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4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, May 15, 2012
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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# Rules and Regulations

Federal Register
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Monday, May 7, 2012



## OFFICE OF PERSONNEL MANAGEMENT

**RIN 3206–AM44**

**5 CFR Part 733**

## Political Activity—Federal Employees Residing in Designated Localities

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** OPM is amending its regulations to grant Federal employees residing in King George County, Virginia, a partial exemption from the political activity restrictions in the Hatch Act, and to add King George County to its regulatory list of designated localities. The amendment reflects OPM's determination that King George County meets the criteria in the Hatch Act and OPM regulations for a partial exemption to issue.

**DATES:** This rule is effective June 6, 2012.

**FOR FURTHER INFORMATION CONTACT:** Jo-Ann Chabot, Office of the General Counsel, United States Office of Personnel Management, (202) 606–1700.

**SUPPLEMENTARY INFORMATION:** The Hatch Act, at 5 U.S.C. 7323(a)(2) and (3), prohibits Federal employees from becoming candidates for partisan political office and from soliciting, accepting, or receiving political contributions. However, 5 U.S.C. 7325, authorizes OPM to prescribe regulations permitting employees in certain communities to participate in local elections for partisan political office without regard to the prohibitions in 5 U.S.C. 7323(a)(2) and (3) only if the requirements described in section 7325 are met. The first requirement is that the community or political subdivision must be located in Maryland or Virginia, and in the immediate vicinity of the District of Columbia. Alternatively, the majority of the community's registered voters must be employed by the United States Government. The second requirement is that OPM must determine that it is in the domestic interest of the employees to permit that political participation because of special or unusual circumstances existing in the community or political subdivision. These statutory requirements are reflected in 5 CFR 733.107(a). Under 5 CFR part 733, the exemption from the prohibitions in 5 U.S.C. 7323(a)(2) and (3) is a partial exemption because in 5 CFR 733.103–733.106, OPM has established limitations on political participation by most Federal employees residing in these designated municipalities and subdivisions.

On August 22, 2011, OPM issued a proposed rule at 72 FR 39582 to add King George County, Virginia, to this regulatory list of designated localities at 5 CFR 733.107(c). In its notice of proposed rulemaking, OPM noted that King George County, Virginia, had fulfilled the statutory requirements for a partial exemption to issue and proposed the addition of King George County to the regulatory list of designated localities. 76 FR 52287 (August 22, 2011). OPM also placed a legal notice in the print edition of *The Free Lance Star* on September 9, 2011. OPM did not receive any comments on the proposed rule during the 60-day notice and comment period.

Therefore, OPM is adding King George County to its list of designated localities at 5 CFR 733.107(c). When this rule becomes effective, Federally employed residents of King George County will be permitted under 5 CFR 733.103 to participate in the following activities:

(1) Run as independent candidates for election to partisan political office in elections for local county office in King George County;

(2) Solicit, accept, or receive a political contribution as, or on behalf of, an independent candidate for partisan political office in elections for local office in King George County;

(3) Accept or receive a political contribution on behalf of an individual who is a candidate for local partisan political office and who represents a political party;

(4) Solicit, accept, or receive uncompensated volunteer services as an independent candidate, or on behalf of an independent candidate, for local partisan political office, in connection with the local elections of King George County; and

(5) Solicit, accept, or receive uncompensated volunteer services on behalf of an individual who is a candidate for local partisan political office and who represents a political party.

Under 5 CFR 733.104 of title 5, however, Federally employed residents of King George County may not:

(1) Run as the representative of a political party for local partisan political office;

(2) Solicit a political contribution on behalf of an individual who is a candidate for local partisan political office and who represents a political party;

(3) Knowingly solicit a political contribution from any Federal employee, except as permitted under 5 U.S.C. 7323(a)(2)(A)–(C).

(4) Accept or receive a political contribution from a subordinate;

(5) Solicit, accept, or receive uncompensated volunteer services from a subordinate for any political purpose;

(6) Participate in political activities:

- While they are on duty;
- While they are wearing a uniform, badge, or insignia that identifies the employing agency or instrumentality or the position of the employee;
- While they are in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof; or
- While using a Government-owned or leased vehicle or while using a privately owned vehicle in the discharge of official duties.

Moreover, candidacy for, and service in, a partisan political office shall not result in neglect of, or interference with, the performance of the duties of the employee or create a conflict, or apparent conflict, of interest.

Sections 733.103 and 733.104 of Title 5, Code of Federal Regulations, do not apply to individuals, such as career senior executives and employees of the Federal Bureau of Investigation, who are employed in the agencies or positions listed in 5 CFR 733.105(a). These individuals are subject to the more stringent limitations described in 5 CFR 733.105 and 733.106.

Individuals who require advice concerning specific political activities, and whether an activity is permitted or prohibited under 5 CFR 733.103–733.106, should contact the United States Office of Special Counsel at (800) 854–2824 or (202) 254–3650. Requests for Hatch Act advisory opinions may be made by email to: *hatchact@osc.gov*.

King George County will be listed after Herndon, Virginia, and before

Loudoun County, Virginia, at 5 CFR 733.107(c).

**E.O. 12866, Regulatory Review**

This regulation has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the changes will affect only employees of the Federal Government.

**List of Subjects in 5 CFR Part 733**

Political activities (Government employees).

U.S. Office of Personnel Management.

**John Berry,**

*Director.*

Accordingly, the Office of Personnel Management amends 5 CFR part 733 as follows:

## PART 733—POLITICAL ACTIVITY—FEDERAL EMPLOYEES RESIDING IN DESIGNATED LOCALITIES

■ 1. The authority citation for part 733 continues to read as follows:

**Authority:** 5 U.S.C. 7325; sec. 308 of Pub. L. 104–93, 109 Stat. 961, 966 (Jan. 6, 1996)

■ 2. Section 733.107(c) is amended by adding King George County, Virginia, alphabetically to the list of designated Virginia municipalities and political subdivisions as set forth below.

**§ 733.107 Designated localities.**

* * * * *

(c) * * *

In Virginia

* * * * *

King George County June 6, 2012.

* * * * *

[FR Doc. 2012–10951 Filed 5–4–12; 8:45 am]

**BILLING CODE 6325–48–P**

## DEPARTMENT OF AGRICULTURE

### Office of Procurement and Property Management

### 7 CFR Part 3203

**RIN 0599–AA13**

### Guidelines for the Transfer of Excess Computers or Other Technical Equipment Pursuant to Section 14220 of the 2008 Farm Bill

**AGENCY:** Office of Procurement and Property Management, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Office of Procurement and Property Management (OPPM) of the U.S. Department of Agriculture (USDA) is establishing and implementing procedures for the transfer of excess computers or other technical equipment for the purposes of distribution to a city, town, or local government entity in a rural area.

**DATES:** *Effective Date:* June 6, 2012.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael R. Johnson, Office of Procurement and Property Management, USDA on (202) 720–9779 or by Email at *michaelr.johnson@dm.usda.gov.*

**SUPPLEMENTARY INFORMATION:**

**A. Background**

A proposed rule was published in the **Federal Register** on May 16, 2011 (76 FR 28188–28191, FR Doc No: 2011–11601) soliciting comments on the establishment of Guidelines for the Transfer of Excess Computers or Other Technical Equipment Pursuant to Section 14220 of the 2008 Farm Bill. The proposed rule would have established 7 CFR part 3201, but the final rule will be establishing part 3203. The proposed rule had a comment period of 60 days ending July 15, 2011. No comments were received through email, fax, mail, or hand delivery/courier. A total of 12 comments were received through the Federal eRulemaking Portal. Of the comments received, two were sent as tests, nine were submitted to the wrong docket and subsequently moved to the correct docket, and one comment had multiple questions and comments that were put into one of three categories: (1) Comments on the Farm Bill itself, which will not be addressed; (2) Questions on personal property disposal which are covered by Federal Management Regulations, Agriculture Property Management Regulations and internal agency regulations and policies, and will not be addressed; and (3) A question that asked who is responsible and what happens to the equipment if the items are refurbished and the intended recipient changes its mind or cannot pay the cost (go to *www.Regulations.gov* to see entire comment). Two revisions have been made as a result of the comment referenced above: 1. The word 'designated' has been added before 'organization' in sections 3203.6(c), 3203.7 and 3203.8; and 2. Additional language has been added to section 3203.4(e)(5) stating that the recipient needs to furnish a copy of the agreement between the recipient and its designated organization.

**B. Executive Orders Number 12866 and 13563**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a non-significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

This rule implements Section 14220 of the 2008 Farm Bill. It is expected that the benefits that accrue to cities, towns, and local government entities in rural areas from the receipt of excess USDA computers and technical equipment will exceed the costs to USDA in providing such equipment.

**C. Regulatory Flexibility Act**

USDA certifies that this rule will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The impact of this regulation will be primarily limited to rural towns and government entities. The Department estimates that 400 eligible entities will submit requests for donated equipment annually. As small businesses are not considered eligible entities under this regulation, the rule will not have a significant impact on the small business community or on a substantial number of small businesses. The Department invited comments on its estimates for the potential impact of this rule on small businesses and did not receive any comments.

**D. Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 through 3520), the information collection is currently approved under OMB control number 0505–0023.

**E. Executive Order 12630**

This rule has been reviewed in accordance with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and does not contain policies that would have implications for these rights.

**F. Executive Order 13132**

This rule has been reviewed in accordance with Executive Order 13132, Federalism, and does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

**G. Unfunded Mandates Reform Act of 1995**

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), and therefore a written statement is not required.

**H. Executive Order 12372**

This rule has been reviewed in accordance with Executive Order 12372, Intergovernmental review of Federal programs, and does not establish federal financial assistance or direct Federal development with State and local governments, and is therefore outside the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

**I. Executive Order 13175**

This rule has been reviewed in accordance with Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, and does not have tribal implications or impose unfunded mandates with Indian tribes.

**J. E-Government Act Compliance**

USDA is committed to compliance with the E-Government Act, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. This rule requires one letter from requestors that can be sent electronically to USDA. USDA will continue to seek other avenues to increase electronically submitted information.

**List of Subjects in 7 CFR 3203**

Computers, Excess, Excess computers, Excess government property, Government property, Other technical equipment, Personal property, Technical equipment.

For the reasons set forth in the preamble, the Department of Agriculture adds 7 CFR part 3203 to read as follows:

## PART 3203—GUIDELINES FOR THE TRANSFER OF EXCESS COMPUTERS OR OTHER TECHNICAL EQUIPMENT PURSUANT TO SECTION 14220 OF THE 2008 FARM BILL

Sec.



**Authority:** 7 U.S.C. 2206b.

### § 3203.1 Purpose.

This part sets forth the procedures to be utilized by USDA when transferring excess USDA computers or other technical equipment to an organization for the purposes of distribution to a city, town, or local government entity in a rural area as authorized by 7 U.S.C. 2206b.

### § 3203.2 Eligibility.

To be eligible under this part:

(a) A city, town, or local government entity must be located in a rural area as defined in 7 U.S.C. 1991(a)(13)(A).

(b) A designated organization must:

(1) Have the documented capability to refurbish and distribute excess computers or other technical equipment;

(2) Serve the interest of cities, towns, or local government entities in rural areas; and

(3) Have been designated by an official of a city, town, or local government entity in a rural area to receive excess computers or other technical equipment under this part.

### § 3203.3 Definitions.

*Cannibalization* means to remove serviceable parts from one item of equipment in order to install them on another item of equipment in order to repair or enhance its operability.

*City, town, or local government entity in a rural area* as defined in 7 U.S.C. 1991(a)(13)(A) means any area other than:

(1) A city or town that has a population of greater than 50,000 inhabitants; and

(2) Any urbanized area contiguous and adjacent to such a city or town described in paragraph (1) of this definition.

*Computers or other technical equipment* means central processing units, laptops, desktops, computer mouses, keyboards, monitors, related peripheral tools (e.g., printers, modems, routers, servers, multimedia projectors, multifunctional devices, external hard drives) and fax machines. This term may also include computer software where the transfer of a license is permitted.

*Designated Organization* means an organization that has been selected by an official of a city, town, or local government entity in a rural area to provide refurbishing services on donated computer and technical equipment.

*Excess* means any property under the control of a USDA agency that is no longer required for that agency's or another USDA agency's needs, as determined by the agency head or designee.

*Property Management Officer (PMO)* is an eligible recipient's designated point of contact, responsible for adherence to procedures described in this part.

*Recipient* means a city, town, or local government entity located in a rural area as defined in 7 U.S.C. 1991(a)(13)(A) that may receive excess computers or other technical equipment under this part.

*Refurbish* means to make 'like new' by the process of major maintenance or minor repair of an item, either aesthetically or mechanically.

### § 3203.4 Procedures.

(a) Each agency head will designate, in writing, an authorized official to approve transfers of excess computers or other technical equipment under this part consistent with the Department's policies on personal property management.

(b) Excess computers or other technical equipment must first be internally screened to ensure it is not needed elsewhere in the Department.

(c) To receive information concerning the availability of USDA excess computers or other technical equipment, an eligible recipient's PMO should contact any USDA office near to its location.

(d) The USDA employee responsible for personal property, at the office contacted, will review the request for eligibility of the recipient and the availability of excess computers or other technical equipment. The USDA employee will inform the requestor of the outcome of the review (e.g. eligibility, the availability of excess computers or other technical equipment).

(e) Eligible recipients will express their interest in receiving property under this part by submitting a request, on letterhead paper (electronic copy is

acceptable), to a USDA authorized official. All requests must originate from, and be signed by, a representative of an eligible recipient city, town, or local government entity. Requests must include:

(1) Type of excess computers or other technical equipment requested (should include specifications);

(2) Justification for eligibility (see § 3203.2);

(3) Contact information of the requestor;

(4) Logistical information such as when and how the property will be picked up; and

(5) Information on the recipient's designated organization (company name, contact person and phone number) that is designated to receive and refurbish the property for the eligible recipient along with a copy of the agreement between the recipient and its designated organization.

(f) Excess computers or other technical equipment should be inspected before the property is transferred or the USDA agency should be contacted to verify the condition of the property.

(g) If the condition of the property is acceptable, the recipient or its designated organization will coordinate with the USDA contact for transfer of the property. Since the USDA agency office may have several requests for property, it is critical that the recipient or its designated organization contact USDA as soon as possible. Property will usually be allocated on a first-come, first-served basis, taking into account fair and equitable distribution of excess computers or other technical equipment to all eligible recipients.

(h) Transfers will be accomplished using the appropriate USDA property transfer form. The transfer form must contain the following statement: ''Property listed on this form is being transferred pursuant to the provisions in 7 CFR Part 3203.'' The form must be signed by an authorized official of the USDA agency and an official of the recipient organization.

(i) A copy of the request that transferred the property must be attached to the transfer order and kept in the USDA agency's files.

(j) When property is transferred to a designated organization, a copy of the completed transfer document will be sent to the eligible recipient government entity for its records. Eligible recipients are responsible for following up with the designated organization they have designated for the final receipt of the property.

(k) In cases where an agency receives competing requests for excess computers or other technical equipment, to the extent permitted by law, the agency shall give full consideration to such factors as national defense requirements, emergency needs, energy conservation, preclusion of new procurement, fair and equitable distribution, transportation costs, and retention of title in the Government.

(l) Prior to transferring any property pursuant to this Act, the transferring agency must remove data from the excess computers or other technical equipment (memory or any kind of data storage device) according to accepted sanitization procedures. To the maximum extent practicable, the transferring agency must remove data using a means that does not remove, disable, destroy, or otherwise render unusable the excess computers or other technical equipment or components. It is imperative that agencies take the necessary steps to ensure that no personal computer, server, external storage device, or related electronic component is transferred that might contain sensitive or confidential information. See Departmental Manual 3575–001, Security Controls in the System Life Cycle/System Development Life Cycle, for additional guidance.

### § 3203.5 Dollar limitation.

There is no dollar limitation on excess computers or other technical equipment obtained under this part.

### § 3203.6 Restrictions.

(a) Only an authorized USDA official may approve the transfer of excess computers or other technical equipment under this part.

(b) Excess computers or other technical equipment may be transferred for the purpose of cannibalization, provided that the requestor submits a statement clearly indicating that cannibalization of the requested property will have greater benefit than utilization of the item in its existing form. Cannibalization is a secondary use of equipment and, therefore, these requests are considered subordinate to requests for primary use.

(c) Designated organizations will only receive property for cannibalization when it has been specifically requested by the recipient and the cannibalized parts must only be used in computers or other technical equipment destined for eligible recipients.

### § 3203.7 Title.

Title of ownership to excess computers or other technical equipment transferred under this part shall automatically pass to the recipient once the transferring agency and recipient or designated organization sign the transfer form indicating that the designated organization has received the property.

### § 3203.8 Costs.

The designated organization must pay any costs associated with packaging and transportation of the property unless it has made other arrangements. The designated organization must remove property from the USDA agency's premises within 15 calendar days after being notified that the property is available for pickup, unless otherwise coordinated with the USDA agency. If the recipient decides prior to picking up or removing the property that it no longer wants the property, it must notify the USDA agency that approved the transfer request that the property is no longer needed.

### § 3203.9 Accountability and recordkeeping.

(a) USDA requires all excess computers or other technical equipment received by an eligible recipient pursuant to this part be placed into use within one year of receipt of the property and used for at least one year thereafter. The recipient's PMO must maintain accountable records for such property during this time period.

(b) GSA requires that all excess personal property given to non-federal recipients be reported each fiscal year. USDA agencies that transfer property under this part must report the transfers in their annual reports to OPPM and include both the recipient and organization names. OPPM will review the reports for accuracy, as well as fair and equitable distribution of the excess computers or other technical equipment, before submitting to GSA.

### § 3203.10 Disposal.

When property received under this part is no longer needed by the recipient, it must be disposed of in an environmentally sound manner that is not detrimental or dangerous to public health or safety and in accordance with all Federal, State and local laws.

### § 3203.11 Liabilities and losses.

USDA assumes no liability with respect to accidents, bodily injury, illness, or any other damages or loss related to excess computers or other technical equipment transferred under this part. The recipient/designated organization is advised to insure or otherwise protect itself and others as appropriate.

Dated: April 27, 2012.

**Lisa M. Wilusz,**

*Director.*

[FR Doc. 2012–10745 Filed 5–4–12; 8:45 am]

**BILLING CODE 3410–TX–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0044; Directorate Identifier 2010–NM–059–AD; Amendment 39–17039; AD 2012–09–04]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Model 767–200, –300, –300F, and –400ER Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** We are superseding an existing airworthiness directive (AD) that applies to The Boeing Company Model 767–200, –300, and –300F series airplanes. That AD currently requires inspections to detect cracking or corrosion of the fail-safe straps between the side fitting of the rear spar bulkhead at body station 955 and the skin; and follow-on and corrective actions. This new AD expands the applicability; and adds an inspection for cracking in the fail-safe strap, and repair or replacement if necessary. This AD was prompted by additional reports of cracks in 51 fail-safe straps on 41 airplanes; we have also received a report of a crack found in the ''T'' fitting that connects the fail-safe strap to the outboard edge of the pressure deck. We are issuing this AD to detect and correct fatigue cracking or corrosion of the fail-safe straps and the ''T'' fittings, which could result in cracking of adjacent structure and consequent reduced structural integrity of the fuselage.

**DATES:** This AD is effective June 11, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of June 11, 2012.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of November 1, 2004 (69 FR 57636, September 27, 2004, as referenced in 70 FR 58000, October 5, 2005).

**ADDRESSES:** For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1, fax 206–766–5680; email *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98057–3356. For information on the availability of this material at the FAA, call 425–227–1221.

### Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6577; fax: 425–917–6590; email: *berhane.alazar@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2004–19–06 R1, amendment 39–14313 (70 FR 58000, October 5, 2005). That AD applies to The Boeing Company Model 767–200, –300, and –300F series airplanes. The NPRM published in the **Federal Register** on February 24, 2011 (76 FR 10288). That NPRM proposed to continue to require inspections to detect cracking or corrosion of the fail-safe straps between the side fitting of the rear spar bulkhead at body station 955 and the skin; and follow-on and corrective actions. That NPRM also proposed to expand the applicability, and add an inspection for cracking in the fail-safe strap, and repair or replacement if necessary.

### Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal and the FAA's response to each comment.

### Request To Add Airplanes to Applicability

Aviation Partners Boeing (APB) asked that we include airplanes in the NPRM (76 FR 10288, February 24, 2011) that have been modified with winglets, in accordance with Supplemental Type Certificate (STC) ST01920SE. APB stated that it completed an analysis of Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010, and determined that the defined rework limits are valid when winglets are installed. APB added that including these airplanes will reduce the effort to support requests for alternative methods of compliance (AMOCs) to the NPRM.

We acknowledge APB's request to include airplanes modified with winglets in accordance with the referenced STC in the applicability of this AD. We received an analysis package from APB which verifies that the compliance information included in Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010, is adequate to provide an acceptable level of safety for airplanes equipped with those winglets. Those airplanes are listed in the effectivity section of Revision 2 of this service bulletin, which is identified in the applicability section of this AD. We have not changed the AD in this regard. However, since the referenced STC does not affect accomplishment of the requirements of this AD, we have clarified that an AMOC is not necessary for these airplanes by adding this provision in new Note 1 to paragraph (c) of this AD. We have also reidentified subsequent notes.

### Request To Change Supplementary Information Section of NPRM

Boeing noted that in the Supplementary Information section of the NPRM (76 FR 10288, February 24, 2011), there is an error under ''Actions Since Existing AD Was Issued.'' Boeing asked for a correction to the ''flight cycles'' data in the sentence ''Fail-safe straps were repaired on 33 airplanes with total accumulated flight cycles ranging from 39,886 to 89,236.'' Boeing stated that the correct flight cycles range is ''9,250 to 38,490,'' and the correct flight hours range is ''39,886 to 89,236,'' as published in Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010.

We agree with Boeing that there is an error in the number of flight cycles specified under ''Actions Since Existing AD Was Issued;'' the correct number of flight cycles was inadvertently omitted

from the NPRM (76 FR 10288, February 24, 2011). However, since that section of the preamble does not reappear in the final rule, no change to the AD has been made in this regard.

**Request To Change the Unsafe Condition**

Boeing asked that we enhance the clarity of the unsafe condition that is given as the reason for issuing the NPRM (76 FR 10288, February 24, 2011) because the ''T'' fittings should not be included in the unsafe condition. Boeing noted that the proposed actions are for detecting and repairing corrosion or cracking of the fail-safe straps. Boeing added that inspections of the ''T'' fitting were added to Revision 2, dated January 15, 2010, of Boeing Alert Service Bulletin 767–53A0100, so that a removed/kept ''T'' fitting would be installed in a condition that contains no detectable damage around the three fastener holes that connect to the fail-safe strap. Boeing stated that the inspections are intended only to increase damage detection prior to installation of a kept ''T'' fitting.

We agree that emphasizing the fail-safe strap is the main issue in this AD; however, we do not agree that the unsafe condition should be changed to remove the reference to the ''T'' fittings. Some ''T'' fitting cracks have been reported since issuance of the existing AD, as noted in Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010; therefore, the ''T'' fitting is part of the unsafe condition. We have not changed this AD in this regard.

**Request To Change Paragraph (k) of This AD**

Continental Airlines (CAL) asked that we change paragraph (k) of the NPRM (76 FR 10288, February 24, 2011) to include contacting Boeing with corrosion damage details to obtain further repair instructions and/or approval. CAL stated that paragraph (k) of the NPRM requires that the corrosion on the fail-safe straps be repaired in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010. CAL added that paragraph 3.B.7 of the Accomplishment Instructions specifies that if corrosion is found on the fail-safe straps, it should be removed as given in Chapter 51–10–02 of the Boeing 767 Structural Repair Manual (SRM). CAL noted that it did not find any information pertaining to the fail-safe straps when reviewing the SRM for the correct rework limits. CAL believes the corrosion removal instructions are incomplete.

We agree that corrosion removal instructions specified in Chapter 51–10–02 of the SRM do not specifically identify how to blend out corrosion on the fail-safe straps. That chapter contains general procedures for repairing corrosion (which apply to the fail-safe straps), which include inspection, repair, and rework limits but does not contain specific procedures for removing corrosion from fail-safe straps.

We have received Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012. That revision removes the reference to the SRM in Step 3.B.7., and instead specifies to contact Boeing for repair instructions. Therefore we have revised paragraph (k) of this AD to specify that where Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012, specifies to contact Boeing for repair, this AD requires repair using a method approved in accordance with paragraph (o) of this AD.

Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012, also adds notes and revised steps to provide flexibility and revised figures to correct errors. These changes include revising a Standard Operating Practices Manual (SOPM) reference to specify SOPM 20–20–00, adding a fastener code to Figure 28 that was omitted, and revising cable identification labels in Figures 32 and 34. We have revised this AD to refer to Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012, as the appropriate source of service information for accomplishing the required actions. We have added Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010, to paragraph (n) of this AD to give credit for doing actions before the effective date of this AD, using that revision.

**Request To Change Certain References in the Service Information**

CAL asked that certain references in Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010, be changed, as follows:

CAL stated that the use of the procedures in the Standard Wiring Practices Manual, Section 20–20–00, should be allowed for the resistance check of bonding fasteners during the panel installation. CAL stated that the standard operating manual reference specified in the resistance check of bonding fasteners during the panel installation does not provide the maximum resistance value.

CAL noted that Figure 28 of the Accomplishment Instructions of Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010, which identifies Fastener Code ''B,'' is missing from the top corner of the panel.

CAL also noted that the circle control numbers identified in Figures 32 and 34 of the Accomplishment Instructions of Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010, do not match the aileron control cables and work instructions. CAL stated that the control cable turnbuckle body station locations are reversed.

We acknowledge the commenter's concerns regarding the referenced figures and SOPM. The actions specified in the SOPM and those figures are only referred to in the service bulletin for optional guidance. As stated previously, Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012, corrects these errors. We have made no change to the AD in this regard.

**Explanation of Additional Changes Made to This AD**

We have made the following changes to this AD:

- Revised certain headers throughout this AD.
- Redesignated Note 2 of the NPRM (76 FR 10288, February 24, 2011) as paragraph (g)(3) in this AD, and redesignated subsequent notes accordingly.
- Revised the heading for and wording of paragraph (n) of this AD; this change has not changed the intent of that paragraph.

**Conclusion**

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously—and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (76 FR 10288, February 24, 2011) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (76 FR 10288, February 24, 2011).

We also determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

**Costs of Compliance**

We estimate that this AD will affect 390 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Inspection for Model 767–200, –300, and –300F airplanes (retained actions from AD 2004-19–06 R1, Amendment 39-14313 (70 FR 58000, October 5, 2005)). | 2 work-hours × $85 per hour = $170 per inspection cycle. | $0 | $170 per inspection cycle. | $60,180 per inspection cycle. |
| New inspections for all airplanes (new action). | 2 work-hours × $85 per hour = $170 per inspection cycle. | 0 | $170 per inspection cycle. | $66,300 per inspection cycle. |

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

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Repair or replacement, Groups 1–7, 10, and 11 airplanes. | 295 work-hours × $85 per hour = $25,075 ..... | Between $9,054 and $15,837. | Between $34,129 and $40,912. |
| Repair or replacement, Groups 8 and 9 airplanes. | 297 work hours × $85 per hour = $25,245 ..... | Between $32,593 and $32,727. | Between $57,838 and $57,972. |

### Authority for This Rulemaking

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

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

### Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

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

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2004–19–06 R1, Amendment 39–14313 (70 FR 58000, October 5, 2005), and adding the following new AD:

**2012–09–04 The Boeing Company:** Amendment 39–17039; Docket No. FAA–2011–0044; Directorate Identifier 2010–NM–059–AD.

**(a) Effective Date**

This AD is effective June 11, 2012.

**(b) Affected ADs**

This AD supersedes AD 2004–19–06 R1, Amendment 39–14313 (70 FR 58000, October 5, 2005).

**(c) Applicability**

This AD applies to Model 767–200, –300, –300F, and –400ER series airplanes, certificated in any category; as identified in Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012.

**Note 1 to paragraph (c) of this AD:** Supplemental Type Certificate (STC) ST01920SE (*http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgstc.nsf/0/082838ee177dbf62862576a4005cdfc0/$FILE/ST01920SE.pdf*) does not affect the ability to accomplish the actions required by this AD. Therefore, for airplanes on which STC ST01920SE is installed, a ''change in product'' alternative method of compliance (AMOC) approval request is not necessary to comply with the requirements of 14 CFR 39.17. For all other AMOC requests, the operator must request approval for an AMOC according to paragraph (o) of this AD.

**(d) Subject**

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 53, Fuselage.

**(e) Unsafe Condition**

This AD was prompted by additional reports of cracks in 51 fail-safe straps on 41 airplanes; we have also received a report of a crack found in the ''T'' fitting that connects the fail-safe strap to the outboard edge of the pressure deck. We are issuing this AD to detect and correct fatigue cracking or corrosion of the fail-safe straps and the ''T'' fittings, which could result in cracking of adjacent structure and consequent reduced structural integrity of the fuselage.

**(f) Compliance**

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

**(g) Retained Inspections and Follow-on/ Corrective Actions With New Service Information**

These inspection requirements are retained from AD 2004–19–06 R1, Amendment 39–14313 (70 FR 58000, October 5, 2005). For Model 767–200, –300, and –300F series airplanes having line numbers 1 through 931 inclusive: Except as provided by paragraph (h) of this AD, prior to the accumulation of 15,000 total flight cycles, or within 3,000 flight cycles after November 1, 2004 (the effective date of AD 2004–19–06 R1, Amendment 39–14313, 70 FR 58000, October 5, 2005), whichever occurs later, perform a detailed inspection and eddy current inspection to detect cracking or corrosion of the fail-safe straps between the side fitting of the rear spar bulkhead at body station (BS) 955 and the skin, per Figure 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 767–53A0100, dated September 26, 2002; Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010; or Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012. As of the effective date of this AD, use only Boeing Alert Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012. Doing the inspections required by paragraph (i) of this AD terminates the requirements of this paragraph.

(1) If no crack or corrosion is found, repeat the inspections thereafter at intervals not to exceed 6,000 flight cycles or 36 months, whichever occurs first, until paragraph (i) of this AD is done.

(2) If any crack or corrosion is found, before further flight, repair per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or using a method approved in accordance with paragraph (o) of this AD.

(3) For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

**(h) Retained Inspections and Follow-on/ Corrective Actions**

These inspection requirements are retained from AD 2004–19–06 R1, Amendment 39–14313 (70 FR 58000, October 5, 2005). For airplanes identified in paragraph (g) of this AD on which the fail-safe strap has been replaced before November 1, 2004: Do the actions required by paragraph (g) of this AD within 12,000 flight cycles after accomplishing the replacement.

**Note 2 to paragraph (h) of this AD:** Steps 2 and 8 of the Work Instructions of Boeing Alert Service Bulletin 767–53A0100, dated September 26, 2002, refer incorrectly to Boeing 767 Airplane Maintenance Manual (AMM) 32–00–20 for guidance on opening the MLG doors; the correct reference is Boeing 767 AMM 32–00–15, which is referred to in steps 3 and 7 of the Work Instructions. Step 2 also should state ''Open Main Landing Gear (MLG) doors'' instead of ''Open Main Landing Green (MLG) doors.''

**(i) New Repetitive Detailed and Eddy Current Inspections**

Prior to the accumulation of 15,000 total flight cycles, or within 3,000 flight cycles after the effective date of this AD, whichever occurs later: Perform detailed and eddy current inspections to detect cracking and/or corrosion of the fail-safe straps between the side fitting of the rear spar bulkhead at BS 955 and the skin, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012. If no crack or corrosion is found, repeat the inspections thereafter at intervals not to exceed 6,000 flight cycles or 36 months, whichever occurs first. Accomplishing the actions required by this paragraph ends the requirements of paragraphs (g) and (g)(1) of this AD.

**(j) New Repetitive Ultrasonic Inspections**

Prior to the accumulation of 15,000 total flight cycles, or within 3,000 flight cycles after the effective date of this AD, whichever occurs later: Do an ultrasonic inspection of the fail-safe strap for cracking, and all applicable related investigative actions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012. Do all applicable related investigative actions before further flight. If no crack is found, repeat the inspection thereafter at intervals not to exceed 6,000 flight cycles or 36 months, whichever occurs first.

**(k) New Corrective Actions**

If any corrosion is found during any inspection required by paragraph (i) of this AD: Before further flight, repair the corrosion, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012; except where Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012, specifies to contact Boeing for repair, before further flight, repair using a method approved in accordance with paragraph (o) of this AD.

**(l) New Corrective Actions**

If any crack is found during any inspection required by paragraph (i) or (j) of this AD: Before further flight, repair in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012; except where Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012, specifies to contact Boeing for appropriate action, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (o) of this AD. Accomplishing the fail-safe strap trim repair in accordance with Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012, ends the repetitive inspections required by paragraphs (i) and (j) of this AD only on the side of the airplane where the repair was done. Replacing the fail-safe strap with a replacement strap that has the revised edge configuration in accordance with Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012, ends the repetitive inspections required by paragraphs (i) and (j) of this AD only on the side of the airplane where the replacement was done.

**(m) New Post-Replacement Inspections**

For any replacement strap that does not have a revised edge configuration, as specified in Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012: Within 12,000 flight cycles after doing the replacement, accomplish the inspections required by paragraphs (i) and (j) of this AD. Repeat the inspections thereafter at intervals not to exceed 6,000 flight cycles or 36 months, whichever occurs first. Replacing the fail-safe strap with a replacement strap that has the revised edge configuration in accordance with Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012, ends the repetitive inspections required by paragraphs (i) and (j) of this AD only on the side of the airplane where the replacement was done.

**(n) New Credit for Previous Actions**

This paragraph provides credit for actions required by paragraphs (g) through (m) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 767–53A0100, Revision 1, dated August 11, 2006; or Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010.

**(o) Alternative Methods of Compliance (AMOCs)**

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

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane and 14 CFR 25.571, Amendment 45, and the approval must specifically refer to this AD.

(4) AMOCs approved for AD 2004–19–06, Amendment 39–13800 (69 FR 57636, September 27, 2004); and AD 2004–19–06 R1, Amendment 39–14313 (70 FR 58000, October 5, 2005); are approved as AMOCs for paragraphs (g) and (h) of this AD, as applicable.

**(p) Related Information**

For more information about this AD, contact Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle

ACO, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6577; fax: (425) 917–6590; email: *berhane.alazar@faa.gov.*

**(q) Material Incorporated by Reference**

(1) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the **Federal Register** approved the incorporation by reference (IBR) under 5 U.S.C. 552(a) and 1 CFR part 51 of the following service information on the date specified.

(i) Boeing Service Bulletin 767–53A0100, Revision 3, dated February 6, 2012, approved for IBR June 11, 2012.

(ii) Boeing Alert Service Bulletin 767–53A0100, Revision 2, dated January 15, 2010, approved for IBR June 11, 2012.

(iii) Boeing Alert Service Bulletin 767–53A0100, dated September 26, 2002; approved for IBR November 1, 2004 (69 FR 57636, September 27, 2004, as referenced in 70 FR 58000, October 5, 2005).

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; email *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

(3) You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr_locations.html.*

Issued in Renton, Washington on April 23, 2012.

**Michael Kaszycki,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2012–10570 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 97

**[Docket No. 30840; Amdt. No. 3477]**

## Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective May 7, 2012. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 7, 2012.

**ADDRESSES:** Availability of matter incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

*Availability*—All SIAPs are available online free of charge. Visit *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

**FOR FURTHER INFORMATION CONTACT:** Richard A. Dunham III, Flight Procedure Standards Branch (AFS–420) Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

**SUPPLEMENTARY INFORMATION:** This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of Title 14 of the Code of Federal Regulations.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAP and the corresponding effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

### The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP as modified by FDC/P–NOTAMs.

The SIAPs, as modified by FDC P–NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice

and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

**Conclusion**

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 97**

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on April 27, 2012.

**Ray Towles,**

*Deputy Director, Flight Standards Service.*

**Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, 14 CFR part 97, is amended by amending Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

## PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

**§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, 97.35 [Amended]**

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

* * * Effective Upon Publication

| AIRAC Date | State | City | Airport | FDC No. | FDC Date | Subject |
|---|---|---|---|---|---|---|
| 31–May–12 .. | MO | St Louis | Lambert-St Louis Intl | 2/1136 | 4/20/12 | ILS OR LOC RWY 6, Amdt 1C |
| 31–May–12 .. | MO | Columbia | Columbia Rgnl | 2/1214 | 4/20/12 | RNAV (GPS) RWY 31, Orig |
| 31–May–12 .. | AK | Soldotna | Soldotna | 2/1292 | 4/20/12 | VOR A, Amdt 7 |
| 31–May–12 .. | MT | Billings | Billings Logan Intl | 2/1298 | 4/20/12 | VOR/DME RWY 28R, Amdt 14 |
| 31–May–12 .. | KY | Covington | Cincinnati/Northern Kentucky Intl. | 2/1417 | 4/20/12 | ILS OR LOC RWY 18R, ILS RWY 18R (CAT II), Amdt 1A |
| 31–May–12 .. | KY | Covington | Cincinnati/Northern Kentucky Intl. | 2/1418 | 4/20/12 | ILS OR LOC RWY 36C, ILS RWY 36C (CAT II), ILS RWY 36C (CAT III), Amdt 41A |
| 31–May–12 .. | KY | Covington | Cincinnati/Northern Kentucky Intl. | 2/1419 | 4/20/12 | ILS OR LOC RWY 36L, ILS RWY 36L (CAT II), Amdt 1A |
| 31–May–12 .. | KY | Covington | Cincinnati/Northern Kentucky Intl. | 2/1420 | 4/20/12 | ILS OR LOC RWY 36R, ILS RWY 36R (CAT II), ILS RWY 36R (CAT III), Amdt 8A |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1439 | 4/11/12 | ILS OR LOC RWY 36R, ILS RWY 36R (CAT II0), ILS RWY 36R (CAT III), Amdt 3B |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1441 | 4/11/12 | ILS OF LOC RWY 36L, ILS RWY 36L (CAT II), ILS RWY 36L (CAT III), Amdt 14C |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1442 | 4/11/12 | ILS OR LOC RWY 36C, ILS RWY 36C (CAT II), ILS RWY 36C (CAT III), Amdt 3B |
| 31–May–12 .. | OH | Batavia | Clermont County | 2/1617 | 4/20/12 | NDB RWY 22, Amdt 1 |
| 31–May–12 .. | OH | Batavia | Clermont County | 2/1623 | 4/20/12 | VOR B, Amdt 7 |
| 31–May–12 .. | MN | Mankato | Mankato Rgnl | 2/1869 | 4/20/12 | RNAV (GPS) RWY 22, Orig |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1907 | 4/11/12 | RNAV (RNP) Y RWY 18L, Orig-B |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1908 | 4/11/12 | RNAV (GPS) Z RWY 18C, Amdt 2 |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1909 | 4/11/12 | RNAV (RNP) Y RWY 18C, Orig-A |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1910 | 4/11/12 | RNAV (GPS) Z RWY 18R, Amdt 2 |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1911 | 4/11/12 | ILS OR LOC RWY 18R, Amdt 14A |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1913 | 4/11/12 | ILS OR LOC RWY 18L, Amdt 2B |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1918 | 4/11/12 | RNAV (GPS) Z RWY 18L, Amdt 2 |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1919 | 4/11/12 | RNAV (RNP) Y RWY 18R, Orig-B |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1920 | 4/11/12 | RNAV (RNP) X RWY 18L, Orig-B |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1921 | 4/11/12 | RNAV (RNP) X RWY 18R, Orig-B |
| 31–May–12 .. | TN | Memphis | Memphis Intl | 2/1922 | 4/11/12 | ILS OR LOC RWY 18C, Amdt 1B |
| 31–May–12 .. | WI | Milwaukee | General Mitchell Intl | 2/2232 | 4/20/12 | ILS OR LOC RWY 1L, ILS RWY 1L (CAT II), ILS RWY 1L (CAT III), Amdt 9A |

| AIRAC Date | State | City | Airport | FDC No. | FDC Date | Subject |
|---|---|---|---|---|---|---|
| 31–May–12 .. | WY | Cheyenne ..... | Cheyenne Rgnl/Jerry Olson Field. | 2/3058 | 4/20/12 | ILS OR LOC RWY 27, Amdt 34B |
| 31–May–12 .. | PA | Perkasie ..... | Pnnridge ..... | 2/3117 | 4/11/12 | RNAV (GPS) RWY 26, Orig |
| 31–May–12 .. | PA | Perkasie ..... | Pnnridge ..... | 2/3154 | 4/11/12 | NDB OR GPS A, Amdt 2 |
| 31–May–12 .. | PA | Perkasie ..... | Pnnridge ..... | 2/3164 | 4/11/12 | RNAV (GPS) RWY 8, Amdt 1 |
| 31–May–12 .. | VA | Luray ..... | Luray Caverns ..... | 2/4789 | 4/20/12 | RNAV (GPS) RWY 4, Orig |
| 31–May–12 .. | VA | Luray ..... | Luray Caverns ..... | 2/4790 | 4/20/12 | NDB A, Amdt 7 |
| 31–May–12 .. | VA | Luray ..... | Luray Caverns ..... | 2/4791 | 4/20/12 | VOR/DME B, Amdt 3 |
| 31–May–12 .. | VA | Luray ..... | Luray Caverns ..... | 2/4792 | 4/20/12 | RNAV (GPS) RWY 22, Amdt 1 |
| 31–May–12 .. | UT | Milford ..... | Milford Muni/Den And Judy Briscoe Field. | 2/5298 | 4/20/12 | RNAV (GPS) RWY 16, Orig |
| 31–May–12 .. | LA | New Orleans ..... | Louis Armstrong New Orleans Intl. | 2/5888 | 4/20/12 | ILS OR LOC RWY 10, ILS RWY 10 (CAT II), ILS RWY 10 (CAT III), Amdt 2B |
| 31–May–12 .. | IL | Chicago ..... | Chicago O'Hare Intl ..... | 2/6031 | 4/11/12 | ILS OR LOC RWY 4R, Amdt 6L |
| 31–May–12 .. | MN | Cloquet ..... | Cloquet Carlton ..... | 2/6430 | 4/20/12 | NDB RWY 35, Amdt 4 |
| 31–May–12 .. | WI | Racine ..... | John H Batten ..... | 2/8815 | 4/11/12 | ILS OR LOC RWY 4, Amdt 4C |
| 31–May–12 .. | TX | Houston ..... | George Bush Intercontinental/Houston. | 2/8871 | 4/20/12 | ILS OR LOC RWY 26R, ILS RWY 26R (SA CAT I), ILS RWY 26R (CAT II), ILS RWY 26R (CAT III), Amdt 3 |
| 31–May–12 .. | TX | Houston ..... | George Bush Intercontinental/Houston. | 2/8872 | 4/20/12 | ILS OR LOC RWY 26L, ILS RWY 26L (SA CAT I), ILS RWY 26L (CAT II), ILS RWY 26L (CAT III), Amdt 20 |
| 31–May–12 .. | TX | Houston ..... | George Bush Intercontinental/Houston. | 2/8874 | 4/20/12 | ILS OR LOC RWY 27, ILS RWY 27 (SA CAT I), ILS RWY 27 (CAT II), ILS RWY 27 (CAT III), Amdt 9 |
| 31–May–12 .. | CA | Lakeport ..... | Lampson Field ..... | 2/9212 | 4/20/12 | RNAV (GPS) A, Orig |
| 31–May–12 .. | OH | Toledo ..... | Toledo Express ..... | 2/9345 | 4/20/12 | ILS OR LOC RWY 25, Amdt 7A |
| 31–May–12 .. | OH | Toledo ..... | Toledo Express ..... | 2/9347 | 4/20/12 | RNAV (GPS) RWY 25, Amdt 2 |

[FR Doc. 2012–10720 Filed 5–4–12; 8:45 am]
**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 97

**[Docket No. 30839; Amdt. No. 3476 ]**

## Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective May 7, 2012. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 7, 2012.

**ADDRESSES:** Availability of matters incorporated by reference in the amendment is as follows:

*For Examination—*

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

*Availability*—All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit *http://www.nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

**FOR FURTHER INFORMATION CONTACT:** Richard A. Dunham III, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954–4164.

**SUPPLEMENTARY INFORMATION:** This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or revoking SIAPS, Takeoff Minimums and/or ODPS. The complete regulators description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5

U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, in addition to their complex nature and the need for a special format make publication in the **Federal Register** expensive and impractical. Furthermore, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their depiction on charts printed by publishers of aeronautical materials. The advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA forms is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs and the effective dates of the, associated Takeoff Minimums and ODPs. This amendment also identifies the airport and its location, the procedure, and the amendment number.

