Section 9 requires. Any public concern about notice of this restrictive interpretation might reasonably be subdued by the express indication in the proposed rule that, in practical effect, the change from the current Board procedural norm would be to increase from 10 to 20 percent the number of individuals whose eligibility issues would be deferred to post-election litigation. However, the NPRM gave the public no notice of the possibility that any and all unit inclusion and voter eligibility issues would generally be deferred. Consequently, when my colleagues determined to make this change, it was incumbent upon them to follow a supplemental notice-and-comment procedure.

The majority's claim that it has deferred the 20% issue to another day is disingenuous and misleading. Moreover, their suggestion that the regional directors' discretion in this area remains unchanged is absurd. Quite simply, the Rule to go into effect nationwide on April 30 does not retain the 20% language, while it explicitly overrules the prior discretionary practice of deferring unit inclusion and eligibility involving up to 10% of a unit. Even if not intended, the change from the NPRM to the adopted Rule constitutes a bait and switch. The public is not expected to extrapolate from the Agency's published proposals its unspoken thoughts or guess what the agency really means. *Shell Oil Co.,* 950 F.2d at 751. The public has not had a meaningful opportunity to comment, and the Board has not had a meaningful opportunity to consider this necessary input. Consequently, this aspect of the Rule is invalid for the further reason of the failure to comply with the APA's notice and comment requirements.

V. The Rule Impermissibly Burdens First Amendment Free Speech Rights [107]

An employer's right to engage in free speech in the labor relations context has long been recognized by the Supreme Court. See *NLRB* v. *Virginia Electric & Power Co.,* 314 U.S. 469, 477–479 (1941) (nothing in the Act prohibits employers from expressing their views about unions).[108] This right only has meaning if there is a realistic opportunity for the employer to speak to employees about the choice of representation, when that choice has been defined by the filing of an election petition. Furthermore, and of paramount importance in assessing the Rule's validity under the First Amendment, government regulations cannot, absent compelling circumstances, be drawn to redress perceived distortions in the debate about unionization. That is effectively what the Rule does, and I firmly believe that is what my colleagues intend it to do, notwithstanding their denials.

As previously stated, the point of limiting pre-election hearings and eliminating post-hearing briefs, pre-election requests for review, and the customary post-decisional waiting period is not rationally related to systemic problems of procedural delay. It is transparently and rationally related to shortening by three weeks or more the time from the filing of a petition, when support for unionization is often at its peak, to the day of the election.[109] The record in this proceeding is replete with claims and counterclaims about when an employer learns about a unionization campaign and, if so inclined, begins to oppose it. I readily concede than many employers know about a campaign long before a petition is filed, and that some employers make their opposition to unions quite clear before there even is a campaign. On the other hand, it seems that my colleagues do concede there are some employers who only learn of the unionization effort when notified of a petition's filing, and that prior to then they have attended to business operations without expressing to their employees any views about the merits of unionization. As

[104] *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.,* 435 U.S. 519, 542 (1978).

[105] As previously stated, my colleagues err in claiming that the Rule is purely procedural and not subject to the APA's notice-and-comment requirements.

[106] See generally, Philip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking,* 48 Admin. L. Rev. 213 (1996).

[107] I emphasize that I find no need in the following analysis to rely on Sec. 8(c) of the Act.

[108] See also *Thomas* v. *Collins,* 323 U.S. 516, 537–538 (1944) (''employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty.'').

[109] The majority claims that the Rule does not necessarily shorten the time between the petition and the election because it does not establish any rigid timelines. Really? In that case, there is no point at all to the pre-hearing elements of their Rule, the express purpose of which is to ''directly speed Board processing of representation cases.'' 76 FR 80150.

long as this possibility exists, and in the absence of any objective measure in our record of its frequency, the Board is required to consider it in evaluating the consequences of a rule in which at least some employers will have less time than previously to communicate with their employees about the unionization campaign.

What consideration do my colleagues provide in this regard? Feigning a neutral attitude towards the electoral outcome, they emphasize their belief that employers always have the upper hand in campaign communications.[110] My colleagues and pro-union commenters depict an employer on the day a petition is filed as sophisticated and fully knowledgeable about labor unions, collective-bargaining, and election procedures. For those sorry few who are caught unaware and unprepared, labor consultants and counsel will seek them out to offer their services. In any event, through daily contact with employees in the workplace, and with the opportunity to engage in such lawful activities as captive audience speeches, any employer can quickly and effectively present the case against unionization. As if that were not enough to tip the balance against unions, because elections are generally held on an employer's premises, the employer has the great advantage of a ''last word'' with employees just before they vote.[111]