**The Rule**

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as contained in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPS and Takeoff Minimums and ODPS, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPS contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPS and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedures before adopting these SIAPS, Takeoff Minimums and ODPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

**Conclusion**

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26,1979); and (3)does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 97**

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on April 27, 2012.

**Ray Towles,**

*Deputy Director, Flight Standards Service.*

**Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and/or Takeoff Minimums and/or Obstacle Departure Procedures effective at 0902 UTC on the dates specified, as follows:

## PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

** * * Effective 31 MAY 2012*

Anchorage, AK, Ted Stevens Anchorage Intl, ILS RWY 15, Amdt 6
Anchorage, AK, Ted Stevens Anchorage Intl, ILS OR LOC/DME RWY 7L, ILS RWY 7L (SA CAT I), ILS RWY 7L (SA CAT II), Amdt 3
Anchorage, AK, Ted Stevens Anchorage Intl, ILS OR LOC/DME RWY 7R, ILS RWY 7R (CAT II), ILS RWY 7R (CAT III), ILS RWY 7R (SA CAT I), Amdt 3
Oneonta, AL, Robbins Field, RNAV (GPS) RWY 5, Orig
Oneonta, AL, Robbins Field, RNAV (GPS) RWY 23, Orig
Oneonta, AL, Robbins Field, Takeoff Minimums and Obstacle DP, Orig
Prattville, AL, Prattville-Grouby Field, RNAV (GPS) RWY 9, Amdt 2
Prattville, AL, Prattville-Grouby Field, RNAV (GPS) RWY 27, Orig
Camden, AR, Harrell Field, RNAV (GPS) RWY 1, Amdt 1
Camden, AR, Harrell Field, RNAV (GPS) RWY 19, Amdt 1
Camden, AR, Harrell Field, Takeoff Minimums and Obstacle DP, Amdt 1
Phoenix, AZ, Phoenix-Mesa Gateway, RNAV (GPS) Y RWY 30C, Amdt 1
Phoenix, AZ, Phoenix-Mesa Gateway, RNAV (RNP) Z RWY 30C, Orig
Oxford, CT, Waterbury-Oxford, RNAV (GPS) RWY 36, Amdt 2
Windsor Locks, CT, Bradley Intl, RNAV (GPS) Y RWY 24, Amdt 3A
Windsor Locks, CT, Bradley Intl, RNAV (RNP) Z RWY 24, Orig-A
Washington, DC, Washington Dulles Intl, VOR/DME RWY 12, Amdt 9
Apalachicola, FL, Apalachicola Regional, NDB RWY 14, AMDT 2
Apalachicola, FL, Apalachicola Regional, NDB RWY 32, AMDT 2
Apalachicola, FL, Apalachicola Regional, RNAV (GPS) RWY 6, Amdt 1
Apalachicola, FL, Apalachicola Regional, RNAV (GPS) RWY 14, Amdt 2
Apalachicola, FL, Apalachicola Regional, RNAV (GPS) RWY 18, Orig
Apalachicola, FL, Apalachicola Regional, RNAV (GPS) RWY 24, Amdt 1
Apalachicola, FL, Apalachicola Regional, RNAV (GPS) RWY 32, Amdt 2
Apalachicola, FL, Apalachicola Regional, RNAV (GPS) RWY 36, Orig
Apalachicola, FL, Apalachicola Regional, RNAV (GPS)-A, Orig-A, CANCELLED
Apalachicola, FL, Apalachicola Regional, RNAV (GPS)-B, Orig-A, CANCELLED
Apalachicola, FL, Apalachicola Regional, Takeoff Minimums and Obstacle DP, Amdt 1
Fort Pierce, FL, St Lucie County Intl, Takeoff Minimums and Obstacle DP, Amdt 4
Miami, FL, Miami Intl, ILS OR LOC RWY 8R, Amdt 30B
Panama City, FL, Northwest Florida Beaches Intl, ILS OR LOC/DME RWY 16, Amdt 1
Panama City, FL, Northwest Florida Beaches Intl, RNAV (GPS) RWY 16, Amdt 1
Panama City, FL, Northwest Florida Beaches Intl, RNAV (GPS) RWY 34, Amdt 1
Tampa, FL, Peter O Knight, NDB RWY 4, Amdt 12A
Tampa, FL, Peter O Knight, RNAV (GPS) RWY 22, Amdt 2
Tampa, FL, Peter O Knight, RNAV (GPS) RWY 36, Amdt 2A
Tampa, FL, Peter O Knight, Takeoff Minimums and Obstacle DP, Amdt 7
Independence, IA, Independence Muni, RNAV (GPS) RWY 36, Orig-A
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 9L, ILS RWY 9L (CAT II), ILS RWY 9L (CAT III), Amdt 1
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 22L, Amdt 5
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 22R, Amdt 9
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 27R, ILS RWY 27R (CAT II), ILS RWY 27R (CAT III), Amdt 1
Chicago, IL, Chicago O'Hare Intl, LOC RWY 4L, Amdt 22

Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 4L, Amdt 2
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 4R, Amdt 1
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 9L, Amdt 1
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 10, Amdt 3C
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 14L, Amdt 1E
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 14R, Amdt 2B
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 22L, Amdt 1
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 22R, Amdt 2
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 27R, Amdt 1
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 28, Amdt 2D
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) Y RWY 22L, Orig-C, CANCELLED
Wichita, KS, Wichita Mid-Continent, RNAV (GPS) RWY 1R, Amdt 1
Greenville, KY, Muhlenberg County, Takeoff Minimums and Obstacle DP, Amdt 2
Natchitoches, LA, Natchitoches Rgnl, LOC RWY 35, Amdt 4
Natchitoches, LA, Natchitoches Rgnl, NDB RWY 35, Amdt 6
Natchitoches, LA, Natchitoches Rgnl, RNAV (GPS) RWY 17, Amdt 1
Natchitoches, LA, Natchitoches Rgnl, RNAV (GPS) RWY 35, Amdt 1
Hopedale, MA, Hopedale Industrial Park, GPS–A, Orig-A, CANCELLED
Hopedale, MA, Hopedale Industrial Park, RNAV (GPS)-A, Orig
Orange, MA, Orange Muni, GPS RWY 32, Orig-E, CANCELLED
Orange, MA, Orange Muni, NDB RWY 1, Amdt 1
Orange, MA, Orange Muni, NDB RWY 32, Amdt 1
Orange, MA, Orange Muni, RNAV (GPS) RWY 32, Orig
Orange, MA, Orange Muni, Takeoff Minimums and Obstacle DP, Amdt 1
Gaithersburg, MD, Montgomery County Airpark, RNAV (GPS)-A, Orig
Ridgely, MD, Ridgely Airpark, RNAV (GPS) RWY 12, Orig-A
Ridgely, MD, Ridgely Airpark, RNAV (GPS) RWY 30, Orig-A
Boyne City, MI, Boyne City Muni, RNAV (GPS) RWY 9, Orig
Boyne City, MI, Boyne City Muni, RNAV (GPS) RWY 27, Orig
Boyne City, MI, Boyne City Muni, Takeoff Minimums and Obstacle DP, Orig
Ontonagon, MI, Ontonagon County-Schuster Field, NDB OR GPS–A, Amdt 4A, CANCELLED
Ontonagon, MI, Ontonagon County-Schuster Field, RNAV (GPS)-A, Orig
Ontonagon, MI, Ontonagon County-Schuster Field, Takeoff Minimums and Obstacle DP, Amdt 2
Owatonna, MN, Owatonna Degner Rgnl, ILS OR LOC RWY 30, Amdt 2A
Owatonna, MN, Owatonna Degner Rgnl, RNAV (GPS) RWY 12, Amdt 1
Owatonna, MN, Owatonna Degner Rgnl, RNAV (GPS) RWY 30, Orig
Jacksonville, NC, Albert J Ellis, ILS OR LOC RWY 5, Amdt 9
Jacksonville, NC, Albert J Ellis, RNAV (GPS) RWY 5, Amdt 1
Jacksonville, NC, Albert J Ellis, RNAV (GPS) RWY 23, Orig
Pittstown, NJ, Sky Manor, RNAV (GPS) RWY 7, Orig
Pittstown, NJ, Sky Manor, RNAV (GPS) RWY 25, Orig
Pittstown, NJ, Sky Manor, Takeoff Minimums and Obstacle DP, Amdt 2
Pittstown, NJ, Sky Manor, VOR RWY 7, Amdt 3
Robbinsville, NJ, Trenton-Robbinsville, GPS RWY 11, Orig, CANCELLED
Robbinsville, NJ, Trenton-Robbinsville, RNAV (GPS) RWY 11, Orig
Robbinsville, NJ, Trenton-Robbinsville, RNAV (GPS) RWY 29, Amdt 1
Robbinsville, NJ, Trenton-Robbinsville, VOR RWY 29, Amdt 11
Somerville, NJ, Somerset, RNAV (GPS) RWY 30, Amdt 1
Somerville, NJ, Somerset, VOR RWY 8, Amdt 12
Cortland, NY, Cortland County-Chase Field, Takeoff Minimums and Obstacle DP, Amdt 3
Hornell, NY, Hornell Muni, GPS RWY 18, Orig-B, CANCELLED
Hornell, NY, Hornell Muni, GPS RWY 36, Orig-B, CANCELLED
Hornell, NY, Hornell Muni, RNAV (GPS) RWY 18, Orig
Hornell, NY, Hornell Muni, RNAV (GPS) RWY 36, Orig
Hornell, NY, Hornell Muni, Takeoff Minimums and Obstacle DP, Amdt 5
New York, NY, La Guardia, RNAV (GPS) RWY 13, Amdt 1
Ogdensburg, NY, Ogdensburg Intl, RNAV (GPS) RWY 9, Orig
Westhampton Beach, NY, Francis S Gabreski, COPTER ILS OR LOC RWY 24, Amdt 2A, CANCELLED
Westhampton Beach, NY, Francis S Gabreski, ILS OR LOC RWY 24, Amdt 10
Westhampton Beach, NY, Francis S Gabreski, RNAV (GPS) RWY 6, Amdt 2
Westhampton Beach, NY, Francis S Gabreski, RNAV (GPS) RWY 24, Amdt 2
Westhampton Beach, NY, Francis S Gabreski, TACAN RYW 6, Orig
Westhampton Beach, NY, Francis S Gabreski, TACAN RWY 24, Orig
Westhampton Beach, NY, Francis S Gabreski, Takeoff Minimums and Obstacle DP, Amdt 2
Portsmouth, OH, Greater Portsmouth Rgnl, Takeoff Minimums and Obstacle DP, Amdt 3
Tiffin, OH, Seneca County, RNAV (GPS) RWY 24, Amdt 1
Madras, OR, Madras Municipal, RNAV (GPS) RWY 16, Amdt 1
Madras, OR, Madras Municipal, RNAV (GPS) RWY 34, Orig
Madras, OR, Madras Municipal, RNAV (GPS)-A, Amdt 1, CANCELLED
Danville, PA, Danville, RNAV (GPS) RWY 9, Orig
Danville, PA, Danville, RNAV (GPS) RWY 27, Orig
Danville, PA, Danville, Takeoff Minimums and Obstacle DP, Orig
Lebanon, PA, Keller Brothers, RNAV (GPS) RWY 7, Orig
Lebanon, PA, Keller Brothers, RNAV (GPS) RWY 25, Orig
Lebanon, PA, Keller Brothers, Takeoff Minimums and Obstacle DP, Orig
Philadelphia, PA, Philadelphia Intl, Takeoff Minimums and Obstacle DP, Amdt 9
Quakertown, PA, Quakertown, NDB RWY 29, Amdt 11
Quakertown, PA, Quakertown, RNAV (GPS) RWY 11, Orig
Quakertown, PA, Quakertown, RNAV (GPS) RWY 29, Amdt 1
Austin, TX, Austin-Bergstrom Intl, ILS OR LOC RWY 17L, ILS RWY 17L (SA CAT I), ILS RWY 17L (CAT II), ILS RWY 17L (CAT III), Amdt 2
Austin, TX, Austin-Bergstrom Intl, ILS OR LOC RWY 17R, Amdt 4
Austin, TX, Austin-Bergstrom Intl, ILS OR LOC RWY 35L, Amdt 5
Austin, TX, Austin-Bergstrom Intl, ILS OR LOC RWY 35R, Amdt 2
Austin, TX, Austin-Bergstrom Intl, RNAV (GPS) RWY 17L, Amdt 1
Austin, TX, Austin-Bergstrom Intl, RNAV (GPS) RWY 17R, Amdt 1
Austin, TX, Austin-Bergstrom Intl, RNAV (GPS) RWY 35L, Amdt 1
Austin, TX, Austin-Bergstrom Intl, RNAV (GPS) RWY 35R, Amdt 1
Austin, TX, Austin-Bergstrom Intl, RNAV (GPS) Y RWY 35L, Orig, CANCELLED
Houston, TX, George Bush Intercontinental/Houston, GLS RWY 8L, Orig
Houston, TX, George Bush Intercontinental/Houston, GLS RWY 8R, Orig
Houston, TX, George Bush Intercontinental/Houston, GLS RWY 9, Orig
Houston, TX, George Bush Intercontinental/Houston, GLS RWY 26L, Orig
Houston, TX, George Bush Intercontinental/Houston, GLS RWY 26R, Orig
Houston, TX, George Bush Intercontinental/Houston, GLS RWY 27, Orig
Houston, TX, George Bush Intercontinental/Houston, ILS OR LOC RWY 8L, ILS RWY 8L (CAT II), ILS RWY 8L (CAT III), ILS RWY 8L (SA CAT I), Amdt 3
Houston, TX, George Bush Intercontinental/Houston, ILS OR LOC RWY 8R, ILS RWY 8R (SA CAT II), Amdt 24
Houston, TX, George Bush Intercontinental/Houston, ILS OR LOC RWY 9, ILS RWY 9 (SA Cat II), Amdt 9
Houston, TX, George Bush Intercontinental/Houston, RNAV (GPS) RWY 8L, Amdt 4
Houston, TX, George Bush Intercontinental/Houston, RNAV (GPS) RWY 9, Amdt 4
Houston, TX, George Bush Intercontinental/Houston, RNAV (GPS) RWY 26L, Amdt 3A
Houston, TX, George Bush Intercontinental/Houston, RNAV (GPS) RWY 26R, Amdt 3A
Houston, TX, George Bush Intercontinental/Houston, RNAV (GPS) Z RWY 8R, Amdt 3
Houston, TX, George Bush Intercontinental/Houston, RNAV (RNP) Y RWY 8R, Orig
Houston, TX, George Bush Intercontinental/Houston, RNAV (RNP) Y RWY 27, Orig
Madisonville, TX, Madisonville Muni, Takeoff Minimums and Obstacle DP, Orig
Monahans, TX, Roy Hurd Memorial, Takeoff Minimums and Obstacle DP, Amdt 1
Clarksville, VA, Lake Country Regional, GPS RWY 4, Orig-B, CANCELLED
Clarksville, VA, Lake Country Regional, RNAV (GPS) RWY 4, Orig

Clarksville, VA, Lake Country Regional, RNAV (GPS) RWY 22, Orig
Leesburg, VA, Leesburg Executive, ILS OR LOC RWY 17, Amdt 1
Leesburg, VA, Leesburg Executive, RNAV (GPS) RWY 17, Amdt 3
New Market, VA, New Market, Takeoff Minimums and Obstacle DP, Orig
Norfolk, VA, Norfolk Intl, ILS OR LOC RWY 5, Amdt 26A
Newport, VT, Newport State, GPS RWY 36, Orig-A, CANCELLED
Newport, VT, Newport State, RNAV (GPS) RWY 36, Orig
Guernsey, WY, Camp Guernsey, GPS RWY 32, Orig, CANCELLED
Guernsey, WY, Camp Guernsey, NDB RWY 32, Amdt 1
Guernsey, WY, Camp Guernsey, RNAV (GPS) RWY 32, Orig
Torrington, WY, Torrington Muni, NDB RWY 10, Amdt 2
Torrington, WY, Torrington Muni, NDB RWY 28, Amdt 2

RESCINDED: On March 28, 2012 (77 FR 18683), the FAA published an Amendment in Docket No. 30833, Amdt No. 3470 to Part 97 of the Federal Aviation Regulations under section 97.33. The following 46 entries for Denver, CO, and 1 entry for Camden, AR, effective 31 May, 2012, are hereby rescinded in their entirety:

Camden, AR, Harrell Field, VOR/DME RWY 1, Amdt 10
Denver, CO, Centennial, Takeoff Minimums and Obstacle DP, Amdt 5
Denver, CO, Denver Intl, ILS OR LOC RWY 7, Amdt 3
Denver, CO, Denver Intl, ILS OR LOC RWY 8, Amdt 5
Denver, CO, Denver Intl, ILS OR LOC RWY 16L, Amdt 3
Denver, CO, Denver Intl, ILS OR LOC RWY 16R, Amdt 1
Denver, CO, Denver Intl, ILS OR LOC RWY 17L, Amdt 4
Denver, CO, Denver Intl, ILS OR LOC RWY 17R, Amdt 3
Denver, CO, Denver Intl, ILS OR LOC RWY 25, Amdt 3
Denver, CO, Denver Intl, ILS OR LOC RWY 26, Amdt 3
Denver, CO, Denver Intl, ILS OR LOC RWY 34L, ILS RWY 34L (CAT II), ILS RWY 34L (CAT III), ILS RWY 34L (SA CAT I), Amdt 2
Denver, CO, Denver Intl, ILS OR LOC RWY 34R, ILS RWY 34R (CAT II), ILS RWY 34R (CAT III), ILS RWY 34R (SA CAT I), Amdt 3
Denver, CO, Denver Intl, ILS OR LOC RWY 35L, ILS RWY 35L (CAT II), ILS RWY 35L (CAT III), ILS RWY 35L (SA CAT I), Amdt 5
Denver, CO, Denver Intl, ILS OR LOC RWY 35R, ILS RWY 35R (CAT II), ILS RWY 35R (CAT III), ILS RWY 35R (SA CAT I), Amdt 3
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 7, Amdt 1
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 8, Amdt 1
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 16L, Amdt 1
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 16R, Amdt 1
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 17L, Amdt 1
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 17R, Amdt 1
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 25, Amdt 1
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 26, Amdt 1
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 34L, Amdt 2
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 34R, Amdt 2
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 35L, Amdt 2
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 35R, Amdt 2
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 7, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 8, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 16L, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 16R, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 17L, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 17R, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 25, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 26, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 34L, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 34R, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 35L, Orig
Denver, CO, Denver Intl, RNAV (RNP) Z RWY 35R, Orig
Denver, CO, Front Range, ILS OR LOC RWY 17, Amdt 1
Denver, CO, Front Range, ILS OR LOC RWY 26, Amdt 5
Denver, CO, Front Range, ILS OR LOC RWY 35, Amdt 1
Denver, CO, Front Range, NDB RWY 26, Amdt 5
Denver, CO, Front Range, RNAV (GPS) RWY 17, Amdt 1
Denver, CO, Front Range, RNAV (GPS) RWY 26, Amdt 1
Denver, CO, Front Range, RNAV (GPS) RWY 35, Amdt 1
Denver, CO, Front Range, Takeoff Minimums and Obstacle DP, Amdt 3
Denver, CO, Rocky Mountain Metropolitan, Takeoff Minimums and Obstacle DP, Amdt 5

[FR Doc. 2012–10727 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–13–P**

## COMMODITY FUTURES TRADING COMMISSION

## 17 CFR Part 1

## Fees for Reviews of the Rule Enforcement Programs of Designated Contract Markets and Registered Futures Associations

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of FY 2011 schedule of fees.

**SUMMARY:** The Commission charges fees to designated contract markets and registered futures associations to recover the costs incurred by the Commission in the operation of its program of oversight of self-regulatory organization rule enforcement programs, specifically National Futures Association, a registered futures association, and the designated contract markets. The calculation of the fee amounts charged for FY 2011 by this notice is based upon an average of actual program costs incurred during FY 2008, 2009, and 2010.

**DATES:** *Effective Date:* Each SRO is required to remit electronically the fee applicable to it on or before July 6, 2012.

**FOR FURTHER INFORMATION CONTACT:** Mark Carney, Chief Financial Officer, Commodity Futures Trading Commission, (202) 418–5477, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. For information on electronic payment, contact Jennifer Fleming, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581, (202) 418–5034.

**SUPPLEMENTARY INFORMATION:**

### I. Background Information

*A. General*

This notice relates to fees for the Commission's review of the rule enforcement programs at the registered futures associations [1] and designated contract markets (DCM) each of which is a self-regulatory organization (SRO) regulated by the Commission. The Commission recalculates the fees charged each year to cover the costs of operating this Commission program.[2] All costs are accounted for by the Commission's Budget Program Activity Codes (BPAC) system, formerly the Management Accounting Structure Codes (MASC) system, which records each employee's time for each pay period. The fees are set each year based on direct program costs, plus an overhead factor. The Commission calculates actual costs, then calculates an alternate fee taking volume into account, then charges the lower of the two.[3]

[1] NFA is the only registered futures association.

[2] *See* section 237 of the Futures Trading Act of 1982, 7 U.S.C. 16a, and 31 U.S.C. 9701. For a broader discussion of the history of Commission fees, see 52 FR 46070, Dec. 4, 1987.

[3] 58 FR 42643, Aug. 11, 1993 and 17 CFR part 1, app. B.

*B. Overhead Rate*

The fees charged by the Commission to the SROs are designed to recover program costs, including direct labor costs and overhead. The overhead rate is calculated by dividing total Commission-wide overhead direct program labor costs into the total amount of the Commission-wide overhead pool. For this purpose, direct program labor costs are the salary costs of personnel working in all Commission programs. Overhead costs consist generally of the following Commission-wide costs: indirect personnel costs (leave and benefits), rent, communications, contract services, utilities, equipment, and supplies. This formula has resulted in the following overhead rates for the most recent three years (rounded to the nearest whole percent): 144 percent for fiscal year 2008, 147 percent for fiscal year 2009, and 153 percent for fiscal year 2010.

*C. Conduct of SRO Rule Enforcement Reviews*

Under the formula adopted by the Commission in 1993, the Commission calculates the fee to recover the costs of its rule enforcement reviews and examinations, based on the three-year average of the actual cost of performing such reviews and examinations at each SRO. The cost of operation of the Commission's SRO oversight program varies from SRO to SRO, according to the size and complexity of each SRO's program. The three-year averaging computation method is intended to smooth out year-to-year variations in cost. Timing of the Commission's reviews and examinations may affect costs—a review or examination may span two fiscal years and reviews and examinations are not conducted at each SRO each year.

As noted above, adjustments to actual costs may be made to relieve the burden on an SRO with a disproportionately large share of program costs. The Commission's formula provides for a reduction in the assessed fee if an SRO has a smaller percentage of United States industry contract volume than its percentage of overall Commission oversight program costs. This adjustment reduces the costs so that, as a percentage of total Commission SRO oversight program costs, they are in line with the pro rata percentage for that SRO of United States industry-wide contract volume.

The calculation is made as follows: The fee required to be paid to the Commission by each DCM is equal to the lesser of actual costs based on the three-year historical average of costs for that DCM or one-half of average costs incurred by the Commission for each DCM for the most recent three years, plus a pro rata share (based on average trading volume for the most recent three years) of the aggregate of average annual costs of all DCMs for the most recent three years. The formula for calculating the second factor is: 0.5a + 0.5 vt = current fee. In this formula, ''a'' equals the average annual costs, ''v'' equals the percentage of total volume across DCMs over the last three years, and ''t'' equals the average annual costs for all DCMs. NFA has no contracts traded; hence, its fee is based simply on costs for the most recent three fiscal years. This table summarizes the data used in the calculations of the resulting fee for each entity:

| | Actual total costs | | | 3-Year average actual costs | 3-Year % of volume | Volume adjusted costs | FY2011 Assessed fee |
|---|---|---|---|---|---|---|---|
| | FY2008 | FY2009 | FY2010 | | | | |
| CBOE Futures | ..... | $519 | ..... | $173 | 0.057 | $448 | $173 |
| Chicago Board of Trade | $30,305 | 142,446 | $87,953 | 86,901 | 27,706 | 218,442 | 86,901 |
| Chicago Climate Exchange | 23,590 | 2,129 | ..... | 8,573 | 0.025 | 4,444 | 4,444 |
| Chicago Mercantile Exchange | 13,511 | 341,186 | 882,542 | 412,413 | 54.224 | 548,690 | 412,413 |
| ICE Future U.S. | 126,362 | 286,289 | 94,043 | 168,898 | 2.883 | 102,659 | 102,659 |
| Kansas City Board of Trade | 78,321 | 2,888 | 227,296 | 102,835 | 0.139 | 52,294 | 52,294 |
| Minneapolis Grain Exchange | 187,679 | 123,566 | ..... | 103,748 | 0.047 | 52,172 | 52,172 |
| New York Mercantile Exchange | 497,654 | 15,948 | 596,767 | 370,123 | 14.214 | 274,838 | 274,838 |
| North American Derivative Exchanges | 25,175 | ..... | ..... | 8,392 | 0.000 | 4,196 | 4,196 |
| One Chicago | 3,471 | ..... | ..... | 1,157 | 0.134 | 1,425 | 1,157 |
| Subtotal | 986,069 | 914,972 | 1,888,601 | 1,263,214 | 100 | 1,259,607 | 991,247 |
| National Futures Association | 1,054,392 | 109,639 | 1,206,393 | 790,141 | ..... | ..... | 790,141 |
| Total | 2,040,460 | 1,024,611 | 3,094,994 | 2,053,355 | ..... | ..... | 1,781,388 |

An example of how the fee is calculated for one exchange, the Chicago Board of Trade, is set forth here:

a. Actual three-year average costs equal $86,901.

b. The alternative computation is: (.5) ($86,901) + (.5) (.2771) ($1,263,214) = $218,442.

c. The fee is the lesser of a or b; in this case $86,901.

As noted above, the alternative calculation based on contracts traded is not applicable to NFA because it is not a DCM and has no contracts traded. The Commission's average annual cost for conducting oversight review of the NFA rule enforcement program during fiscal years 2008 through 2010 was $790,141 (one-third of $2,370,423). The fee to be paid by the NFA for the current fiscal year is $790,141.

**II. Schedule of Fees**

Therefore, fees for the Commission's review of the rule enforcement programs at the registered futures associations and DCMs regulated by the Commission are as follows:

| | 2011 Fee lesser of actual or calculated fee |
|---|---|
| CBOE Futures | $173 |
| Chicago Board of Trade | 86,901 |
| Chicago Climate Exchange | 4,444 |
| Chicago Mercantile Exchange | 412,413 |
| ICE Futures U.S. | 102,659 |
| Kansas City Board of Trade | 52,294 |
| Minneapolis Grain Exchange | 52,172 |
| New York Mercantile Exchange | 274,838 |
| North American Derivatives Exchange | 4,196 |
| OneChicago | 1,157 |
| Subtotal | 991,247 |
| National Futures Association | 790,141 |
| Total | 1,781,388 |

### III. Payment Method

The Debt Collection Improvement Act (DCIA) requires deposits of fees owed to the government by electronic transfer of funds (See 31 U.S.C. 3720). For information about electronic payments, please contact Jennifer Fleming at (202) 418–5034 or *jfleming@cftc.gov*, or see the CFTC Web site at *www.cftc.gov,* specifically, *www.cftc.gov/cftc/cftcelectronicpayments.htm.*

Issued in Washington, DC, on this 1st day of May, 2012, by the Commission.

**David Stawick,**

*Secretary of the Commission.*

[FR Doc. 2012–10898 Filed 5–4–12; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## 18 CFR Part 35

**[Docket No. RM11–17–000; Order No. 760]**

## Enhancement of Electricity Market Surveillance and Analysis Through Ongoing Electronic Delivery of Data From Regional Transmission Organizations and Independent System Operators

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Federal Energy Regulatory Commission (Commission) is amending its regulations to require each regional transmission organization (RTO) and independent system operator (ISO) to electronically deliver to the Commission, on an ongoing basis, data related to the markets that it administers. Specifically, the Commission is amending its regulations to establish ongoing electronic delivery of data relating to physical and virtual offers and bids, market awards, resource outputs, marginal cost estimates, shift factors, financial transmission rights, internal bilateral contracts, uplift, and interchange pricing. Such data will facilitate the Commission's development and evaluation of its policies and regulations and will enhance Commission efforts to detect anti-competitive or manipulative behavior, or ineffective market rules, thereby helping to ensure just and reasonable rates.

**DATES:** *Effective Date:* This rule will become effective July 6, 2012.

**FOR FURTHER INFORMATION CONTACT:**

William Sauer (Technical Information), Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–6639, *william.sauer@ferc.gov.*

Christopher Daignault (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8286, *christopher.daignault@ferc.gov.*

**SUPPLEMENTARY INFORMATION:**

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139 FERC ¶ 61,053

Before Commissioners: Jon Wellinghoff, Chairman; Philip D. Moeller, John R. Norris, and Cheryl A. LaFleur.

**Final Rule**

*Issued April 19, 2012*

### I. Introduction

1. In this final rule, the Federal Energy Regulatory Commission (Commission) is revising its regulations to require each regional transmission organization (RTO) and independent system operator (ISO) to electronically deliver to the Commission, on an ongoing basis, data related to the markets that it administers. The Commission, acting pursuant to sections 301(b) and 307(a) of the Federal Power Act (FPA),[1] will amend its regulations to establish ongoing electronic delivery of data relating to physical and virtual offers and bids, market awards, resource outputs, marginal cost estimates, shift factors, financial transmission rights (FTR), internal bilateral contracts, uplift, and interchange pricing. Such data will facilitate the Commission's

[1] 16 U.S.C. 825(b), 825f(a).

development and evaluation of its policies and regulations and will enhance Commission efforts to detect anti-competitive or manipulative behavior, or ineffective market rules, thereby helping to ensure just and reasonable rates.

## II. Background

2. Wholesale electricity markets have changed dramatically in recent years: [2] From an industry characterized by self-sufficient, vertically integrated utilities, where most utilities operated their own generation, transmission, and distribution facilities, to an industry that utilizes market-based rates and ''open access'' to transmission systems. The 1980s and early 1990s experienced an increased adoption of market-based ratemaking and wholesale power sales competition to promote efficiency and to lower wholesale power prices.[3] Further, the Commission found that the availability of transmission service can enhance competition in power markets, by increasing power supply options of buyers and power sales options of sellers, and can lead to lower rates for consumers.[4]

3. By the mid-1990s, the Commission concluded that, beyond the industry's voluntary efforts, additional measures were needed to address undue discrimination in transmission access. Accordingly, the Commission issued Order Nos. 888 [5] and 889,[6] requiring ''open access'' transmission service. The Commission explained that such open access would ''remove impediments to competition in the wholesale power marketplace and * * * bring more efficient, lower cost power to the Nation's electricity customers.'' [7] Subsequently, the Commission issued Order No. 890 [8] to further remedy undue discrimination and thereby remove barriers to competition.

4. In addition to addressing undue discrimination in transmission access, Order No. 888 encouraged the formation of ISOs, reasoning that ''ISOs have great potential to assist us and the industry to help provide regional efficiencies, to facilitate economically efficient pricing, and, especially in the context of power pools, to remedy undue discrimination and mitigate market power.'' [9] To date, the Commission has approved six RTOs and ISOs: PJM Interconnection, L.L.C. (PJM); New York Independent System Operator, Inc. (NYISO); Midwest Independent Transmission System Operator, Inc. (MISO); ISO New England Inc. (ISO–NE); California Independent System Operator Corporation (CAISO); and Southwest Power Pool, Inc. (SPP).

5. Recognizing the importance of information relating to market trading and market oversight, the Commission issued Order No. 2001 [10] and Order No. 697,[11] establishing reporting requirements for entities selling under market-based rates. The information solicited by these orders has helped foster appropriate oversight of developing electricity markets, for ''[i]nformation is the key to a viable electricity market and to preventing market manipulation.'' [12] In addition, the Energy Policy Act of 2005 (EPAct 2005) [13] gave the Commission expanded authority to address market manipulation,[14] including the ability to assess increased civil penalties.[15] EPAct 2005 also provided increased criminal penalties.[16]

6. Independent market monitoring by RTO and ISO market monitoring units (MMU) is another important means to evaluate market developments and to identify and deter market abuses and manipulation. In Order No. 2000, the Commission identified market monitoring as a basic function of an RTO.[17] The Commission refined its approach to MMUs in a 2005 policy statement and in Order No. 719.[18] In the

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[2] A more in-depth discussion of developments in wholesale electricity markets—which no commenter disputed—is provided in the Notice of Proposed Rulemaking (NOPR), which can be found at *Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations and Independent System Operators,* Notice of Proposed Rulemaking, 76 FR 66211 (Oct. 26, 2011), FERC Stats. & Regs. ¶ 32,681 (2011).

[3] *See, e.g.,* Louisville Gas & Elec. Co., 62 FERC ¶ 61,016, at 61,143 & n.16, 61,149 (1993) (accepting non-traditional, market-based rates as consistent with primary regulatory goal of ensuring lowest reasonable cost energy to consumers, provided service is reliable and the seller demonstrates a lack of market power); *Pac. Gas & Elec. Co.,* 38 FERC ¶ 61,242, at 61,790 (1987) (accepting proposed competitive rates because ''competition * * * encourages utilities to make efficient decisions with a minimum of regulatory intervention [and, u]ltimately, consumers should benefit from lower prices as competition improves efficiency.''), *modified on other grounds,* 47 FERC ¶ 61,121 (1989), *modified,* 50 FERC ¶ 61,339 (1990), *modified sub nom. W. Sys. Power Pool,* 55 FERC ¶ 61,099, at 61,319 (addressing applicant's failure to eliminate anticompetitive effects by mitigating market power), *granting stay,* 55 FERC ¶ 61,154, *reh'g granted in part,* 55 FERC ¶ 61,495 (1991), *modified,* 59 FERC ¶ 61,249 (1992); *Pub. Serv. Co. of N.M.,* 25 FERC ¶ 61,469, at 62,038 (1983) (averring that ''competition penalizes a seller that is inefficient or has an unreasonable pricing strategy[; consequently,] consumers * * * benefit because the improvements in efficiency lead to lower prices.''); *see also Heartland Energy Servs., Inc.,* 68 FERC ¶ 61,223 (1994) (reviewing early Commission decisions granting market-based rate authority).

[4] *Fla. Mun. Power Agency* v. *Fla. Power & Light Co.,* 65 FERC ¶ 61,125, at ¶ 61,615, *reh'g dismissed,* 65 FERC ¶ 61,372 (1993), *final order,* 67 FERC ¶ 61,167 (1994), *order on reh'g,* 74 FERC ¶ 61,006 (1996).

[5] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order No. 888–A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC,* 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC,* 535 U.S. 1 (2002).

[6] *Open Access Same-Time Information System and Standards of Conduct,* Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g,* Order No. 889–A, FERC Stats & Regs. ¶ 31,049, *reh'g denied,* Order No. 889–B, 81 FERC ¶ 61,253 (1997).

[7] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,634.

[8] *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g,* Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g,* Order No. 890–B, 123 FERC ¶ 61,299 (2008), *order on reh'g,* Order No. 890–C, 126 FERC ¶ 61,228 (2009), *order on clarification,* Order No. 890–D, 129 FERC ¶ 61,126 (2009).

[9] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,652; *see also id.* at 31,730–32.

[10] *Revised Public Utility Filing Requirements,* Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied,* Order No. 2001–A, 100 FERC ¶ 61,074, *reh'g denied,* Order No. 2001–B, 100 FERC ¶ 61,342, *order directing filing,* Order No. 2001–C, 101 FERC ¶ 61,314 (2002), *order directing filing,* Order No. 2001–D, 102 FERC ¶ 61,334, *order refining filing requirements,* Order No. 2001–E, 105 FERC ¶ 61,352 (2003), *order on clarification,* Order No. 2001–F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements,* Order No. 2001–G, 120 FERC ¶ 61,270, *order on reh'g and clarification,* Order No. 2001–H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements,* Order No. 2001–I, 125 FERC ¶ 61,103 (2008).

[11] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified,* 121 FERC ¶ 61,260 (2007), *order on reh'g,* Order No. 697–A, FERC Stats. & Regs. ¶ 31,268, Order No. 697–B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g,* Order No. 697–C, FERC Stats. & Regs. ¶ 31,291 (2009), *aff'd sub nom. Montana Consumer Counsel* v. *FERC,* 659 F.3d 910 (9th Cir. Oct. 13, 2011). In its decision upholding Order No. 697, the Ninth Circuit Court of Appeals noted that monitoring must be accompanied by enforcement because ''[w]ithout enforcement, there is little reason to believe that sellers will police themselves.'' *Montana Consumer Counsel,* 659 F.3d at 920 n.5.

[12] Charles H. Koch, Jr., *Collaborative Governance: Lessons for Europe from U.S. Electricity Restructuring,* 61 Admin. L. Rev. 71, 97 (2009).

[13] Public Law 109–58, 119 Stat. 594 (2005).

[14] *See, e.g.,* 16 U.S.C. 824v.

[15] *See* 16 U.S.C. 825o–1 (civil penalties).

[16] *See* 16 U.S.C. 825o (criminal penalties).

[17] Prior to this first generic consideration of MMUs in Order No. 2000, the Commission addressed market monitoring in connection with individual RTO and ISO proposals. *See Pac. Gas & Elec. Co.,* 77 FERC ¶ 61,265 (1996), *order on reh'g,* 81 FERC ¶ 61,122 (1997), *order on clarification,* 83 FERC ¶ 61,033 (1998) (requiring the ISO to file a detailed monitoring plan and listing minimum elements for such a plan); *Pennsylvania-New Jersey-Maryland Interconnection,* 81 FERC ¶ 61,257 (1997) (requiring PJM Interconnection, L.L.C. to develop a market monitoring program to evaluate market power and market design flaws).

[18] *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators,* 111 FERC ¶ 61,267 (2005) (2005 Policy Statement); *Wholesale Competition in*

Continued

2005 Policy Statement, the Commission outlined tasks for MMUs to perform in order to enhance the competitive structure of RTO and ISO markets.[19] Subsequently, in Order No. 719, the Commission further clarified requirements for MMU functions, independence, and information sharing.[20]

7. While MMUs perform a vital and necessary function in market oversight,[21] they do not supplant the Commission's authority.[22] Rather, MMUs are designed to provide the Commission with an additional means of detecting market power abuses, market design flaws, and opportunities for improvements in market efficiency.[23]

## III. Discussion

### *A. Commission Authority and the Need for Market Data*

#### 1. NOPR

8. The NOPR proposed to obtain ongoing delivery of RTO and ISO data pursuant to the Commission's authority under sections 301(b) and 307(a) of the FPA.[24] Section 301(b) provides that the Commission shall at all times have access to, and the right to inspect and examine, all accounts and records of public utilities; section 307(a) provides that the Commission has authority to investigate any facts, conditions, practices, or matters it may deem necessary or proper to determine whether any person, electric utility, transmitting utility, or other entity may have violated or might violate the FPA or the Commission's regulations, or to aid in the enforcement of the FPA or the Commission's regulations, or to obtain information about wholesale electric energy sales or the transmission of electric energy in interstate commerce.

9. In the NOPR, the Commission sought comment on its proposal to revise its regulations to require each RTO and ISO to electronically deliver to the Commission, on an ongoing, non-public basis, data related to the markets that it administers; [25] namely, data relating to physical and virtual offers and bids, market awards, resource outputs, marginal cost estimates, shift factors, FTRs, internal bilateral contracts, and interchange pricing.[26] The Commission explained that ongoing electronic delivery of data from each RTO and ISO would facilitate the Commission's development and evaluation of its policies and regulations and would enhance Commission efforts to detect anti-competitive or manipulative behavior, or ineffective market rules, thereby helping to ensure just and reasonable rates.

10. The NOPR also emphasized efforts by the Commission to streamline the collection of data it already has the authority to request from public utilities. The Commission noted that it currently requests data from individual RTOs and ISOs on an ad hoc basis. The Commission averred that such ad hoc requests may require more Commission and RTO and ISO resources than the proposed ongoing electronic delivery of this data using an automated process. Accordingly, the Commission proposed to require an automated ongoing data delivery process, in part, to minimize any burden on RTOs and ISOs.

11. In the NOPR, the Commission also addressed the relationship between the Commission and the MMUs. The Commission explained that the NOPR did not seek to displace or modify any of the existing market monitoring functions or any evaluations of market rules and designs performed by the MMUs; rather, the intent of the data collection is to help the Commission detect anti-competitive or manipulative behavior, inefficient market rules, and ensure just and reasonable rates.[27] The Commission acknowledged that MMUs perform a vital and necessary function in market oversight.[28] The Commission explained that, rather than supplant the Commission's authority,[29] MMUs are designed to provide the Commission with an additional means of detecting market power abuses, market design flaws, and opportunities for improvements in market efficiency.[30]

#### 2. Comments

12. Commenters do not dispute the Commission's authority under sections 301(b) and 307(a) of the FPA to require ongoing delivery of data from each RTO and ISO. As PA PUC stated, the proposal to expand the categories of information that RTOs and ISOs have to make available to the Commission is a logical and necessary extension of the Commission's existing authority under sections 301 and 307 of the FPA.[31]

13. Most commenters agree that ongoing delivery of data from each RTO and ISO would assist the Commission in carrying out its monitoring functions.[32] For instance, Powerex states that:

> The Commission correctly recognizes that as markets continue to evolve with increased levels of sophistication, the Commission must continue to evaluate the type of data necessary to ensure just and reasonable rates. Having ongoing, routine access to [RTO and ISO] data will provide greater transparency to the Commission on market activities and allow the Commission to perform systematic, comprehensive analysis to aid in monitoring market behavior and creating effective market rules and efficient market design.[33]

14. Several commenters agree that an ongoing, automated data delivery process may reduce administrative burdens on the RTOs and ISOs and the Commission when compared with ad hoc data requests.[34] The PA PUC states that it does not believe the rules expanding RTO and ISO reporting requirements will unnecessarily burden these organizations.[35]

15. In their joint comments, EEI/EPSA state that they understand the Commission's desire to collect information to enhance its market monitoring and surveillance capabilities but question the need for ongoing data transfers to the Commission.[36] Specifically, EEI/EPSA question why the Commission needs the additional information; whether the Commission is proposing to duplicate the function of RTO and ISO MMUs; the justification for imposing a burden on RTOs and ISOs and market participants; and why the Commission is collecting more information than what is contained in the Electric Quarterly Reports (EQR).[37]

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*Regions with Organized Electric Markets,* Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g,* Order No. 719–A, FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g,* Order No. 719–B, 129 FERC ¶ 61,252 (2009).

[19] 2005 Policy Statement, 111 FERC ¶ 61,267 at P 2.

[20] Specifically, MMU functions consist of evaluating existing and proposed market rules, tariff provisions, and market design elements and recommending changes, if applicable; reviewing and reporting on the performance of wholesale markets; and identifying and notifying the Commission of behavior that may require investigation. *See* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 354.

[21] *See, e.g.,* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 314.

[22] Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,156–57.

[23] *Id.*

[24] 16 U.S.C. 825(b); 16 U.S.C. 825f(a).

[25] Appendix A lists commenters and their abbreviated names as used here.

[26] *See* NOPR, FERC Stats. & Regs. ¶ 32,681 at P 36; *see infra* § III.F (Data Requested) for the data in this final rule to be provided.

[27] *See* NOPR, FERC Stats. & Regs. ¶ 32,681 at PP 29 & 35.

[28] *Id.* PP 8–9 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 314).

[29] *Id.* P 9 (citing Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,156–57).

[30] *Id.*

[31] PA PUC at 2.

[32] SWP at 1–2; NYPSC at 3; PA PUC at 2–10; IRC at 1–2; Powerex § IV.A; APPA at 6; ISO–NE at 3; EEI/EPSA at 6; *see also* CAC/EPUC at 1 (expressing no protest against such delivery of data).

[33] Powerex § IV.A. (footnote omitted).

[34] *Id.* § IV.A.; ISO–NE at 3.

[35] PA PUC at 4.

[36] EEI/EPSA at 6.

[37] *Id.*

3. Commission Determination

16. The Commission concludes that requiring each RTO and ISO to electronically deliver to the Commission on an ongoing, non-public basis, data related to the markets that each administers will help the Commission to carry out its statutory responsibilities, as explained below. The Commission finds that the revisions are consistent with the Commission's authority under sections 301(b) and 307(a) of the FPA. In addition, these reforms are expected to reduce administrative burdens on the RTOs and ISOs.

17. EEI/EPSA's joint comments touch on a range of issues regarding the ongoing delivery of data from the RTOs and ISOs. Specifically, they ask why the Commission needs the specified data and question whether such reporting will result in duplicative market monitoring. These datasets are necessary to the Commission's better ensuring that Commission jurisdictional rates are just and reasonable.[38] Ongoing electronic delivery of these particular datasets will help the Commission more effectively and accurately, and thus more efficiently, monitor and evaluate the activity in RTO and ISO markets. Such data will permit the Commission to improve its screening of participants' market activity for inappropriate conduct, making such conduct more difficult to mask.[39] In addition, the ongoing delivery of this data will provide a better picture of market activity and lessen the possibility that market monitoring and surveillance screens will result in error. Thus, electronic delivery of this data will permit the Commission to meet its statutory obligations in a more efficient manner.

18. The Commission's oversight capabilities, and associated data delivery requirements, must keep pace with market developments and evolve along with the markets. A part of the Commission's oversight of the wholesale electricity markets is the evaluation of existing market designs and the effectiveness of current market rules. The ongoing, electronic delivery of specific datasets will enable the Commission to more effectively carry out this function. This data will provide the Commission with empirical information that will augment its ability to assess the effectiveness of Commission-approved market rules and provide better tools to monitor the efficiency of existing market designs in producing just and reasonable rates. Thus, the ongoing delivery of the data sought in this final rule will inform the Commission's continuing evaluation of market rules, regulations, and the development of its policies.

19. Requiring this data does not displace the MMUs' existing efforts to evaluate market rules and market designs or modify any of their market monitoring functions. Nor does the Commission's analysis and monitoring efforts using the data specified in this final rule duplicate the MMUs' existing efforts. For example, because of the Commission's ability to look across all RTO and ISO markets, the Commission is in a unique position to perform cross-market analysis. This cross-market analysis will enhance the Commission's ongoing efforts to improve surveillance and monitoring of the markets and assess the performance of different market designs and rules.[40]

*B. Duplicative Requirements*

1. NOPR

20. The NOPR stated that the electronic delivery of the types of data proposed herein will help to maintain the Commission's access to RTO and ISO data on par with the types and levels of activity in those markets and will help to ensure that rates are just and reasonable.[41]

2. Comments

21. Several commenters urge the Commission to avoid duplicative reporting, given other recent data collection requirements.[42]

22. Consistent with the mandate to avoid duplicative or unnecessarily burdensome regulation,[43] SWP urges the Commission to consider the impact of this additional data requirement. SWP posits that the EQR reporting requirements in Docket No. RM10–12 are duplicative and, in fact, the EQR data come from transactions that are already captured by other government reports, RTO and ISO reports, and reports by non-jurisdictional entities' public utility counterparties.[44] SWP states that the instant proposal makes the EQR reporting requirements redundant and unwarranted, given the Commission's statutory and executive mandates for streamlining regulation, reducing regulatory burdens, and eliminating duplicative reporting requirements.[45]

23. In their joint comments, EEI/EPSA encourage the Commission to require RTOs and ISOs to report EQR information for sales conducted within their markets, whether or not the RTOs and ISOs are actual counterparties to the transactions.[46] They also suggest that the Commission hold RTOs and ISOs responsible for the accuracy of the information they provide, to avoid duplicative burden on market participants.[47] Consequently, EEI/EPSA suggest that the Commission explicitly clarify that market participants are no longer required to report in their own EQRs the information that RTOs and ISOs are required to report under the final rule, nor to report in other Commission forms information that will be provided by RTOs and ISOs under the final rule.[48]

3. Commission Determination

24. Despite some similarities in data provided by market participants in their EQRs, we find that the reporting requirements placed on RTOs and ISOs in this final rule facilitate, rather than compromise, the goals of streamlining regulation, reducing regulatory burdens, or eliminating duplicative reporting requirements.

25. First, the nature of the data, the frequency of its collection, and the data format differ between the data submitted in EQRs and the data sought here. Currently, market participants provide contractual and transactional data in their EQRs related to their jurisdictional sales and transmission service in a specified format that is

[38] *See* 16 U.S.C 824d, 824e.

[39] *See* NOPR, FERC Stats. & Regs. ¶ 32,681 at PP 30–31.

[40] *Id.* P 29.

[41] *Id.* P 13.

[42] SWP at 2 (referring to EQR requirements); EEI/EPSA at 8–9 (same); *see also Electricity market Transparency Provisions of Section 220 of the Federal Power Act,* FERC Stats & Regs., Proposed Rules ¶ 32,676 (Apr. 21, 2011).

[43] *See Plan for Retrospective Analysis of Existing Rules,* Docket No. AD12–6 (Nov. 8, 2011) (''The Commission voluntarily and routinely, albeit informally, reviews its regulations to ensure that they achieve their intended purpose and do not impose undue burdens on regulated entities or unnecessary costs on those entities or their customers. In addition, the Commission considers the spirit of these Executive Orders [mandating regulatory streamlining and avoidance of unnecessary regulatory burdens] when evaluating possible new regulations.''), *available at http://www.ferc.gov/legal/maj-ord-reg/retro-analysis/ferc-eo-13579.pdf.*

[44] SWP at 2.

[45] *Id.*

[46] EEI/EPSA at 6.

[47] *Id.*

[48] *Id.* at 8. Additionally, EEI/EPSA suggest that there would be significant benefits associated with their proposal: if properly implemented, these changes would considerably reduce the burden for EQR filers and other RTOs and ISOs; would significantly reduce the size of most EQR Filings, largely resolving size-related upload problems that have occurred; a Commission EQR database consisting of only bilateral data would be much smaller and more manageable (the Commission could maintain a separate database of RTO and ISO market transactions or rely on information posted on RTO and ISO Web sites or servers); and, RTO and ISO sales data would be consistently, completely, and correctly reported. EEI/EPSA 8–9.

made available to the public. The Commission established the EQR reporting requirements in Order No. 2001 [49] to help ensure the collection of information needed to perform the Commission's regulatory responsibilities over sales and transmission service, while making available data useful to the public and allowing public utilities to better fulfill their responsibility under FPA section 205(c) to have rates on file in a convenient form and place.[50] By contrast, this final rule initiates a process for collecting *non-public* data from the RTOs and ISOs relating to market participants' jurisdictional service in the RTO and ISO markets, which is more granular and diverse. RTOs and ISOs will deliver this data, pursuant to the Commission's authority under sections 301(b) and 307(a) of the FPA, in a format consistent with how the data is currently collected in each RTO and ISO system,[51] on an ongoing (rather than quarterly) basis to help the Commission stay informed of market developments and to help ensure just and reasonable rates through better market surveillance and evaluation of policies and regulations.

26. Second, this final rule streamlines the process through which RTOs and ISOs provide data to the Commission by requiring ongoing delivery of such data, instead of relying on periodic, ad hoc requests.

27. Third, no additional regulatory burden is placed on market participants through these requirements, as the data sought is already collected by the RTOs and ISOs and will not be separately collected by the Commission from individual market participants.

28. Accordingly, we find that RTOs' and ISOs' reporting requirements under this final rule do not duplicate market participants' EQR reporting requirements. Based on this finding, we will continue to require individual market participants to submit their EQRs.

29. With respect to certain commenters' concern about the burden on market participants of filing information in EQRs about sales in RTO and ISO markets, we note that RTOs and ISOs may file EQRs on behalf of their members or participants if authorized to do so as their agent.[52] We also note that the Commission has worked with numerous RTOs and ISOs to produce settlement reports in a format that allows easy importation into the EQR software.

### *C. Confidentiality of Data*

#### 1. NOPR

30. In the NOPR, the Commission stated that much of the information it will receive is, by its nature, commercially sensitive.[53] Disclosure of such information could result in competitive harm to market participants and the market as a whole.[54] Accordingly, the Commission proposed that the data sought would not be made publicly available, except as may be directed by the Commission or a court with appropriate jurisdiction.[55]

31. The Commission stated in the NOPR that it will make publicly available the analysis derived from data that the Commission uses, for example, to support a proposed market rule change, except that the Commission will ensure that confidential information will remain non-public. The Commission also noted that it may direct its staff to issue a public report outside of a rulemaking proceeding with similar protections for confidential or otherwise protected information.

#### 2. Comments

32. Several commenters note that some of the data the Commission is proposing to receive is commercially sensitive and should be protected from release.[56] Commenters also argue that it would be beneficial to publicly release some of the information the Commission is proposing to receive.[57] APPA notes, for instance, that the Commission could take a strong first step in improving market transparency by requiring RTOs and ISOs to publish bid information, including identification of bidders, within a reasonable timeframe.[58] Powerex notes that while some of the data, if released, would result in competitive harm, much of the information the Commission is seeking from the RTOs and ISOs is already publicly available. As such, Powerex argues that public release of certain data would support better investment decisions and better responses to price signals, and would create more confidence in the functioning of markets, which in turn would benefit the whole market and end-use consumers because better decisions result in lower risk premiums and lower costs for consumers.[59]

33. In their joint comments, EEI/EPSA raise concerns about the security of the data transferred to the Commission and the potential for information retained by the Commission to be discoverable under FOIA.[60] Specifically, EEI/EPSA state they are concerned about the Commission's ability to honor its commitment to keep the information non-public under the Commission's current rules and regulations. EEI/EPSA state that, prior to requiring RTOs and ISOs to report this information, the Commission should adopt rules that would ensure that this information is kept confidential and not disclosed.[61]

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[49] Order No. 2001, FERC Stats. & Regs. ¶ 31,127. In a recent Notice of Proposed Rulemaking, the Commission proposed to amend its EQR regulations to require market participants that are excluded from the Commission's jurisdiction under FPA section 205 and have more than a de minimis market presence to file EQRs with the Commission. *See Electricity Market Transparency Provisions of Section 220 of the Federal Power Act,* Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,676 (2011).

[50] Order No. 2001, FERC Stats. & Regs. 31,127 at P 31.

[51] *See infra* § III.D (Data Formatting).

[52] *See* Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 336; Order No. 2001–E, 105 FERC ¶ 61,352 at P 12.

[53] In the past, the Commission has granted requests for privileged or confidential treatment of similar non-public data. *See, e.g., N.Y. Indep. Sys. Operator, Inc.,* 131 FERC ¶ 61,169, at P 15 (2010) (granting such treatment for data relating to specific generator or other equipment details, transmission system information, bidding strategies, generator reference levels, generator costs, guarantee payments, and the associated relevant time periods); *see also S. Cal. Edison Co.,* 135 FERC ¶ 61,201, at P 20 (2011); *Hydrogen Energy Cal. LLC,* 135 FERC ¶ 61,068, at P 25 (2011); *N.Y. Indep. Sys. Operator, Inc.,* 130 FERC ¶ 61,029, at P 3 (2010).

[54] The Freedom of Information Act (FOIA) allows persons to file requests to obtain data from the Commission. FOIA exemption 4 protects ''trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.'' 5 U.S.C. 552(b)(4) (2006), *amended by* OPEN Government Act of 2007, Pub. L. 110–175, 121 Stat. 2524 (2007); *accord* 18 CFR 388.107(d). We would expect that commercially-sensitive data, like that described in the NOPR, which satisfy the requirements of exemption 4 would be protected from disclosure.

[55] Section 301(b) of the FPA, 16 U.S.C. 825(b), provides that no member, officer, or employee of the Commission may divulge any fact or information that may come to his knowledge during the course of examination of books or other accounts, except as may be directed by the Commission or by a court.

[56] *See* CAC/EPUC at 1–2; EEI/EPSA at 10; Powerex § IV.C.

[57] *See* Powerex § IV.C; APPA at 4.

[58] APPA at 4.

[59] Powerex § IV.C. Powerex notes that the following data should be made publicly available: (1) Market awards (both volumes and prices including all Exceptional and Out-of-market dispatches); (2) resource outputs (including actual delivery to/from interties; (3) Financial Transmission Rights, including Congestion Revenue Rights; (4) uplift costs per megawatt; and (5) make-whole and bid cost recovery payments. Powerex § IV.C.

[60] *See* EEI/EPSA at 9–11.

[61] EEI/EPSA at 11. EEI/EPSA's concern is that ''the Commission may not be able to maintain the confidentiality of the information under FOIA. As a practical matter it can be difficult for any agency to ensure such confidentiality under FOIA with absolute certainty. As such, EEI and EPSA request that the Commission avoid collecting sensitive information, require any such information that is reported to be aggregated to minimize disclosure

EEI/EPSA also suggest that the Commission could allow RTOs and ISOs to post any non-confidential information on their Web sites or servers rather than having to deliver it to the Commission.[62]

3. Commission Determination

34. As the Commission stated in the NOPR, much of the information that the Commission expects to receive in this proposal is, by its nature, commercially sensitive.[63] While one may file a request to obtain data from the Commission,[64] FOIA exemption 4 protects ''trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.'' [65] Accordingly, although the Commission cannot foreclose requests of information relating to ongoing electronic submissions of non-public data, we expect that all such data found to satisfy the requirements of exemption 4 would be protected from disclosure.

35. The Commission may, of course, make publicly available analyses derived from data that the Commission uses, but insofar as the law allows, the Commission will ensure that confidential information will remain non-public. The Commission's doing these kinds of analyses and making them public is appropriate. Such analyses may be, among other things, in the form of a staff white paper or the initiation of a rulemaking proceeding, both of which are equally appropriate uses of the information collected.

36. The Commission recognizes that public release of certain data may support better investment decisions and better responses to price signals, as Powerex maintains, and also that portions of the information the Commission is seeking from the RTOs and ISOs already may be publicly available. However, the datasets the Commission will receive pursuant to this final rule are expected to contain in large measure the type of information covered under FOIA exemption 4, and would remain non-public.

*D. Data Formatting*

1. NOPR

37. The Commission proposed to require that any data electronically delivered to the Commission be in an XML format that is consistent for all RTOs and ISOs. The Commission stated that it was not proposing that each RTO and ISO materially modify the data prior to electronic delivery. The Commission sought comment on data formatting, noting that XML may not be the preferred format to use when electronically delivering RTO and ISO data.[66]

2. Comments

38. Commenters generally support allowing each RTO and ISO to provide data in its current format with minimal modification, rather than in a format consistent for all RTOs and ISOs.[67] ISO–NE contends that a common format would require a significantly longer implementation timeframe.[68] NYPSC posits that unnecessary expenses due to converting the format (to one not currently used by the RTOs and ISOs) could be costly, leading to a negative impact on ratepayers.[69]

39. The IRC states that regional differences and the individual market designs of each RTO and ISO may lead to discrepancies when attempting to reconcile these different market rules and products into XML or another common format.[70] The IRC proposes that each RTO and ISO electronically deliver the requested data in a format that mirrors the format in each one's system, with minimal transformation. The IRC further proposes that the data would be delivered to the Commission in a format acceptable to the Commission and that a guide explaining the data format and presentation would be provided.[71] Specifically, the IRC proposes to add the italicized language below to the text proposed in the NOPR:

> Each Commission-approved regional transmission organization and independent system operator must electronically deliver to the Commission, on an ongoing basis *and in a form and manner consistent with its own collection of data* and in a form and manner acceptable to the Commission, data related to the markets that the regional transmission organizations or independent system operators administers.

3. Commission Determination

40. Given the various data collection and storage methods used by RTOs and ISOs, we will allow data to be electronically delivered to the Commission in a format consistent with how the data is collected in each RTO and ISO system.[72] We agree with commenters that requiring data delivery in a consistent format for all RTOs and ISOs likely would be more costly and may result in data that fails to accurately capture the nuances of each market. Accordingly, the Commission will include the IRC's proposed additions, reflected in the italicized language above, in the regulation adopted by this final rule.

41. We recognize that the current data format and storage procedures used by each RTO and ISO may require that they make certain adjustments before the datasets are electronically delivered to the Commission, which are expected to be minimal. These adjustments, if necessary, will secure dependable, ongoing delivery of the data while preserving the individual character of each RTO's or ISO's datasets. For example, data the Commission is requesting may be stored by an RTO or ISO in a manner such that a particular dataset contains additional details that are unnecessary for Commission analysis. Similarly, an RTO's or ISO's reported times may be stored in various time zones, both within each RTO or ISO and across the RTOs and ISOs. Adjusting such data to either reduce the volume of information delivered to the Commission or to reflect a uniform time zone, *inter alia,* will improve the Commission's ability to understand and manage the data. Therefore, the Commission would expect that RTOs and ISOs will make certain minimal adjustments to the datasets from time to time, working with Commission staff.

42. As part of the determination not to require a consistent format for all RTOs and ISOs, we will direct that such data be delivered in one of two file types; namely, Comma Separated Value (i.e., CSV) or Tab Delimited.[73] These file types have been listed in order of Commission preference; they are commonly used file types and provide sufficient flexibility to allow for divergent formatting schemes among the RTOs and ISOs. Each RTO and ISO

concerns, and ensure the appropriate rules and regulations are enacted prior to requiring the reporting of confidential information.''

*Id.*

[62] EEI/EPSA at 4.

[63] *See* NOPR, FERC Stats. & Regs. ¶ 32,681 at P 45.

[64] *See id.* P 45 & n.48. We note that RTOs and ISOs also can specifically request privileged and confidential treatment by marking their documentation that accompanies the data delivery (*see infra* P 43 & n.75) pursuant to 5 U.S.C. 552, 18 CFR 1b.9, 1b.20, and 388.112.

[65] 5 U.S.C. 552(b)(4) (2006), *amended by* OPEN Government Act of 2007, Pub. L. 110–175, 121 Stat. 2524 (2007); *accord* 18 CFR 388.107(d).

[66] *See* NOPR, FERC Stats. & Regs. ¶ 32,681 at P 42.

[67] NYPSC at 4; IRC at 2–4; ISO–NE at 3; EEI/EPSA at 4.

[68] ISO–NE at 3

[69] NYPSC at 4.

[70] IRC at 3.

[71] *Id.* at 4.

[72] We consider format to include the structure of the data (*i.e.,* the data tables, columns, rows, and fields), as well as details relating to the data specifications for each field (*i.e.,* string, numeric, etc.).

[73] RTOs and ISOs, working with Commission staff, may switch to one of the other two file types. Moreover, in the future another file type may be determined to be more practicable or desirable.

must use the file type it selects on a consistent basis, that is, without altering the file type with each data transfer. Accordingly, we will not accept data delivered in XML, because its use may be more appropriate in situations where the formatting is consistent.[74]

43. Further, we agree with the IRC that documentation defining each field in the datasets provided by the RTOs and ISOs would assist the Commission in its analysis of the electronic data.[75] Accordingly, we will require each RTO and ISO to provide such documentation, given that correctly interpreting and understanding the data is a prerequisite to any analytic effort. Moreover, the Commission directs that such documentation be provided initially no later than 30 days prior to the first day of the ongoing delivery for each dataset.

44. Finally, to allow the Commission to stay abreast of any change in how data described in this final rule is collected, we direct each RTO and ISO to notify Commission staff in writing of any such change, 90 days prior to such a change or as soon as practicable once such a change is known. Such a change may necessitate the submission of updated documentation. Notifications of forthcoming changes, and updated documentation when appropriate, will allow the Commission to anticipate and make necessary adjustments to its own management and storage of RTO and ISO data, especially given that the data will not be received in a single consistent format across the RTOs and ISOs.

*E. Web-Based Delivery*

1. NOPR

45. Due to the commercially-sensitive nature of the requested market data, the Commission proposed that each RTO and ISO use a secure data delivery method to provide data to the Commission. Specifically, the Commission proposed that RTO and ISO market data be electronically delivered using the Secure File Transfer Protocol (SFTP) and that access to the server where the data is electronically delivered only be granted to each applicable RTO and ISO and to the Commission.

2. Comments

46. ISO–NE and the IRC do not anticipate problems associated with using SFTP to transfer encrypted market data to the Commission; they expect this method to be straightforward.[76] Both commenters state that the Commission should allow flexibility with respect to whether each RTO or ISO or the Commission hosts the exchange server.[77] For this purpose, the IRC urges the Commission to define ''deliver'' in this context as either ''transmission to the Commission'' or as ''making available to the Commission for retrieval.'' [78] The IRC suggests that other delivery mechanisms may be more technically attractive and, if the Commission finds this to be the case, requests that the Commission accommodate the other delivery mechanisms that are acceptable.[79] Finally, as noted above, in lieu of delivery to the Commission, EEI/EPSA suggest that the Commission could allow RTOs and ISOs to post any non-confidential information on their Web sites or servers.[80] In the event the Commission requires data to be delivered, EEI/EPSA suggest that the data be aggregated such that any disclosure will not cause commercial impacts.[81]

3. Commission Determination

47. We adopt the proposal outlined in the NOPR which requires RTO and ISO market data to be electronically delivered using SFTP.[82] Access to the server where the data is electronically delivered will only be granted to each applicable RTO and ISO and to the Commission.[83] We define ''deliver'' in this final rule to mean ''transmission to the Commission.''

48. The Commission rejects EEI/EPSA's suggestions that the Commission allow RTOs and ISOs to post only non-confidential information on their Web sites or to require the delivery of aggregated data to satisfy the requirement for ongoing delivery to the Commission. Commission use of such postings of non-confidential information or delivery of aggregated information would do little to further the Commission's market surveillance and its evaluation of policies and regulations. And as discussed in greater detail above, data that is electronically delivered pursuant to this final rule likely would be considered non-public.[84]

*F. Data Requested*

1. NOPR

49. In the NOPR, the Commission proposed to require ongoing electronic delivery of the data (e.g., the information to be included in the datasets) described below:

1. Supply offers and demand bids for energy and ancillary services—Data on supply offers and demand bids submitted to RTO and ISO markets. This dataset would include all offers and bids for energy and ancillary services. This dataset would also include offers and bids submitted for interchange transactions, as well as those submitted without economic consideration, i.e., self-schedules.

2. Virtual offers and bids—Data on virtual supply offers and virtual demand bids submitted to RTO and ISO markets.

3. Energy/ancillary service awards—Data on market awards for energy and ancillary services. This dataset would include the quantity and price of all market awards for energy and ancillary services. The dataset would also identify resources that are self-scheduled.

4. Capacity market offers, designations, and prices—For RTOs and ISOs with centralized capacity markets, data on capacity offers as well as capacity market outcomes or designations. This data would include the identity of capacity resources, the amount of procured capacity, and the applicable capacity market price.

5. Resource output—Data on resource output data used in market settlements. This dataset would include details used in market settlements, including RTO and ISO dispatch instructions (i.e., the output that a dispatched resource is expected to produce in real-time) for energy or ancillary services, or whether resources are operating at self-scheduled output levels, and measured output levels.

6. Marginal cost estimates—Data on marginal cost estimates; such estimates are typically generated for the potential replacement of supply offers in market power mitigation procedures. This dataset would include all marginal cost estimates that have been developed, and

[74] As the IRC noted, XML may be appropriate when presenting data that is based on a common format (IRC at 3). The use of XML is unsuitable for this data collection when common formatting does not exist.

[75] We consider documentation defining each field to consist of a data dictionary, entity relationship model, and file transfer record layout. This documentation would provide details about data such as meaning, relationships to other data, origin, usage, and format, as well as details defining the method for identifying new record submissions and record corrections (*i.e.,* an addition to, change in, or deletion of previously delivered data).

[76] ISO–NE at 5–6; IRC at 4–5.

[77] ISO–NE at 5–6; IRC at 4–5.

[78] IRC at 5.

[79] *Id.* at 4.

[80] EEI/EPSA at 4.

[81] *Id.* at 10.

[82] In the future, another delivery method may be determined to be more practicable or desirable.

[83] If the RTO or ISO elects to have the MMU deliver data to the Commission, the MMU also should be granted access to the server where data is delivered. *See infra* P 61.

[84] *See supra* § III.C. (Confidentiality of Data).

not just those estimates that were used to generate mitigated supply offers. The Commission is seeking only the resulting marginal cost estimates themselves, however, and not the inputs that allow for calculation of those estimates. Further, the Commission is not seeking other operating information regarding individual generators' actual costs, revenues, or profits.

7. Day-ahead shift factors—Data on shift factors calculated for use in the day-ahead market. This would include generation shift factors, which are factors to be applied to a generator's expected change in output to determine the amount of flow contribution that that change in output will impose on an identified transmission facility or flowgate, and load shift factors, which are factors to be applied to a load's expected change in demand to determine the amount of flow contribution that that change in demand will impose on an identified transmission facility or flowgate. This dataset would not be limited to binding constraints, but should also include all shift factors calculated to address non-binding constraints.

8. FTR data—Data on FTR transactions that may not be publicly posted in all RTO and ISO markets. Specifically, RTOs and ISOs must provide data detailing how all FTRs and allocated rights were acquired, either through RTO and ISO allocation or auction procedures; data detailing whether the acquired allocation positions were converted from positions that collect auction revenue into positions that collect congestion revenue; and data detailing secondary market transactions to the extent that they are available to the RTO and ISO.

9. Internal Bilateral Contracts—Data on the settlement of internal bilateral contracts for energy.

10. Pricing data for interchange transactions—Data on pricing information for scheduled interchanges including eTag IDs, when applicable, in addition to other interchange pricing details and transaction identification. Scheduled interchanges include any transaction between two or more Balancing Authority Areas.

50. The Commission also proposed that descriptive information, such as market participant names, unique identifiers, pricing points, and other information that the Commission considers necessary and appropriate to understand and analyze the data described in the NOPR would be included in the delivery of these datasets. The Commission noted that much of the data discussed in the NOPR are already collected and stored by the RTOs and ISOs in order to administer their markets.[85] And to the extent that an RTO or ISO does not already collect specific data, the Commission proposed not to require either the collection of such data from market participants or its electronic delivery to the Commission.

51. Finally, the Commission proposed to direct each RTO and ISO to submit a compliance filing within 45 days after the effective date of any final rule in this proceeding, amending its open access transmission tariff to reflect the requirement for the ongoing electronic delivery of data.

2. Comments

52. Most commenters support the Commission's proposal to require each RTO and ISO to electronically deliver data described in the NOPR as a means to more effectively carry out Commission functions.[86]

53. Several commenters encouraged the Commission to consider requesting additional data.[87] For example, Powerex believes that the following data would aid the Commission in enhancing its market surveillance: [88] (1) Market awards, both in terms of volumes and prices, including all exceptional and out-of-market dispatches; (2) uplift costs per megawatt; and (3) make-whole payments/bid costs recovery payments.

54. APPA considers it a substantial shortcoming in the Commission proposal to seek only estimated marginal cost data and not information regarding individual generators' actual costs, revenues, and profits.[89] APPA argues that, without looking at the underlying generator-seller cost data, the Commission cannot ''determine whether the average prices charged by a seller are comparable to the average prices that would be charged in a competitive market where no sellers were able to exercise market power.'' [90]

55. Several commenters support the Commission's intent to require only data that is collected or stored by each RTO or ISO to be delivered to the Commission.[91] In that vein, ISO–NE and the IRC state that, in certain cases, data requested in the NOPR is either not produced or retained by the RTO or ISO.[92] The IRC notes that for some RTOs and ISOs, such as the MISO, the data may be developed by the MMU.[93] In particular, the IRC notes that certain requested data serving as the basis for market power mitigation may be calculated by the MMU but not transmitted to the RTO or ISO and therefore cannot be supplied by the RTO or ISO. The IRC points out that, in other cases, certain inputs that are not critical to the clearing of the market routinely are not retained.[94] Likewise, ISO–NE states that it does not retain either shift factors calculated to address non-binding constraints or data ''flags'' that identify which of the alternative market mitigation methods would be used to calculate a reference level at the segment level (as opposed to the block level).[95] ISO–NE also states that it no longer administers a secondary FTR market, so it would not be in a position to deliver this data to the Commission.[96]

56. In order to reflect situations where the Commission is requesting data that is either not produced or retained by the RTO or ISO, the IRC requests that the Commission clarify in the final rule that no RTO or ISO will be required to deliver such data.[97] Specifically, the IRC requests that the Commission clarify that the data to be supplied is that which is used to settle or clear the relevant market and that the Commission need not be provided data—such as non-binding shift factors—that do not influence market outcomes. The IRC further requests that the Commission clarify that it is not directing the RTOs and ISOs to begin tracking incremental changes to the data that they do not currently track.[98]

3. Commission Determination

57. The Commission will adopt the proposal in the NOPR to require ongoing electronic delivery of data related to physical and virtual offers and bids, market awards, resource outputs, marginal cost estimates, shift factors, FTRs, internal bilateral contracts, and interchange pricing. In addition, the Commission will require each RTO and ISO to provide data on uplift charges and credits. The Commission concludes that the data specified in this final rule will facilitate the Commission's

[85] NOPR, FERC Stats. & Regs. ¶ 32,681 at P 14.

[86] SWP at 1–2; NYPSC at 3; PA PUC at 2–10; IRC at 1–2; Powerex § IV.A.; APPA at 6; ISO–NE at 2–3.

[87] Powerex § IV.B.; APPA at 4.

[88] Powerex contends that this data should be made publicly available in order to increase market transparency. Powerex § IV.B., .C.; *see also supra* § III.C. (Confidentiality of Data).

[89] APPA at 4.

[90] *Id.* at 5–6 (quoting *Lockyer ex rel State of California* v. *FERC,* 383 F.3d 1006, 1012–13 (9th Cir. 2004), and *Mont Consumer Counsel* v. *FERC,* 659 F.3d 910, 919 (9th Cir. 2011)).

[91] PA PUC at 3; EEI/EPSA at 4.

[92] ISO–NE at 4; IRC at 5–6.

[93] IRC at 5.

[94] One example is preliminary entries of bids that are subsequently modified by market participants prior to the submission of a final bid and prior to the market close. IRC at 5.

[95] ISO–NE at 4.

[96] *Id.* at 4–5.

[97] IRC at 6.

[98] *Id.*

development and evaluation of its policies and regulations and will enhance Commission efforts to detect anti-competitive or manipulative behavior, or ineffective market rules, thereby helping to ensure just and reasonable rates. Accordingly, we require each RTO and ISO to electronically deliver to the Commission, on an ongoing basis, the data described in this final rule to the extent that each RTO or ISO already collects such data.[99] We also direct each RTO and ISO to submit a compliance filing within 45 days of the effective date of this final rule, amending its open access transmission tariff to reflect the requirement for the ongoing electronic delivery of data. In response to the comments received on the NOPR, we provide the following clarifications.

58. First, we agree with Powerex that uplift charges and credits should be included in this final rule.[100] Upon further consideration, we find this data is important to furthering Commission goals of facilitating market surveillance and the evaluation of policies and regulations. As an example, uplift data may be used to identify instances where bidding strategies might merit examination or investigation. Uplift data may also be used to identify market designs that result in excess uplift charges. Accordingly, we will require RTOs and ISOs to report, consistent with the reporting structures outlined in this final rule, uplift charges and credits to market participants. This dataset would include details used in market settlements concerning uplift charges and credits as well as identification of each relevant market participant and resource.

59. However, we reject Powerex's request to make certain uplift data, along with other data covered by this rule, publicly available. This data may reveal individual market participant bidding strategies and other commercially-sensitive information. Consistent with our discussion earlier in this final rule, we expect that all data that satisfy the requirements of FOIA exemption 4 would be protected from public disclosure.

60. Second, we agree with the IRC and ISO–NE that there are some data elements not critical to the formation of market outcomes that will not need to be delivered under this final rule. Specifically, the Commission is not requesting the delivery of preliminary entries of bids that are subsequently modified by market participants prior to their submission of a final bid and prior to market closure. In addition, the Commission is seeking shift factor data related to active or binding constraints, not shift factor data associated with non-binding constraints or non-active constraints that is not retained by the RTO or ISO. Also, in response to ISO–NE's comment that it should not be required to deliver information about secondary FTR markets that it no longer administers, we clarify that the Commission does not require delivery of data on secondary markets that are not administered by the RTOs and ISOs or when secondary market transaction data are not provided to the RTO or ISO by market participants.

61. Third, to the extent the RTO or ISO relies on its MMU to produce or retain some of the requested data, we direct the RTO or ISO either to: (1) Request such data from its MMU, so that the RTO or ISO can deliver it to the Commission; or (2) request its MMU to deliver such data directly to the Commission. For instance, IRC indicates that MISO relies on its MMU to calculate certain requested data that form the basis for market power mitigation that is not delivered to the MISO. Market power mitigation data are critical to the proper functioning of RTO and ISO markets and important for facilitating market surveillance and evaluation of Commission policies and regulations. Therefore, in this example, the Commission expects MISO either to direct its MMU to provide MISO with such data so that MISO can then deliver it to the Commission, or MISO can direct its MMU to provide such data to the Commission.

62. With respect to tracking and documenting what the IRC terms as ''incremental changes'' to the data, we clarify that we may require documentation concerning any change in how the data described in this final rule are collected by each RTO and ISO.[101] Such documentation will help the Commission understand and appropriately utilize the data that the RTOs and ISOs are delivering to the Commission. Therefore, we will direct each RTO and ISO to notify Commission staff in writing of any such change as it pertains to data described in this final rule. Commission staff will determine whether the identified change requires the submission of updated documentation.

63. Finally, we disagree with APPA that the Commission should seek not only estimated marginal cost data but also individual generators' actual costs, revenues, and profits. In this final rule, the Commission is undertaking a data collection from the RTOs and ISOs that will enable it to better fulfill its statutory responsibilities. In contrast, information on individual generators' actual costs, revenues, and profits is not currently collected by RTOs and ISOs and to obtain such information would require its collection from market participants. At this time, the Commission will not undertake a separate data collection effort from market participants, as proposed by APPA; that is beyond the scope of this proceeding. Furthermore, to the extent the Commission is concerned that a particular seller may be exercising market power, it may seek additional data from that seller, including some or all of the data specified by APPA.

*G. Implementation Timeline and Phasing*

1. NOPR

64. The Commission invited comments with respect to the timeframe for electronic delivery of the data to the Commission. The Commission also invited comments on whether the requirements of the final rule should be implemented in phases and, if so, what a potential phased approach should entail.

2. Comments

65. Both ISO–NE and the IRC support phased implementation.[102] ISO–NE maintains that full implementation of ongoing electronic delivery of data could be accomplished in about six months following the issuance of the final rule.[103] ISO–NE proposes that phased implementation could involve the following steps: (1) Establish the initial systems needed and transfer methodology; (2) begin with an individual dataset and deliver it to the Commission after three months; and (3) expand functionality incrementally to deliver all requested data sets within six months.[104]

66. The IRC and EEI/EPSA proffer that a twelve-month timeframe would be appropriate.[105]

67. The IRC supports an initial, three-month delivery timeframe for a first, individual dataset but proposes all

[99] In the event an RTO or ISO begins to collect certain datasets described in this final rule not currently collected, that RTO or ISO thereafter would be expected to deliver such data to the Commission on an ongoing basis.

[100] We note that make-whole payments, bid cost recovery payments and details on some exceptional or out of market dispatches would be captured in the datasets electronically delivered to the Commission per the requirements of this final rule.

[101] *See supra* PP 43–44.

[102] ISO–NE at 6; IRC at 9.

[103] ISO–NE at 6.

[104] *Id.*

[105] IRC at 9; EEI/EPSA at 12.

requested data would be available to the Commission after twelve months of the final rule's effective date.[106] Further, recognizing that there will be a defined deadline, the IRC proposes that ''individual [RTOs and ISOs] could work with Commission staff to define a set of deliverable dates for tiers (which need not be defined in the final rule).'' [107]

3. Commission Determination

68. In response to the requests for additional time to implement the ongoing electronic delivery, the Commission will direct that electronic delivery of all the datasets be fully implemented 210 days after the effective date of this final rule, which is 60 days after publication in the **Federal Register**. Moreover, we adopt the proposal to implement delivery on a ''phased'' approach, a suggestion supported by the IRC and ISO–NE. Phased initial delivery will allow the Commission and each RTO and ISO to address data transfer issues more effectively.

69. Accordingly, we will direct that all RTOs and ISOs implement the ongoing electronic delivery of at least one dataset no later than 45 days after the effective date of this final rule. Unless otherwise determined on a case-by-case basis, this initial delivery would include at least all data relating to supply offers for energy, as discussed and defined in the NOPR.

70. We will direct that ongoing, electronic delivery of the remaining datasets be phased in gradually, with delivery of all datasets occurring no later than 210 days after the effective date of this final rule. Descriptive information necessary to understand each dataset, such as market participant names, unique identifiers, pricing points, and other information the Commission considers necessary and appropriate to analyze each dataset, should be provided at the same time initial delivery of each applicable dataset begins.

71. Unless otherwise determined on a case-by-case basis, following the initial delivery of (at least) the data relating to supply offers for energy, in the second phase we will direct that the following datasets be delivered electronically no later than 90 days after the effective date of this final rule: Virtual offers and bids; and demand bids for energy.

72. Unless otherwise determined on a case-by-case basis, in the third phase we will direct that the following datasets be delivered no later than 150 days after the effective date of this final rule: Marginal cost estimates; energy and ancillary service awards; resource output; internal bilateral contracts; and uplift data.

73. Finally, unless otherwise determined on a case-by-case basis, in the fourth and final phase that ends 210 days after the effective date of this final rule, we will direct that all remaining datasets be delivered, namely: Day-ahead shift factors; supply offer and demand bids for ancillary services; capacity market offers, designations and prices; pricing data for interchange transactions; and FTR data.

*H. Ongoing Electronic Delivery*

1. NOPR

74. The Commission proposed that RTOs and ISOs be required to electronically deliver the requested data to the Commission within seven days after each RTO or ISO creates the datasets in a daily market run or otherwise. For data that are updated less frequently than every day, including capacity market results, estimated marginal costs, and FTR data, each RTO or ISO would be expected to electronically deliver such data within seven days after it is created or updated by the RTO or ISO. The Commission also proposed that, in the event an RTO or ISO makes later corrections to the data (i.e., after the original data has been delivered to the Commission), the RTO or ISO would be expected to electronically deliver the corrected data to the Commission within seven days after the correction has been made. The Commission invited comments with respect to the timeframe in which the data described in this NOPR should be electronically delivered to the Commission.

2. Comments

75. The IRC believes that the seven-day requirement would be workable, provided that the RTO or ISO with corrected data can deliver the data to the Commission in a format consistent with the manner in which each RTO or ISO stores the data, with minimal modifications.[108]

76. The IRC interprets the Commission's intent as focused on obtaining data quickly and efficiently, rather than erecting a new compliance program. Towards this end, the IRC requests that the Commission clarify in the final rule that an RTO or ISO will not face compliance penalties in the event that data is not delivered in the specified timeframe, provided that the RTO or ISO is making its best efforts to comply with the rule and provided that the RTO or ISO gives timely notice to the Commission when the RTO or ISO becomes aware that there may be a delay in the delivery of data or some impact on the accuracy or completeness of the data.[109]

77. Further, the IRC states that the possibility exists that RTOs and ISOs will, on occasion, inadvertently produce or deliver inaccurate, incomplete, or imperfectly formatted data.[110] The IRC requests that the Commission expressly state in the final rule that, unless an error or omission was made to mislead the Commission, the submittal of inaccurate, incomplete, or imperfectly formatted data should not result in a violation of the Commission's regulations or a violation of the RTO's or ISO's tariff.[111]

3. Commission Determination

78. The Commission will require each RTO and ISO to electronically deliver the specified data to the Commission in a format consistent with the manner in which each RTO and ISO collects this data.[112] The Commission will adopt the proposal in the NOPR that RTOs and ISOs electronically deliver data to the Commission within seven days after each RTO and ISO creates the datasets in a market run or other procedure.[113] For data that are updated less frequently than every day, including capacity market results, estimated marginal costs, and FTR data, each RTO and ISO must electronically deliver that data within seven days after it is created or updated by the RTO or ISO. Each RTO and ISO is required to deliver all data consistent with timelines described elsewhere in this final rule. With respect to any corrections made to the data (i.e., after they have been delivered to the Commission), the RTO or ISO will be expected to electronically deliver the corrected data to the Commission within seven days after the correction has been made and identify whether that correction is adding to, changing, or deleting data previously delivered.[114]

79. We cannot make a blanket statement, as requested by the IRC, that the submission of inaccurate, incomplete, or imperfectly formatted data will not result in a violation of the Commission's regulations or the RTO and ISO tariff. However, as a general matter, the Commission does not intend

[106] IRC at 9.

[107] *Id.*

[108] *Id.* at 6.

[109] *Id.* at 7.

[110] *Id.* at 10.

[111] *Id.*

[112] *See supra* § III.D (Data Formatting).

[113] NOPR, FERC Stats. & Regs. ¶ 32,681 at P 38.

[114] *See supra* note 75.

to penalize RTOs and ISOs for infrequent, minor errors in data reporting. Moreover, as stated in the Revised Policy Statement on Enforcement, the Commission's Enforcement staff ''frequently exercises prosecutorial discretion to resolve minor infractions with voluntary compliance measures rather than with penalties.'' [115]

*I. Future Specifications and Modifications of the Data and the Process for Delivery*

1. NOPR

80. The Commission stated that the data it is proposing to receive would be limited to physical and virtual offers and bids, market awards, resource outputs, marginal cost estimates, shift factors, FTRs, internal bilateral contracts, and interchange pricing. The Commission also stated that these datasets would include descriptive information such as market participant names, unique identifiers, pricing points, and other information the Commission considers necessary and appropriate to understand and analyze the data described in this NOPR. However, the Commission recognized that markets are not static and, as markets continue to evolve, the Commission may initiate a new rulemaking proceeding in the future to reassess the data necessary for its market monitoring and surveillance efforts and for its policy and decision-making needs.

2. Comments

81. The IRC states that the proposed regulation itself does not specify the data that the RTOs and ISOs will be required to deliver, nor does the regulation specify any process by which the Commission may alter the obligations to provide data.[116] The IRC further states that, because the RTOs and ISOs need time to make modifications to the processes they employ in response to a change in the data delivery obligations, the Commission should specify the process it will use to modify the required data, data format, and/or the delivery mechanism.[117]

3. Commission Determination

82. The regulatory text adopted by this final rule sets forth the obligation for RTOs and ISOs to provide data to the Commission. The narrative preamble to that regulatory text, i.e., the final rule, provides additional, specific information about the datasets and details about the electronic delivery formatting, procedures, and security measures.

83. As to future changes in reporting, the Commission anticipates that changes in the datasets to be provided will be made through a rulemaking proceeding.

*J. Technical Conference*

1. Comments

84. In their joint comments, EEI/EPSA encourage the Commission to convene one or more technical conferences to address concerns related to this rulemaking and other Commission data collection efforts.[118]

2. Commission Determination

85. We deny EEI/EPSA's request to hold a technical conference. EEI/EPSA have not raised any issues that have not been adequately addressed in the rulemakings and that would otherwise require a technical conference.

## IV. Information Collection Statement

86. The collections of information contained in this final rule are being submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d). Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to these collections of information if the collections of information do not display a valid OMB control number.

87. The final rule does not require market participants other than the RTOs and ISOs to report information to the Commission.

88. The Commission did not receive any comments regarding the burden estimates in the proposed rule and uses the same estimates here.

89. In this final rule, the Commission did deviate from the proposed rule in several instances. Specifically, the Commission included an additional dataset, uplift, in this final rule. Any increase in burden associated with the inclusion of uplift data, however, should be offset by the decision in this final rule not to require consistent formatting by the RTOs and ISOs.

90. In addition, in this final rule, the Commission also clarifies that, in very limited instances, individual datasets that the Commission is requesting may be produced or retained by the MMUs. The Commission directed each RTO and ISO either to: (1) Request such data from its MMU, so that the RTO or ISO can deliver such data to the Commission; or (2) request its MMU to deliver such data directly to the Commission. Any burden associated with the delivery of such data is counted as burden on the RTO or ISO, as each RTO or ISO is responsible for such delivery to the Commission, and not the MMU.

91. The burden imposed by this rule on the RTOs and ISOs is captured through the estimates below.

| Data collection, FERC–921 | Number of respondents | Implementing burden | | Annual recurring operating burden | | Average annual burden (implementation cost averaged over 3 yrs.) | |
|---|---|---|---|---|---|---|---|
| | | Burden hrs. per respondent | Cost per respondent | Burden hrs. per respondent | Cost per respondent | Burden hrs. for all respondents | Cost for all respondents |
| Compliance filing | 6 | 7 | $1,750 | | | 14 | $3,500 |
| Web-Based Delivery | 6 | 1,040 | $100,864 | 40 | $3,879 | 2,320 | 225,003 |
| Grand Total, Average Annual Estimates | 6 | | | | | 2,334 | 228,503 |

92. The Commission recognizes that there will be an initial implementation burden associated with providing the Commission with RTO and ISO data. This includes submitting a compliance filing to the Commission, which the

[115] *Enforcement of Statutes, Regulations, and Orders,* 123 FERC ¶ 61,156, at P 9 (2008).

[116] IRC at 11.

[117] *Id.*

[118] EEI/EPSA at 12.