In sum, it does not really concern my colleagues that the Rule should limit the time in which an employer can exercise First Amendment rights of free speech about unionization because any such effect permissibly redresses an unfair balance of power between unions and employers in the battle for employee support. The problem with this position is that it runs directly counter to the Supreme Court's decision in *Citizens United* v. *Federal Election Commission,* 130 S.Ct. 876 (2010). The Court there held that the government cannot prohibit independent expenditures in support of a political candidate based on the source's corporate identity.[112] Relevant to this proceeding, the Court explicitly overruled *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and rejected the ''anti-distortion theory'' in *Austin* that corporate spending limitations could be premised on preventing ''corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace.'' *Citizens United,* 130 S.Ct. at 904 (citations omitted). The Court reasoned that First Amendment protections cannot turn on a speaker's financial ability and that *Austin* ''interferes with the 'open marketplace' of ideas protected by the First Amendment.'' Id. at 907, citing *New York State Bd. of Elections* v. *Lopez Torres,* 552 U.S. 196, 208 (2008). In short, ''the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'' Id. at 904, quoting *Buckley* v. *Valeo,* 424 U.S. 1, 48–49 (1976).

My colleagues' Rule has the same impermissible ''anti-distortion'' purpose applied to the ''uninhibited, robust and wide-open debate in labor disputes'' that is an essential part of Federal labor policy.[113] By limiting the time for employer speech, they seek to enhance the relative voice of a union and its proponents. The Rule far transcends any Board election speech regulation that would fall within the ''narrow zone'' deemed permissible by the *Brown* Court.[114] Further, given the discriminatory purpose and effect of the Rule, which fall more heavily on employers than unions, it cannot be justified as a reasonable and neutral time, place, and manner limitation of speech. The Rule is clearly contrary to the First Amendment.

V. Conclusion

The current, longstanding Board representation case procedure, now doomed to imminent and radical revision absent judicial intervention, has worked well for most election participants. It could be better. The ideal objective would be to have a system in which no representation case takes longer from start to finish than reasonably necessary, by objective standards, (1) to provide participants an opportunity to resolve legitimate disputes, (2) to provide a meaningful opportunity during the critical pre-election period for proponents and opponents of unionization to exercise their free speech rights, and (3) to assure adequate Board involvement in oversight of duties delegated to the regional directors. I would enthusiastically support and participate in a broad-based agency and public effort to carefully review and selectively reform our electoral procedure to meet this objective. That is not what has happened in this rulemaking.

Stripped of considerable legalistic dross, my colleagues' Rule belies an entirely different, single-minded purpose. They believe that unions should be winning more representation elections, and they revise the Board's electoral procedures to accomplish that end. Their effort contravenes the Act, lacks the requisite rational justification, and infringes on First Amendment rights. That is reason enough as a matter of law for the Rule to be invalidated.

[110] 76 FR 80153–80155.

[111] 76 FR 80155. But see *2 Sisters Food Group,* discussed infra at fn.66.

[112] 130 S.Ct. at 913.

[113] See *Chamber of Commerce* v. *Brown,* 554 U.S. 60, 68 (2008).

[114] ''The NLRB has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA, 29 U.S.C. 159. Whatever the NLRB's regulatory authority within special settings such as imminent elections, however, Congress has clearly denied it the authority to regulate the broader category of noncoercive speech * * *'' *Brown,* 554 U.S. at 74.

From the agency perspective, there is further reason to object. With this Rule, the recent adjudicatory overruling of related representation case law, and the prospect of further change both in the reserved elements of the NPRM and in pending representation cases, my colleagues have deviated so far beyond the norm of partisan shifts in agency policymaking as to imperil the Board's legitimacy in the eyes of the Congress that created it and in eyes of a substantial portion of the public that it serves.[115] To an increasing number of persons outside and inside this venerable agency, it now appears to be directed by a myopic conviction that all law and procedure must be channeled to assuring the prize of workforce unionization, no matter how incompatible that conviction may be with the Taft-Hartley Act, or the reality that less than 10 percent of private sector employees have chosen collective-bargaining representation. With this Rule, I fervently believe that my colleagues imperil the Board's future, and as such, they may in the end do far more to damage the interests they promote than to further them.

I now dissent from the Rule. Notwithstanding judicial doctrines of deference to agency action, it should be invalidated. Even if not, it would behoove the current Board to rescind the Rule and start over in search of electoral revisions that would really address what can reasonably be defined as systemic delay.

Signed in Washington, DC, on April 23, 2012.

Mark Gaston Pearce,

Chairman.

[FR Doc. 2012–10263 Filed 4–26–12; 4:15 pm]

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[115] It is no coincidence that a 2000 article by two union lawyers criticized the so-called Clinton Board for acting only within ''the increasingly confined (indeed, relatively insignificant) doctrinal terrain on which the conflict over U.S. labor policy is enacted,'' even as Congress complained that actions by that Board and the General Counsel veered too far from the elusive standard of neutrality. Jonathan P. Hiatt and Craig Becker, *Drift and Division on the Clinton NLRB,* 16 Lab. Law. 103 (2000). The authors of that article contended that far more radical and fundamental changes in Board law were necessary to revive the interest of American workers in unionization.

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