Commission estimates as a burden of 7 hours per RTO and ISO, and implementing a process to automatically upload data to an SFTP site for Commission use (including development, testing and production). The Commission estimates a burden of 1,040 hours per RTO and ISO for the development, testing and production of an automated process to provide the Commission with the data required in this final rule. In this regard, though, RTO and ISO markets have already developed capabilities necessary to handle RTO and ISO data in an automated manner. For instance, through their Open Access Same-time Information Systems (OASIS), RTOs and ISOs already make certain market data publically available using automated procedures. Likewise, some RTOs and ISOs have developed procedures similar to those contained in this final rule to deliver data to their MMUs.

93. For the recurring effort involved in electronically delivering RTO and ISO data to the Commission, the Commission anticipates that the additional burden associated with this rule will be minimal. Any recurring burden would be associated with addressing updates to RTO and ISO data as the data that they process changes and due to occasional errors in the data handling or data upload process.

*Information Collection Costs:* The Commission has estimated the cost of compliance per RTO and ISO to be $102,614 in the initial year of implementation and $3,879 in subsequent years. The Commission expects that the compliance filing will be completed by RTO and ISO legal staff and has estimated an hourly rate at $250/hour. The Commission estimates that a variety of staff, including legal, database administrators and IT and information security specialists, will be required to electronically deliver to the Commission the RTO and ISO data identified in this final rule. The Commission has estimated the average hourly cost for this task to be $96.98/hour (including legal staff at $250/hour, information systems manager at $105.35/hour, database administrator at $55.61/hour, and information security analyst at $57.67/hour).[119]

*Title:* FERC–921,[120] Enhancement of Electricity Market Surveillance and Analysis.

*Action:* New Collection.

*OMB Control No.:* 1902–0257.

*Respondents for this Rulemaking:* RTOs and ISOs.

*Frequency of Information:* Initial implementation, compliance filing, and automated daily updates.

*Necessity of Information:* As wholesale electricity markets continue to develop and evolve, new opportunities arise for anti-competitive or manipulative behavior. The Commission's market monitoring and surveillance capabilities and associated data requirements must keep pace with market developments and evolve along with the markets. The data requirement set forth in this final rule will allow the Commission to more effectively identify and address such behavior; to identify ineffective market rules; to better inform Commission policies and regulations; and thus to help ensure just and reasonable rates.

*Internal Review:* The Commission has made a preliminary determination that the revisions are necessary to keep pace with ever-changing possibilities for anti-competitive or manipulative behavior and to better inform Commission policies and regulations, and thus to ensure that rates are just and reasonable. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimate associated with the information requirements.

94. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, Office of the Executive Director, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, email: *DataClearance@ferc.gov,* phone: (202) 502–8663, fax: (202) 273–0873].

95. Comments concerning the information collections required in this Final Rule and the associated burden estimates should be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by email to OMB at the following email address: *oira_submission@omb.eop.gov.* Please reference FERC–921 and the docket number of this rulemaking (Docket No. RM11–17–000) in your submission.

## V. Environmental Analysis

96. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[121] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[122] The actions proposed here fall within a categorical exclusion in the Commission's regulations, i.e., they involve information gathering, analysis, and dissemination.[123] Therefore, environmental analysis is unnecessary and has not been performed.

## VI. Regulatory Flexibility Act

97. The Regulatory Flexibility Act of 1980 (RFA) [124] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards is responsible for the definition of a small business.[125] The SBA has established a size standard for utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours.[126] RTOs and ISOs are not small entities, and they are the only entities impacted directly by this final rule.[127]

98. CAISO is a nonprofit organization with over 54,000 megawatts of capacity and over 25,000 circuit miles of transmission lines.

99. NYISO is a nonprofit organization that oversees wholesale electricity

[119] Hourly average wage is an average and was calculated using Bureau of Labor Statistics (BLS), Occupational Employment Statistics data for May 2010 (at *http://www.bls.gov/oes/*) for the database administrator and information security analysts. The average hourly figure for legal staff and information systems manager is a composite from BLS and other resources. The following weightings were applied to estimate the average hourly cost: legal staff (⅙), information systems manager (⅙), database administrator (⅓), and information security analyst (⅓).

[120] OATT compliance filings (like the one-time compliance filing here) are normally included under FERC–516 (OMB Control No. 1902–0096). However, the reporting requirements (including the compliance filing) contained in this final rule in Docket No. RM11–17 will be covered by the FERC–921.

[121] *Regulations Implementing the National Environmental Policy Act,* Order No. 486, 52 FR 47,897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

[122] 18 CFR 380.4.

[123] *See* 18 CFR 380.4(a)(5).

[124] 5 U.S.C. 601–612.

[125] 13 CFR 121.101.

[126] 13 CFR 121.201 (Sector 22, Utilities).

[127] As noted in the final rule, an MMU may be directed by the RTO or ISO to provide data to the RTO or ISO, or directly to the Commission. Any impact on the MMU is considered part of the impact on RTOs and ISOs and does not affect the analysis performed in this section.

markets serving 19.2 million customers. NYISO manages a nearly 11,000-mile network of high-voltage transmission lines.

100. PJM is comprised of more than 700 members including power generators, transmission owners, electricity distributers, power marketers, and large industrial customers and serves 13 states and the District of Columbia.

101. SPP is comprised of 63 members serving 6.2 million households in nine states and has 48,930 miles of transmission lines.

102. MISO is a nonprofit organization with over 145,000 megawatts of installed generation. MISO has over 57,600 miles of transmission lines and serves 13 states and one Canadian province.

103. ISO–NE is a regional transmission organization serving six states in New England. The system is comprised of more than 8,000 miles of high-voltage transmission lines and over 300 generators.

104. The Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

### VII. Document Availability

105. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

106. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

107. User assistance is available for eLibrary and the the Commission's Web site during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202)502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

### VIII. Effective Date and Congressional Notification

108. These regulations are effective July 6, 2012. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

### List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By the Commission.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

In consideration of the foregoing, the Commission amends Part 35, Chapter I, Title 18, Code of Federal Regulations, as follows.

## PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for Part 35 continues to read as follows:

**Authority:** 16 U.S.C 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. In § 35.28, paragraphs (g)(4) through (g)(7) are redesignated as paragraphs (g)(5) through (g)(8) and a new paragraph (g)(4) is added to read as follows:

**§ 35.28. Non-discriminatory open access transmission tariff.**

* * * * *

(g) * * *

(4) *Electronic delivery of data.* Each Commission-approved regional transmission organization and independent system operator must electronically deliver to the Commission, on an ongoing basis and in a form and manner consistent with its own collection of data and in a form and manner acceptable to the Commission, data related to the markets that the regional transmission organization or independent system operator administers.

* * * * *

**Note:** The following appendix will not be published in the Code of Federal Regulations.

### Appendix A

### Commenters on the NOPR

American Public Power Association (APPA)
California Department of Water Resources State Water Project (SWP)
Cogeneration Association of California and the Energy Producers and Users Coalition (CAC/EPUC)
Edison Electric Institute and the Electric Power Supply Association (EEI/EPSA)
ISO New England Inc. (ISO–NE)
ISO/RTO Council (IRC)
New York Public Service Commission (NYPSC)
Pennsylvania Public Utility Commission (PA PUC)
Powerex Corp. (Powerex)

[FR Doc. 2012–9847 Filed 5–4–12; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## 18 CFR Part 40

**[Docket No. RM11–18–000; Order No. 762]**

## Transmission Planning Reliability Standards

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Final rule.

**SUMMARY:** Under section 215 of the Federal Power Act, the Federal Energy Regulatory Commission remands proposed Transmission Planning (TPL) Reliability Standard TPL–002–0b, submitted by the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization. The proposed Reliability Standard includes a provision that allows for planned load shed in a single contingency provided that the plan is documented and alternatives are considered and vetted in an open and transparent process. The Commission finds that this provision is vague, unenforceable and not responsive to the previous Commission directives on this matter. Accordingly, the Final Rule remands NERC's proposal as unjust, unreasonable, unduly discriminatory or preferential, and not in the public interest.

**DATES:** This rule will become effective July 6, 2012.

**ADDRESSES:** You may submit comments, identified by docket number by any of the following methods:

• *Agency Web Site: http://www.ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.

• *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

**FOR FURTHER INFORMATION CONTACT:**

Eugene Blick (Technical Information), Office of Electric Reliability, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8066, *Eugene.Blick@ferc.gov.*

Robert T. Stroh (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8473, *Robert.Stroh@ferc.gov.*

**SUPPLEMENTARY INFORMATION:**

**139 FERC ¶ 61,060**

*Before Commissioners:* Jon Wellinghoff, Chairman; Philip D. Moeller, John R. Norris, and Cheryl A. LaFleur.

## Final Rule

Issued April 19, 2012.

1. Under section 215(d) of the Federal Power Act,[1] the Commission remands proposed Transmission Planning (TPL) Reliability Standard TPL–002–0b, submitted by the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization. The proposed Reliability Standard includes a provision that allows for planned load shed in a single contingency provided that the plan is documented and alternatives are considered and vetted in an open and transparent process.[2] The Commission finds that this provision is vague, unenforceable and not responsive to the previous Commission directives on this matter. Accordingly, the Final Rule remands NERC's proposal as unjust, unreasonable, unduly discriminatory or preferential, and not in the public interest. We require NERC to utilize its Expedited Reliability Standards Development Process to develop timely modifications to TPL–002–0b, Table 1 footnote 'b' in response to our remand.[3]

[1] 16 U.S.C. 824o(d)(4) (2006).

[2] NERC filed a petition seeking approval of Table 1, footnote 'b' of four Reliability Standards: Transmission Planning: TPL–001–1—System Performance Under Normal (No Contingency) Conditions (Category A), TPL–002–1b—System Performance Following Loss of a Single Bulk Electric System Element (Category B), TPL–003–1a—System Performance Following Loss of Two or More Bulk Electric System Elements (Category C), and TPL–004–1—System Performance Following Extreme Events Resulting in the Loss of Two or More Bulk Electric System Elements (Category D). While footnote 'b' appears in all four of the above referenced TPL Reliability Standards, its relevance and practical applicability is limited to TPL–002–0a.

[3] NERC Rules of Procedure, Appendix 3A, Standard Processes Manual at 34 (effective January 31, 2012).

## I. Background

2. Section 215 of the FPA requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Approved Reliability Standards are enforced by the ERO, subject to Commission oversight, or by the Commission independently. On March 16, 2007, the Commission issued Order No. 693, approving 83 of the 107 Reliability Standards filed by NERC, including Reliability Standard TPL–002–0.[4] In addition, pursuant to section 215(d)(5) of the FPA,[5] the Commission directed NERC to develop modifications to 56 of the 83 approved Reliability Standards, including footnote 'b' of Reliability Standard TPL–002–0.[6]

### *A. Transmission Planning (TPL) Reliability Standards*

3. Currently-effective Reliability Standard TPL–002–0b addresses Bulk-Power System planning and related transmission system performance for single element contingency conditions. Requirement R1 of TPL–002–0b requires that each planning authority and transmission planner ''demonstrate through a valid assessment that its portion of the interconnected transmission system is planned such that the network can be operated to supply projected customer demands and projected firm transmission services, at all demand levels over the range of forecast system demands, under the contingency conditions as defined in Category B of Table I.'' [7] Table I identifies different categories of contingencies and allowable system impacts in the planning process. With regard to system impacts, Table I further provides that a Category B (single) contingency must not result in cascading outages, loss of demand or curtailed firm transfers, system instability or exceeded voltage or thermal limits. With regard to loss of demand, current footnote 'b' of Table 1 states:

> Planned or controlled interruption of electric supply to radial customers or some local Network customers, connected to or supplied by the Faulted element or by the affected area, may occur in certain areas without impacting the overall reliability of the interconnected transmission systems. To prepare for the next contingency, system adjustments are permitted, including curtailments of contracted Firm (non-recallable reserved) electric power Transfers.

[4] *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g,* Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[5] 16 U.S.C. 824o(d)(5)(2006).

[6] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1797.

[7] Reliability Standard TPL–002–0a, Requirement R1.

### *B. Order No. 693 Directive*

4. In Order No. 693, the Commission stated that it believes that the transmission planning Reliability Standard should not allow an entity to plan for the loss of non-consequential firm load in the event of a single contingency.[8] The Commission directed the ERO to develop certain modifications, including a clarification of Table 1, footnote 'b.'

5. In a subsequent clarifying order, the Commission stated that it believed that a regional difference, or a case-specific exception process that can be technically justified, to plan for the loss of firm service would be acceptable in limited circumstances.[9] Specifically, the Commission stated that ''a regional difference, or a case-specific exception process that can be technically justified, to plan for the loss of firm service at the fringes of various systems would be an acceptable approach.'' [10]

### *C. NERC Petition*

6. On March 31, 2011, NERC filed a petition seeking approval of its proposal to revise and clarify footnote 'b' ''in regard to load loss following a single contingency.'' [11] NERC stated that it did not eliminate the ability of an entity to plan for the loss of non-consequential load in the event of a single contingency but drafted a footnote that, according to NERC, ''meets the Commission's directive while simultaneously meeting the needs of industry and respecting jurisdictional bounds.'' [12] NERC stated that its proposed footnote 'b' establishes the requirements for the limited circumstances when and how an entity can plan to interrupt Firm Demand for Category B contingencies. According to NERC, the provision allows for planned interruption of Firm Demand when ''subject to review in an open and transparent stakeholder process.'' [13] NERC's proposed footnote 'b' states:

> An objective of the planning process should be to minimize the likelihood and magnitude of interruption of firm transfers or Firm Demand following Contingency events. Curtailment of firm transfers is allowed when

[8] *See* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1794.

[9] *Mandatory Reliability Standards for the Bulk Power System,* 131 FERC ¶ 61,231, at P 21 (2010) (June 2010 Order).

[10] *Id.*

[11] NERC Petition at 10.

[12] *Id.*

[13] *Id.*

achieved through the appropriate redispatch of resources obligated to re-dispatch, where it can be demonstrated that Facilities, internal and external to the Transmission Planner's planning region, remain within applicable Facility Ratings and the re-dispatch does not result in the shedding of any Firm Demand. It is recognized that Firm Demand will be interrupted if it is: (1) directly served by the Elements removed from service as a result of the Contingency, or (2) Interruptible Demand or Demand-Side Management Load. Furthermore, in limited circumstances Firm Demand may need to be interrupted to address BES performance requirements. When interruption of Firm Demand is utilized within the planning process to address BES performance requirements, such interruption is limited to circumstances where the use of Demand interruption are documented, including alternatives evaluated; and where the Demand interruption is subject to review in an open and transparent stakeholder process that includes addressing stakeholder comments.

7. NERC supplemented the filing on June 7, 2011, in response to a Commission deficiency letter. NERC explained that ''the approach proposed in footnote 'b' is equally efficient because many of the stakeholder processes that will be used in footnote 'b' planning decisions are already in place, as implemented by FERC in Order No. 890 and in state regulatory jurisdictions.'' [14] NERC also pointed to state public utility commission processes or processes existing in local jurisdictions that address transmission planning issues that could serve to provide a case-specific review of the planned interruption of Firm Demand. According to NERC, such processes would more likely engage the appropriate local-level decision-makers and policy-makers.

8. With respect to review and oversight by NERC and the Regional Entities, NERC submitted that an ERO-specific process would place the ERO in the position of managing and actively participating in a planning process, which conflicts with its role as the compliance monitor and enforcement authority. NERC also stated that neither the ERO nor the Regional Entities will review decisions regarding planned interruptions. Their role will be limited to reviewing whether the registered entity participated in a stakeholder process when planning to interrupt Firm Demand. NERC explained that Regional Entities will have oversight after-the-fact by auditing the entity's implementation of footnote 'b' to determine if the entity planned on interrupting Firm Demand and whether the decision by the entity to rely on planned interruption of Firm Demand was vetted through the stakeholder process and qualified as one of the situations identified in footnote 'b.'

9. Furthermore, NERC stated that an objective of the planning process should be to minimize the likelihood and magnitude of planned Firm Demand interruptions. NERC contended that, due to the wide variety of system configurations and regulatory compacts, it is not feasible for the ERO to develop a one-size-fits-all criterion for limiting the planned firm load interruptions for Category B events. According to NERC, the standards drafting team evaluated setting a certain magnitude of planned interruption of Firm Demand, but there was no analytical data to support a single value, and it would be viewed as arbitrary.

*D. Notice of Proposed Rulemaking*

10. On October 20, 2011, the Commission issued a Notice of Proposed Rulemaking (NOPR [15]) proposing to remand NERC's proposal to modify footnote 'b.' In the NOPR, the Commission stated that it believed that NERC's proposal does not meet the directives in Order No. 693 and the June 2010 Order and does not clarify or define the circumstances in which an entity can plan to interrupt Firm Demand for a single contingency. The Commission expressed concern that the procedural and substantive parameters of NERC's proposed stakeholder process are too undefined to provide assurances that the process will be effective in determining when it is appropriate to plan for interrupting Firm Demand, does not contain NERC-defined criteria on circumstances to determine when an exception for planned interruption of Firm Demand is permissible, and could result in inconsistent results in implementation. The NOPR stated that the proposed footnote effectively turns the processes into a reliability standards development process outside of NERC's existing procedures. Furthermore, the NOPR stated that regardless of the process used, the result could lead to inconsistent reliability requirements within and across reliability regions. While the Commission recognized that some variation among regions or entities is reasonable, there are no technical or other criteria to determine whether varied results are arbitrary or based on meaningful distinctions.

11. The Commission proposed to provide further guidance on acceptable approaches to footnote 'b' and sought comment on certain options for revising footnote 'b', as well as other potential options to solve the concerns outlined in the NOPR. In response to the NOPR, comments were filed by seventeen interested parties.[16]

## II. Discussion

12. For the reasons discussed below, the Commission concludes that NERC's proposed TPL–002–0b does not meet the Commission's Order No. 693 directives, nor is it an equally effective and efficient alternative. Further, the Commission finds that the proposal is vague, potentially unenforceable and may lack safeguards to produce consistent results. On this basis, the Commission remands the proposal to NERC as unjust, unreasonable, unduly discriminatory or preferential and not in the public interest. Below, the Commission also provides guidance on acceptable approaches to footnote 'b.'

13. The Commission adopts the proposed NOPR finding that the footnote 'b' process lacks adequate parameters. The Reliability Standard requires that, when planning to interrupt Firm Demand, the Firm Demand interruption must be ''subject to review in an open and transparent stakeholder process that includes addressing stakeholder comments.'' [17] Without meaningful substantive parameters governing the stakeholder process, the enforceability of this obligation by NERC and the Regional Entities would be limited to a review to ensure only that a stakeholder process occurred. As NERC explained, Regional Entities' involvement is limited to after-the-fact oversight by auditing the entity's implementation of footnote 'b' to determine if the entity planned on interrupting Firm Demand and whether the decision by the entity to rely on planned interruption of Firm Demand was vetted through the stakeholder process and qualified as one of the situations identified in footnote 'b.' [18]

[14] NERC Data Response at 4.

[15] *Transmission Planning Reliability Standards,* Notice of Proposed Rulemaking, 76 FR 66229 (Oct. 20, 2011), FERC Stats. & Regs. ¶ 32,683 (2011).

[16] NERC, The Edison Electric Institute (EEI), American Public Power Association (APPA), National Association of Regulatory Utility Commissioners (NARUC), ITC Holdings Corp. (ITC), Manitoba Hydro, California Department of Water Resources State Water Project (California SWP) Hydro One Networks, Inc and the Ontario Independent Electricity System Operator (Hydro One and IESO), Duke Energy Corporation (Duke), New York State Public Service Commission (NYPSC), Bonneville Power Administration (BPA), Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (KCPL), Midwest Independent System Operator, Inc. (MISO), Public Utility District No. 1 of Snohomish County, Washington (Snohomish), Transmission Access Policy Study Group (TAPS), Powerex Corp. (Powerex), and Florida Reliability Coordinating Council (FRCC).

[17] NERC Petition at 10.

[18] NERC Data Response at 7–9.

14. Further, the NERC proposal leaves undefined the circumstances in which it is allowable to plan for Firm Demand to be interrupted in response to a Category B contingency. The Commission believes that proposed footnote 'b' could be used as a means to override the reliability objective and system performance requirements of the TPL Reliability Standard without any technical or other criteria specified to determine when planning to interrupt Firm Demand would be allowable, and without violating any of the requirements of the TPL Reliability Standard. The TPL Reliability Standard requires that a planner demonstrate through a valid assessment that the transmission system is planned and can be operated to supply projected Firm Demand at all demand levels over a range of forecasted system demands.[19] In addition, a planner must consider all single contingencies under Table 1, Category B and demonstrate system performance.[20] For single contingency events where system performance is not met, a planner must provide a written summary of its plans to achieve system performance including implementation schedules, in service dates of facilities and implementation lead times.[21]

15. However, if system performance is not met for any single contingency event(s) under NERC's proposed footnote 'b,' a planner could plan to interrupt some portion of Firm Demand to meet system performance requirements thereby overriding the performance requirements of the TPL Reliability Standard. For example, if a planner determines during its annual assessment that for a single bulk-power system transformer contingency other bulk-power system elements would exceed their thermal ratings, a planner would have authority under the standard to plan to interrupt Firm Demand to relieve the exceeded thermal ratings of the bulk-power system elements rather than planning the system to withstand such a single contingency and avoid shedding firm load as the performance requirements of the TPL Reliability Standard require. Therefore, without articulating some bounds on the use of the planned shedding of Firm Demand, there could be instances of multiple exceptions that could affect the robustness of the system. Further, contrary to commenters contentions, NERC's proposal, for example, has no provision to evaluate this cumulative effect of the individual decisions to shed firm.[22]

16. The Commission disagrees with commenters that NERC's proposed footnote 'b' will have no adverse impact on reliable planning of the bulk-power system because planning to shed Firm Demand is intended to ensure that single contingency events do not result in adverse impacts and intended to preserve bulk-power system reliability.[23] Table 1 of the TPL Reliability Standard identifies the system performance requirements or ''System Limits or Impacts'' that a planner must apply during its assessment of Category B, single contingency events.[24] Except in limited circumstances, if a planner determines that it must plan to interrupt Firm Demand so that it does not violate the Table 1 system performance requirements, a planner should not apply footnote 'b' as a mitigation plan to plan to operate reliably. The Commission therefore is concerned that NERC's proposal provides authority to adjust the TPL Reliability Standard and its system performance requirements for each single contingency event that does not meet the system performance requirements of Table 1.

17. Further, NERC has not provided technically sound means of determining situations in which planning to interrupt Firm Demand would be allowable. While NERC expects that such determinations will be made in a stakeholder process, this provides no assurance that such a process will use technically sound means of approving or denying exceptions. The Commission concludes that the multiple stakeholder processes across the country engaging in such determinations could lead to inconsistent and arbitrary exceptions including, potentially, allowing entities to plan to interrupt any amount of Firm Demand in any location and at any voltage level.

18. While the Commission recognizes that some variation among regions or entities is reasonable given varying grid topography and other considerations, there are no technical or other criteria to determine whether varied results are arbitrary or based on meaningful distinctions. The Commission, thus, concludes that NERC's proposal lacks safeguards to ensure against inconsistent results and arbitrary determinations to allow for the planned interruption of Firm Demand.

19. A remand gives NERC and industry flexibility to develop an approach that would address the issues identified by the Commission with the proposed footnote 'b' stakeholder process including, as discussed below, definition of the process and criteria or guidelines for the process.

20. The Commission believes that, on remand, both NERC and the Commission will benefit from a more complete record regarding the electric industry's reliance on planned Firm Demand interruptions. In response to the Commission's request to explain and quantify the extent to which Firm Demand is planned to be interrupted pursuant to currently-effective footnote 'b,' NERC explained:

> NERC and the Regional Entities have not collected statistics or preformed a survey concerning the prospective implementation of Footnote b under TPL–002–0a. During the drafting team's deliberations concerning TPL–001–2 and TPL–002–0a Footnote b, including the NERC Technical Conference on Footnote b, the informal assessments demonstrated that the use of Footnote b would not be widespread.[25]

Likewise, several commenters state that the interruption of Firm Demand is rarely needed, but provide no support for this conclusion.[26] For example, EEI asks the Commission to ''recognize'' that ''* * * the actions taken as outcomes of the planning review process, are likely to identify few/isolated circumstances in which these [footnote b] provisions would be invoked* * *.''[27] However, the Commission believes that more specific information regarding the specific circumstances and frequency with which Firm Demand is planned to be interrupted will assist both NERC in developing, and the Commission in reviewing, appropriate revisions to

[19] Reliability Standard TPL–002–0b, Requirement R1.

[20] Reliability Standard TPL–002–0b, Requirement R1.3.7.

[21] Reliability Standard TPL–002–0b, Requirement R2.

[22] BPA Comments at 5 (''The reasons for interrupting Firm Demand would be documented in studies and demonstrate that there would be no adverse impact to the BPS''); FRCC Comments at 3 (''Indeed, the transmission planning entity is responsible as part of the system assessment process under the TPL standards to test remedies to ensure that they address the problems being caused and do not cause additional problems.''); and Hydro One Comments at 5 (''Loss of load is under the purview of the regulatory authority and not NERC, unless it has an adverse impact on the BES which is already taken into consideration by the TPL standards * * * In all cases, steps are taken in planning, design and operations of the system to ensure that Firm Demand shedding would not adversely impact the BES * * *'').

[23] *See, e.g.,* NERC Comments at 11, TAPS Comments at 10, APPA Comments at 6.

[24] Reliability Standard TPL–002–0b, Table 1, Transmission System Standards—Normal and Emergency Conditions. Table 1 identifies the system performance requirements or ''System Limits or Impacts'' which are as follows: ''System Stable and both Thermal and Voltage Limits within Applicable Rating'', ''Loss of Demand or Curtailed Firm Transfers'' and ''Cascading Outages.''

[25] NERC Data Response at 10.

[26] *See, e.g.,* FRCC Comments at 4; MISO Comments at 4; BPA Comments.

[27] EEI Comments at 2.

footnote 'b' on remand. Therefore, pursuant to section 39.2(d) of the Commission's regulations,[28] we direct NERC to identify the specific instances of any planned interruptions of Firm Demand under footnote 'b' and how frequently the provision has been used. We direct NERC to use section 1600 of its Rules of Procedure to obtain information from users, owners and operators of the bulk-power system to provide this requested data.[29] NERC shall submit this information to the Commission with NERC's footnote 'b' filing that addresses the concerns in this Final Rule.

21. We urge NERC to develop in a timely manner an appropriate modification that is responsive to the Commission's directives in Order No. 693 and our concerns set forth in this Final Rule. In that regard, we require NERC to deploy its Expedited Reliability Standards Development Process to quickly respond to the remand. As the Commission noted in previous orders, the use of planned or controlled load interruption is a fundamental reliability issue and, certainty regarding the loss of non-consequential load for a single contingency event is warranted.[30] Thus, using the Expedited Standards Development Process will more rapidly bring needed certainty to this fundamental reliability issue.

22. Below we discuss three concerns: (a) Jurisdictional issues, (b) lack of technical criteria, and (c) the stakeholder process. The Commission also provides guidance on other acceptable approaches.

*A. Jurisdictional Issues*

23. A number of commenters express concern that the Commission is reaching beyond its FPA section 215 jurisdiction.[31] Commenters assert that the Commission options exceed its jurisdiction involving acceptable levels and types of service. Commenters seek assurance that the Commission's proposal does not infringe on matters reserved to the States and instead ''only prescribe acceptable load shedding as it pertains to wholesale customers that are in a position to select interruptible or conditional firm transmission service.'' [32] NARUC states that ''any NERC standard for shedding distribution level load must be guided by States and that a demonstration that interruption of the load will not cause instability, uncontrolled separation, or cascading failures on the bulk system is appropriate for a NERC standard.'' [33] NARUC adds that specifications of what retail load and what levels of retail load can be interrupted is a State determination that is not reviewable by the Commission. TAPS agrees with NERC that issues pertaining to whether it is permissible to plan to interrupt firm load involves conflicts among federal, provincial, state, and local governing bodies.[34]

24. The Commission disagrees that it is infringing on State Commissions or overstepping jurisdictional bounds. In this Final Rule, the Commission remands NERC's proposed footnote 'b' as an inadequate mechanism to address planned curtailment of firm demand and not responsive to the Commission's directives in Order No. 693 regarding this matter. The Commission is not directing that NERC develop a specific solution or approach on remand. Thus, our remand of the NERC proposed modification to TPL–002–0b, Table 1, footnote 'b' is fully within the Commission's authority pursuant to section 215(d)(4) to remand to the ERO for further consideration a modification to a proposed reliability standard that the Commission disapproves in whole or in part. Moreover, FPA section 215 gives the Commission jurisdiction over mandatory Reliability Standards to ensure reliability of the Bulk-Power System.[35] Consistent with its statutory authority, the Commission's interest and focus in this proceeding is on the planned interruption of Firm Demand on the Bulk-Power System. The Commission views this matter in the context of Reliability Standard TPL–002–0b, which requires that in planning the system to withstand the loss of a single Bulk-Power System element, Bulk-Power System performance criteria must be met. If it is not met, a corrective action plan is required to address the Bulk-Power System performance criteria violation. Contingencies studied pursuant to Reliability Standard TPL–002–0b pertinent to Bulk-Power System facilities are subject to Commission jurisdiction under FPA section 215. In sum, the performance of the Bulk-Power System under the TPL–002–0b Reliability Standard is within the Commission's jurisdiction.

*B. Lack of Technical Criteria*

NOPR Proposal

25. In the NOPR, the Commission proposed to remand NERC's proposal to modify Reliability Standard TPL–002–0b, Table 1, footnote 'b.' The Commission stated that it believed that NERC's proposal does not meet the directives in Order No. 693 and the June 2010 Order and does not clarify or define the circumstances in which an entity can plan to interrupt Firm Demand for a single contingency.[36] In the NOPR the Commission expressed concern that NERC's proposed footnote 'b' lacks parameters. Without any substantive parameters governing the stakeholder process, the enforceability of this obligation by NERC and the Regional Entities would be limited to a review to ensure only that a stakeholder process occurred. The Commission noted that NERC appears to confirm this concern, as NERC explained that Regional Entities' involvement is limited to after-the-fact oversight by auditing the entity's implementation of footnote 'b' to determine if the planned interruption of Firm Demand was vetted through the stakeholder process.[37]

26. Further, in the NOPR the Commission stated that since the proposed footnote 'b' contains no constraints, it could allow an entity to plan to interrupt any amount of planned Firm Demand, in any location or at any voltage level as needed for any single contingency, provided that it is documented and subjected to a stakeholder process. The Commission found this result remains contrary to the underlying Reliability Standard and prior Commission orders.[38] The Commission requested comment on this specific concern of the lack of technical criteria or parameters.

Comments

27. Some commenters agree with the Commission that there is lack of technical criteria to determine planned interruption of Firm Demand. For example, California SWP states that Reliability Standards ''should ensure transparent criteria based on technical merits and not software limitations derived from a desire to mask [locational marginal pricing] price signals with socialized pricing or on *status quo* practices.'' [39] ITC believes that there is a need for defined parameters that will guide the review of exceptions and that will prevent

[28] 18 U.S.C. 39.2(d).

[29] NERC Rules of Procedure, Section 1601 (effective January 31, 2012).

[30] *North American Electric Reliability Corp.,* 130 FERC ¶ 61,200 (2010) (March 2010 Order); *North American Electric Reliability Corp.,* 131 FERC ¶ 61,231 (2010) (June 2010 Order).

[31] *See, e.g.,* Comments of NERC, NARUC, APPA and TAPS.

[32] NYPSC Comments at 5.

[33] NARUC Comments at 3–4.

[34] TAPS Comments at 9.

[35] 16 U.S.C. 824o(b)(1).

[36] NOPR, FERC Stats. & Regs. ¶ 32,683 at P 11.

[37] *Id.* P 12.

[38] *Id.*

[39] California SWP Comments at 4.

planned interruptions from becoming commonplace.[40] Manitoba Hydro states that the characteristics of openness and transparency are indicators of a non-discriminatory planning process; however, these characteristics do not ensure that certain reliability criteria of the planned facilities will be met.[41]

28. Other commenters disagree with the Commission's concern that there is a lack of criteria to determine planned interruption of Firm Demand. NERC states that it does not believe that an exceptions process that provides defined criteria, with some allowances, could be crafted that would respect pre-existing decision making processes that occur at state and local jurisdictions. NERC argues that the decision to interrupt local load is essentially an economic decision—a quality of service issue, not a reliability issue.[42]

29. MISO disagrees that additional language would reduce the potential for inconsistent results and points out that registered entities already have many established requirements that govern the transmission planning processes.[43] MISO believes that if the Commission determines that criteria are needed, such criteria should be determined by the stakeholders in the regions though their established stakeholder processes.[44] EEI does not believe that specific criteria should be developed until a better understanding is obtained regarding the role of service interruptions as a reliability tool.[45] EEI believes that these are appropriate aspects of the NERC proposal that would be readily amenable to an initial implementation approach, followed by an adjustment period that would refine the overall process consistent with the Commission's concerns.

Commission Determination

30. We believe that openness and transparency do not alone ensure that bulk electric system performance criteria will be met to ensure system reliability. The Commission is not persuaded that developing technical criteria is unachievable. As the Commission observed in the NOPR, NERC has thresholds in other reliability contexts, such as vegetation management pursuant to Reliability Standard FAC–003–1 which applies to all transmission lines operated at 200 kV and above. Likewise, NERC's Statement of Compliance Registry Criteria includes numerous thresholds for determining eligibility for registration.[46]

31. The Commission does not agree with EEI's recommendation to implement a stakeholder process that is absent technical criteria but then amend it later. While the Commission has, in other circumstances, approved a Reliability Standard and, as a separate action, directed NERC to develop a modification pursuant to section 215(d)(5) of the FPA, in such proceedings the Commission concluded that the proposed Reliability Standard was just, reasonable, not unduly discriminatory or preferential and in the public interest. In the immediate proceeding, however, we cannot make such a finding in light of the flawed stakeholder process provision.

32. In response to MISO's argument that such criteria should be determined by the stakeholders in the regions though their established stakeholder processes, the Commission would be amenable to such an approach if, for example, NERC and/or the Regional Entities developed an exception process that provides flexibility in decisions based on disparate topology or on other matters since they could utilize their technical expertise to determine the reliability impact from one region to another. For these reasons, the Commission concludes that a more defined process is needed with NERC-defined technical criteria to determine planned interruption of Firm Demand. However, we conclude that the approach of allowing a decentralized process without any overarching parameters is unacceptable.

33. With regard to NERC's comment that the decision to interrupt local load is essentially an economic decision that is a quality of service issue, not a reliability issue, the Commission notes that in Order No. 693, we dismissed the argument that it may be preferable to plan the bulk electric system in such a manner that contemplates the interruption of some firm load customers in the event of a N–1 contingency, and that such interruption is based largely on the matter of economics, not reliability.[47]

*C. Stakeholder Process*

NOPR Proposal

34. In the NOPR, the Commission expressed concern that NERC's proposed footnote 'b' stakeholder process is insufficient to meet Order No. 693 and the June 2010 Order clarification that a regional difference, or a case-specific exception process that can be technically justified, to plan for the loss of firm services at the fringes of the systems is acceptable in limited circumstances.[48] The Commission also noted that nothing in the proposed footnote 'b' defines the stakeholder process, other than that it must be an open and transparent stakeholder process that includes addressing stakeholder comments.[49] The Commission noted that any meeting that is open to stakeholders could meet this criteria.

35. The Commission further stated that the lack of a defined stakeholder process could allow a transmission planner to develop a process that provides insufficient opportunity for stakeholder participation and transparency yet still comply with the standard. The Commission expressed its belief that nothing in the proposed footnote 'b' restricts the stakeholder process, other than that it must be an open and transparent stakeholder process that includes addressing stakeholder comments. The Commission requested comment on whether a stakeholder process is the appropriate vehicle to approve or deny exceptions to allow entities to plan to interrupt Firm Demand for a single contingency and if so, whether the proposed footnote 'b' would require any stakeholder due process.

Comments

36. Several commenters believe that NERC's proposed stakeholder process is the appropriate venue to approve or deny exceptions to interrupt planned Firm Demand. NERC and other commenters contend that building on existing stakeholder processes is appropriate, rather than creating new, duplicative processes. While EEI, APPA, and TAPS concur with or acknowledge the Commission's concerns about the inadequacy of the proposed stakeholder process, they nonetheless urge the Commission to approve NERC's proposal stating that it reflects the considered expertise that instances of planned load shed are uncommon and not amenable to a one-size-fits-all approach.[50] NERC believes the introduction of an additional planning process may contribute to further delays and regulatory confusion. NERC states

[40] ITC Comments at 2.

[41] Manitoba Hydro Comments at 6.

[42] NERC Comments at 13.

[43] MISO Comments at 3.

[44] *Id.* at 5.

[45] EEI Comments at 10.

[46] *See, e.g.,* NERC Statement of Registry Criteria, section III. The Commission approved the Statement of Registry Criteria in Order No. 693. *See* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 95.

[47] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1792.

[48] NOPR, FERC Stats. & Regs. ¶ 32,683 at P 19.

[49] *Id.* P 20.

[50] *See, e.g.,* EEI Comments at 3, TAPS Comments at 5, APPA Comments at 3.

that ''keeping decision-making with those most impacted by decisions regarding reliability and costs, lack of jurisdictional authority, and the existence of established open and transparent stakeholder processes—are the reasons NERC did not create a new stakeholder process.'' [51]

37. Duke Energy believes that the current Order No. 890-type process involving the local transmission planning collaborative is the appropriate stakeholder process. Duke Energy suggests that footnote 'b' should be revised to include a local regulatory authority process as the appropriate stakeholder process to allow entities to plan to interrupt Firm Demand for a single contingency. According to Duke Energy, in such a process a transmission planner would submit its plan to interrupt Firm Demand for a single contingency to its local regulatory authority that has jurisdiction over quality of service to local load prior to any actual interruption of Firm Demand.

38. BPA states that the stakeholder process will keep the decision local, where the parties involved understand the different factors that must be considered in deciding the proper path forward.[52] APPA maintains that these processes impose due process requirements on the transmission planner, including participation in an open and transparent stakeholder process that considers stakeholder comments.[53]

39. FRCC disagrees with the Commission that enforceability is limited since the process requires development of a record documenting the decisions and stakeholder comments and planning authority responses. According to FRCC, the result will provide NERC and the Commission substantive and procedural grounds to assess whether sufficient consideration was given to maintaining reliability.[54]

40. Some commenters believe that NERC's proposed stakeholder process is not the appropriate vehicle to approve or deny exceptions to interrupt planned Firm Demand. ITC argues that the stakeholder process is inadequately undefined to ensure that planned Firm Demand interruptions are kept to a minimum. Manitoba Hydro indicates that by acknowledging an exception for interruptible Firm Demand, NERC appears to recognize that the right to interrupt is not solely a reliability issue, but also a commercial or legal issue based on contractual rights.[55]

41. While TAPS encourages the Commission to accept NERC's proposed footnote 'b,' it shares the NOPR's concerns about the adequacy of the open and transparent stakeholder process and has argued for a decision-making role for transmission-dependent utilities in the Order No. 890 and Order No. 1000 planning processes to ensure that stakeholder processes do not result in a presentation of a decision followed by the transmission provider simply ''rubber-stamping'' the decision.[56] If the Commission determines that these objectives cannot be accomplished without more robust action from the Commission in this proceeding, TAPS urges the Commission not to remand the proposed footnote 'b,' but instead to accept NERC's proposal and direct NERC to submit a further modified footnote 'b' to address the parameters of the ''open and transparent stakeholder process that includes addressing stakeholder comments.'' [57]

Commission Determination

42. The Commission is not persuaded that the stakeholder process is adequately defined. The Commission is concerned that the stakeholder process could undermine the system performance criteria of TPL–002–0b Reliability Standard. As the Commission stated in Order No. 693, one of the key reliability objectives of the TPL Reliability Standard is that the system can be operated following the loss of one element and supply projected firm customer demands and projected firm transmission services at all demand levels over the range of forecast system demands.[58] The Commission finds that the stakeholder process without appropriate parameters is inconsistent with the reliability objective to supply projected firm customer demands for the loss of one element. While the Reliability Standard requires that the system is planned so that the system can be operated following the loss of one element and supply projected firm customer demands, the proposed stakeholder process could defeat this by allowing a transmission planner to plan to shed as much load as needed so that the system can be operated to supply whatever customers remain.

43. The Commission agrees with TAPS to the extent it observes that the proposal could allow a transmission planner to utilize a new or existing stakeholder process that provides insufficient opportunity for a stakeholder to provide meaningful input. We conclude that the stakeholder process with no criteria to objectively assess whether varied results are arbitrary or based on meaningful differences is unjust, unreasonable, unduly discriminatory or preferential, and not in the public interest. Nothing in proposed footnote 'b' defines the stakeholder process, other than it must be an open and transparent stakeholder process that includes addressing stakeholder comments.

44. The Commission is not persuaded by FRCC's comment that enforceability is not limited by proposed footnote 'b' and that development of a record will provide NERC ''substantive and procedural'' grounds to assess the outcome of the process. Neither FRCC nor any other commenter identifies the minimum procedural safeguards to assure an adequate level of stakeholder participation and consideration of stakeholder comment in the decision-making process. Moreover, even NERC, which states that it can conduct after-the-fact audits, indicates that such audits would not explore substantive adequacy or the reliability basis for a decision to plan to shed Firm Demand.[59] Further, the Commission is not persuaded by APPA and BPA comments that local stakeholder participation and due process requirements imposed on the transmission planner are sufficient. Rather, the Commission believes that if a transmission planner invokes a process that provides for minimal stakeholder involvement, it could argue that it satisfied the provision, even if the transmission planner is the ultimate decision maker and simply 'rubber stamps' its own proposal to interrupt planned Firm Demand.

*D. Guidance on Acceptable Approaches to Footnote 'b'*

45. The Commission proposed three options in the NOPR for further guidance on acceptable approaches to footnote 'b.' In addition, the Commission requested comment on other potential options to solve the concerns outlined in the NOPR.

1. Existing Protocols To Develop Criteria/Quantitative Limits

46. In the NOPR, the Commission acknowledged that NERC considered a variety of limits but observed that NERC's establishment of some form of

[51] NERC Comments at 12.

[52] BPA Comments at 4.

[53] APPA Comments at 5.

[54] FRCC Comments at 3.

[55] Manitoba Hydro Comments at 5.

[56] TAPS Comments at 5.

[57] *Id.* at 11.

[58] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1771.

[59] NERC Data Response at 7–9.

criteria for planning to interrupt Firm Demand could be an acceptable approach for footnote 'b.' The Commission requested comment on whether existing protocols such as the Department of Energy's Electric Emergency Incident and Disturbance Report (Form OE–417), which requires an entity to report a certain amount of uncontrolled loss of firm system loads, or NERC's Statement of Compliance Registry Criteria could provide guidance to NERC to devise criteria.

Comments

47. Commenters were unanimous that the examples of existing protocols would not be beneficial to devise criteria. NERC and others state that any bright-line megawatt limit would be inappropriate because the bright-line would be arbitrary.[60] Some commenters do not believe that existing protocols, such as the requirement in Form OE–417 should be used to determine criteria related to planned loss of Firm Demand.[61]

48. BPA, ITC, and Duke Energy comment that setting a quantitative limit would push transmission planners to plan to meet such a limit for a single contingency in all cases. Currently, transmission planners start from the premise that no load should be interrupted in the event of a single contingency. ITC believes that including such an acceptable lost load criterion as an option could lead to that option being chosen as the ''default solution,'' i.e., allowing for a certain amount of acceptable interruption of Firm Demand without a stakeholder exception review process.[62] In the same vein, Duke indicates that a specific megawatt threshold may prohibit certain interruptions of Firm Demand that would be acceptable from a quality of service and local consequences perspectives.[63]

Commission Determination

49. The Commission is persuaded by the commenters that Form OE–417 or the Registry Criteria are not, by themselves, beneficial to use to devise criteria. The Commission also agrees that a bright-line criteria by itself does not present a viable option and would have the potential to constitute an acceptable *de facto* interruption and become commonplace to plan to interrupt Firm Demand. For example, if the bright-line criteria included up to 50 MW of planned interruptible Firm Demand under proposed footnote 'b', then planners may choose to automatically shed up to 50 MW of load as their first course of action for any single contingency event that would cause a violation of system performance criteria. This is not an acceptable outcome.

2. A Blend of Quantitative and Qualitative Thresholds

50. The Commission also sought comment on whether a blend of quantitative and qualitative thresholds to be used to interrupt planned Firm Demand would be an appropriate option for providing criteria that would be generally applicable, but also for allowing for certain cases that may exceed the criteria. For example, a Reliability Standard could require a process with a quantitative limitation on how much Firm Demand could be planned for interruption and the standard could provide an exception process where a registered entity would submit documents and explanation to the ERO or a Regional Entity for approval based upon certain considerations.[64] The Commission suggested that setting generally applicable criteria for when an applicable entity can plan to shed Firm Demand, coupled with an exceptions process overseen by NERC and the Regional Entities, could mean that few exception requests must be processed by NERC and the Regional Entities.[65] The Commission observed in the NOPR that this approach may satisfy the need for technical criteria while accounting for NERC's concerns about the difficulty of developing a one-size-fits-all criterion for limiting planned Firm Demand interruptions and the appropriateness and feasibility of managing and actively participating in each planning process.

Comments

51. California SWP indicates that standards must constrain the use of firm load shedding as a reliability solution in transmission planning and at the same time, require a transparent and clearly defined stakeholder process to support any such planned use of load shedding for single contingency events.[66] BPA suggests that, if the Commission does set a quantitative limit on planned interruption of Firm Demand, a limit based on a fraction of aggregated normal peak load would be one option that may be more effective and adaptable to all sizes of utilities.[67]

52. Other commenters disagree that a blend is a good option. NARUC indicates that rather than inventing another stakeholder process by requiring NERC to set specific quantitative or qualitative requirements for distribution load shedding, NERC should look to State commissions and existing State curtailment plans to guide load shedding in contingency planning.[68] Duke Energy submits that a blend of quantitative and qualitative thresholds does not provide enough flexibility to permit the qualitative assessment of the loads and locations for which transmission planners may interrupt under their exercise of footnote 'b' because a blended threshold may still rely too heavily on a quantitative threshold for planned interruption of Firm Demand.[69] FRCC states it is not feasible to develop a single quantitative rule that would apply equitably to all stakeholders and regions.[70]

53. EEI believes that adopting a process that would provide greater clarity, reporting, and refinement would provide the specific information on the extent that the footnote 'b' issue presents itself. EEI also agrees with NERC that efforts to create a one-size-fits-all approach have less value than a process that ensures openness and transparency.

Commission Determination

54. The Commission believes that setting a quantitative and qualitative threshold in developing a limited exception for planned interruption of Firm Demand may be a workable solution. First, qualitative thresholds could be used to overcome the concern discussed immediately above regarding the quantitative threshold becoming an acceptable *de facto* interruption of planned Firm Demand. By utilizing a blend, the planner must also meet the qualitative threshold which could consist of, for example, the submittal of documents and explanation to the entity ultimately deciding whether the planned load shed is acceptable. For example, if 100 MW of planned Firm Demand was permitted to be interrupted, the planner could not automatically and unilaterally shed up to 100 MW of planned Firm Demand each time system performance criteria would be violated. Under the blend concept, the Commission envisions that

[60] NERC Comments at 14.

[61] ITC Comments at 5; *see also* Hydro One and IESO Comments.

[62] ITC Comments at 5.

[63] Duke Comments at 6.

[64] NOPR, FERC Stats. & Regs. ¶ 32,683 at P 18.

[65] *Id.* P 27.

[66] California SWP Comments at 2.

[67] BPA Comments at 4.

[68] NARUC Comments at 3.

[69] Duke Energy Comments at 7.

[70] FRCC Comments at 7.

the planner would consider up to 100 MW of planned Firm Demand interruption along with other options to resolve the system performance criteria violation and submit its documentation and explanation to the entity deciding whether the planned load shed is acceptable. The concept of a blend of thresholds would prevent an acceptable *de facto* interruption of planned Firm Demand and avoid the difficulty of developing a one-size-fits-all criterion for limiting planned Firm Demand interruptions, but still allow for those limited circumstances to be reviewed in an exception process where a limited amount of planned interruption of Firm Demand may be acceptable.

55. We believe it is appropriate for the Regional Entities, with NERC as the final authority, to make determinations under a ''blended'' exception process. First, NERC and the Regional Entities provide both objectivity in the decision-making process as well as the necessary reliability-focused expertise. Second, this should not overly burden NERC or Regional Entity resources as utilization of the planned load shed exception is—and would be—rarely utilized.[71] Further, we are not persuaded by the assertion that NERC would be conflicted as the ERO and also inserting itself in the process. NERC's ERO role would continue, in coordination with its current responsibilities in implementing other exceptions such as the Technical Feasibility Exception process under the Critical Infrastructure Protection Reliability Standards.

56. The Commission does not agree with BPA's suggestion of using quantitative thresholds based on a fraction of aggregated normal peak load. BPA's suggestion attempts to address the concerns of commenters that a bright-line threshold must be established that would be a one-size-fits-all criteria. For example, instead of a megawatt bright-line threshold for all entities, the ERO could establish a threshold based on a percentage of aggregated normal peak load. The Commission believes that it would be difficult to demonstrate that adoption of BPA's suggestion would be just and reasonable, not unduly discriminatory or preferential and in the public interest. If criteria were established that permitted a percentage of aggregated normal peak load as an acceptable threshold for planned interruption of Firm Demand, even a small percentage could equate to entire towns, cities or regions of load.[72] The Commission, therefore, does not support the planned interruption of Firm Demand based on a fraction of aggregated normal peak load. The Commission believes that an appropriate mechanism would be based on impact studies that consider minimizing planned interruption of Firm Demand within, and adjacent to, communities and small localities.

57. The Commission offers guidance to NERC to consider the option of a blend of quantitative and qualitative thresholds. An example of a qualitative threshold could include identifying geographical or topological ''fringes of the system.'' While interruption at the fringes of the system may be expected by some consumers, not all customers necessarily have that same expectation. For example, we don't expect that many water treatment facilities or telecom switching stations normally plan to be interrupted for single contingency events.[73] While the Commission has offered one example of a qualitative threshold, NERC may explore other qualitative thresholds on remand. The Commission believes that a blend of quantitative and qualitative thresholds coupled with an exception process overseen by NERC and the Regional Entities would be a reasonable option to allow for the limited interruption of planned Firm Demand. Accordingly, the Commission directs the ERO to consider some blend of quantitative and qualitative thresholds.

3. Customer or Community Consent

58. In the NOPR the Commission also requested comment on whether a feasible option would be to revise footnote 'b' to allow for the planned interruption of Firm Demand in circumstances where the ''transmission planner can show that it has customer or community consent and there is no adverse impact to the Bulk-Power System.'' [74] The Commission suggested that this would not require affirmative consent by every individual retail customer, but would recognize that either group would need to be adequately defined. The Commission requested comments on who might be able to represent the customer or community in this option and how customer or community consent might be demonstrated.[75] The Commission also requested comment on how it would be determined that firm demand shedding with customer consent would not adversely impact the Bulk-Power System. Additionally, the Commission requested comment on whether a customer who would otherwise consent to having its planning authority or transmission planner plan to interrupt Firm Demand pursuant to this option could instead select interruptible or conditional firm service under the tariff to address cost concerns.

Comments

59. Several commenters agreed with the Commission that the customer or community consent should be required. ITC believes the customers or entities should be involved in a stakeholder process such as a representative group for the affected load or customers (community representatives or a separate load serving entity where the transmission provider is not an integrated utility), the public service/utility regulatory commission for the affected load, the RTO or ISO for the affected area, and any other affected entity. California SWP also supports notice to and consent of loads (or their wholesale representatives) that are planned to be interrupted for the loss of a single element.[76] In its comments, California SWP explains that it was ''surprised to learn that in lieu of transmission upgrades, [its transmission planner] relied on interruption of SWP's large firm pump loads supposedly receiving the same California Independent System Operator (CAISO) transmission service as provided to SCE loads. At that time, SWP was not consulted about the planned curtailment of its firm loads as an alternative to a transmission upgrade, and thus had no opportunity to correct this error.'' [77]

60. Other commenters disagree that customer or community consent should be required. NERC states that it has no relationship with retail customers and, therefore, has no mechanism to bring retail customers into the conversation. NERC adds that both wholesale and retail customers are already involved in state processes which provide a forum for them to be heard.

61. Hydro One and the IESO submit that customer interests are managed by the relevant regulatory authority and consent is through regulatory approval. In all cases, steps are taken in planning, design, and operations of the system to

[71] *See, e.g.,* FRCC Comments at 4; MISO Comments at 4; BPA Comments.

[72] For example, the PJM aggregated normal system peak load is approaching 160,000 MW, so a one percent threshold would equate to allowance of planned interruption for a single contingency of up to 1600 MW of load, which is the size of some entire towns, cities or regions.

[73] While we anticipate that such facilities are prepared for distribution-level blackouts, we are not aware that they are prepared for a transmission-level blackout.

[74] NOPR, FERC Stats. & Regs. ¶ 32,683 at P 28.

[75] *Id.*

[76] California SWP Comments at 4.

[77] *Id.* at 2–3.

ensure that Firm Demand shedding would not adversely impact the bulk electric system in addition to the fact that the customer also has other options such as to select interruptible service. NYPSC recommends that the Commission only prescribe acceptable load shedding as it pertains to wholesale customers that are in a position to select interruptible or conditional firm transmission service under Commission-approved tariffs.

62. FRCC states that the evaluation of the possible use of interruptible or conditional firm service instead of planned interruptions of Firm Demand is not warranted. According to FRCC, the adoption of a Firm Demand interruption alternative would inherently entail customer benefits from foregone project costs and the non-incurrence of environmental and other impacts. The customers would also generally enjoy a higher quality of service than traditional interruptible or conditional firm. Consequently, FRCC believes that applying any such rate in place of Demand interruption would present imponderable issues of quantification and application.

63. BPA does not believe that this proceeding is appropriate to decide issues related to service choice. BPA argues that the Commission has determined that the rate for conditional firm service be the same as the firm rate. BPA does not anticipate that the interruption of Firm Demand would occur on a frequent basis, if at all. Thus, BPA does not believe that a customer should pay a different transmission rate under these circumstances. APPA states that footnote 'b' arms wholesale transmission customers and communities served at retail with information and studies prepared by the transmission planner, documenting the specific circumstances (i.e., specific Bulk Electric System Contingency events) under which interruption of Firm Demand may be needed to address bulk electric system performance requirements.

Commission Determination

64. We understand NERC's position that as the entity that addresses Bulk-Power System reliability, it does not have a mechanism to coordinate with customers. Likewise, how to define customers and community decisions and engage them in the NERC process could be challenging.[78]

65. At the same time, California SWP provides a compelling example of how a customer can be adversely affected by planned load shedding for Firm Demand if it was unaware its load would be interrupted until its load was actually shed. In contrast to California SWP's experience, a customer should have notice and understanding that the transmission planner plans to curtail certain Firm Demand in the event of a single contingency indentified in the system modeling under NERC's Transmission Planning requirements. NERC should consider these matters on remand.[79]

Summary

66. In sum, the Commission remands the proposed footnote 'b' and directs NERC to revise its proposal to address the Commission's concerns described above, subject to consideration of the additional guidance provided in this Final Rule.

67. As stated in the NOPR, NERC will need to support the revision to footnote 'b.' If there is a threshold component to the revised footnote, NERC would need to support the threshold and show that instability, uncontrolled separation, or cascading failures of the system will not occur as a result of planning to shed Firm Demand up to the threshold. In addition, if there is an individual exception option, the applicable entities should be required to find that there is no adverse impact to the Bulk-Power System from the exception and that it is considered in wide-area coordination and operations. Further, the Commission believes that any exception should be subject to further review by the Regional Entity or NERC.

## III. Information Collection Statement

68. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting and recordkeeping (collections of information) imposed by an agency.[80] The information contained here is also subject to review under section 3507(d) of the Paperwork Reduction Act of 1995.[81]

69. As stated above, the subject of this Final Rule is NERC's proposed modification to Table 1, footnote 'b' applicable in four TPL Reliability Standards. This Final Rule remands the footnote 'b' modification to NERC. By remanding footnote 'b' the applicable Reliability Standards and any information collection requirements are unchanged. Therefore, the Commission will submit this Final Rule to OMB for informational purposes only.

70. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, email: *data.clearance@ferc.gov*, phone: (202) 502–8663, or fax: (202) 273–0873].

## IV. Environmental Analysis

71. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[82] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[83] The actions proposed herein fall within this categorical exclusion in the Commission's regulations.

## V. Regulatory Flexibility Act

72. The Regulatory Flexibility Act of 1980 (RFA)[84] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[85] The SBA has established a size standard for electric utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours.[86] The RFA is not implicated by this Final Rule because the Commission is remanding

[78] As suggested in the NOPR, customer or community consent would not require affirmative consent by every individual retail customer, but the process NERC developed would recognize that either group would need to be adequately defined. We note that, although NERC comments that it addresses Bulk-Power System reliability, the process that NERC proposes will impact firm load service to retail customers.

[79] We will not consider the tariff-related comments as they are beyond the scope of this rulemaking.

[80] 5 CFR 1320.11.

[81] 44 U.S.C. 3507(d).

[82] *Regulations Implementing the National Environmental Policy Act of* 1969, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,783 (1987).

[83] 18 CFR 380.4(a)(2)(ii).

[84] 5 U.S.C. 601–612.

[85] 13 CFR 121.201.

[86] *Id.* n.22.

footnote 'b' and not proposing any modifications to the existing burden or reporting requirements. With no changes to the Reliability Standards as approved, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities.

**VI. Document Availability**

73. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page *(http://www.ferc.gov)* and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington DC 20426.

74. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

75. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

**VII. Effective Date and Congressional Notification**

76. These regulations are effective July 6, 2012. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

By direction of the Commission. Commissioner Norris is dissenting in part and concurring in part with a separate statement attached.

**Kimberly D. Bose,**

*Secretary.*

NORRIS, Commissioner, *dissenting in part and concurring in part:*

The continued implementation and evolution of the mandatory reliability standards program enacted by Congress in 2005 has been at the forefront of our agenda since I arrived at the Commission in 2010. As we have grappled with the difficult issues raised by proposed new or revised standards, and as I have discussed these issues with regulated industry, state regulators, and the public, I have consistently heard a common theme: mandatory reliability standards come with costs that consumers ultimately must bear.

As I have thought about this issue, it has become clear to me that in any discussion of a new or revised mandatory reliability standard, there is always a tradeoff between the level of reliability to be achieved by that standard and the costs that the standard will impose. However, that tradeoff is rarely discussed explicitly in the standards development process or during the Commission's review of standards. But, we know that it is an implicit consideration of entities participating in the standards development process. I believe it is more appropriate to make those considerations, where they are relevant, explicit. Therefore, I have advocated for an open dialogue between NERC, the industry, and the Commission to consider the connection between the mandatory standards we approve to maintain and improve the reliability of the Bulk Power System and the costs required to meet those standards.

However, I have perceived some hesitancy in openly addressing costs when considering reliability matters. This is not surprising, as there are no easy answers to these tough questions, and regulators and industry charged with assuring reliability will always be hesitant to be perceived as sacrificing reliability in an effort to save on costs. While I am not advocating for a cost-benefit threshold for approving reliability standards, I do not believe that we can ignore the costs of proposed mandatory reliability standards as we consider whether they are ''just, reasonable, not unduly discriminatory or preferential, and in the public interest''.[1] These are issues with real world implications, not just for the reliability and security of our Nation's electric grid, but for the day-to-day struggles of local communities to balance the economic realities of many competing obligations.

I am compelled to raise these issues in this proceeding because I believe that the Transmission Planning (TPL) Reliability Standard footnote 'b' addressed in today's order presents a stark example of the tradeoffs that sometimes must be made between increasing levels of reliability and the costs that come with achieving them. As such, I hope my comments today will help generate a dialogue on how economics and reliability fit together when considering mandatory reliability standards.

In today's order, I agree with the majority's decision to remand proposed TPL footnote 'b' because it is vague, potentially unenforceable, and lacks adequate safeguards to determine when planning to shed firm load would be permitted. However, I am concerned that, in allowing for an exception to the TPL standards requirement that firm load must be maintained under N–1 scenarios, the order does not sufficiently recognize that this is both an economic and reliability issue, and must allow for a balancing of the economic and reliability considerations involved.

There may be cases where planning to avoid shedding firm load in all N–1 scenarios will impose significant costs on customers, with perhaps little added reliability benefit for those customers. In such instances, I believe that wholesale transmission customers and local communities with retail load service should be empowered to consider the economic tradeoffs between incurring costs to avoid shedding firm load versus planning to shed firm load, as long as that decision does not adversely impact the reliability of the Bulk Power System. Simply put, if a customer seeks to avoid significant costs, and can do so without impacting its neighbors, the customer should be making that decision. Today's order fails to adequately acknowledge the economic consequences of having to invest in significant facility upgrades to avoid shedding firm load under certain N–1 scenarios that may be rare or unlikely and that would have only local impacts.[2]

Accordingly, in my view, the Commission should have directed NERC to revise footnote 'b' to address two broad concerns. First, wholesale transmission customers and retail load should have the ability to choose whether to shed firm load during an N–1 contingency where that decision will not adversely impact the Bulk Power System. Second, the decision to shed firm load must be validated to ensure that there is no adverse impact on the Bulk Power System. Absent this reliability check, the planning of firm load shedding should not be permitted, because reliability of the Bulk Power System is paramount. While NERC, the Regional Entity, and/or the local planning authority must be involved in the reliability check, these entities would not be expected to be involved in the economic decision.

Additionally, I agree with various comments filed in response to the NOPR that firm load shedding is and should be used rarely or infrequently. I do not expect that any new process that NERC may propose to determine whether firm load shedding is permitted would result in a rush by entities seeking to plan to shed firm load. In other words, I do not expect this exception to ''swallow the rule'' under the TPL standards that firm load may not be planned to be shed for N–1 contingencies.

Finally, the concerns I note above regarding the failure to consider both the economic and reliability aspects of a decision to plan to shed firm load extend to the specific guidance provided in the order. The guidance in the order with respect to what

[1] *See* 16 U.S.C. 824o(d)(2).

[2] *Transmission Planning Reliability Standards,* Order No. 762, 139 FERC ¶ 61,060, at P 33 (2012) (''With regard to NERC's comment that the decision to interrupt local load is essentially an economic decision that is a quality of service issue, not a reliability issue, the Commission notes that in Order No. 693, we dismissed the argument that * * * such interruption is based largely on the matter of economics, not reliability.'') I also note that the brief Commission findings in Order No. 693 failed to acknowledge or sufficiently address this issue, leaving the uncertainty we are still faced with today. *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 1791–1794 (2007).

would constitute an allowable exception fails to provide a realistic means for entities to balance these economic and reliability considerations. Instead, I would have provided that an entity could submit its plan to shed firm load for a single contingency to its relevant regulatory authority or governing body prior to any actual interruption.[3] The politically accountable regulatory authority or governing body would have then made the determination, based upon economics and in the best interests of its customers, as to whether firm load shedding should be permitted. Those determinations would be subject to oversight and review by NERC, the Regional Entity, and/or the planning authority to ensure that they will not adversely impact the Bulk Power System.[4]

For these reasons, I respectfully dissent in part and concur in part.

John R. Norris,

*Commissioner.*

[FR Doc. 2012–10944 Filed 5–4–12; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Parts 510 and 522

**[Docket No. FDA–2012–N–0002]**

## New Animal Drugs; Change of Sponsor; Change of Sponsor Address; Change of Sponsor Name and Address; Fomepizole

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor name from Bioniche Teoranta to Mylan Institutional, LLC; a change of sponsor for fomepizole injectable solution from Synerx Pharma, LLC, to Mylan Institutional, LLC; and a change of sponsor address for Modern Veterinary Therapeutics, LLC.

**DATES:** This rule is effective May 7, 2012.

**FOR FURTHER INFORMATION CONTACT:** Steven D. Vaughn, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7520 Standish Pl., Rockville, MD 20855, 240–276–8300, email: *steven.vaughn@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Bioniche Teoranta, Inverin, County Galway, Ireland, has informed FDA that it has changed its name and address to Mylan Institutional, LLC, 4901 Hiawatha Dr., Rockford, IL 61103. Synerx Pharma, LLC, 100 N. State St., Newton, PA 18940, has informed FDA that it has transferred ownership of, and all rights and interest in, abbreviated new animal drug application (ANADA) 200–472 for Fomepizole for Injection to Mylan Institutional, LLC. Modern Veterinary Therapeutics, LLC, 1550 Madruga Ave., suite 329, Coral Gables, FL 33146, has informed FDA that it has changed its address to 18001 Old Cutler Rd., suite 317, Miami, FL 33157. Accordingly, the Agency is amending the regulations in parts 510 and 522 (21 CFR parts 510 and 522) to reflect these changes.

Following this change of sponsorship, Synerx Pharma, LLC, is no longer the sponsor of an approved application. Accordingly, § 510.600 (21 CFR 510.600) is being amended to remove the entries for this firm.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

**List of Subjects**

*21 CFR Part 510*

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

*21 CFR Part 522*

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510 and 522 are amended as follows:

## PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

■ 2. In § 510.600, in the table in paragraph (c)(1), remove the entries for ''Bioniche Teoranta'' and ''Synerx Pharma, LLC''; revise the entry for ''Modern Veterinary Therapeutics, LLC''; and alphabetically add a new entry for ''Mylan Institutional, LLC''; and in the table in paragraph (c)(2), remove the entry for ''068882'' and revise the entries for ''015914'' and ''063286'' to read as follows:

**§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.**

* * * * *

(c) * * *

(1) * * *

| Firm name and address | Drug labeler code |
|---|---|
| * * * * * | |
| Modern Veterinary Therapeutics, LLC, 18001 Old Cutler Rd., suite 317, Miami, FL 33157 ..... | 015914 |
| * * * * * | |
| Mylan Institutional LLC, 4901 Hiawatha Dr., Rockford, IL 61103 .. | 063286 |
| * * * * * | |

(2) * * *

| Drug labeler code | Firm name and address |
|---|---|
| * * * * * | |
| 015914 | Modern Veterinary Therapeutics, LLC, 18001 Old Cutler Rd., suite 317, Miami, FL 33157. |
| * * * * * | |
| 063286 | Mylan Institutional, LLC, 4901 Hiawatha Dr., Rockford, IL 61103. |
| * * * * * | |

## PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for 21 CFR part 522 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

■ 4. In § 522.1004, revise paragraph (b) to read as follows:

**§ 522.1004 Fomepizole.**

* * * * *

(b) *Sponsors.* See Nos. 046129 and 063286 in § 510.600(c) of this chapter.

* * * * *

Dated: April 30, 2012.

**Steven D. Vaughn,**

*Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.*

[FR Doc. 2012–10892 Filed 5–4–12; 8:45 am]

**BILLING CODE 4164–01–P**

[3] *See e.g.,* Duke Energy Corporation Dec. 22, 2011 Comments, Docket No. RM11–18–000.

[4] NERC may propose an alternative to Commission guidance that is equally efficient and effective at addressing the Commission's reliability concerns. Order No. 693 at P 31.

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 1**

**[TD 9588]**

**RIN 1545–BH84**

## Allocation of Mortgage Insurance Premiums

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations and removal of temporary regulations.

**SUMMARY:** This document contains final regulations that explain how to allocate prepaid qualified mortgage insurance premiums to determine the amount of the prepaid premium that is treated as qualified residence interest each taxable year. The final regulations reflect changes to the law made by the Tax Relief and Health Care Act of 2006, the Mortgage Forgiveness Debt Relief Act of 2007, and the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. The regulations affect taxpayers who pay prepaid qualified mortgage insurance premiums.

**DATES:** *Effective Date:* These regulations are effective on May 4, 2012.

*Applicability Dates:* For dates of applicability, see § 1.163–11(d).

**FOR FURTHER INFORMATION CONTACT:** Charles Kim, (202) 622–5020 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### Background

This document contains amendments to 26 CFR part 1. On May 7, 2009, the Treasury Department and IRS published temporary regulations (TD 9449) under section 163 of the Internal Revenue Code (Code) in the **Federal Register** (74 FR 21256) that explain how to allocate prepaid qualified mortgage insurance premiums to determine the amount of the prepaid premium that is treated as qualified residence interest each taxable year. On the same day, the Treasury Department and IRS published a notice of proposed rulemaking (REG–107271–08) cross-referencing the temporary regulations in the **Federal Register** (74 FR 21295). No public hearing was requested or held. No comments responding to the notice of proposed rulemaking were received. The proposed regulations under section 163 are adopted as amended by this Treasury decision, and the corresponding temporary regulations under section 163 are removed.

TD 9449 also contained temporary regulations under section 6050H(h) that require persons who receive premiums, including prepaid premiums, for mortgage insurance to make a return setting forth the amount of premiums received. A notice of proposed rulemaking (REG–107271–08) cross-referencing the temporary regulations was published in the **Federal Register** on the same day (74 FR 21295). Because the deduction for mortgage insurance premiums currently does not apply to amounts paid or accrued after December 31, 2011, the Treasury Department and the IRS are not taking any action at this time with respect to the temporary regulations or the proposed regulations under section 6050H(h). The temporary regulations will expire on May 4, 2012.

Section 419 of the Tax Relief and Health Care Act of 2006, Public Law 109–432 (120 Stat. 2967) (2006), added sections 163(h)(3)(E), (h)(4)(E), and (h)(4)(F) to the Code. Section 3 of the Mortgage Forgiveness Debt Relief Act of 2007, Public Law 110–142 (121 Stat. 1803) (2007), amended section 163(h)(3)(E)(iv). Section 759(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Public Law 111–312 (124 Stat. 3296) (2010), further amended section 163(h)(3)(E)(iv). In general, these new provisions treat certain qualified mortgage insurance premiums as qualified residence interest. This treatment only applies to certain qualified mortgage insurance premiums paid or accrued on or after January 1, 2007, and on or before December 31, 2011, on mortgage insurance contracts issued on or after January 1, 2007.

Section 163(h)(3)(E)(i) provides that premiums paid or accrued for qualified mortgage insurance in connection with acquisition indebtedness for a qualified residence are treated as qualified residence interest for purposes of section 163. Section 163(h)(4)(E) defines *qualified mortgage insurance* as (i) mortgage insurance provided by the Veterans Administration (VA), the Federal Housing Administration (FHA), or the Rural Housing Administration (Rural Housing),[1] and (ii) private mortgage insurance (as defined by section 2 of the Homeowners Protection Act of 1998 (12 U.S.C. 4901) as in effect on December 20, 2006). The amount treated as qualified residence interest may be reduced or eliminated under section 163(h)(3)(E)(ii), which provides that the amount allowed as a deduction is phased out ratably by 10 percent for each $1,000 ($500 in the case of a married individual filing a separate return) (or fraction thereof) that the taxpayer's adjusted gross income exceeds $100,000 ($50,000 in the case of a married individual filing a separate return).

Section 163(h)(4)(F) states that any amount paid by the taxpayer for qualified mortgage insurance that is properly allocable to any mortgage the payment of which extends to periods that are after the close of the taxable year in which the amount is paid shall be chargeable to capital account and shall be treated as paid in the periods to which the amount is allocated. No deduction shall be allowed for the unamortized balance of the account if the mortgage is satisfied before the end of its term. Section 163(h)(4)(F) provides that the allocation rules under section 163(h)(4)(F) do not apply to amounts paid for qualified mortgage insurance provided by the VA or Rural Housing. Additionally, section 163(h)(3)(E)(iv)(II) disallows a deduction for amounts allocable to any period after December 31, 2011.

### Explanation of Provisions

These final regulations provide rules regarding the allocation of prepaid qualified mortgage insurance premiums to determine the amount of the prepaid premium that is treated as qualified residence interest each taxable year under section 163(h)(4)(F).

These final regulations apply to prepaid qualified mortgage insurance premiums paid or accrued on or after January 1, 2011. The treatment of mortgage insurance premiums as interest described in these final regulations is limited to prepaid qualified mortgage insurance premiums that are paid or accrued on or after January 1, 2011, and during periods to which section 163(h)(3)(E) is applicable. The temporary regulations are applicable to prepaid qualified mortgage insurance premiums paid or accrued on or after January 1, 2008, and on or before December 31, 2010.

### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection

[1] References in section 163(h)(4)(E)(i) to the Veterans Administration and Rural Housing Administration are interpreted to mean their respective successors, the Department of Veterans Affairs and Rural Housing Service.

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, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

**Drafting Information**

The principal author of these regulations is Charles Kim, Office of the Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and the Treasury Department participated in their development.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

## PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

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

■ **Par. 2.** Section 1.163–11 is added to read as follows:

**§ 1.163–11 Allocation of certain prepaid qualified mortgage insurance premiums.**

(a) *Allocation*—(1) *In general.* As provided in section 163(h)(3)(E), premiums paid or accrued for qualified mortgage insurance during the taxable year in connection with acquisition indebtedness with respect to a qualified residence (as defined in section 163(h)(4)(A)) of the taxpayer shall be treated as qualified residence interest (as defined in section 163(h)(3)(A)). If an individual taxpayer pays such a premium that is properly allocable to a mortgage the payment of which extends to periods beyond the close of the taxable year in which the premium is paid, the taxpayer must allocate the premium to determine the amount treated as qualified residence interest for each taxable year. The premium must be allocated ratably over the shorter of—

(i) The stated term of the mortgage; or

(ii) A period of 84 months, beginning with the month in which the insurance was obtained.

(2) *Limitation.* If a mortgage is satisfied before the end of its stated term, no deduction as qualified residence interest shall be allowed for any amount of the premium that is allocable to periods after the mortgage is satisfied.

(b) *Scope.* The allocation requirement in paragraph (a) of this section applies only to mortgage insurance provided by the Federal Housing Administration or private mortgage insurance (as defined by section 2 of the Homeowners Protection Act of 1998 (12 U.S.C. 4901) as in effect on December 20, 2006). It does not apply to mortgage insurance provided by the Department of Veterans Affairs or the Rural Housing Service. Paragraph (a) of this section applies whether the qualified mortgage insurance premiums are paid in cash or are financed, without regard to source.

(c) *Limitation on the treatment of mortgage insurance premiums as interest.* This section applies to prepaid qualified mortgage insurance premiums described in paragraph (a) of this section that are paid or accrued on or after January 1, 2011, and during periods to which section 163(h)(3)(E) is applicable. This section does not apply to any amount of prepaid qualified mortgage insurance premiums that are allocable to any periods to which section 163(h)(3)(E) is not applicable.

(d) *Effective/applicability date.* This section is applicable on and after January 1, 2011. For regulations applicable before January 1, 2011, see § 1.163–11T in effect prior to January 1, 2011 (§ 1.163–11T as contained in 26 CFR part 1 edition revised as of April 1, 2011).

**§ 1.163–11T [Removed]**

■ **Par. 3.** Section 1.163–11T is removed.

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

Approved: April 24, 2012.

**Emily S. McMahon,**

*Acting Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. 2012–10937 Filed 5–4–12; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2012–0283]**

**RIN 1625–AA00**

## Safety Zone; Coast Guard Exercise, Hood Canal, WA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary Final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone around vessels involved in a Coast Guard Ready for Operations exercise in Hood Canal, WA that will take place between May 08, 2012 and May 10, 2012. A safety zone is necessary to ensure the safety of the maritime public during the exercise and will do so by prohibiting any person or vessel from entering or remaining in the safety zone unless authorized by the Captain of the Port (COTP) or his Designated Representative.

**DATES:** This rule is effective from 4:00 a.m. May 08, 2012 until 11:59 p.m. on May, 10, 2012.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2012–0283 and are available online by going to *http://www.regulations.gov,* inserting USCG–2012–0283 in the ''Keyword'' box, and then clicking ''Search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or email ENS Nathaniel P. Clinger; Waterways Management Division, Coast Guard Sector Puget Sound; Coast Guard; telephone 206–217–6045, email *SectorPugetSoundWWM@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Information**

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it would be impracticable, since the event requiring the establishment of this safety zone would be over before a comment period would end. The vessels involved in the Coast Guard Ready for

Operations exercise have an important and urgent need to perform this training in order to be ready to protect U.S. persons, assets, and waters; it would be impracticable to delay the exercise to allow for a comment period. The safety zone created is short in duration, and vessels can transit around it, or through it with permission of the COTP or his Designated Representative.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Good cause exists because the event would be over before the final rule could be published. The vessels involved in this Coast Guard exercise have an important and urgent need to perform this training in order to be ready to protect U.S. persons, assets, and waters; it would be impracticable to delay this important exercise to allow for a delayed effective date.

**Background and Purpose**

The Coast Guard will be conducting a Ready for Operations (RFO) exercise in the northern part of Hood Canal, WA. During the exercise, tactical vessels will be maneuvering through the Hood Canal from the entrance of Dabob Bay to Foulweather Bluff. This exercise will include fast moving surface vessels, smoke machines, and pyrotechnics. Blank ammunition, flares and LA51 warning munitions will be used during the exercise. This safety zone is being created to ensure the safety of the maritime public and vessels participating in the exercise by preventing collisions between exercising vessels and the maritime public, and by keeping the maritime public a safe distance away from potentially startling or disorienting smoke, bright flashes, and loud noises.

**Discussion of Rule**

The temporary safety zone established by this rule will prohibit any person or vessel from entering or remaining within 500 yards of any vessel involved in the Coast Guard Ready for Operations exercise. Members of the maritime public will be able to identify participating vessels as those flying the Coast Guard Ensign. The COTP may also be assisted in the enforcement of the zones by other federal, state, or local agencies.

**Regulatory Analyses**

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

**Regulatory Planning and Review**

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

The Coast Guard bases this finding on the fact that the safety zones will be in place for a limited period of time and vessel traffic will be able to transit around the safety zones. Maritime traffic may also request permission to transit through the zones from the COTP, Puget Sound or Designated Representative.

**Small Entities**

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities; the owners and operators of vessels intending to operate in the waters covered by the safety zone while it is in effect. The rule will not have a significant economic impact on a substantial number of small entities because the safety zone will be in place for a limited period of time and maritime traffic will still be able to transit around the safety zone. Maritime traffic may also request permission to transit though the zones from the COTP, Puget Sound or Designated Representative.

**Assistance for Small Entities**

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

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

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Technical Standards**

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

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

**Environment**

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a safety zone. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add 165.T13–214 to read as follows:

**§ 165.T13–214 Safety Zone; Coast Guard Exercise, Hood Canal, Washington**

(a) *Location.* The following area is a safety zone: All waters encompassed within 500 yards of any vessel that is involved in the Coast Guard Ready for Operations exercise while such vessel is transiting Hood Canal, WA between Foul Weather Bluff and the entrance to Dabob Bay. Vessels involved will be various sizes and can be identified as those flying the Coast Guard Ensign.

(b) *Regulations.* In accordance with the general regulations in 33 CFR Part 165, Subpart C, no person may enter or remain in the safety zone created in this rule unless authorized by the Captain of the Port or his Designated Representative. See 33 CFR Part 165, Subpart C, for additional information and requirements. Vessel operators wishing to enter the zone during the enforcement period must request permission for entry by contacting the on-scene patrol commander on VHF channel 13 or 16, or the Sector Puget Sound Joint Harbor Operations Center at (206) 217–6001.

(c) *Enforcement Period.* This rule will be enforced on 4:00 a.m. May 8, 2012 until 11:59 p.m. on May 10, 2012 unless canceled sooner by the Captain of the Port.

Dated: April 6, 2012.

**S.J. Ferguson,**

*Captain, U.S. Coast Guard, Captain of the Port, Puget Sound.*

[FR Doc. 2012–10885 Filed 5–4–12; 8:45 am]

**BILLING CODE 9110–04–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 11

**[EB Docket No. 04–296; FCC 12–41]**

### Review of the Emergency Alert System

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission) amends its rules governing the Emergency Alert System (EAS) rules so that EAS Participants may, but are not required to, employ the text-to-speech (TTS) functions described in the EAS–CAP Industry Group (ECIG) Implementation Guide.

**DATES:** Effective May 7, 2012.

**FOR FURTHER INFORMATION CONTACT:** Lisa Fowlkes, Deputy Bureau Chief, Public Safety and Homeland Security Bureau, at (202) 418–7452, or by email at *Lisa.Fowlkes@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Order on Reconsideration* in EB Docket No. 04–296, FCC 12–41, adopted and released on April 19, 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.*

**Introduction**

1. On January 10, 2012, the Commission released its *Fifth Report and Order* in the above-referenced docket, in which it adopted rules specifying the manner in which EAS Participants must be able to receive alert messages formatted in the Common Alerting Protocol (CAP), and streamlined its part 11 rules to enhance their effectiveness and clarity. In this *Order on Reconsideration,* the Commission reconsiders one aspect of the *Fifth Report and Order:* the applicability of TTS specifications set

forth in the ECIG Implementation Guide recommendations. As discussed below, the Commission is deferring action on, rather than prohibiting, the use of the ECIG Implementation Guide's TTS specifications. Accordingly, the Commission amends its EAS rules so that EAS Participants may, but are not required to, employ the TTS functions described in the ECIG Implementation Guide.

**Background**

2. In the *Fifth Report and Order,* the Commission limited the scope of the new Part 11 EAS CAP-related obligations to those necessary to ensure that CAP-formatted alert messages distributed to EAS Participants will be converted into and processed in the same way as messages formatted in the current EAS Protocol. In that regard, the Commission required EAS Participants to be able to convert CAP-formatted EAS messages into messages that comply with the EAS Protocol requirements, following the procedures for such conversion as set forth in the ECIG Implementation Guide.

3. Notwithstanding that the Commission mandated compliance with most of the ECIG Implementation Guide, it declined at that time to impose such a mandatory approach with respect to the ECIG Implementation Guide's provisions regarding TTS. The Commission noted, for example, that the accuracy and reliability of TTS had not been established in the record. The Commission also recognized that a regime that addressed lack of audio by focusing on the EAS Participant end—where the EAS Participants would effectuate the TTS conversion by using any of the available TTS software packages that may be configured into their EAS equipment—might be less desirable than an approach that required the message originator to make the conversion with TTS software on the originating end. Because of the need for multiple conversions using a variety of software, the former approach would be more prone to the generation of differing, and thus confusing, audio messages to be broadcast for the same EAS message. The latter approach would tend to avoid this risk by applying the conversion before the alert is widely distributed throughout the community of EAS Participants. The Commission further observed that it may consider the TTS issue in an upcoming proceeding. Accordingly, the Commission stated that it ''continue[s] to believe that discussion of text-to-speech and speech-to-text software is best reserved for a separate proceeding, and [that] we therefore defer these issues at this time.''

In order to avoid imposing the Guide's mandatory approach toward TTS conversions—which would have required EAS Participants to effectuate such conversions using EAS Participant-provided technologies if their EAS devices could support them—the Commission revised § 11.56 of its rules to preclude application of the Guide's mandatory requirement outright.

4. The Commission also stated in the *Fifth Report and Order* that ''we do not permit the construction of EAS audio from a CAP text message at this time,'' and noted that ''we will not allow EAS Participants to use text-to-speech software configured in their EAS equipment to generate the audio portion of an EAS message.''

5. On March 12, 2012, the Federal Emergency Management Agency (FEMA) made a filing, titled a ''Petition for Reconsideration'' (FEMA Request), requesting reversal of the Commission's decision in the *Fifth Report and Order* ''to deviate from the [ECIG] Implementation Guide in the matter of text-to-speech conversion.'' In its request, FEMA stated that the Commission, by prohibiting use of the ECIG Implementation Guide TTS specifications ''discourages and * * * limits further development of text-to-speech technology in support of EAS.'' FEMA also noted that an ''unintended consequence of disallowing [TTS] conversion by CAP EAS devices is that CAP messages supplied without audio content * * * may cause a CAP–EAS device to interrupt the programming of EAS participants'' and only convey limited information. According to FEMA, the lack of TTS conversion capability could possibly disrupt dissemination of National Weather Service alerts, delay retrieval of referenced audio files in alerts, and impact the ability of jurisdictions with limited resources, or those with certain, already implemented CAP alerting capabilities, to issue CAP-formatted alerts. FEMA requested that the Commission delete the reference to ''using text-to-speech technology'' from the revised § 11.56(a)(2). The recent Final Report of Working Group 9 of the Commission's third Communications Security, Reliability and Interoperability Council (CSRIC) reiterated these same concerns. The Commission also received filings from state and local emergency management agencies and others requesting a similar change to this rule.

**Discussion**

6. Upon review of the *Fifth Report and Order,* and based on the observations and arguments made in various filings since release of that decision, the Commission concludes that an absolute bar against using the specifications set out in the ECIG Implementation Guide could have unintended negative consequences, such as compromising the ability of EAS Participants to receive EAS messages from states and local governments that have implemented CAP-based alerting systems that rely on TTS technologies. Moreover, such a bar would depart from the Commission's original intention to maintain a more neutral stance on the best approach for establishing TTS requirements pending fuller consideration of the issues involved. And the Commission is convinced that the merits of mandating TTS use have yet to be fully developed in the record.

7. Accordingly, pursuant to § 1.108 of the its rules, on it own motion the Commission reconsiders and revises § 11.56(a)(2) of its rules to replace the parenthetical phrase ''except that any and all specifications set forth therein related to using text-to-speech technology and gubernatorial 'must carry' shall not be followed'' with the phrase ''except that any and all specifications set forth therein related to gubernatorial 'must carry' shall not be followed, and that EAS Participants may adhere to the specifications related to text-to-speech on a voluntary basis.'' The Commission also revises footnote 118 of the *Fifth Report and Order* to delete the phrase ''While we do not permit the construction of EAS audio from a CAP text message at this time * * *'' and revises footnote 496 of the *Fifth Report and Order* to delete the phrase ''* * * we will not allow EAS Participants to use text-to-speech software configured in their EAS equipment to generate the audio portion of an EAS message * * *'' With these revisions, the Commission hereby defers consideration of the ECIG Implementation Guide's adoption of TTS software configured in EAS equipment to generate the audio portion of an EAS message, and thus neither requires nor prohibits EAS Participants from following the ECIG Implementation Guide's specifications on use of TTS.

**I. Procedural Matters**

*A. Accessible Formats*

8. 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).

*B. Paperwork Reduction Act Analysis*

9. This document contains no modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13.

*C. Congressional Review Act*

10. The Commission will send a copy of this *Order on Reconsideration* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (''CRA''), *see* 5 U.S.C. 801(a)(1)(A).

*D. Effective Date of Rule*

11. The Commission makes this rule revision effective immediately upon publication in the **Federal Register**, pursuant to Section 553(d) of the Administrative Procedure Act. In this case, where the Commission's action removes a restriction that would have applied to EAS Participants and retains the status quo, it finds that there is no need for the 30-day period. In addition, the Commission concludes that good cause exists to make the rule effective immediately upon **Federal Register** publication. In making the good cause determination, agencies must balance the necessity for immediate implementation against principles of fundamental fairness that require that all affected persons be afforded a reasonable time to prepare for the effective date of a new rule. No party will be prejudiced by an expedited effective date for this rule revision. This revision simply now provides them with the option to follow the ECIG Implementation Guide's TTS provisions should they choose to do so. However, the expedited date is necessary to provide the parties with regulatory certainty sufficiently in advance of the current June 30, 2012, deadline for complying with the relevant requirements of the Commission's *Fifth Report and Order.* There is also no information collection associated with this rule revision, so no OMB approval is required for the revised rule.

**II. Final Regulatory Flexibility Analysis**

12. The Regulatory Flexibility Act (RFA) requires that agencies prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that ''the rule will not have a significant economic impact on a substantial number of small entities.'' In this *Order on Reconsideration,* the Commission removes the prohibition on following the ECIG Implementation Guide's specifications related to using TTS technology, and clarifies that EAS Participants may, but are not required, to use these specifications. The Commission hereby certifies that this rule revision will not have a significant economic impact on a substantial number of small entities, because this action merely provides EAS Participants with the option to use these specifications. EAS Participants may continue to opt not to use these specifications and thereby maintain the status quo. The Commission will send a copy of this *Order on Reconsideration,* including this certification, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Commission will publish this *Order on Reconsideration* (or a summary thereof) and certification in the **Federal Register**.

**III. Ordering Clauses**

13. Accordingly, *it is ordered* that, pursuant to § 1.108 of the Commission's rules, 47 CFR 1.108, this Order on Reconsideration *is adopted;*

14. *It is further ordered* that part 11 of the Commission's Rules, 47 CFR part 11, *is amended* as set forth in the Appendix. This Order shall become effective immediately upon publication in the **Federal Register**;

15. *It is further ordered* that the Petition for Reconsideration filed of the Federal Emergency Management Agency on March 12, 2012, in EB Docket 04–296 is dismissed as moot;

16. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Order on Reconsideration, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 11**

Radio, Television.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 11 as follows:

## PART 11—EMERGENCY ALERT SYSTEM (EAS)

■ 1. The authority citation for part 11 continues to read as follows:

**Authority:** 47 U.S.C. 151, 154 (i) and (o), 303(r), 544(g) and 606.

■ 2. Amend § 11.56 by revising paragraph (a)(2) to read as follows:

**§ 11.56 Obligation to process CAP-formatted EAS messages.**

(a) * * *

(2) Converting EAS alert messages that have been formatted pursuant to the Organization for the Advancement of Structured Information Standards (OASIS) Common Alerting Protocol Version 1.2 (July 1, 2010), and Common Alerting Protocol, v. 1.2 USA Integrated Public Alert and Warning System Profile Version 1.0 (Oct. 13, 2009), into EAS alert messages that comply with the EAS Protocol, such that the Preamble and EAS Header Codes, audio Attention Signal, audio message, and Preamble and EAS End of Message (EOM) Codes of such messages are rendered equivalent to the EAS Protocol (set forth in § 11.31), in accordance with the technical specifications governing such conversion process set forth in the EAS–CAP Industry Group's (ECIG) Recommendations for a CAP EAS Implementation Guide, Version 1.0 (May 17, 2010) (except that any and all specifications set forth therein related to gubernatorial ''must carry'' shall not be followed, and that EAS Participants may adhere to the specifications related to text-to-speech on a voluntary basis).

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[FR Doc. 2012–10622 Filed 5–4–12; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### 49 CFR Parts 228 and 231

**[Docket No. FRA–2004–17529; Notice No. 9]**

**RIN 2130–AB94**

## Inflation Adjustment of the Aggravated Maximum Civil Monetary Penalty for a Violation of a Federal Railroad Safety Law or Federal Railroad Administration Safety Regulation or Order; Correction

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule; correcting amendments.

**SUMMARY:** On April 24, 2012, FRA published a final rule, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, which increased the aggravated maximum civil monetary penalty that the agency will apply when assessing a civil penalty for a violation of a railroad safety statute, regulation, or order under its authority. *See* 77 FR 24416. In preparing that final

rule for publication, three errors were made as described in the Supplementary Information. FRA is correcting these minor errors so that the final rule clearly conforms to FRA's intent.

**DATES:** The corrections to the final rule are effective on June 25, 2012.

**FOR FURTHER INFORMATION CONTACT:** Veronica Chittim, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., Mail Stop 10, Washington, DC 20590 (telephone 202–493–0273), *veronica.chittim@dot.gov.*

**SUPPLEMENTARY INFORMATION:** Three errors were included in the final rule published on April 24, 2012. *See* 77 FR 24416. FRA failed to account for an October 31, 2011 amendment to 49 CFR part 228. The October 31, 2011 amendment to part 228 redesignated § 228.21, ''Penalties,'' as § 228.6, and removed and reserved § 228.21. *See* 76 FR 67073, 67087–88. In preparing the April 24, 2012, final rule for publication, FRA instructed that the numerical amount ''$100,000'' be removed from 49 CFR 228.21 and the numerical amount ''$105,000'' be added in its place. The instruction should have directed the removal of the numerical amount ''$100,000'' from 49 CFR 228.6 and the addition of ''$105,000'' in its place. Additionally, FRA inadvertently transposed two numbers, in instructions 66 and 67, by instructing changes to the numerical amounts at ''213.146.A'' in appendix A to part 231. *See* 77 FR 24416. The final rule should have instructed that the changes be made to ''146.A''. FRA is correcting these minor errors so that the final rule clearly conforms to FRA's intent.

**List of Subjects**

*49 CFR Part 228*

Administrative practice and procedure, Buildings and facilities, Hazardous materials transportation, Noise control, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements, Sanitation.

*49 CFR Part 231*

Penalties, Railroad safety.

**The Final Rule**

In accordance with the foregoing, parts 228 and 231, of subtitle B, chapter II of title 49 of the Code of Federal Regulations are corrected by making the following correcting amendments:

## PART 228—[AMENDED]

■ 1. The authority citation for part 228 continues to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 21101–21109; Sec. 108, Div. A, Pub. L. 110–432, 122 Stat. 4860–4866; 49 U.S.C. 21301, 21303, 21304, 21311; 28 U.S.C. 2461, note; 49 U.S.C. 103; and 49 CFR 1.49.

**§ 228.6 [Amended]**

■ 2. Section 228.6 is amended by removing the numerical amount ''$100,000'' and adding in its place the numerical amount ''$105,000''.

## PART 231—[AMENDED]

■ 3. The authority citation for part 231 continues to read as follows:

**Authority:** 49 U.S.C. 20102–20103, 20107, 20131, 20301–20303, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

**Appendix A to Part 231—[Amended]**

■ 4. Appendix A is amended by:
■ a. Removing the numerical amount ''650'' from the entry at 146.A and adding in its place the numerical amount ''1,000''; and
■ b. Removing the numerical amount ''1,000'' from the entry at 146.A and adding in its place the numerical amount ''2,000''.

Issued in Washington, DC, on May 1, 2012.

**Robert C. Lauby,**

*Acting Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration.*

[FR Doc. 2012–10946 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 648

**[Docket No. 110901552–1021–01]**

**RIN 0648–BB34**

## Fisheries of the Northeastern United States; Northeast Multispecies, Monkfish, Atlantic Sea Scallop; Amendment 17

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

**ACTION:** Final rule; enforcement of collection-of-information requirements.

**SUMMARY:** NMFS announces approval by the Office of Management and Budget of collection-of-information requirements for a days-at-sea credit provision for the Northeast multispecies, monkfish, and Atlantic sea scallop fisheries. This final rule sets the enforcement date for the collection-of information requirements.

**DATES:** The collection-of-information requirements in 50 CFR 648.53, 648.82, and 648.92 are enforced as of May 7, 2012.

**ADDRESSES:** Written comments regarding the burden-hour estimates or other aspects of the collection-of information requirements contained in this final rule may be submitted to the Northeast Regional Office, NMFS, 55 Great Republic Drive, Gloucester, MA 01930, by email to *OIRA_Submission@omb.eop.gov,* or by fax to 202–395–7285.

**FOR FURTHER INFORMATION CONTACT:** Jason Berthiaume, Fisheries Management Specialist, 978–281–9177.

**SUPPLEMENTARY INFORMATION:**

**Background**

A final rule to implement measures in Amendment 17 to the Northeast Multispecies Fishery Management Plan was published in the **Federal Register** on March 23, 2012 (77 FR 16942). That final rule contained a provision for fishing vessels to receive a credit of days-at-sea (DAS) under certain circumstances. A detailed explanation regarding the DAS credit provision is in the final rule and is not repeated here. The information collection requirements associated with the DAS credit provision were published at §§ 648.53, 648.82, and 648.92.

The Office of Management and Budget (OMB) had not yet approved the collection-of-information requirements in §§ 648.53, 648.82, and 648.92 by the date the final rule was submitted to the Office of the Federal Register for publication, and thus those provisions were not enforced when that final rule published in the **Federal Register**. On March 26, 2012, OMB approved the collection-of-information requirements in the rule. This final rule makes the collection-of-information requirements enforceable.

**Classification**

NMFS previously solicited public comments on the measures described in the Amendment 17 proposed rule, including this collection of information, through the rulemaking process. NMFS received no comments on the collection of information requirements. Thus, this action merely implements portions of the final rule implementing Amendment 17 that were previously proposed and subjected to public comment, but that under the Paperwork Reduction Act (PRA) required OMB approval in order to become effective. OMB has now approved the collection of information provisions. Because the public has already had an opportunity to comment

on these provisions, an additional public comment period is unnecessary.

The Assistant Administrator for Fisheries finds good cause to waive the 30-day delayed enforcement date required by 5 U.S.C. 553 and make this rule enforceable upon publication. This provision is not a restriction, but rather provides a mechanism for small entities to regain lost DAS due to circumstances that were out of their control. Although a DAS credit provision can be requested using existing information collection provisions, the revised collection of information provisions at §§ 648.53, 648.82, and 648.92 are more streamlined and will reduce the administrative burden on regulated entities. A delay in enforcement of 30 days would prevent vessels from utilizing the streamlined form and process NMFS has developed to request a DAS credit, and thus prolong the burdens on vessels.

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

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection-of-information requirement subject to the requirements of the PRA, unless that collection-of-information displays a currently valid OMB control number. This final rule contains revisions to collection-of-information requirements subject to the PRA under OMB Control Numbers 0648–0202 and 0648–0212 and was approved by OMB on March 26, 2012.

The collection of information requirements for the DAS credit provision require vessel owners to provide NMFS with an initial notification as well as the submission of a DAS credit request form. The public burden for requesting a DAS credit is estimated to average 15 min per application, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Based upon permit type, a maximum of 1,908 permits holders could possibly apply for a DAS credit. With an average response time of 15 min, the total burden for applying for a DAS credit is 478 hr. This analysis was conducted assuming each permitted vessel requests one DAS credit per fishing year. Of the 1,908 permit holders, 845 are vessel monitoring system vessels and the remaining 1,063 are assumed to be either interactive voice response vessels or inactive vessels. Although the notification method depends upon the vessels reporting requirements, the associated time burdens will be similar.

Send comments on these burden estimates or any other aspects of these collections-of-information, including suggestions for reducing the burden, by mail to the Northeast Regional Office (see **ADDRESSES**), by email to *OIRA_Submission@omb.eop.gov* or by fax to 202–395–7285.

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

Dated: May 2, 2012.

**Samuel D. Rauch III,**

*Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.*

[FR Doc. 2012–10983 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register
Vol. 77, No. 88
Monday, May 7, 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

### Food Safety and Inspection Service

### 9 CFR Part 424

**[Docket No. FSIS–2011–0018]**

**RIN 0583–AD47**

## Food Ingredients and Sources of Radiation Listed and Approved for Use in the Production of Meat and Poultry Products

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is proposing to remove sodium benzoate, sodium propionate, and benzoic acid from the list of substances that the regulations prohibit for use in meat or poultry products. Under this proposal, new uses of these substances in meat or poultry products would continue to be approved by the Food and Drug Administration (FDA) for safety and by FSIS for suitability. FSIS would add approved uses of these substances to the list of approved substances contained in the Agency's directive system.

**DATES:** Comments must be received by July 6, 2012.

**ADDRESSES:** FSIS invites interested persons to submit relevant comments on this proposed rule. Comments may be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the online instructions at that site for submitting comments.
- *Mail, including floppy disks or CD–ROMs, and hand- or courier-delivered items:* Send to Docket Clerk, U.S. Department of Agriculture (USDA), FSIS, OPPD, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, 8–163A, Washington, DC 20250–3700.

*Instructions:* All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2011–0018. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

*Docket:* For access to background documents or comments received, go to the FSIS Docket Room at the address listed above between 8 a.m. and 4:30 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Charles Williams, Acting Director, Policy Issuances Division, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250–3700, (202) 690–2282.

**SUPPLEMENTARY INFORMATION:**

### Background

Under the Federal Food Drug and Cosmetics Act (FFDCA), (21 U.S.C. 301 *et seq.*) FDA is responsible for determining the safety of ingredients and sources of irradiation used in the production of meat and poultry products, as well as prescribing safe conditions of use. Under the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*), FSIS is responsible for determining the suitability of FDA-approved substances in meat and poultry products. Pursuant to a Memorandum of Understanding (MOU) that was implemented in January 2000, FDA and FSIS work together to evaluate petitions requesting the approval of new substances, or new uses of previously approved substances, for use in or on meat and poultry products. The MOU is available for viewing by the public in the FSIS docket room and on the FSIS Web site at: *http://www.fsis.usda.gov/Regulations_&_Policies/Labeling_FDA_MOU/index.asp.* If an ingredient is approved for use in meat or poultry products, FDA establishes the parameters of the approved use under its regulatory system. FSIS also lists the substance in FSIS Directive 7120.1, ''Safe and Suitable Ingredients Used in the Production of Meat, Poultry, and Egg Products,'' as part of a comprehensive listing of the substances that have been reviewed and that have been accepted as safe and suitable.

### Prohibited Substances That May Conceal Damage or Inferiority—Regulatory Requirements

The regulations that prescribe requirements for the use of food ingredients and sources of radiation in meat and poultry products prohibit for use in such products substances that conceal damage or inferiority or that make the product appear better or of greater value (9 CFR 424.23(a)). Under the regulations, certain antimicrobial substances are prohibited for use in meat or poultry products because these substances have the potential to conceal damage or inferiority when used at certain levels (9 CFR 424.23(a)(3)). Among these substances are potassium sorbate, propylparaben (propyl p-hydroxybenzoate), calcium propionate, sodium propionate, benzoic acid, and sodium benzoate. The regulations provide that these substances ''* * * may be used in or on any product, only as provided in 9 CFR Chapter III'' (9 CFR 424.23(a)(3)). Thus, while FSIS lists approved uses of other substances in its directive system, the Agency must codify any approved use of the substances listed in 9 CFR 424.23(a)(3) in the meat or poultry products inspection regulations.

### Waivers of Regulatory Requirements

The meat and poultry products inspection regulations provide for the FSIS Administrator to ''* * * waive for limited periods any provisions of the regulations * * * to permit * * * experimentation so that new procedures, equipment, and/or processing techniques may be tested to facilitate definite improvements'' (9 CFR 303.1(h) and 381.3(b)). Under the regulations, FSIS may only grant waivers from the provisions in the regulations that are not in conflict with the purposes or provisions of the FMIA or PPIA (9 CFR 303.1(h) and 381.3(b)).

FSIS decides whether to grant requests for waivers after considering proposals and documentation submitted by establishments to demonstrate that the use of a new technology is scientifically sound; that it will facilitate definite improvements; and that issuing the waiver will not conflict with the provisions of the FMIA or PPIA, i.e., the conditions of use will not

result in an adulterated product or product labeling that misleads consumers.[1] If FSIS determines that the information submitted by an establishment supports the requested waiver, the Agency will waive the relevant provisions in the regulation for a limited period of time to allow the establishment to conduct an in-plant trial. The purpose of the in-plant trial is to gather data on the effects of the use of the new technology. FSIS reviews the data that are developed in the trial to determine whether they show that the purpose of the waiver is being met.

**Petitions**

On January 19, 2007, Kraft Foods Global, Inc. petitioned FSIS to amend the Federal meat and poultry products inspection regulations to permit the use of sodium benzoate and sodium propionate as acceptable antimicrobial agents that may be used in combination with other approved ingredients to inhibit the growth of *Listeria monocytogens* (*Lm*) in ready-to-eat (RTE) meat and poultry products. Kraft requested that FSIS permit the use of sodium benzoate in amounts of up to 0.1 percent (by weight of total product formulation) in combination with approved antimicrobial agents. Kraft requested that FSIS permit the use of sodium propionate in amounts up to 0.2 percent (by weight of total formulation) in combination with approved antimicrobial agents and adjuvants.

On July 26, 2010, Kemin Food Technologies petitioned FSIS to amend the regulations to permit the use of liquid sodium propionate and liquid sodium benzoate as acceptable antimicrobial agents in meat and poultry products. Kemin requested that FSIS approve the use of liquid sodium propionate to inhibit microbial growth in various meat and poultry products in amounts of up to 0.5 percent by weight of total product formulation. Kemin also requested that FSIS approve the use of liquid sodium propionate and sodium benzoate to prohibit microbial growth in various meat and poultry products in amounts of up to 0.4 percent by weight of total formulation, whereas liquid sodium benzoate will not exceed 0.1 percent of product formulation.

After receiving each petition, FSIS conducted an initial evaluation of the requested action to confirm that FDA had no objections to the safety of sodium benzoate, sodium propionate, or benzoic acid at the proposed levels of use. FSIS also considered each petition's supporting data on the suitability of these substances for use in meat and poultry products. From its initial evaluation of each petition, FSIS, in consultation with FDA, concluded that the petitioners had established the safety of sodium benzoate, sodium propionate, and benzoic acid at the proposed levels of use but that the Agency needed additional data to make a final suitability determination.

Therefore, in July 2007, FSIS issued a waiver to Kraft to conduct trials in 59 of its establishments on the use of sodium benzoate and sodium propionate, in combination with other ingredients, to control the growth of *Lm* in RTE meat and poultry products. Additionally, from September 2010 through March 2011, FSIS issued waivers to various meat and poultry products processing establishments to conduct trials on the use of antimicrobial agents containing liquid sodium propionate and propionic acid supplied by Kemin for *Lm* control in RTE meat and poultry products. FSIS granted the waivers to allow the companies to gather additional data on the suitability of these substances to support an amendment to the regulations.

As a condition of the waivers, both Kraft and Kemin were to track issues regarding consumer acceptance of products containing the substances at issue during the trial period and to identify any situations that resulted in consumer concerns about the products. The waivers also provided that both companies were to collect data to show that normal spoilage indicators are not masked in products treated with the substances, that nutrients are not adversely affected, and that product appearance (e.g., color) did not change when compared with untreated products. Another condition of the waivers was that the meat and poultry products formulated with the subject ingredients have an approved label that includes an accurate declaration of the ingredients in the appropriate order of predominance.

While operating under the waivers, both companies gathered sufficient data to support the use of sodium propionate, sodium benzoate, and benzoic acid as antimicrobial agents in RTE meat and poultry products. Accordingly, FSIS is initiating this rulemaking proposing to remove these substances from the list of substances prohibited for use in meat or poultry products. Should FSIS finalize this proposed rule, the Agency will list approved uses of these substances in FSIS Directive 7120.1. FSIS has extended the companies' regulatory waivers for the use of these substances pending the conclusion of this rulemaking.

**Data on Suitability**

To demonstrate that sodium benzoate, sodium propionate, and benzoic acid are suitable for their intended use as antimicrobial agents in meat and poultry products, Kraft submitted data collected from its in-plant-trials and from scientific studies that show that these substances do not conceal damage or inferiority or make products appear better or of greater value than they are under the proposed conditions of use.

Kraft submitted research findings to demonstrate that its proposed use of sodium benzoate and sodium propionate is effective in controlling the growth of *Lm* in RTE meat and poultry products. The research took into account the unique composition of diverse products, such as hot dogs, bologna, ham, and turkey breast. Kraft developed an approach to predicting the effect of antimicrobial ingredients on *Lm* growth and confirmed the findings with tests of different formulations. Kraft assessed treated products for quality, analyzed the nutritional composition of planned formulations, and considered the status of sodium benzoate and sodium propionate as generally recognized as safe (GRAS) substances under FDA requirements. Kraft's research demonstrated that differences in product composition, especially moisture, can influence antimicrobial activity and formulation needs. From its study, Kraft determined that the following formulations for the antimicrobial ingredients are effective in controlling the growth of *Lm:*

(1) A combination of 0.1 percent sodium benzoate and 0.1 percent sodium diacetate in some lower moisture products such as hot dogs;

(2) A combination of 0.1 percent sodium benzoate, 0.15 percent sodium diacetate, and 0.2 percent sodium propionate in high moisture products such as ham; and

(3) A combination of 0.1 percent sodium benzoate, 0.15 percent sodium diacetate, 0.2 percent sodium propionate, and 0.56 percent Lem-O-Fos® in turkey.

In addition, Kraft submitted three studies to address concerns about the potential use of the substances to conceal damage or mask inferiority. First, Kraft assessed whether the proposed uses of sodium benzoate and sodium propionate would affect normal indicators of spoilage. The results of two shelf life studies on the spoilage issue showed that there was very little

[1] For Agency New Technology waiver procedures, see *http://www.fsis.usda.gov/Regulations_&_Policies/New_Technologies/index.asp.*

difference in spoilage characteristics among products formulated with the antimicrobial treatments being evaluated and products formulated without antimicrobials. Second, Kraft conducted a nutritional composition test for moisture, protein, fat, ash, and sodium content. Other than a reduction in ash and an increase in moisture as lactate solids are replaced by water, the study found no differences in nutritional composition between products treated with the substances and untreated products. Finally, Kraft evaluated the efficacy and spoilage characteristics of sodium benzoate and sodium propionate in vacuum packaging or modified atmosphere packaging with nitrogen and carbon dioxide and found that the type of packaging did not have a technical effect on the efficacy and spoilage characteristics of sodium benzoate and sodium propionate. Furthermore, Kraft conducted consumer research to demonstrate that there is consumer acceptance, that normal spoilage indicators were not masked, that nutrients were not adversely affected, and that product appearance was not changed as compared to untreated product. The Kraft petition and supporting material are available for viewing by the public on the FSIS Web site at: *http://www.fsis.usda.gov/PDF/Petition_Kraft.pdf.*

In its petition, Kemin submitted data collected from in-house trials and university research that demonstrate that its proposed applications of ≤ 0.5 percent liquid sodium propionate alone or ≤ 0.4 percent for the liquid blend of sodium propionate with benzoate are effective in controlling the growth of *Lm* in cured turkey and cooked chicken breast. Kemin noted that a comparison of test results with previous studies and predictive models suggests that moisture, pH, NaCl, added nitrite, storage temperature, and perhaps meat type, are significant factors in determining the efficacy of various antimicrobials. The petition explained that validation of the most effective use rates of any antimicrobial treatments will need to be performed on a case-by-case basis to account for many variables that can affect microbial growth and efficacy in specific RTE meat and poultry products.

To show that its proposed uses of liquid sodium propionate alone or in a blend with sodium benzoate do not conceal damage or inferiority when used in meat or poultry products, Kemin conducted studies to demonstrate that the use of these substances does not affect normal spoilage indicators in RTE poultry products. The studies compared products containing Kemin's antimicrobial treatments at use rates of 0.3, 0.4, and 0.5 percent sodium propionate alone, or 0.4 percent when combined with sodium benzoate, with an untreated control or a product containing the current industry standard lactate. The studies showed that, although growth of spoilage microorganisms was significantly different in products from replicate trials, the competitive microflora did not appear to have been affected by Kemin's antimicrobial substances, and normal spoilage indicators were not disguised. In addition, Kemin submitted data to demonstrate that proposed uses of liquid sodium propionate alone or in a blend with sodium benzoate do not negatively affect color, texture and other sensory attributes, nutritional profile, or consumer acceptance when used at rates of up to 0.5 percent alone or 0.4 percent with sodium benzoate.

The Kemin petition and supporting material are available for viewing by the public on the FSIS Web site at *http://www.fsis.usda.gov/PDF/Petition_Kemin.pdf.*

**Proposed Rule**

FSIS has reviewed the data that Kraft and Kemin have submitted in support of their petitions and has determined that sodium benzoate, sodium propionate, and benzoic acid, under the conditions proposed in the petitions, are both safe and suitable for use as antimicrobial agents in certain RTE meat and poultry products. Therefore, FSIS is proposing to amend 9 CFR 424.23(a)(3) to remove these substances from the list of prohibited substances that may be used ''* * * in or on any product, only as provided in 9 CFR Chapter III.''

If this proposed rule is finalized, use of these substances in or on meat or poultry products will continue to be approved by FDA for safety and by FSIS for suitability. FDA will continue to establish the parameters of the approved use under its regulatory system, and FSIS will list approved uses of these substances in the table of approved substances in Directive 7120.1. The proposed amendment will make the procedures for listing approved uses of sodium propionate, benzoic acid, and sodium benzoate consistent with the procedures for listing other safe and suitable substances. This proposed rule will also expedite the listing of substances, such as sodium benzoate and sodium propionate, which enhance food safety by controlling *Lm* in RTE products.

FSIS is not proposing to remove potassium sorbate, propylparaben (propyl p-hydroxybenzoate), and calcium propionate from the list of prohibited substances in 9 CFR 424.23(a)(3) because the petitions did not include data on the use of these substances in meat or poultry products. Therefore, if this proposed rule is finalized, approved new uses of potassium sorbate, propylparaben (propyl p-hydroxybenzoate), and calcium propionate would continue to be listed through rulemaking. FSIS requests comments and supporting data on whether the Agency should remove any of these substances from 9 CFR 424.23(a)(3) and list their approved new uses in FSIS Directive 7120.1.

**Executive Order 12866, Executive Order 13563, and Regulatory Flexibility Act**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been determined to be not significant and therefore has not been reviewed by the Office of Management and Budget (OMB) under EO 12866.

This proposed rule would eliminate the need for FSIS to conduct rulemakings each time that the use of certain substances identified in § 424.23(a)(3), i.e., sodium propionate, sodium benzoate, and benzoic acid, is found to be safe by FDA and suitable by FSIS for use in the production of meat and poultry products at specified levels. This proposed rule would benefit companies that want to use these substances in the production of meat and poultry products by expediting the approval process. It would also benefit consumers by expediting the approved use of substances that enhance food safety by controlling the growth of *Lm* in RTE meat and poultry products. This proposed rule would make the approval process for new uses of sodium propionate, sodium benzoate, and benzoic acid in meat and poultry products consistent with the process for obtaining approval for other safe and suitable substances.

There are no expected costs associated with this proposed rule. All substances intended for use in the production of meat and poultry

products will continue to be subject to FDA evaluation for safety and FSIS evaluation for suitability. Company costs and the agencies' costs associated with these evaluations will not be affected by this proposed rule should it become final. The only change would be the process for listing the substances specified in this proposal after they have been approved.

**Regulatory Flexibility Act**

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FSIS Administrator has made a preliminary determination that this proposed rule will not have a significant impact on a substantial number of small entities. This determination is based primarily on the fact that the proposed rule would not affect the process for approving new uses of sodium benzoate, sodium propionate, and benzoic acid in meat or poultry products. This proposed rule would make the process of listing approved uses of these substances more efficient by eliminating the need for FSIS to conduct rulemaking each time a new use is approved.

**Paperwork Reduction Act**

This rule does not contain any new information collection or record keeping requirements that are subject to the Office of Management and Budget (OMB) approval under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

**E-Government Act**

FSIS and USDA are committed to achieving the purposes of the E-Government Act (44 U.S.C. 3601, *et seq.*) by, among other things, promoting the use of the Internet and other information technologies and providing increased opportunities for citizen access to Government information and services, and for other purposes.

**Executive Order 12988**

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule: (1) Has no retroactive effect; and (2) does not require administrative proceedings before parties may file suit in court challenging this rule. However, the administrative procedures specified in 9 CFR 306.5, 381.35, and 590.300 through 590.370, respectively, must be exhausted before any judicial challenge may be made of the application of the provisions of the proposed rule, if the challenge involves any decision of an FSIS employee relating to inspection services provided under the FMIA, PPIA, or EPIA.

**Additional Public Notification**

FSIS will announce the availability of this proposed rule on-line through the FSIS Web page located at *http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Proposed_Rules/index.asp.*

FSIS also will make copies of this **Federal Register** publication available through the *FSIS Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Update* is communicated via Listserv, a free email subscription service for industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The *Update* also is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience.

In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/.* Options range from recalls to export information to regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password-protect their accounts.

**List of Subjects in 9 CFR Part 424**

Food additives, Food packaging, Meat inspection, Poultry and poultry products.

For the reasons set forth in the preamble, FSIS proposes to amend 9 CFR part 424 as follows:

## PART 424—PREPARATION AND PROCESSING OPERATIONS

1. The authority citation for part 424 would continue to read as follows:

**Authority:** 7 U.S.C. 450, 1901–1906; 21 U.S.C. 451–470, 601–695; 7 CFR 2.18, 2.53.

2. Revise § 424.23(a)(3) as follows:

**§ 424.23 Prohibited uses.**

* * * * *

(a) * * *

(3) Sorbic acid, calcium sorbate, sodium sorbate, and other salts of sorbic acid shall not be used in cooked sausages or any other meat; sulfurous acid and salts of sulfurous acid shall not be used in or on any meat; and niacin or nicotinamide shall not be used in or on fresh meat product; except that potassium sorbate, propylparaben (propyl p-hydroxybenzoate), and calcium propionate, may be used in or on any product, only as provided in 9 CFR chapter III.

* * * * *

Done at Washington, DC, on May 1, 2012.

**Alfred V. Almanza,**

*Administrator.*

[FR Doc. 2012–10871 Filed 5–4–12; 8:45 am]

**BILLING CODE 3410–DM–P**

## COMMODITY FUTURES TRADING COMMISSION

**17 CFR Part 49**

**RIN 3038–AD83**

### Swap Data Repositories: Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Proposed interpretative statement.

**SUMMARY:** The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is proposing this interpretative statement to provide guidance regarding the applicability of the confidentiality and indemnification provisions set forth in new section 21(d) of the Commodity Exchange Act (''CEA'') added by section 728 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). The Commission requests comment on all aspects of the proposed interpretative statement. The proposed interpretative statement clarifies that the provisions of section 21(d) should not operate to inhibit or prevent foreign regulatory authorities from accessing data in which they have an independent and sufficient regulatory interest, even if that data also has been reported pursuant to the CEA and Commission regulations.

**DATES:** Comments must be received on or before June 6, 2012.

**ADDRESSES:** Comments, identified by RIN number 3038–AD83, may be sent by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures

Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

• *Hand Delivery/Courier:* Same as mail above.

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Adedayo Banwo, Counsel, Office of the General Counsel, at (202) 418.6249, *abanwo@cftc.gov;* With respect to questions relating to international consultation and coordination: Jacqueline Mesa, Director, Office of International Affairs, at (202) 418.5386, *jmesa@cftc.gov*, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act (''FOIA''),[1] a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the CFTC's regulations.[2] The Commission reserves the right, but shall have no obligation, to review, prescreen, filter, redact, refuse, or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under FOIA.

**SUPPLEMENTARY INFORMATION:** In this release, the Commission addresses issues raised by foreign regulators with respect to the scope and application of the confidentiality and indemnification provisions of new section 21(d) of the CEA and proposes to clarify that these provisions should not operate to inhibit or prevent foreign regulatory authorities from accessing data in which they have an independent and sufficient regulatory interest.

[1] 5 U.S.C. 552.

[2] 17 CFR 145.9.

## I. Background: Statutory and Regulatory Authorities

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.[3] Title VIIamended the CEA to establish a comprehensive new regulatory framework for swaps and security-based swaps.[4] The legislation was enacted to reduce risk, increase transparency and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

To enhance transparency, promote standardization and reduce systemic risk, section 727 of the Dodd-Frank Act added to the CEA new section 2(a)(13)(G),[5] which requires all swaps—whether cleared or uncleared—to be reported to swap data repositories (''SDRs'').SDRs are new registered entities created by section 728 of the Dodd-Frank Act.[6] SDRs are required to perform specified functions related to the collection and maintenance of swap transaction data and information.[7]

CEA section 21(c)(7) requires that SDRs make data available to certain domestic and foreign regulators[8] under specified circumstances.[9] Separately, section 21(d) mandates that prior to receipt of any requested data or information from an SDR, a regulatory authority described in section 21(c)(7) shall agree in writing to abide by the confidentiality requirements described in section 8 of the CEA,[10] and to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under section 8 of the CEA.[11]

Section 752 of the Dodd-Frank Act seeks to ''promote effective and consistent global regulation of swaps,'' and provides that the CFTC and foreign regulators ''may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest. * * *'' [12] In light of this statutory directive, the Commission has been working to provide sufficient access to SDR data to appropriate domestic and foreign regulatory authorities.

On June 8, 2011, the Chairman of the CFTC and the Chairman of the Securities and Exchange Commission (''Chairmen'') jointly submitted a letter to Michel Barnier, European Commissioner for Internal Markets and Services,[13] highlighting their desire for international cooperation. In the letter, the Chairmen expressed their belief that indemnification and notice requirements need not apply when a registered SDR is also registered in a foreign jurisdiction and the foreign regulator, acting within the scope of its jurisdiction, seeks information directly from the SDR.

On September 1, 2011, the Commission adopted regulations implementing CEA section 21's registration standards, duties, and core principles for SDRs. To implement the provisions of section 21(c)(7) and (d), the Commission adopted definitions and standards for determining access by domestic and foreign regulators to data maintained by SDRs.

The Commission acknowledged in the SDR Final Rules that the CEA's indemnification requirement could have the unintended effect of inhibiting direct access by other regulators to data maintained by SDRsdue to various home country laws and regulations.[14] The SDR Final Rulesprovided that

[3] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010), available at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[4] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010;'' 7 U.S.C. 1 *et seq.*

[5] 7 U.S.C. 2(a)(13)(G).

[6] Section 721 of the Dodd-Frank Act amends section 1a of the CEA to add a definition of the term ''swap data repository.'' Pursuant to CEA section 1a(48), the term ''swap data repository means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.'' 7 U.S.C. 1a(48).

[7] *See* 7 U.S.C. 24a(c). *See also* Commission, Final Rulemaking: Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136, Jan. 13, 2012 (''Data Final Rules''). The Data Final Rules, among other things, set forth regulations governing SDR data collection and reporting responsibilities under part 45 of the Commission's regulations.

[8] The Commission's regulations designate such regulators as either an ''Appropriate Domestic Regulator'' or an ''Appropriate Foreign Regulator'' in § 49.17(b). *See* Commission, Final Rulemaking: Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538, 54554 Sept. 1, 2011 (''SDR Final Rules'').

[9] 7 U.S.C. 24a(c)(7).

[10] 7 U.S.C. 12.

[11] 7 U.S.C. 24a(d).

[12] *See* section 752(a) of the Dodd-Frank Act.

[13] *See* letter from Gary Gensler, Chairman of the Commission, and Mary Schapiro, Chairman of the SEC, to Michel Barnier, European Commissioner for Internal Markets and Services, European Commission, dated June 8, 2011.

[14] *See* SDR Final Rules at 54554.

under specified circumstances, certain ''Appropriate Domestic Regulators'' [15] may gain access to the swap data reported and maintained by SDRs without being subject to the notice and indemnification requirements of CEA sections 21(c)(7) and (d).[16] In connection with foreign regulatory authorities, the Commission determined in the SDR Final Rules that confidential swap data reported to and maintained by an SDR may be accessed by an Appropriate Foreign Regulator [17] without the execution of a confidentiality and indemnification agreement when the Appropriate Foreign Regulator has supervisory authority over an SDR registered with it pursuant to foreign law and/or regulation that is also registered with the Commission.

The confidentiality and indemnification provisions of new CEA section 21 apply only when a regulatory authority seeks access to data from an SDR. In the SDR Final Rules, the Commission noted that section 8(e) of the CEA provides for the Commission (as opposed to an SDR) to share confidential information in its possession with any department or agency of the Government of the United States, or with any foreign futures authority, department or agency of any foreign government or political subdivision thereof,[18] acting within the scope of its jurisdiction.[19]

The SDR Final Rules became effective on October 31, 2011.[20] Under these rules, trade repositories may apply to the Commission for full registration as SDRs.Pending the adoption and effectiveness of other, related regulatory provisions and definitions, however, such registrations are deemed ''provisional.'' [21]

## II. Considerations Relevant to the Commission's Proposed Interpretative Statement [22]

### *A. International Considerations*

As noted above, section 752(a) of the Dodd-Frank Act directs the Commission to consult and coordinate with foreign regulatory authorities regarding the establishment of consistent international standards for the regulation of swaps and various ''swap entities.'' Section 752(a) also provides that the Commission ''may agree to such information-sharing arrangements [*with foreign regulatory authorities*] as may be deemed to be necessary or appropriate in the public interest'' or for the protection of investors and counterparties.[23]

The Commission is committed to a cooperative international approach to the registration and regulation of SDRs, and consulted extensively with various foreign regulatory authorities in promulgating both its proposed and final regulations concerning SDRs.[24] The Commission notes that the SDR Final Rules are largely consistent with the recommendations and goals of the May 2010 ''CPSS–IOSCO Consultative Report, Considerations for Trade Repositories in the OTC Derivatives Market'' (''Working Group Report'').[25]

### *B. Public Comments on SDR Regulations*

In developing the SDR Final Rules, the Commission received several comments regarding access to SDR data by foreign regulatory authorities and the confidentiality and indemnification provisions of CEA section 21(d). The Commission has considered these comments in formulating this proposed interpretation but requests further comment concerning the specific interpretative statement proposed.

Managed Funds Association (''MFA'') requested that the Commission actively participate in facilitating foreign regulatory access and confirming a foreign regulator's authority in connection with any SDR data request.[26] The CME Group Inc. (''CME'') argued against the Commission designating any third party to receive swap data, and TriOptima suggested that the Commission ''adopt as flexible an interpretation as possible'' regarding the indemnification provisions in CEA section 21(d).[27]

The Depository Trust & Clearing Corporation (''DTCC'') stated that the ''indemnification provisions should not apply in situations where regulators are carrying out regulatory responsibilities, acting in a manner consistent with international agreements and maintaining the confidentiality of data.'' [28] Additionally, the Commission received a comment letter from the European Securities and Markets Authority (''ESMA'') [29] stating that it believes the indemnification provision ''undermines'' principles of trust and consultation.

### *C. Consultations With Foreign Regulatory Authorities*

Consistent with the international harmonization envisioned by section 752 of the Dodd-Frank Act, the Commission has engaged in consultations with foreign regulatory authorities regarding the Commission's regulations relating to the Dodd-Frank Act. During these consultations, many foreign regulatory authorities have expressed concern about the difficulty in complying with the indemnification provisions of CEA section 21(d).

As a consequence of these consultations with foreign regulatory

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[15] The term Appropriate Domestic Regulator is defined in 17 CFR 49.17(b)(1) as the Securities and Exchange Commission; each prudential regulator identified in section 1a(39) of the CEA. 7 U.S.C. 1a(39); the financial Stability Oversight Council; the Department of Justice; any Federal Reserve Bank; the Office of Financial Research; and any other person the Commission deems appropriate.

[16] In the Commission's view, it is appropriate to permit access to the swap data maintained by SDRs to Appropriate Domestic Regulators that have concurrent regulatory jurisdiction over such SDRs, without the application of the notice and indemnification provisions of sections 21(c)(7) and (d) of the CEA. *See* SDR Final Rules at 54554 n.163. Accordingly, these provisions do not apply to an Appropriate Domestic Regulator that has regulatory jurisdiction over an SDR registered with it pursuant to a separate statutory authority that is also registered with the Commission, if the Appropriate Domestic Regulator executes an MOU or similar information sharing arrangement with the Commission and the Commission, consistent with CEA section 21(c)(4)(A), designates the Appropriate Domestic Regulator to receive direct electronic access. *See* 17 CFR 17(d)(2).

[17] The term Appropriate Foreign Regulator is defined in 17 CFR 49.17(b)(2) as a foreign regulator with an existing memorandum of understanding (''MOU'') or similar type of information sharing arrangement executed with the Commission, and/or a foreign regulator without an MOU as determined on a case-by-case basis by the Commission.

[18] Section 725(f) of the Dodd-Frank Act amended section 8(e) of the CEA to include foreign central banks and ministries.

[19] *See* SDR Final Rules at 54554.

[20] *Id.*

[21] *See* 17 CFR 49.3(b).

[22] Legislation has been introduced in Congress that would amend the CEA to eliminate or substantially limit the SDR indemnification provision.

[23] *See* section 752(a) of the Dodd-Frank Act.

[24] *See* public comment file in response to the proposal for the SDR Final Rules, available at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=939* and SDR Final Rules note 6 at 54539, *supra.*

[25] This working group was jointly established by the Committee on Payment and Settlement Systems (''CPSS'') of the Bank of International Settlements and the Technical Committee of the International Organization of Securities Commissions (''IOSCO''). The Working Group Report presented a set of factors to consider in connection with the design, operation and regulation of SDRs. A significant focus of the Working Group Report is access to SDR data by appropriate regulators. The Working Group Report urges that a trade repository ''should support market transparency by making data available to relevant authorities and the public in line with their respective information needs.'' The Working Group Report is available at *http://www.bis.org/publ/cpss90.pdf. See also* CPSS–IOSCO Consultative Report, Principles of Financial Market Infrastructures (March 2011) available at *http://www.bis.org/publ/cpss94.pdf. See also* Financial Stability Board (''FSB''), Implementing OTC Derivatives Market Reforms, Oct. 25, 2010 (''FSB Report''); FSB, Derivative Market Reforms, Progress Report on Implementation, Apr. 15, 2010 (''FSB Progress Report'').

[26] *See* comment letter from MFA.

[27] *See* comment letters from CME and TriOptima.

[28] *See* comment letter from DTCC.

[29] *See* comment letter from ESMA.

authorities, and pursuant to the mandate for cooperation under section 752, the Commission concludes that further guidance is necessary to ensure that appropriate access by foreign regulatory authorities is not unnecessarily inhibited. For example, the Commission has learned that foreign regulatory authorities have asked whether a recognition regime with respect to SDRs, and/or access by foreign authorities that do not regulate an SDR, would conflict with § 49.17(d)(3) and § 49.18(c) of the SDR Final Rules, which refer to registration with Appropriate Foreign Regulators. Foreign regulatory authorities have also taken action to harmonize regulatory reporting rules.

While the SDR Final Rules address foreign regulators with supervisory authority and regulatory responsibility, the Commission is proposing the following interpretative statement, pursuant to section 752, to ensure that foreign regulators receive sufficient access to data reported to SDRs where such foreign regulators have an independent and sufficient regulatory interest.

## III. Commission Proposed Interpretative Statement

In this proposed interpretative statement, the CFTC provides guidance regarding the confidentiality and indemnification provisions of CEA section 21(d). As noted above, the Commission seeks comment from interested members of the public on all aspects of this proposed interpretative statement.

### *A. Data Reported to Registered SDRs*

The Commission understands that some registered SDRs also maybe registered, recognized or otherwise authorized in a foreign jurisdiction and may accept swap data reported pursuant to the foreign regulatory regime. The Commission concludes that the confidentiality and indemnification provisions of CEA section 21(d) generally apply only to such data reported pursuant to the CEA and Commission regulations.

The Commission further concludes that the confidentiality and indemnification provisions should not operate to inhibit or prevent foreign regulatory authorities from accessing data in which they have an independent and sufficient regulatory interest (even if that data also has been reported pursuant to the CEA and Commission regulations).

Accordingly, and consistent with the Commission's SDR Final Rules, the Commission proposes to interpret CEA section 21(d) such that a registered SDR would not be subject to the confidentiality and indemnification provisions of that section if:

- Such registered SDR also is registered, recognized or otherwise authorized in a foreign jurisdiction's regulatory regime; and
- The data sought to be accessed by a foreign regulatory authority has been reported to such registered SDR pursuant to the foreign jurisdiction's regulatory regime.

This proposed interpretative guidance is grounded in principles of international law and comity. For example, in *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.,* the U.S. Supreme Court, in reviewing the extraterritorial applicability of a different federal statute, stated that extraterritorial jurisdiction should be construed, where ambiguous, ''to avoid unreasonable interference with the sovereign authority of other nations.'' [30] In cases considering concepts of international law and comity in evaluating the extraterritorial scope of federal statutes, the Supreme Court has noted that the principles in the Third Restatement of Foreign Relations Law are relevant to the interpretation of U.S. law.[31]

Specifically, section 403 of the Third Restatement of Foreign Relations Law states, in relevant part:

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) The link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) The connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) The existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) The importance of the regulation to the international political, legal, or economic system;
>
> (f) The extent to which the regulation is consistent with the traditions of the international system;
>
> (g) The extent to which another state may have an interest in regulating the activity; and
>
> (h) The likelihood of conflict with regulation by another state.[32]

To avoid unreasonable interference with the sovereign authority of foreign regulators, this proposed interpretative statement is supported and underpinned by principles of international law and comity.

### *B. Foreign Regulatory Access*

In the Commission's view, a foreign regulator's access to data held in a registered SDR that also is registered, recognized, or otherwise authorized in a foreign jurisdiction's regulatory regime, where the data sought to be accessed has been reported pursuant to that regulatory regime, should be governed by such foreign jurisdiction's regulatory regime. The Commission concludes that application of the requirements of CEA section 21(d) in these circumstances is unreasonable in light of, among other things, the importance of such data to the foreign jurisdiction's regulatory regime, foreign regulators' interest in unfettered access to such data, and the traditions of mutual trust and cooperation among international regulators.[33]

Therefore, the Commission proposes that a foreign regulator's access to data from a registered SDR that also is registered, recognized, or otherwise authorized in a foreign jurisdiction's regulatory regime, where the data to be accessed has been reported pursuant to that regulatory regime, will be dictated by that foreign jurisdiction's regulatory regime and not by the CEA or Commission regulations. Such access is appropriate, in the Commission's view, even if the applicable data is also reported to the registered SDR pursuant to the Commission's Data Final Rules.[34]

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[30] *F. Hoffmann-LaRoche, Ltd.* v. *Empagran S.A.,* 542 U.S. 155, 164 (2004). In *Hoffmann-LaRoche,* the Supreme Court also stated that canons of statutory construction ''assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'' *Id.*

[31] *Id.* at 164–165.

[32] Rest. 3d., Third Restatement Foreign Relations Law section 403 (scope of a statutory grant of authority must be construed in the context of international law and comity including, as appropriate, the extent to which regulation is consistent with the traditions of the international system).

[33] The Commission notes that access to data held by trade repositories is a concept under discussion and development among international regulators. At the request of the FSB, CPSS and IOSCO have established a working group of relevant authorities to produce a forthcoming report regarding authorities' access to trade repository data.

[34] Regarding the Commission's access to SDR data, section 21(b)(1)(A) of the CEA states that the Commission ''shall prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered swap data repository.'' Section 21(c)(1) of the CEA requires registered SDRs to ''accept data prescribed by the Commission for each swap under subsection (b).'' Therefore, with respect to Commission access to data held in registered SDRs, the Commission

Additionally, the Commission reiterates that a foreign regulatory authority, like domestic regulators, can nonetheless receive confidential data, without the execution of a confidentiality and indemnification agreement, from the Commission (as opposed to an SDR) pursuant to section 8(e) of the CEA.[35] Such data sharing and access would be governed by the confidentiality provisions of section 8 of the CEA.

*C. Request for Comment*

The Commission requests comment on all aspects of its proposed interpretative statement. In particular, the Commission requests comment on the following issue: How would the timing and implementation of foreign jurisdictions' regulatory regimes affect the Commission's proposed interpretative guidance?

By the Commission.

Dated: Issued in Washington, DC, on April 30, 2012.

**David A. Stawick,**

*Secretary of the Commission.*

## Appendices To Swap Data Repositories: Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act Interpretive Statement—Commission Voting Summary and Statements of Commissioners

**Note:** The following appendices will not appear in the Code of Federal Regulations.

## Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner votes in the negative.

## Appendix 2—Statement of Chairman Gary Gensler

I support the proposed interpretative statement regarding the application of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) indemnification provisions for swap data repositories (SDRs). The Commission is working closely with international regulators on a collaborative approach regarding how data may be accessed by regulators. The proposed guidance, which benefited from international input, states the Commission's view that foreign regulators will not be subject to the indemnification provisions in the Dodd-Frank Act if the SDR is registered, recognized or otherwise authorized by foreign law and the data to be accessed is reported to the SDR pursuant to foreign law. The public will now have an opportunity to comment on the proposed guidance, and I look forward to the public's input.

## Appendix 3—Statement of Commissioner Jill E. Sommers

I concur in the issuance of this Proposed Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act (Proposed Interpretive Statement). It provides some additional clarification with respect to how the Commission intends to interpret the application of the Section 21(d) indemnification provisions beyond what the Commission stated when it finalized the swap data repository (SDR) rules. *See Swap Data Repositories: Registration Standards, Duties and Core Principles,* 76 FR 54,538 (Sept. 1, 2011). However, a legislative fix is the only real solution to providing appropriate regulators, both foreign and domestic, with timely access to relevant data. I agree with Commissioner O'Malia that the Commission should publicly support repeal of the indemnification provisions, and note that the SEC has already done so.

When finalizing the SDR rules, the Commission stated that a foreign regulator may have direct access to confidential swap data reported to and maintained by an SDR registered with the Commission without executing a Confidentiality and Indemnification Agreement when the SDR is also registered with the foreign regulator and the foreign regulator is acting in a regulatory capacity with respect to the SDR. *See id.* at 54,554. The Proposed Guidance clarifies that this should be the case even if the data the foreign regulator seeks also has been reported pursuant to the CEA and Commission regulations.

Aside from making this point, the Proposed Interpretive Statement does not provide any information that cannot be otherwise gleaned from the SDR final rules, with one notable exception. The final SDR rules define an ''Appropriate Foreign Regulator'' as one that has supervisory authority over an SDR that is *registered* with the foreign regulator and with the CFTC. The Proposed Interpretive Statement expands this concept to SDRs that are *registered, recognized, or otherwise authorized* in a foreign jurisdiction's regulatory regime. Thus, registration and recognition are equivalent. This is a welcome clarification and a step in the right direction.

I should note that the indemnification provisions of Section 21(d) may have an adverse effect on U.S. regulators too. The Proposed Interpretive Statement touches on a distinction drawn in Part 49 between ''Appropriate Domestic Regulators,'' which include a number of domestic regulatory authorities, and an ''Appropriate Domestic Regulator with Regulatory Responsibility over a Swap Data Repository'' (a single entity subcategory of Appropriate Domestic Regulators, namely, the Securities and Exchange Commission (SEC)). Only the latter category of domestic regulator (i.e. the SEC) is exempt from the indemnification provisions of Section 21(d). While it makes sense that the SEC should be able to receive SDR data directly from an SDR absent an indemnification agreement, I encourage comments as to whether other Appropriate Domestic Regulators should have similar access.

## Appendix 4—Statement of Commissioner Scott D. O'Malia

I concur in support of the Commission's proposed interpretative statement (''Proposed Interpretative Statement'') regarding the confidentiality and indemnification provisions of Section 21(d) of the Commodity Exchange Act (''CEA'').

Ultimately, Congress should repeal the confidentiality and indemnification provisions of Section 21(d) of the CEA and the Commission should publicly support that repeal. Absent a legislative fix, however, I believe the Commission is taking the right step to allay the concerns expressed by many foreign regulatory authorities.

I am somewhat concerned that the Proposed Interpretative Statement does not address one important issue. Specifically, the Proposed Interpretative Statement would not provide foreign regulatory authorities with access to swaps data if those authorities had not yet finalized their regulations. In order to better understand the public's view on this issue, I have added a question seeking comment on how the timing and implementation of foreign jurisdictions' regulatory regimes should affect the Commission's final interpretation.

Lastly, I am pleased that this Proposed Interpretative Statement is based on principles of international harmonization and comity. The Commission should continue to consult with foreign regulatory authorities in a manner consistent with international agreements regarding the registration of swap data repositories and the sharing of swaps data. In my view, these principles should establish the foundation of the Commission's forthcoming rulemaking concerning the extraterritorial application of the Dodd-Frank Act to foreign-based entities. Several foreign jurisdictions are in the process of finalizing new rules for the regulation of swaps and it is important that those rules provide a level and competitive playing field for U.S. firms as well.

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concludes that the direct electronic access provisions of CEA section 21(c)(4) apply only to such data that the SDR is required to accept under section 21(c)(1), which is further defined by part 45 of the Commission's regulations. In this respect, the Commission concludes that its direct electronic access applies only to such data reported pursuant to section 21 and Commission regulations promulgated thereunder.

[35] As noted above, CEA section 8(e) allows the Commission to share confidential information in its possession obtained in connection with the administration of the CEA with ''any department or agency of the Government of the United States'' or with any foreign futures authority or a department, central bank or ministry, or agency of a foreign government or political subdivision thereof, acting within the scope of its jurisdiction. The Commission acknowledges the difficulty that registered SDRs may face in determining what data or reporting falls within the jurisdiction of a regulatory authority. In this regard, the Commission is considering a separate release regarding section 2(i) of the CEA.

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## 18 CFR Part 40

**[Docket No. RM12–1–000]**

## Transmission Planning Reliability Standards

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization, petitions for the approval of modified Transmission Planning Reliability Standard, TPL–001–2 (Transmission System Planning Performance Requirements), which combines four currently effective TPL Reliability Standards, TPL–001–1, TPL–002–1b, TPL–003–1a, and TPL–004–1, into a single standard. NERC also requests retirement of the currently-effective TPL standards. Pursuant to section 215 of the Federal Power Act, the Federal Energy Regulatory Commission proposes to remand proposed Reliability Standard, TPL–001–2. The proposed Reliability Standard includes a provision that would allow a transmission planner to plan for non-consequential load loss following a single contingency provided that the plan is documented and vetted in an open and transparent stakeholder process. The Commission believes that, with the inclusion of this provision, proposed TPL–001–2 does not meet the statutory criteria for approval.

**DATES:** Comments are due July 6, 2012.

**ADDRESSES:** You may submit comments, identified by docket number by any of the following methods:

- *Agency Web Site: http://ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

**FOR FURTHER INFORMATION CONTACT:** Eugene Blick (Technical Information), Office of Electric Reliability, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8066, *Eugene.Blick@ferc.gov.*

Robert T. Stroh (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8473, *Robert.Stroh@ferc.gov.*

**SUPPLEMENTARY INFORMATION:**

**139 FERC ¶ 61,059**

**Notice of Proposed Rulemaking**

*April 19, 2012*

1. The North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization (ERO), petitions for the approval of Reliability Standard, TPL–001–2 (Transmission System Planning Performance Requirements), which combines four currently effective TPL Reliability Standards, TPL–001–1, TPL–002–1b, TPL–003–1a, and TPL–004–1, into a single standard. NERC also requests retirement of the currently effective TPL standards. Pursuant to section 215(d) of the Federal Power Act (FPA), the Federal Energy Regulatory Commission (FERC) proposes to remand proposed Reliability Standard, TPL–001–2. The proposed Reliability Standard includes a provision in Table 1 (Steady State and Stability Performance Extreme Events), footnote 12 that would allow a transmission planner to plan for ''non-consequential load loss,'' i.e., load shedding, following a single contingency provided that the plan is documented and alternatives are considered and subject to review in an open and transparent stakeholder process. As discussed below, the Commission believes that this provision is vague and unenforceable because it does not adequately define the circumstance in which an entity can plan for non-consequential load loss following a single contingency. Accordingly, the Commission proposes to find that, with the inclusion of this provision, proposed TPL–001–2 does not meet the statutory criteria for approval that a mandatory Reliability Standard must be just, reasonable, not unduly discriminatory or preferential, and in the public interest.

2. NERC states that proposed Reliability Standard TPL–001–2 introduces significant revisions and improvements to the Transmission Planning Reliability Standards, including increased specificity of data required for modeling conditions, and requires planners to address the impact of the unavailability of long lead-time critical equipment in a manner consistent with the entity's spare equipment strategy.[1] Further, according to NERC, the proposed Reliability Standard addresses twenty-seven Commission directives set forth in Order No. 693 and subsequent Commission orders.[2] We agree with NERC that proposed TPL–001–2 includes specific improvements over the currently effective Transmission Planning Reliability Standards and, as discussed below, is responsive to certain Commission directives. However, the provision in the proposed Reliability Standard allowing for transmission planners to plan for non-consequential load loss following a single contingency without adequate safeguards undermines the potential benefits the proposed Reliability Standard may provide. Section 215(d)(4) requires that the Commission remand to the ERO for further consideration a Reliability Standard ''that the Commission disapproves in whole *or in part.*'' [3] Thus, notwithstanding improvements contained in other provisions of proposed Reliability Standard TPL–001–2, our concerns regarding the stakeholder process set forth in Table 1, footnote 12 provides us no option other than to propose to remand the entire Reliability Standard.

3. We are concurrently issuing a Final Rule in Docket No. RM11–18–000 that remands a related Reliability Standard, TPL–002–0b, which contains the same objectionable stakeholder process provision in Table 1, footnote 'b'.[4] In the Final Rule in Docket No. RM11–18–000, the Commission urges NERC to employ its Expedited Reliability Standards Development Process to timely develop a modified provision regarding planned shedding of non-consequential load loss that satisfies the relevant Commission's directives in Order No. 693 and the subsequent orders. A rapid resolution of this one matter will allow the industry, NERC and the Commission to go forward with the consideration of other improvements contained in proposed Reliability Standard TPL–001–2.

### I. Background

4. Section 215 of the FPA requires a Commission-certified ERO to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Approved Reliability Standards are enforced by the ERO, subject to Commission oversight, or by the Commission independently.

5. Pursuant to section 215 of the FPA, the Commission established a process to

[1] NERC Petition at 4.

[2] *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g,* Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[3] 16 U.S.C. 824o(d)(4) (2006) (emphasis added).

[4] *Transmission Planning Reliability Standards,* Order No. 762, 139 FERC ¶ 61,060 (2012).

select and certify an ERO [5] and, subsequently, certified NERC as the ERO.[6] On March 16, 2007, the Commission issued Order No. 693, approving 83 of the 107 Reliability Standards filed by NERC, including the existing TPL Reliability Standards. In addition, pursuant to section 215(d)(5) of the FPA,[7] the Commission directed NERC to develop modifications to 56 of the 83 approved Reliability Standards, including the TPL Reliability Standards.[8]

*A. Transmission Planning (TPL) Reliability Standards and Order No. 693 Directives*

6. The currently-effective TPL Reliability Standards consists of four approved standards and are intended to ensure that the transmission system is planned and designed to meet an appropriate and specific set of reliability criteria. Transmission planning is a process that involves a number of stages including developing a model of the Bulk-Power System, using this model to assess the performance of the system for a range of operating conditions and contingencies, determining those operating conditions and contingencies that have an undesirable reliability impact, identifying the nature of potential options, and developing and evaluating a range of solutions and selecting the preferred solution, taking into account the time needed to place the solution in service.

7. In Order No. 693, the Commission accepted the Version 0 TPL Reliability Standards and directed NERC, pursuant to FPA section 215(d)(5), to develop modifications to TPL–001–0 through TPL–004–0 through the Reliability Standards development process. In addition, the Commission neither approved nor remanded two other planning Reliability Standards, TPL–005–0 and TPL–006–0, as these two Reliability Standards applied only to regional reliability organizations.[9] The Commission encouraged the ERO to monitor a series of technical conferences and regional meetings to obtain industry input to achieve the goal of regional planning and use the results as input to the standards development process to revise TPL–005–0 to address regional planning and related processes.[10]

8. With regard to Reliability Standard TPL–002–0b, Table 1, footnote 'b', the Commission directed NERC to clarify footnote 'b' regarding the loss of non-consequential load for a single contingency event. In a March 18, 2010 order, the Commission directed NERC to submit a modification to footnote 'b' responsive to the Commission's directive in Order No. 693, by June 30, 2010.[11] In a June 11, 2010 order, the Commission granted partial clarification to NERC and extended the compliance deadline until March 31, 2011.[12]

*B. RM11–18–000 Proposed Remand of Footnote 'b'—Version 1*

9. In response to the March 2010 and June 2010 Orders, on March 31, 2011, NERC submitted proposed TPL–002–1 (Version 1), which proposed to modify footnote 'b' to permit planned interruption of Firm Demand when documented and subject to an open stakeholder process. On October 20, 2011, the Commission issued a Notice of Proposed Rulemaking that proposed to remand to NERC the proposed modification to footnote 'b' because it does not adequately clarify or define the circumstances in which an entity can plan to use interruption of Firm Demand as a mitigation plan to resolve a single contingency.[13] The Commission stated that the procedural and substantive parameters of NERC's proposal are too undefined to provide assurances that the process will be effective in determining when it is appropriate to plan for interrupting Firm Demand, do not contain NERC-defined criteria on circumstances to determine when an exception for planned interruption of Firm Demand is permissible, and could result in inconsistent results in implementation. In the Final Rule issued concurrently with the NOPR in the immediate proceeding, the Commission remanded proposed Reliability Standard TPL–002–0b.

*C. NERC's Petition for Approval of TPL–001–2*

10. On October 19, 2011, NERC filed a petition seeking approval of Reliability Standard TPL–001–2, the associated implementation plan and Violation Risk Factors (VRFs) and Violation Severity Levels (VSLs), as well as five new definitions to be added to the NERC Glossary of Terms (Version 2). NERC also seeks approval of the retirement of the following four Reliability Standards: TPL–001–1 (System Performance Under Normal (No Contingency) Conditions (Category A)); TPL–002–1b (System Performance Following Loss of a Single Bulk Electric System (BES) Element (Category B)); TPL–003–1a (System Performance Following Loss of Two or More BES Elements (Category C)); and TPL–004–1 (System Performance Following Extreme Events Resulting in the Loss of Two or More Bulk Electric System Elements (Category D)). In addition, NERC requests to withdraw two pending Reliability Standards: TPL–005–0 (Regional and Interregional Self-Assessment Reliability Reports) and TPL–006–0.1 (Data from the Regional Reliability Organization Needed to Assess Reliability).

11. The Version 2 standard also includes language similar to NERC's Version 1 March 31, 2011, proposal to revise and clarify footnote 'b' of Table 1 applicable in four currently-effective TPL Reliability Standards ''in regard to non-consequential firm load loss in the event of a single contingency.'' [14] The proposed Reliability Standard TPL–001–2 (Version 2) expands upon NERC's proposed footnote 'b' (Version 1) and as a result, Version 2 replaces in its entirety the Version 1 footnote 'b.' In creating TPL–001–2, the proposed footnote 'b' in Version 1 was modified slightly and carried over as Steady State & Stability Performance Footnotes 9 and 12 in Version 2. In other words, footnote 'b' in Version 1 has been divided into two footnotes in Version 2, and the subject of the concerns raised by the Commission with respect to the Version 1 footnote 'b' are now contained in footnote 12 of Version 2. Footnote 12 in Version 2 is in all material respects the same as the portion of footnote 'b' in Version 1 that is the subject of the Final Rule issued today in Docket No. RM11–18–000.

*D. Proposed Reliability Standard*

12. As proposed by NERC, TPL–001–2 includes eight requirements and Table 1, summarized as follows:

[5] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, order on reh'g, Order No. 672–A, FERC Stats. & Regs. ¶ 31,212 (2006).

[6] *North American Electric Reliability Corp., 116 FERC ¶ 61,062, order on reh'g and compliance,* 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa, Inc. v. FERC*, 564 F.3d 1342 (DC Cir. 2009).

[7] 16 U.S.C. 824o(d)(5).

[8] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at PP 1691–1845.

[9] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at PP 1840, 1845. The currently-effective versions of the TPL Reliability Standards are as follows: TPL–001–0.1, TPL–002–0b, TPL–003–0a, and TPL–004–0.

[10] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1841.

[11] *Mandatory Reliability Standards for the Bulk Power System,* 130 FERC ¶ 61,200 (2010) (March 2010 Order).

[12] *Mandatory Reliability Standards for the Bulk Power System,* 131 FERC ¶ 61,231 (2010) (June 2010 Order).

[13] *Transmission Planning Reliability Standards,* 137 FERC ¶ 61,077 (2011).

[14] NERC Petition at 11.

*Requirement R1:* Requires the transmission planner and planning coordinator to maintain system models and provides a specific list of items required for the system models and that the models represent projected system conditions. The planner is required to model the items that are variable, such as load and generation dispatch, based specifically on the expected system conditions.

*Requirement R2:* Requires each transmission planner and planning coordinator to prepare an annual planning assessment of its portion of the bulk electric system and must use current or qualified past studies, document assumptions, and document summarized results of the steady state analyses, short circuit analyses, and stability analyses. Requirement R2, Part 2.1.3 requires the planner to assess system performance utilizing a current annual study or qualified past study for each known outage with a duration of at least six months for certain events listed in Table 1, P1. NERC states that this requirement ensures planners evaluate every known outage with known duration of six months or more, even if the known outage is not within one of the study years selected by the planner. NERC states that the requirements and parts of proposed TPL–001–2 provide for what a valid study must entail, timeframes for use of past studies, minimum conditions, what needs to be included in the model, and what performance must be achieved. It also clarifies that qualified past studies can be utilized in the analysis while tightly defining the qualifications for those studies. The use of qualified past studies allows an entity to continue to use validated studies to complete its assessment. Requirement R2 includes a new part (2.7.3) that allows transmission planners and planning coordinators to utilize Non-Consequential Load Loss to meet performance requirements if the applicable entities are unable to complete a Corrective Action Plan due to circumstances beyond their control.

*Requirements R3 and R4:* Requirement R3 describes the requirements for steady state studies and Requirement R4 explains the requirements for stability studies. Requirement R3 and Requirement R4 also require that simulations duplicate what will occur in an actual power system based on the expected performance of the protection systems. These requirements are intended to ensure that if a protection system is designed to remove multiple elements from service for an event that the simulation will be run with all of those elements removed from service. Requirement R3 and Requirement R4 also include new parts that require the planners to conduct an evaluation of possible actions designed to reduce the likelihood or the consequences of extreme events that cause cascading.

*Requirement R5:* Requirement R5 deals with voltage criteria and voltage performance. NERC proposes in Requirement R5 that each transmission planner and planning coordinator must have criteria for acceptable system steady state voltage limits, post-contingency voltage deviations, and the transient voltage response for its system. For transient voltage response the criteria must specify a low-voltage level and a maximum length of time that transient voltages may remain below that level. This requirement will establish more robust transmission planning for organizations and greater consistency as these voltage criteria are shared.

*Requirement R6:* Specifies that an entity must define and document the criteria or methodology used to identify system instability for conditions such as cascading, voltage instability, or uncontrolled islanding within its planning assessment.

*Requirement R7:* Mandates coordination of individual and joint responsibilities for the planning coordinator and the transmission planner which is intended to eliminate confusion regarding the responsibilities of the applicable entities and assures that all elements needed for regional and wide area studies are defined with a specific entity responsible for each element and that no gaps will exist in planning for the Bulk-Power System.

*Requirement R8:* Addresses the sharing of planning assessments with neighboring systems. The requirement ensures that information is shared with and input received from adjacent entities and other entities with a reliability related need that may be affected an entity's system planning.

*Table 1:* Similar to the existing TPL Standard, NERC's proposal contains a series of planning events and describes system performance requirements in Table 1 for a range of potential system contingencies required to be evaluated by the planner. Table 1 includes three parts: Steady State & Stability Performance Planning Events, Steady State & Stability Performance Extreme Events, and Steady State & Stability Performance Footnotes. Table 1 describes system performance requirements for a range of potential system contingencies required to be evaluated by the planner. The table categorizes the events as either ''planning events'' or ''extreme events.'' The proposed table lists seven Contingency planning events (P1 through P7) that require steady-state and stability analysis as well as five extreme event contingencies—three for steady-state and two for stability. The proposed table also includes a no contingency ''event'' labeled as P0 which requires steady state analysis. Footnote 12 of Table 1 provides:

> An objective of the planning process should be to minimize the likelihood and magnitude of Non-Consequential Load Loss following Contingency events. However, in limited circumstances Non-Consequential Load Loss may be needed to address BES performance requirements. When Non-Consequential Load Loss is utilized within the planning process to address BES performance requirements, such interruption is limited to circumstances where the Non-Consequential Load Loss is documented, including alternatives evaluated; and where the utilization of Non-Consequential Load Loss is subject to review in an open and transparent stakeholder process that includes addressing stakeholder comments.[15]

## II. Discussion

13. The Commission proposes to remand proposed Reliability Standard TPL–001–2. The proposed footnote 12 included as part of Reliability Standard TPL–001–2, which is in all material respects the same as the Version 1 footnote 'b' proposal described in Docket No. RM11–18–000, is unjust and unreasonable, unduly discriminatory or preferential, and not in the public interest. Although there are many improvements in the proposed TPL–001–2, the presence of footnote 12 in proposed Reliability Standard TPL–001–2 requires that the Commission remand the entire proposed Reliability Standard.[16]

14. As described in the Final Rule in Docket No. RM11–18–000, the Commission believes that NERC's footnote 'b' proposal (footnote 12 in this NOPR proceeding) does not clarify or define the circumstances in which an entity can plan to interrupt Non-Consequential Load Loss for a single contingency. The Commission is concerned that footnote 12 is inadequate and fails to address the Commission's concerns for three reasons. First, proposed footnote 12 lacks adequate parameters. Second, the NERC proposal leaves undefined the circumstances in

[15] NERC Petition at 12. In NERC's proposal in Docket No. RM11–18–000, Table 1, footnote 'b' planned load shed is called planned ''interruption of Firm Demand.'' In footnote 12, NERC has changed the term from ''interruption of Firm Demand'' to utilization of ''Non-Consequential Load Loss.''

[16] 16 U.S.C. 824o(d)(4).

which it is allowable to plan for Non-Consequential Load Loss to be utilized. The Commission believes that footnote 12 could function as a means to override the reliability objective and system performance requirements of the TPL Reliability Standard without any technical or other criteria specified to determine when planning to use Non-Consequential Load Loss to meet single contingency performance requirements would be allowable.[17] While NERC expects that such determinations will be made in a stakeholder process, this provides no assurance that such a process will use technically sound means of approving or denying exceptions.[18] Third, while the Commission recognizes that some variation among regions or entities is reasonable given varying grid topography and other considerations, there are no technical criteria to determine whether varied results are arbitrary or based on meaningful distinctions.[19] The Commission, thus, concludes that NERC's proposal lacks safeguards to ensure against inconsistent results and arbitrary determinations to allow for the planned interruption of load shed.

15. While we propose to remand Reliability Standard TPL–001–2 because of footnote 12, the Commission sees improvements to the balance of the proposed Reliability Standard. The Commission recognizes the level of complexity and substantial revision that NERC undertook to consolidate the requirements in the four currently-effective TPL Reliability Standards into one standard, and that effort has yielded improvements relative to the current set of standards. The Commission, however, seeks comments from the ERO and other interested persons regarding the following important reliability issues to ensure that the proposed Reliability Standard adequately maintains reliability and that the directives have been met: (a) Planned Maintenance Outages, (b) Violation Risk Factors, (c) Protection System Failures versus Relay Failures, (d) Assessment of Backup or Redundant Protection Systems, (e) Single Line to Ground Faults, and (f) Order No. 693 Directives.

*A. Planned Maintenance Outages*

16. NERC proposed new language in TPL–001–2, Requirement R1 to remove an ambiguity in the current standard concerning what the planner needs to include in the specific studies. It also requires the planner to evaluate six-month or longer duration outages within its system. NERC states that while Requirement R1.3.12 of the currently-effective TPL–002–0b, includes planned outages (including maintenance outages) in the planning studies and requires simulations at the demands levels for which the planned outages are performed, it is not appropriate to have the planner select specific planned outages for inclusion in their studies. Consequently, NERC proposes a bright-line test to determine whether an outage should be included in the system models. Specifically, NERC proposes that Requirement R1, Part 1.1.2 mandate that the system models ''shall represent * * * known outage(s) of generation or Transmission Facility(ies) with a duration of at least six months.'' [20] NERC determined that, in the planning horizon, a six-month or longer outage duration would necessarily extend over a seasonal peak load period and should be included in the planning models. Therefore, NERC states that the specific elements selected to be evaluated are selected by the transmission planner or planning coordinator and must be acceptable to the associated regional reliability organization.[21]

17. In Order No. 693 the Commission stated that in the currently-effective TPL Reliability Standards a planner must demonstrate through a valid assessment that the transmission system performance requirements can be met. The TPL Reliability Standards require that planned outages of transmission equipment must be considered for those demand levels for which planned outages are performed. By modeling the planned transmission equipment outages and through the simulation of various contingency events, a planner must demonstrate that the system can be operated to supply projected customer demands for all maintenance outage conditions and that amongst other things, cascading or system instability will not occur.[22]

18. For example, PJM has recently evaluated a Doubs-Mt. Storm project which includes the replacement of structures that have deteriorated beyond repair, which has resulted in the need to rebuild the transmission circuit. PJM indicates the maintenance outages will be scheduled in four month blocks, September—December and February—May, starting in 2011 through 2015. PJM's analysis indicates that a list of facilities has been determined that should not be scheduled out concurrently with the Doubs-Mt. Storm project. Furthermore, PJM analysis indicated that if any outage on this list of identified facilities must be taken out of service, every effort shall be made to align them with the lightest load period possible.[23] Based on NERC's proposed Requirement R1, Part 1.1.2 and the Doubs-Mt. Storm example, it appears that this type of planned maintenance outage would be excluded from future planning assessments and its potential impact to bulk electric system reliability would be unknown because the outage duration in this example is less than six months.

19. The Commission seeks comment from the ERO and interested persons whether the six month threshold would materially change the number of planned outages as compared to the current standard. The Commission also seeks comment on whether the threshold would exclude almost all planned outages from future planning assessments, such as nuclear plant refueling, large fossil and hydro generating station maintenance, spring and fall transmission construction projects and items indentified in correction actions plans of planning assessments including neighboring corrective action plans. The Commission also seeks comment on what alternative, whether based on outage duration shorter than six months or some other method, such as planners' accounting for planned maintenance outages of high capacity lines, critical transformers, or nuclear outages during non-peak load periods in their assessments, captures the appropriate number of planned outages and types of planned outages to ensure that the Bulk-Power System can be operated to meet system performance requirements during high maintenance periods like the spring and fall seasons. In addition to seasonal peaks, there have been significant system incidents which occur because of unusual weather events during non-seasonal peak periods. The Commission seeks comment on whether a six month outage window would sufficiently capture these events or if they would not be addressed in the proposed planning process. In addition, with respect to protection system maintenance, currently-effective Reliability Standard TPL–002–0, Requirement R1.3.12 requires the planner to ''[i]nclude the planned (including maintenance) outage of any bulk electric equipment (including

[17] Order No. 762, 139 FERC ¶ 61,160 at P 13.

[18] *Id.* P 14.

[19] June 2010 Order, 131 FERC ¶ 61,231 at P 21.

[20] NERC Petition at 35–36.

[21] *Id.*

[22] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at PP 1772, 1799, 1827.

[23] *See http://www.pjm.com/~/media/committees-groups/committees/pc/20110203/20110203-item-12-doubs-mt-storm-impact-summary.ashx.*

protection systems or their components) at those demand levels for which planned (including maintenance) outages are performed.'' [24] NERC did not carry over this language because protection system maintenance or other outages are not anticipated to last six months. The Commission, however, believes that it is critical to plan the system so that a protection system can be removed for maintenance and still be operated reliably. Therefore, the Commission seeks comment on its belief that protection systems are necessary to be included as a type of planned outage.

*B. Violation Risk Factors*

1. VRF for Proposed TPL–001–2, Requirement R1 VRF

20. NERC assigned a ''Medium'' VRF for proposed Reliability Standard TPL–001–2, Requirement R1 and its sub-requirements. NERC states each primary requirement in the proposed Reliability Standard TPL–001–2 is assigned a VRF considering the NERC guidelines and consistent with NERC's August 10, 2009 informational filing.[25] NERC maintains that Requirements R1.3.5, R1.3.7, R1.3.8, and R1.3.9 of the currently-effective Reliability Standard TPL–001–0.1 carry a VRF of ''Medium'' and are similar in purpose and effect to proposed Reliability Standard TPL–001–2, Requirement R1. NERC states that the Requirements are similar because they refer to models that include firm transfers, existing and planned facilities, and reactive power requirements, and they refer to the Table 1 P0 condition. NERC believes that a ''medium VRF for Requirement R1 is consistent with past Commission guidance.'' [26]

21. NERC stated in its filing that ''Requirement R1 of the proposed TPL–001–2 explicitly requires the Transmission Planner and Planning Coordinator to maintain System models.'' [27] The Commission believes that when the planning coordinator or the transmission planner are maintaining the system models to reflect the normal system condition, if the system models are not properly modeled or maintained, the analysis required in the Reliability Standard that uses the models in Requirement R1, such as Category P0 as the normal System condition in Table 1, may lose their validity and ''could, under emergency, abnormal, or restorative conditions anticipated by the preparations, directly cause or contribute to Bulk-Power System instability, separation, or a cascading sequence of failures, or could place the Bulk-Power System at an unacceptable risk of instability, separation, or cascading failures, or could hinder restoration to a normal condition.'' [28]

22. Furthermore, Requirement R1 of the proposed Reliability Standard TPL–001–2 explicitly addresses the establishment of Category P0 as the normal system condition in Table 1, which creates the model of the normal system as the ''Initial Condition'' prior to any contingency.[29] Requirement R1 of the currently-effective Reliability Standard TPL–001–0, which has a VRF of ''High,'' explicitly establishes Category A as the normal system (all facilities in service) in Table 1, which also creates the model of the normal system prior to any contingency. The Commission believes that Requirement R1 of proposed Reliability Standard TPL–001–2 and Requirement 1 of currently-effective TPL–001–0 both establish the normal system planning model that serves as the foundation for all other conditions and contingencies that are required to be studied and evaluated in a planning assessment.

23. Consistent with Guideline 3 of the Commission's VRF Guidelines, the Commission ''expects the assignment of Violation Risk Factors corresponding to Requirements that address similar reliability goals to be treated comparably.'' [30] The Commission seeks comment on why Requirement R1 of proposed Reliability Standard TPL–001–2 carries a VRF of ''Medium'' while Requirement R1 of the currently-effective Reliability Standard TPL–001–0 carries a VRF of ''High.''

2. VRF for Proposed TPL–001–2, Requirement R6

24. NERC proposes to assign a ''Low'' VRF for Requirement R6 from the proposed Reliability Standard TPL–001–2 because ''failure to have established criteria for determining System instability is an administrative requirement affecting a planning time frame.'' [31] NERC explains that Requirement R6 is a new requirement and that violations would not be expected to adversely affect the electrical state or capability of the bulk electric system.

25. Requirement R6 requires planning coordinators and transmission planners to define and document the criteria or methodology used in their analyses to identify system instability for conditions such as cascading, voltage instability or uncontrolled islanding. The Commission recognizes that documenting criteria or methodology is an administrative act. However, defining the criteria or methodology to be used is not an administrative act. If the criteria or methodology used by planning coordinators and transmission planners are not defined properly, the analysis based on this criteria or methodology could lose its validity and ''could, under emergency, abnormal, or restorative conditions anticipated by the preparations, directly cause or contribute to Bulk-Power System instability, separation, or a cascading sequence of failures, or could place the Bulk-Power System at an unacceptable risk of instability, separation, or cascading failures, or could hinder restoration to a normal condition.'' [32]

26. Requirement R6 co-mingles a higher reliability objective (defining criteria or methodology) with a lower reliability objective (documentation). Consistent with Guideline 5 of the Commission's VRF Guidelines, the Commission seeks to ensure that the assignment of Violation Risk Factors corresponding to co-mingled Requirements reflect the higher reliability objective of the co-mingled requirement.[33] The Commission seeks clarification from the ERO why the VRF level assigned to Requirement R6 is ''Low'' since it is appears that Requirement R6 requires more than a purely administrative task.

*C. Protection System Failures Versus Relay Failures*

27. NERC states that its modification to the planning contingency categories in Table 1 of the proposed standard is intended to add clarity and consistency regarding how a delayed fault clearing will be modeled in planning studies. NERC states that the basic elements of any protection system design involve inputs (i.e., current and D/C and A/C voltage) to protective relays and outputs (i.e., trip signals, close signals, and

[24] Reliability Standard TPL–002–0, Requirement R1.3.12.

[25] Informational Filing of the North American Electric Reliability Corporation Regarding the Assignment of Violation Risk Factors and Violation Severity Levels, Docket Nos. RM08–11–000, RR08–4–000, RR07–9–000, and RR07–10–000 (August 10, 2009).

[26] NERC Petition at Exhibit C, Table 1.

[27] NERC Petition at 34.

[28] *North American Electric Reliability Corp., order on violation risk factors,* 119 FERC ¶ 61,145, at P 9 (2007), *order on reh'g and compliance filing,* 120 FERC ¶ 61,145 (2007).

[29] Proposed Reliability Standard TPL–001–2, Table 1.

[30] *North American Electric Reliability Corp., order on violation risk factors,* 119 FERC ¶ 61,145, at P 25 (2007), *order on reh'g and compliance filing,* 120 FERC ¶ 61,145 (2007).

[31] NERC Petition, Exhibit C, at 110.

[32] *North American Electric Reliability Corp., order on violation risk factors,* 119 FERC ¶ 61,145 at P 9.

[33] *Id.* P 32.

alarms) from protective relays and that reliability issues associated with improper clearing of a fault on the bulk electric system can result from the failure of hundreds of individual protection system components in a substation. However, NERC believes that while the population of components that could fail and result in improper clearing is large, that population can be reduced dramatically by eliminating those components which share failure modes with other components. NERC states that the critical components in protection systems are the protective relays themselves, and a failure of a non-redundant protective relay will often result in undesired consequences during a fault. According to NERC, other protection system components related to the protective relay could fail and lead to a bulk electric system issue, but the event that would be studied is identical, from both transient and steady state perspectives, to the event resulting from a protective relay failure if an adequate population of protective relays is considered.[34]

28. In the currently-effective TPL Reliability Standards, Table 1 contingencies address the initiating event and contingency of a single line to ground (SLG) fault with delayed clearing (stuck breaker or protection system failure) for a generator, transformer, transmission circuit and bus section. For this initiating event and set of contingencies, the planner must demonstrate that Table 1 system performance criteria can be met.[35]

29. Currently-effective Reliability Standard TPL–003–0, Requirement R1.3.1 states that current or past study and/or system simulation testing ''[b]e performed and evaluated only for those Category C contingencies that would produce the more severe system results or impacts.'' [36] Referring to Table 1, Category C6–C9, the initiating event and contingency is described as ''SLG Fault, with Delayed Clearing (stuck breaker or protection system failure).'' [37]

30. Requirement R1.3.1 states that in the study and simulation of a protection system failure, the planner should assess the contingencies that produce the more severe system results.[38] If the contingency is a protection system failure, delayed clearing is described as a fault due to the failure of any protection system component such as a relay, circuit breaker, or current transformer, and not because of an intentional design delay.[39]

31. The Commission believes that based on various protection system as-built designs, the planner will have to choose which protection system component failure would have the most significant impact on the Bulk-Power System because as-built designs are not standardized and the most critical component failure may not always be the relay. For example, if a protection system design used one set of fuses to supply power to both the primary and breaker failure relays, failure of one fuse would be more severe than failure of either one of the relays. Similar dependencies can occur in specific designs in the implementation of microprocessor installations. As another example, if a protection system designed includes a shared voltage or current sensing device that provides input to relays for both the primary and backup protection systems, failure of this voltage sensing device would be more severe than failure of either one of the relays.

32. As a result, the planner's selection of a protection system component failure may be influenced by the protection system as-built design. If one protection system component was an integral component of primary protection and breaker failure protection, then it is possible that the loss of that one component would produce the more severe system impact. If, in this example, the protection system component failure was not a relay component, as described in Category P5 of the proposed TPL Standard, it appears that this more severe contingency (loss of both the primary protection and breaker failure protection systems due to the loss of one protection system component) would not be assessed under the proposed TPL Reliability Standard.

33. The Commission seeks comments on whether the proposed TPL Reliability Standard, in the provisions pertaining to study of multiple contingencies, limits the planners' assessment of a protection system failure because it only includes the contingency of a faulty relay component. The Commission also seeks comments on whether, based on protection system as-built designs, the relay may not always be the larger contingency, and how the loss of protection system components that may be integral to multiple protection systems impacts reliability.

*D. Assessment of Backup or Redundant Protection Systems*

34. NERC states that proposed Reliability Standard TPL–001–2, Requirement R3, Part 3.3.1 and Requirement R4, Part 4.3.1 require that simulations faithfully duplicate what will happen in an actual power system based on the expected performance of the protection systems.[40] According to NERC, these requirements ensure that if a protection system is designed ''to remove multiple Elements from service for an event that the simulation will be run with all of those Elements removed from service.'' [41] This proposal is intended to instill event-based analysis over simple element analysis which will provide for more accurate simulations.

35. The current TPL Reliability Standards state that a planner must include the effects of existing and planned protection systems, including any backup or redundant systems in its planning assessment.[42] Specifically, Reliability Standard TPL–003–0, Requirement R1.3.10 requires the planner to ''[i]nclude the effects of existing and planned protection systems, including any backup or redundant systems.'' [43] For this requirement, the planner must include the effects all protection systems, including backup or redundant protection systems.

36. NERC states that Reliability Standard TPL–001–2, Requirement R3, Part 3.3.1 and Requirement R4, Part 4.3.1 require the planner to ''[s]imulate the removal of all elements that the Protection System and other automatic controls are expected to disconnect for each Contingency without operator intervention.'' The proposed NERC provision, however, does not explicitly refer to ''backup or redundant systems'' as in the currently effective TPL standards. The Commission seeks clarification from the ERO whether the proposed Requirements address all protection systems, including backup and redundant protection systems that can have an impact on the performance of the bulk electric system.

*E. P5 Single Line to Ground Faults*

37. Table 1 of the proposed Reliability Standard TPL–001–2 identifies the

[34] NERC Petition at 48.

[35] Currently-effective Reliability Standard TPL–004–0, Categories C1–C4 address the same initiating event and set of contingencies as currently-effective TPL–003–0, Categories C6–C9, but the system performance criteria are different for TPL–003–0 versus TPL–004–0.

[36] Reliability Standard TPL–003–0a.

[37] Reliability Standard TPL–003–0a (Category C).

[38] Requirement R1.3.1 is included in TPL–002–0b, TPL–003–0a and TPL–004–0.

[39] Reliability Standard TPL–003–0, Table 1, footnote e.

[40] NERC Petition at 20.

[41] *Id.*

[42] *E.g.,* Reliability Standards TPL–003–0, R1.3.10 and TPL–004–0, R1.3.7.

[43] Reliability Standard TPL–003–0, R1.3.10 and TPL–004–0, Requirement R1.3.7.

initiating contingencies that must be evaluated to ensure that the planned system meets the performance requirements. These proposed modifications to Table 1 include changing the classification of the events, clarifying events and fault types, and removing the ambiguity of performance requirements. NERC states the proposed Reliability Standard TPL–001–2, Table 1, P5 events are limited to the Single Line to Ground (SLG) Fault type consistent with the comparable C6–C9 events from Table 1 in the currently-effective TPL Reliability Standards. NERC treats SLG and three phase faults as different events even if an SLG event evolves into a three phase fault.[44]

38. The proposed Reliability Standard TPL–001–2, Table 1 includes a column titled ''fault type,'' which contains the specific designation of the fault type such as SLG or three-phase faults. ''Fault type'' is described as a SLG or three-phase fault types that must be evaluated in stability simulations for the event described. For example, a SLG fault could evolve into a 3-phase fault, but the initiating fault is the SLG fault and the associated SLG performance criteria must be applied, not the three-phase performance criteria. The Commission seeks clarification from the ERO whether ''fault types'' in Table 1 of the proposed Reliability Standard refers to the initiating event or initiating fault for the contingency rather than the type of fault in to which the initiating fault may evolve and how the clarification is consistent with the simulations being representative of what will occur in real-time.

*F. Order No. 693 Directives*

39. While the Commission proposes to remand based on the presence of footnote 12, the balance of proposed Reliability Standard TPL–001–2 appears responsive to the Order No. 693 directives regarding the TPL Reliability Standards. The Commission, however, seeks clarification and comment on the following.

1. Peer Review of Planning Assessments

40. In Order No. 693, the Commission stated that it ''sees no reason why peer reviews should not be part of a Reliability Standard since TPL–001–0 through TPL–004–0 already include…a review of assessment by the associated regional reliability organization.'' [45]

The Commission also stated that because neighboring systems may be adversely impacted by other neighboring systems, such systems should be involved in determining and reviewing system conditions and contingencies to be assessed under the currently-effective TPL Standards.[46] Furthermore, the peer review provides for a neighboring entity to identify possible interdependent or adverse impacts on its neighboring systems and thus, provides for an early opportunity to provide input and coordinate plans.[47]

41. NERC states the proposed Reliability Standard does not include a ''peer review'' of planning assessments but instead includes ''an equally effective and efficient manner to provide for the appropriate sharing of information with neighboring systems'' with the incorporation of Requirement R3, Part 3.4.1, Requirement R4, Part 4.4.1, and Requirement R8.[48] Part 3.4.1 provides:

> The Planning Coordinator and Transmission Planner shall coordinate with adjacent Planning Coordinators and Transmission Planners to ensure that Contingencies on adjacent Systems which may impact their Systems are included in the Contingency list.[49]

NERC explains that ''an entity may always decline an offer to participate in a peer review even when they should participate'' and ''the distribution approach means that the entity will always receive the Planning Assessment.'' [50] NERC further states in ''the course of the continuing cycle of Planning Assessments, comments from other entities at the end of a planning cycle will be utilized at the beginning of the next cycle as the planner moves forward in time.'' [51]

42. The Commission seeks clarification on how the NERC proposal ensures the early input of peers into the planning assessments or any type of coordination amongst peers will occur. The Commission seeks comment on whether and how there is a sufficient level of evaluation and ability to provide feedback to the planners on the development and result of assessments. In addition, NERC states that that Requirement R8 ''ensures that information is shared with * * * adjacent entities'' which ''ensures * * * input received from adjacent entities.'' [52] The Commission also seeks comment on whether Requirement R8 requires input on the comments to be included in the results or the development of the Planning Assessments.

2. Spare Equipment Strategy

43. In Order No. 693, the Commission directed NERC to develop a modification ''to require assessments of outages of critical long lead-time equipment, consistent with the entity's spare equipment strategy.'' [53] In response, NERC developed proposed Requirement 2, Part 2.1.5 which addresses steady state conditions to determine system response when equipment is unavailable for prolonged periods of time. The studies must be performed for the P0, P1, and P2 categories in Table 1 ''under the condition that the system is expected to experience during the possible periods of unavailability of the long lead-time equipment.'' NERC states that ''[s]tability impacts related to outages of critical long lead-time equipment will not be addressed in a separated requirement but rather will be analyzed in the normal planning process.'' [54]

44. NERC's spare equipment strategy appears to have limited the strategy to steady state analysis (excluded stability analysis).[55] While including a spare equipment strategy in the proposed Reliability Standard is an improvement, the Commission seeks clarification as to why stability analysis conditions were excluded from the spare equipment strategy.

3. Controlled Load Interruption

45. In Order No. 693, the Commission directed the ERO to modify footnote (c) of Table 1 to the Reliability Standard TPL–003–0a to clarify the term ''controlled load interruption'' to ''ensure that third parties have access to the same options that the transmission owner uses to alleviate reliability constraints including those related to controlled load shedding.'' [56] NERC states in its petition that it excluded the term ''controlled load interruption'' in the proposed Reliability Standard TPL–001–2, but NERC does not explain the

[44] NERC Petition at 49. Three phase events in the existing TPL standards are shown in Table 1, D1–D4 and are retained in TPL–001–2, Table 1, Extreme Events.

[45] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1755.

[46] *Id.* P 1750.

[47] *Id.* P 1754.

[48] NERC Petition at 21.

[49] Proposed Reliability Standard, TPL–001–2, Requirement R3, Part 3.3.1. Part 4.4.1 is in all material respects the same as Part 3.3.1.

[50] NERC Petition at 22. Requirement R8 requires distribution to adjacent planning coordinators and transmission planners within 90 days and to others with a reliability related need that submits a request within 30 days of receiving such a request.

[51] NERC Petition at 22.

[52] Id. at 44.

[53] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1786.

[54] NERC Petition at 25.

[55] Proposed Reliability Standard TPL–001–2, Requirement R 2.1.5.

[56] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1818.

reason for its exclusion.[57] NERC added the term ''Non-Consequential Load Loss'' to the proposed Reliability Standard TPL–001–2, Table 1 and defined ''Non-Consequential Load Loss'' as: Non-Interruptible Load loss that does not include: (1) Consequential Load Loss, (2) the response of voltage sensitive Load, or (3) Load that is disconnected from the System by end-user equipment.[58] In addition, NERC added a new Requirement R2.1.4 for the Near-Term Transmission Planning Horizon portion of steady-state analysis that includes ''Controllable Loads'' as one of the conditions the planning assessment must vary in the sensitivity analysis for system peak load for year one or year two, and for year five and for system off-peak load for one of the five years.

46. The term ''controlled load interruption'' is found in footnote (c) which is applicable to ''Loss of Demand or Curtailed Firm Transfers'' in Table 1 of the existing TPL Reliability Standards. The term ''Loss of Demand or Curtailed Firm Transfers'' for controlled load interruptions in Table 1 of the current TPL Standards appears to be applicable to ''Non-Consequential Load Loss Allowed'' in Table 1 of the proposed TPL Standard. The Commission seeks clarification from the ERO if third-parties have access to the same options that the transmission owner has to alleviate reliability constraints including load shedding options for ''Controllable Loads'' in Requirement 2.1.4 and ''Non-Consequential Load Loss Allowed'' in Table 1 of the proposed Reliability Standard TPL–001–2.

4. Range of Extreme Events

47. In Order No. 693 the Commission directed the ERO to modify Reliability Standard TPL–004–0 to require that, in determining the range of the extreme events to be assessed, the contingency list of Category D would be expanded to include recent events such as hurricanes and ice storms. NERC's proposed Reliability Standard TPL–001–2 appropriately expands the list of extreme event examples in Table 1, but the list limits these items to the loss of two generating stations under Item No. 3a.[59]

48. The Commission seeks clarification from the ERO on conditioning extreme events on the loss of two generating stations.[60] The Commision understands that there are scenarios where an extreme event can impact more than two generation stations that might not be captured due to the ''two generation stations'' restriction in Item No. 3a. For example, within the Florida peninsula, depending on the location within the state, either two or three main gas pipelines supply the majority of the generation for the area. In this scenario, the loss of one of the gas pipelines would result in the loss of more than two generation stations. The Commission seeks clarification regarding whether this scenario is otherwise covered under the catch-all provision in Item No. 3b which states ''[o]ther events based upon operating experience that may result in wide area disturbances.''

5. Assessments and Documentation

49. The Commission seeks clarification from the ERO that planning assessments and associated documentation will include accurate representations of results on the bulk electric system with respect to the following.

a. Dynamic Load Models

50. In Order No. 693, the Commission directed ''the ERO to modify the Reliability Standard to require documentation of load models used in system studies and the supporting rationale for their use.'' [61] Proposed Reliability Standard TPL–001–2, Requirement 2.4, Part 2.4.1 requires a load model which represents the expected dynamic behavior of loads that could impact a study area, considering the behavior of induction motor loads. NERC states that this addition to the proposed standard addresses the specifics of the Order No. 693 directive that requires ''[d]ocument(ing) the load models used in system studies and the supporting rationale for their use.'' [62] Under the proposed Requirement R2, entities are required to document assumptions made in the planning assessments. The Commission seeks clarification on whether the documentation of the dynamic load models used in system studies and the supporting rationale for their use under Requirement 2.4, Part 2.4.1 will be included in the documented assumptions under Requirement R2.

b. Proxies To Simulate Cascade

51. In Order No. 693, the Commission observed that ''if an entity models overload relays, undervoltage relays, all remedial action schemes including those of neighboring systems and has a good load representation, then proxies are not required. However, due to modeling and simulation limitations this is often not the case and planners invariably use proxies.'' [63] Additionally, the Commission stated that sharing of proxies will improve knowledge and understanding and promote a more rigorous approach to analyzing cascading outages. Accordingly, the Commission directed the ERO to modify the Reliability Standard to require ''definition and documentation of proxies necessary to simulate cascading outages.'' [64]

52. NERC states that proposed Requirement R6 ''specifies that an entity must define and document the criteria or methodology used to identify system instability for conditions such as cascading, voltage instability, or uncontrolled islanding within its Planning Assessment.'' [65] NERC adds that this specificity in identifying these ''proxies'' is an important clarification in the proposed revised standard and ''will lead to greater transparency in the planner's evaluation techniques.'' [66] The Commission seeks clarification on whether Requirement R6 includes the documentation of proxies and that Requirement R8 includes the sharing of the documented proxies in the planning assessments.

c. Footnote 'a'

53. In Order No. 693 the Commission directed NERC to modify ''footnote (a) of Table 1 with regard to applicability of emergency rating and consistency of normal ratings and voltages with values obtained from other reliability standards.'' [67] NERC notes that proposed Table 1, header note 'e,' which states planned system adjustments must be executable within the time duration applicable to facility ratings, and header note 'f,' which states applicable facility ratings shall not be exceeded, meets this directive thereby replacing footnote 'a' in the current standard.

54. The Commission observes that the proposed standard applies header note 'e' to ''Steady State and Stability'' while header note 'f' is excluded from ''Stability'' and only applies to ''Steady

[57] NERC Petition at 28.

[58] In Order No. 693, the Commission explained that the term ''consequential load loss'' referred to ''the load that is directly served by the elements that are removed from service as a result of the contingency.'' Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1794 n.461.

[59] NERC Petition at 29–30.

[60] *Id.*

[61] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1789.

[62] NERC Petition at 26.

[63] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1819.

[64] *Id.* P 1820.

[65] NERC Petition at 43–44.

[66] *Id.*

[67] *Id.* at 24.

State'' studies. The Commission seeks clarification from the ERO regarding the rationale for excluding header note 'f' from ''Stability'' studies. Additionally, the Commission seeks clarification on which Reliability Standards the entities should utilize when obtaining the values to be used in their Planning Assessments. In addition, for Table 1, header notes 'e' and 'f,' the Commission seeks comment on whether the normal facility ratings align with, for example, FAC–008–1 and normal voltage ratings align with VAR–001–1. Furthermore, the Commission seeks clarification from the ERO whether facility ratings used in planning assessments align with other reliability standards such as NUC–001–2, BAL–001–0.1a and PRC Standards for UFLS and UVLS.

*G. Commission Proposal*

55. The Commission proposes to remand NERC's proposed TPL Reliability Standard. While much of the proposed Reliability Standard TPL–001–2 appears just, reasonable, not unduly discriminatory or preferential, and in the public interest, we find that footnote 12, allowing for transmission planners to plan for non-consequential load loss following a single contingency without adequate safeguards, undermines the potential benefits the proposed Reliability Standard may provide . This is consistent with the Commission's Final Rule in Docket No. RM11–18–000 remanding footnote 'b,' which is substantially the same as footnote 12. Thus, the Commission proposes to remand the proposed Reliability Standard TPL–001–2 to NERC.

## III. Information Collection Statement

56. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting and recordkeeping (collections of information) imposed by an agency.[68] The information contained here is also subject to review under section 3507(d) of the Paperwork Reduction Act of 1995.[69]

57. As stated above, the subject of this NOPR is NERC's proposed modifications to the TPL Reliability Standards. This NOPR proposes to remand the proposed revisions to NERC. By remanding the proposal, the applicable Reliability Standards and any information collection requirements are unchanged. Therefore, the Commission will submit this NOPR to OMB for informational purposes only.

58. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, email: *data.clearance@ferc.gov*, phone: (202) 502–8663, or fax: (202) 273–0873].

## IV. Regulatory Flexibility Act

59. The Regulatory Flexibility Act of 1980 (RFA)[70] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[71] The SBA has established a size standard for electric utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours.[72] The RFA is not implicated by this NOPR because the Commission is remanding the proposed TPL Reliability Standard and not proposing any modifications to the existing burden or reporting requirements. With no changes to the Reliability Standards as approved, the Commission certifies that this NOPR will not have a significant economic impact on a substantial number of small entities.

## V. Comment Procedures

60. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due 60 days from publication in the **Federal Register**. Comments must refer to Docket No. RM12–1–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

61. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

62. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

63. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

## VI. Document Availability

64. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington DC 20426.

65. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

66. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov*, or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission. Commissioner Norris is concurring in part with a separate statement attached.

**Kimberly D. Bose,**

*Secretary.*

Norris, Commissioner, *concurring in part:*

In today's order, the Commission proposes to remand proposed Transmission Planning Reliability Standard TPL–001–2 to NERC, based on the decision by the Commission to remand proposed TPL–002–0b in the concurrently-issued *Transmission Planning*

[68] 5 CFR 1320.11.

[69] 44 U.S.C. 3507(d).

[70] 5 U.S.C. 601–612.

[71] 13 CFR 121.201.

[72] *Id.*

*Reliability Standards.*[1] For the reasons articulated in my separate statement in Order No. 762, I agree with the decision here to remand proposed TPL–001–2, but I do not fully agree with the basis identified by the majority in their decision.

Thus, I respectfully concur in part.

John R. Norris,
*Commissioner*

[FR Doc. 2012–10943 Filed 5–4–12; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### 49 CFR Part 661

**[Docket No. FTA–2012–0009]**

### Notice of Proposed Buy America Waivers

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of proposed Buy America waivers and request for comments.

**SUMMARY:** The Federal Transit Administration (FTA) received several requests to waive its Buy America requirements for products used in ticket vending machines—the Mars Electronics International (MEI) Sodeco BNA57/542 Bill Handling Unit, and BNR3–XX, BNR4–XX and BNR5–XX Bank Note Recycler product; and the Nextek Corporation (Nextek) BV–6000AG (BV–6000) Currency Validator Tekpak. FTA seeks public comment before deciding whether to grant the requests.

**DATES:** Comments must be received by June 6, 2012. Late filed comments will be considered to the extent practicable.

**ADDRESSES:** Please submit your comments by only one of the following means, identifying your submissions by docket number FTA–2012–0009. All electronic submissions must be made to the U.S. Government electronic site at *www.regulations.gov.* Commenters should follow the instructions below for mailed and hand delivered comments.

(1) *Web site: www.regulations.gov.* Follow the instructions for submitting comments on the U.S. Government electronic docket site;

(2) *Fax:* (202) 493–2251;

(3) *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, Room W12–140, Washington DC, 20590–0001.

(4) *Hand Delivery:* Room W12–140 on the first floor of the West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

*Instructions:* All submissions must refer to the ''Federal Transit Administration'' and include docket number FTA–2012–0009. Due to security procedures in effect since October 2001, mail received through the U.S. Postal Service may be subject to delays. Parties making submissions responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any personal information therein, will be posted without change or alteration to *www.regulations.gov.* For More information, you may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or visit *www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Jayme L. Blakesley at (202) 366–0304 or *jayme.blakesley@dot.gov.*

**SUPPLMENTARY INFORMATION:** The purpose of this notice is to seek public comment on whether the Federal Transit Administration should continue to waive its Buy America requirements for two years for Mars Electronics International (MEI)'s Sodeco BNA57/542 Bill Handling Unit BNR3–XX, BNR4–XX and BNR5–XX Bank Note Recycler products, and the Nextek Corporation's (Nextek) BV–6000AG (BV–6000) Currency Validator Tekpak, or whether FTA should extend the non-shift approach adopted in its 2007 Final Rule (72 FR 53688, September 20, 2007) to the procurement of such devices.

#### Waiver Request: MEI Sodeco BNA57/542 Bill Handling Unit

MEI requested an extension of the Buy-America non-availability component waiver under CFR 661.7(g) for the MEI Sodeco BNA57/542 Bill Handling Units. The FTA granted the initial waiver for these products on July 21, 2000, and has extended the waiver periodically ever since, on December 10, 2003, November 12, 2004, October 20, 2006, and February 23, 2009.

Buy America requires, with few exceptions, that all steel, iron and manufactured goods used in FTA-funded projects be produced in the United States. One such exception is that of non-availability, that in some instances steel, iron, and goods produced in the United States are not produced in the United States in sufficient and reasonably available quantities or are not of a satisfactory quality. Therefore, Congress authorized FTA to waive the above requirement and allow, based on non-availability, the use in an FTA-funded project of steel, iron or manufactured goods produced outside the United States.

According to MEI, the Sodeco BNA57/542 Bill Handling Units includes a multiple bill escrow (up to 15 bills) that enables return of the customer's inserted bills in situations where the transaction is not complete. The unit has the ability to identify, validate and accept multiple note denominations (US $1, $5, $10, $20, $50, $100) utilizing all optical recognition, and allowing for the acceptance of bills in a face up or face down orientation. It also supports remote download, giving a transit agency the option of downloading new bill recognition software (bill variants) via network from one central location.

MEI's customers include the Washington Metropolitan Area Transit Authority (WMATA), New York City Transit (MTA), and the Bay Area Rapid Transit Authority (BART).

In 1999, to support its initial waiver request, MEI performed a market research study. It found no equivalent products manufactured within the United States. In preparation of the instant waiver request, MEI reviewed its earlier findings and compared them with the known providers of payment systems to the transit market. They found no US manufacturers of functionally equivalent products. Companies they identified who supply a similar product—GAO/Geiseke & Deviran (G&D), Toyocom, and Cashcode—all manufacture their products outside of the United States.

#### Waiver Request: MEI BNY3–XX & BNR5–XX Bank Note Recycler Products

In a letter dated February 28, 2011, MEI requested an extension of the Buy America non-availability component waiver under CFR 667.7(g) for BNY3–XX & BNR5–XX Bank Note Recycler products. The initial waiver was granted by FTA on October 20, 2008. The Bank Note Recycler (BNR) can accept and validate bank notes and pay them back out as change. The unit has the ability to identify, validate and accept multiple bank note denominations (US $1, $5, $10, $20, $50, $100) utilizing all optical recognition. This allows for the acceptance of bank notes in a face-up or facedown orientation. The unit has multiple-note escrow function (up to 15 Bank notes) that enables return of the customer's inserted bank notes, in situations where the transaction is not complete, or presentation of bank notes

[1] Order No. 762, 139 FERC ¶ 61,060 (2012).

being paid back as change in one bundle. The BNR performs this operation through a single hole in the Ticket Vending Machine (TVM) cabinet. It can utilize up to four separate recycling devices on which bank notes are accumulated and from which bank notes are dispensed as change. The unit also has a ''loader cassette'' which provides temporary storage of bank notes that are used to restock the recyclers when they become empty due to excessive change making. This ''loader cassette'' is protected against theft by lock and key and remote download. MEI asserts that there are no US manufacturers of functionally equivalent products. The only other manufacturer they identified is Cashcode, which manufactures outside the United States.

**Waiver Request: Nextek Corporation: BV–6000AG (BV–6000) Currency Validator**

Nextek Corporation (Nextek) requests a Buy America waiver for the BV–6000AG (BV–6000) Currency Validator; which is manufactured in Japan by Toyo Networks & System Integration, Ltd. (TNSi) for use in ticket vending machines. After calling for notice and comment, FTA granted a non-availability waiver to the Nextek Corporation for the BV–6000 on October 20, 2006. No domestic supplier has made itself known to FTA.

**Applicability of FTA's 2007 Regulatory Amendments**

In its September 2007 Final Rule (72 FR 53688), FTA adopted a non-shift approach to address the aftermarket procurement of replacement components and subcomponents. Prior to the adoption of the Final Rule, procurements of replacements parts were treated as procurements of end products, i.e., not only must the deliverable item be manufactured in the United States, but each component must also be of domestic origin. Implementation of this policy led to confusion and inconsistencies among transit operators and their suppliers, who urged FTA to adopt a non-shift approach that would treat replacement parts consistent with the procurement of the original product, i.e., if a product was a subcomponent in the initial procurement, it would be treated as a subcomponent in all subsequent procurements. This approach, according to proponents, would foster reasonable predictability and stability in the transit business community, enable bidders and vendors to price proposals more accurately, and allow transit agencies to obtain more competitive pricing.

In the same rulemaking, FTA added the term ''system'' to its definition of ''end product.'' Prior to the rulemaking, the manufacturer of a fare collection system filed complaints with FTA concerning the regulatory compliance of a fare collection system manufactured by a competitor. The complainant posited that every mechanical component of the fare collection system should be treated as an end product—ticket vending machines, fareboxes, faregates, etc. not only would have to be manufactured in the United States, but each component of those devices would similarly need to be of domestic origin. Under this interpretation, the petitioners and their customers would have needed a Buy America waiver in order to install a foreign-made bill-handler, bank note recycler, and currency validator into a US-made fare collection device.

In the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub L. 109–59, August 10, 2005), Congress directed FTA to address the procurement of systems to ensure that major system procurements were not used to circumvent Buy America requirements. FTA sought comment on whether it should include ''systems'' within the definition of ''end product.'' Commenters generally supported this approach, with a caveat that FTA should tightly monitor the treatment of systems to ensure that procurements of extremely large and complex super-systems would not be able to undermine the intent of FTA's Buy America requirements. Among the factors FTA examines in assessing whether a ''system'' is an ''end product'' are: (1) Whether the items are the subject of a single procurement; (2) whether the parts of that system are under a single warranty; (3) whether the resulting end product was functionally different from a mere assembly of elements or materials; and most importantly; (4) whether the individual parts performed on a integrated basis with the other parts of the system.

Based on SAFETEA–LU and its 2007 rulemaking, FTA believes fare collection devices can be regarded as components, and their constituent parts treated as subcomponents, which, consistent with 49 CFR 661.5(d)(2), could come from any foreign or domestic source, provided that the component itself was manufactured in the United States. A formal FTA adoption of this approach would eliminate the need for firms such as MEI and Nextek to seek biennial waivers that would permit the inclusion of foreign subcomponents into their devices, particularly when no interested domestic vendor has identified itself to FTA or the two petitioners during the intervening decade.

FTA invites comment on MEI and Nextek's waiver request and the classification of such devices as subcomponents from all interested parties. Commenters may wish to address potential ramifications of categorizing these devices as subcomponents, whether there are domestically-manufactured substitutes, whether petitioners have done an adequate job of reaching out to potential domestic manufacturers, and what FTA can do to encourage domestic firms to manufacture products that are the subject of these non-availability waiver requests.

In the interest of transparency, FTA has published copies of MEI's and Nextek's requests to the docket. Interested parties may submit comments on or before June 6, 2012. Late-filed comments will be considered to the extent practicable.

Issued this 1st day of May 2012.

**Dorval R. Carter, Jr.,**

*Chief Counsel.*

[FR Doc. 2012–10851 Filed 5–4–12; 8:45 am]

**BILLING CODE P**

# Notices

Federal Register
Vol. 77, No. 88
Monday, May 7, 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

### Advisory Committee on Biotechnology and 21st Century Agriculture Meeting

**AGENCY:** Office of the Under Secretary, Research, Education, and Economics, Agricultural Research Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 2, the United States Department of Agriculture announces a meeting of the Advisory Committee on Biotechnology and 21st Century Agriculture (AC21).

**DATES:** The meeting dates are May 29–30, 2012, 8:30 a.m. to 5 p.m. each day.

**ADDRESSES:** U.S. Access Board Conference Room, 1331 F Street NW., Suite 800, Washington, DC 20004–1111.

**FOR FURTHER INFORMATION CONTACT:** Michael Schechtman, Designated Federal Official, Office of the Deputy Secretary, USDA, 202B Jamie L. Whitten Federal Building, 12th and Independence Avenue SW., Washington, DC 20250; Telephone (202) 720–3817; Fax (202) 690–4265; Email *AC21@ars.usda.gov.*

**SUPPLEMENTARY INFORMATION:** The next meeting of the AC21 has been scheduled for May 29–30, 2012. The AC21 consists of members representing the biotechnology industry, the organic food industry, farming communities, the seed industry, food manufacturers, state government, consumer and community development groups, as well as academic researchers and a medical doctor. In addition, representatives from the Department of Commerce, the Department of Health and Human Services, the Department of State, the Environmental Protection Agency, the Council on Environmental Quality, and the Office of the United States Trade Representative have been invited to serve as ''*ex officio*'' members. The Committee meeting will be held from 8:30 a.m. to 5:00 p.m. on each day. The topics to be discussed will include: final reports from the four AC21 working groups on analyses relevant to the overall AC21 charge; potential economic impacts on farmers from the escape of certain genetically engineered crops with functional traits; and further analysis of committee members' views related to the Committee charge in order to identify areas of agreement as well as differences and to prepare for development of a draft report.

Background information regarding the work and membership of the AC21 is available on the USDA Web site at *http://www.usda.gov/wps/portal/usda/usdahome?contentid=AC21Main.xml&contentidonly=true.* Members of the public who wish to make oral statements should also inform Dr. Schechtman in writing or via Email at the indicated addresses at least three business days before the meeting. On May 29, 2012, if time permits, reasonable provision will be made for oral presentations of no more than five minutes each in duration.

The meeting will be open to the public, but space is limited. If you would like to attend the meetings, you must register by contacting Ms. Dianne Fowler at (202) 720–4074 or by Email at *Dianne.fowler@ars.usda.gov* at least 5 days prior to the meeting. Please provide your name, title, business affiliation, address, telephone, and fax number when you register. If you are a person with a disability and request reasonable accommodations to participate in this meeting, please note the request in your registration. All reasonable accommodation requests are managed on a case by case basis.

Dated: April 18, 2012.

**Ann Bartuska,**

*Deputy Under Secretary, Research, Education and Economics.*

[FR Doc. 2012–10264 Filed 5–3–12; 4:15 pm]

**BILLING CODE 3410–03–P**

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

**[Docket No. FSIS–2011–0009]**

### Changes to FSIS Traceback, Recall Procedures for Escherichia coli O157:H7 Positive Raw Beef Product, and Availability of Compliance Guidelines

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is announcing proposed new procedures that it intends to implement when FSIS or other Federal or State agencies find raw ground beef presumptive positive for *Escherichia coli* (*E. coli*) O157:H7. This methodology will enable FSIS to better determine whether the establishments that produced the source materials for contaminated product have produced other product that may not be microbiologically independent from the contaminated product. The Agency is also announcing its intention to now, as a matter of routine policy, request a recall if an establishment was the sole supplier of beef trim source materials for ground product that FSIS or other Federal or State agencies find positive for *E. coli* O157:H7, evidence suggests that contamination most likely occurred at the supplier establishment, and a portion of the product from the originating source lot was sent to other establishments. This notice also explains that FSIS intends to determine whether it can make better use of establishment results and also intends to conduct a study to help it identify the source of *E. coli* O157:H7 positive ground beef when the material from multiple suppliers was used to produce positive product. Finally, this notice announces the availability of compliance guidelines concerning establishment sampling and testing for shiga toxin-producing *E. coli* (STEC) organisms or virulence markers and compliance guidelines for *E. coli* O157:H7 sampled and tested labeling claims.

**DATES:** FSIS requests comments on policies and procedures in this notice by July 6, 2012. FSIS intends to evaluate comments, make any necessary changes to policies and procedures based on

comments and announce final policies, procedures, and implementation dates in a subsequent **Federal Register** notice.

**ADDRESSES:** FSIS invites interested persons to submit comments on this notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail, including CD–ROMs, etc.:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8–163A, Washington, DC 20250–3700.
- *Hand- or courier-delivered submittals:* Deliver to Patriots Plaza 3, 355 E. Street SW., Room 8–163A, Washington, DC 20250–3700.

*Instructions:* All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2011–0009. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

*Docket:* For access to background documents or comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E. Street SW., Room 8–164, Washington, DC 20250–3700 between 8:00 a.m. and 4:30 p.m., Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

## Background

### Public Meeting

On March 10, 2010, FSIS held a public meeting to discuss the Agency's ongoing efforts to improve product traceback related to *E. coli* O157:H7.[1] Noting that the July 2009 Key Findings Report of the President's Food Safety Working Group identified the ability to trace contaminants back to their source as a high priority for ensuring a safe food supply,[2] FSIS officials described the Agency's current traceback policy and discussed changes the Agency was considering to improve its traceback efforts.

Under FSIS's current traceback policy, FSIS does not begin conducting any investigations or follow up activities until positive results based on FSIS testing are identified or until outbreaks occur. Based on FSIS positive test results or other Federal or State Agency positive test results, FSIS conducts Food Safety Assessments (FSAs) at establishments that produce product (ground beef, beef manufacturing trimmings, or other raw ground beef components) that is positive for *E. coli* O157:H7. FSAs are complete investigations concerning the establishment's entire HACCP system. FSIS also conducts FSAs at supplier establishments that are sole source suppliers for product that FSIS or another Federal or State Agency has found positive for O157:H7, or at establishments that FSIS has found provided source materials for product that FSIS or another Federal or State Agency has found positive more than once in the last 120 days. FSIS Enforcement, Investigations, and Analysis Officers (EIAOs) conduct these FSAs and are trained specifically for these assessments. FSIS also conducts investigations in response to outbreaks, working with CDC and State or local Agencies.

The contemplated changes discussed at the March 10, 2010, public meeting focused on improving FSIS's ability to quickly trace all adulterated products that are implicated by an *E. coli* O157:H7 positive test of raw ground beef or bench trim (defined as, beef manufacturing trimmings derived from cattle not slaughtered on site at the establishment). For example, Agency officials explained that FSIS intends to implement new investigations of production practices at establishments that produced product FSIS finds presumptive positive for *E. coli* O157:H7. Similarly, based on presumptive positive results, Agency officials stated that FSIS intends to implement new investigations of production practices at the establishments' suppliers. FSIS officials explained that FSIS did not intend to wait for confirmation results before initiating these investigations because the Agency believes it is imperative to more quickly identify all affected product and all potential suppliers.

Agency officials also discussed the importance of focusing on slaughter and dressing operations—where contamination is most likely to occur—in mitigating the risk of *E. coli* O157:H7 contamination of raw ground beef products.

Finally, Agency officials described the role played by identifying high event periods (HEPs) in determining whether a systemic breakdown of process control at a slaughter establishment may have led to cross-contamination between multiple production lots. Agency officials explained that this type of loss of process control and cross-contamination would create insanitary conditions that may affect the disposition of intact (primal and subprimal) cuts of beef, in addition to beef manufacturing trimmings. If loss of control leads to insanitary conditions, more product may be adulterated than just the product found positive for the pathogen. In this situation, it is very important that establishments identify all product that may be adulterated and hold that product back from commerce to avoid expensive recalls. FSIS notes that recalls can result in costs of $3–5 million.[3]

Agency officials also described draft compliance guidelines issued by FSIS on August 12, 2008, that included the Agency's then current thinking regarding HEPs.[4] They noted that the Agency had received and considered comments related to that draft guidance document. The transcript to the public meeting and materials presented at the public meeting is available at the following site: *http://www.fsis.usda.gov/Regulations_&_Policies/2010_Notices_Index/index.asp.*

Public comments made during the meeting and others submitted later stated that FSIS needed to take additional actions related to traceback in instances involving sole source suppliers of *E. coli* O157:H7 positive product. These commenters emphasized the need to identify these sole source suppliers in order to better protect the public. One comment specifically stated that FSIS should take action to better identify the source of contamination and to remove associated adulterated product from commerce.

Other commenters stated that additional steps could also be taken to improve traceback methodology in cases where a positive sample is taken from a production lot of ground beef created from multiple sources. Specifically, some commenters suggested that when a production lot of ground beef that was produced from multiple source lots tests positive, FSIS should test any remaining unopened trim from the source production lots to identify which source lot is implicated by the positive ground beef sample.

[1] *http://origin-www.fsis.usda.gov/PDF/Transcript_031010_Traceability.pdf.*

[2] *http://www.foodsafetyworkinggroup.gov/FSWG_Key_Findings.pdf.*

[3] As reported by Food and Drug Administration (FDA) ''Preliminary Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis of the Proposed Rules to Ensure the Safety of Juice and Juice Products'' (63 FR 24258; May 1, 1998). The cost covers manufacturer, retailers and State, local, and Federal authorities.

[4] *http://www.fsis.usda.gov/PDF/Draft_Guidelines_Sampling_Beef_Trimmings_Ecoli.pdf.*

Other commenters asked questions about the new traceback methodology and requested that FSIS continue to share information about the new methodology and clarify issues concerning the new methodology. Several commenters agreed that establishments should develop or use process control procedures based on HEP criteria that indicate higher than expected rates of positive *E. coli* O157:H7 test results. Some commenters raised questions concerning whether N60 sampling procedures are capable of detecting contaminated product on a routine basis. Finally, some commenters recommended that FSIS collect information on suppliers at the time of sample collection, rather than after the sample is confirmed positive for *E. coli* O157:H7 to expedite all necessary investigation and traceback activities.

*Improved Traceback Procedures:* On October 8, 2010, in response to comments received at the public meeting, FSIS issued instructions to inspection program personnel to record information on the source materials and on the suppliers at the time they sample ground beef or bench trim for *E. coli* O157:H7 (FSIS Notice 58–10). With issuance of the October 8, 2010 notice, FSIS changed its procedures so that inspection program personnel no longer wait for a positive test result before they gather supplier information. FSIS agreed with comments that had been submitted in response to the public meeting that collecting supplier information at the time the sample is collected would better serve FSIS's goal to respond to FSIS presumptive positive results by identifying all affected product and all potential suppliers as quickly as possible to protect public health.

FSIS intends to implement additional improved procedures consistent with the procedures it discussed at the public meeting. As is discussed above, inspection program personnel will continue to collect and document information on suppliers at the time of sample collection. Using the supplier information, EIAOs will then conduct traceback investigations at establishments that produced the *E. coli* O157:H7 positive product and at suppliers that provided source materials for ground beef or bench trim that FSIS has found positive. These traceback investigations will begin as soon as possible, based on presumptive positive results and supplier information from the producing establishment. EIAOs will visit both the establishment that produced the positive product and the supplier slaughter establishment and gather relevant information about the production of the product, including use of anti-microbials and prevention of cross contamination, sanitary conditions, and relevant purchase specifications.

As part of their traceback investigations, EIAOs will review establishment test results to determine whether the establishment has experienced a HEP. If the establishment has developed its own supportable HEP criteria, the EIAOs will determine whether it has experienced a HEP based on the establishment's HEP criteria. If it has not, EIAOs will determine whether the establishment has experienced a HEP based on the FSIS criteria discussed below. The occurrence, or lack of occurrence, of a HEP will be one factor that EIAOs will consider when investigating at the establishment that produced positive product or supplied product to an establishment that produced positive product.

Based on all the information gathered, EIAOs will present findings to the District Manager on which to determine whether adulterated product has entered commerce. The EIAO will also make recommendations concerning whether regulatory and enforcement actions are warranted. The District Manager will then determine whether adulterated product entered commerce, and if it has, whether to contact the FSIS Recall Management Staff and whether enforcement actions are appropriate. Consistent with Agency procedures, the Recall Management Staff will lead any Agency requests that establishments recall product.

As is discussed above, EIAOs do not do this type of investigation now until they conduct FSAs. FSAs are scheduled approximately 30 days after the confirmed positive results become available, so they are much later than the investigations FSIS intends to conduct. Also, during the FSAs at this time, EIAOs do not ask all the focused questions FSIS intends to instruct them to ask as part of this new procedure. Finally, EIAOs do not currently evaluate whether the establishment has experienced a HEP on a consistent basis.

*Recalls from sole source suppliers:* Also in response to comments to the public meeting concerning the need to eliminate contaminated source material from commerce, FSIS intends to implement a new recall policy to request that supplier establishments recall product if all of the following circumstances occur:

(1) FSIS or other Federal or State agencies find raw ground beef positive for *E. coli* O157:H7 at a grinding establishment;

(2) FSIS determines that *E. coli* O157:H7 cross-contamination was unlikely to have occurred at the grinding establishment where the sample was taken (based on FSIS's assessment of the grinding establishment's handling practices);

(3) FSIS determines that the grinding establishment did not combine material from multiple source lots to create the lot of product that tested positive;

(4) After conducting traceback to identify the slaughter and trim fabrication supplier that provided the sole source material, FSIS determines that the supplier or downstream users split the implicated lot before sending it to the establishment where the positive sample was taken; and

(5) Some portion of the split lot sent to the grinder was sent into commerce for further processing into product that does not receive a full lethality to eliminate *E. coli* O157:H7 in a federally inspected establishment.

If all of these circumstances occur, FSIS intends to request a recall from the slaughter or trim supplier establishment. If cross contamination did not occur at the grinding establishment, the source materials would be considered adulterated because, based on evidence and available data, contamination occurred at the slaughter or trim establishment.

In the two-year period between January 1, 2009, and December 31, 2010, 65 Agency samples of ground beef (collected as part of the routine and follow-up sampling programs) tested positive for *E. coli* O157:H7. Of those 65 positive samples, 41 of them (63.1%) were taken from production lots created using source material from a sole supplier. Twelve of the 41 sole suppliers were self suppliers, meaning that slaughter, trim fabrication, and grinding were done at the same establishment. Out of the 41 sole suppliers, 29 were external supplier establishments. The remaining 24 of the 65 positive samples (36.9%) were taken from production lots created using source material from multiple suppliers. Therefore, there were 29 external sole suppliers that provided the source materials for positive ground product. If all the criteria for a recall were in place, FSIS would have requested 29 additional recalls. However, it is likely that some of these suppliers did not split lots, so all of the source materials from the production lot involved would have gone to the grinder that produced the positive product. If the suppliers did not split the lot, this policy would not result in any additional recalls. Any additional recalls under these circumstances are likely to better prevent the public from consuming adulterated product.

Based on the 2009–2010 data, a significant number of ground product lots that FSIS found positive were produced from source materials from sole source suppliers. However, in some circumstances, the grinding establishment may have combined material from multiple source lots to create the lot of product that tested positive. Under these circumstances, the new recall policy would not apply.

FSIS agrees with commenters to the public meeting that removing from commerce source materials that may be contaminated with *E. coli* O157:H7 is critically important. In situations where contamination most likely occurred at the slaughter establishment that produced the source materials, removing from commerce those source materials used to produce *E. coli* O157:H7 positive product is scientifically sound. *E. coli* O157:H7 is an enteric pathogen; therefore, contamination may occur during the slaughter process, from transfer of contamination from the hides, hooves, and gut of cattle. Contamination may occur through cross contamination at the grinder; however, if there is no evidence of cross contamination at the grinder, contamination most likely occurred at the slaughter or trim establishment. FSIS is not aware of any circumstance in which a split lot contributed to a reported illness. Regardless, FSIS believes that this new recall policy will better protect the public from consumption of *E. coli* O157:H7 contaminated product because it will better ensure that source materials that are contaminated with *E. coli* O157:H7 are removed from commerce. FSIS has requested recalls from sole suppliers that provided source materials for product found positive at grinders under specific, special circumstances, but not as a general rule. FSIS requests comment on this new recall policy before implementing it as a standard procedure and requests comment on the costs that would result from this recall policy.

*High event periods:* Most establishments use testing that includes an enrichment step followed by differential screening specific to STEC organisms, particularly *E. coli* O157:H7 or their associated virulence markers (e.g., *eae* and *stx* genes). Positive results during these screening tests require further testing to detect *E. coli* O157:H7. If an establishment does not perform additional testing, it should treat lots that test positive in screen tests as positive. Similarly, FSIS considers those results positive for *E. coli* O157:H7 if not confirmed negative. Therefore, the discussion below refers to shiga toxin-producing *E. coli* (STEC) organisms or virulence markers, in addition to *E. coli* O157:H7.

HEPs are periods in which slaughter establishments experience a high rate of *E. coli* O157:H7 (or STEC organisms or virulence markers) in trim samples from production lots containing the same-source materials. That is, the trim was produced from one or more carcasses slaughtered and dressed consecutively or intermittently within a defined period of time (e.g., shift). *E. coli* O157:H7 contamination is generally point-source contamination that occurs sporadically as a consequence of handling during hide removal and dressing of the carcass. However, during HEPs, the contamination has become more widespread. HEPs may stem from a higher than expected level of contamination on hides, a failure of prevention mitigations, or cross contamination of product. A high rate of positives in trim is problematic because the trim is typically used across multiple production lots, is handled by employees, and is therefore likely to contaminate common conveyor belts and equipment. Also, such high rates of positives or HEPs may mean that a systemic breakdown of the establishment's production process may have occurred, and that insanitary conditions existed at the establishment during these periods. Such insanitary conditions may affect the safety of intact (primal and subprimal) cuts, trim, and other beef components used in the production of ground beef. In response to comments from the public meeting that supported the implementation of new traceback procedures to better identify contaminated source materials, FSIS intends to provide more specific instructions to EIAOs concerning HEPs that may occur at slaughter establishments that produced source materials for product that FSIS has found positive for *E. coli* O157:H7. FSIS will issue the new instructions as a notice or directive to its personnel. The new procedures it intends to implement are discussed below. As is discussed below, FSIS is also providing updated guidance to establishments on how to identify HEPs. FSIS considered comments submitted on the guidance and believes that the guidance is now more useful to industry to help it identify HEPs, avoid recalls, and prevent adulterated product from entering commerce.

To help develop the operational criteria for industry to use to identify HEPs and for EIAOs to consider when conducting traceback procedures, FSIS examined industry data collected by FSIS inspection personnel from the top 33 slaughter establishments, representing 80 percent of industry production volume (number of cattle slaughtered).

The data from the 33 establishments show clustering of positives results. Of the 33 establishments, 32 responses were received, 19 had clear definitions of a HEP, 2 had definitions that were incomplete because they did not specify a frame of time (which we interpreted to be a day), 10 had unclear definitions of a HEP, and 1 did not have a definition. Of the 21 establishments that had clear definitions, 7 were using a 5 percent threshold definition; [5] 9 indicated a threshold of 1–3 positive results a day or shift; 2 used between 5–10%; and 3 had definitions greater than 10%.

Based on these results, FSIS selected a target of 5% for the HEP criteria. Because FSIS did not want to define HEP criteria that would be more rigorous than those of a large number of establishments, we did not select a lower target. FSIS set criteria to help identify exceptional events of poor processing. FSIS did not select a higher target (e.g., 10%) because such a target we believe could result in many cases where poor processing, as defined by most of the industry, would not be detected as HEP.

FSIS intends to identify in the guidance and in instructions to EIAOs two types of HEP that may indicate out-of-control situations in the establishment's production process based on establishment results. As noted above, 10 of the establishments had unclear definitions of HEPs, and one had no definition. If establishments use FSIS's criteria, FSIS would find their HEP definitions supportable. Below are the two types of HEPs.

1. A HEP that indicates a localized out-of-control event in which some specific occurrence or event causes a clustering of *E. coli* O157:H7 (or STEC organisms or virulence markers) that indicate contamination in product. The event would not indicate, necessarily, a severe or global systemic break-down or inherent weakness of the process or food safety system. Generally, intact primal and subprimal cuts would not be affected if such cuts routinely undergo a pathogen reduction treatment.

2. A HEP that indicates a systemic break-down or inherent weakness of the process or food safety system. Virtually all raw beef product would likely be affected.

During a systemic break-down situation, establishments may identify

[5] Establishments generally do not wait for confirmation of positive results, which can take up to 8 days; rather establishments respond to presumptive positive results that have not been confirmed for *E. coli* O157:H7.

more product that needs to be assessed to determine whether it may be adulterated than in a localized HEP. A localized HEP may affect only the production of one lot, while a systemic break-down may affect more product. Also, a localized HEP may indicate an isolated problem (such as improper application of an anti-microbial in one lot); a systemic HEP may indicate a broader problem (such as systemic failure to prevent cross contamination among carcasses).

FSIS is setting out criteria for identifying HEPs. These criteria will be especially useful for establishments that have rigorous testing programs. Beef slaughter and fabrication establishments that manufacture 50,000 pounds or more of trimmings daily are likely to conduct sufficient verification testing on same source materials to be able to determine whether a HEP occurred based on the criteria below. Lower volume establishments may choose to test frequently enough to use these criteria. If not, the guidance includes general information for lower volume establishments.

1. For a local HEP: 3 or more *E. coli* O157:H7 (or STEC organisms or virulence markers) positive results out of 10 consecutive samples from production lots containing same-source materials; and

2. For a systemic HEP:

A. 7 or more *E. coli* O157:H7 (or STEC organisms or virulence markers) positive results out of 30 consecutive samples from production lots containing same-source materials.

B. At establishments that test more than 60 samples per day, from production lots containing same-source materials, the number of *E. coli* O157:H7 (or STEC organisms or virulence markers) positive samples below within the samples tested in the table:

| Unacceptable number positives | Within samples tested |
|---|---|
| 8 | 61 |
| 9 | 74 |
| 10 | 86 |
| 11 | 100 |
| 12 | 113 |
| 13 | 127 |
| 14 | 141 |
| 15 | 155 |
| 16 | 169 |
| 17 | 184 |
| 18 | 198 |
| 19 | 213 |
| 20 | 228 |

The above criteria are based on high degrees of confidence (establishing sufficient statistical evidence) that the process percentage exceeded 5% during some period. For the systemic HEP based on daily testing of at least 60 samples [6] and the local HEP guidance, FSIS used close to 99 percent confidence for establishing sufficient statistical evidence.[7] For the systematic short-term HEP (based on 30 samples), FSIS selected about 99.95% confidence for asserting sufficient statistical evidence. The reason for this high degree of confidence is that FSIS wanted to have a short-term HEP criterion to help establishments identify periods of serious processing problems.

Establishments may use the guidance that FSIS has provided as criteria for determining whether they have experienced a HEP. However, the establishment–specific process percent positive could be different than the FSIS criteria (assuming that the sampling plan and analyses are described as above). Consequently, a specified percent positive for a given establishment should be identified and justified if other than that stated by FSIS if past results indicate that a different percent positive was being achieved consistently, and product has low likelihood of being adulterated. Deviations from the previously obtained percent positive should be construed as presumptive evidence that the process is out of control and would warrant investigation to find and eliminate any potential causes for the positive results. As part of their supporting documentation for their hazard analysis (9 CFR 417.5 (a)), FSIS recommends that establishments document the criteria they use to identify HEPs.

Consistent with information FSIS presented at the March 2010 public meeting discussed above, FSIS intends to instruct EIAOs to conduct an investigation at establishments that produced positive *E. coli* O157:H7 product and at establishments that provided the source materials used to produce that product. These traceback investigations will begin as soon as possible, based on presumptive positive results and supplier information at the producing establishment. Through these new procedures, FSIS will investigate the reasons for positive results on a more timely and thorough basis than the Agency does currently. At slaughter establishments that produced positive product or source materials used in the production of positive product, EIAOS will consider whether the establishment has experienced a HEP.

A HEP indicates that production lots of same source material that are presumed to be microbiologically independent (based on test results or other criteria) may no longer be microbiologically independent. As noted above, in such cases, these production lots may be considered to be potentially contaminated with *E. coli* O157:H7, even if the establishment has negative test results. During their investigations, EIAOs will look at establishment test results and will determine whether the establishment has its own HEP criteria. FSIS intends to instruct EIAOs that when a HEP has occurred based on the establishment's criteria or FSIS criteria, they are to determine whether the establishment considered whether negative tested lots of trimmings are releasable, and whether primal and sub-primal product produced from the same source materials as the trimmings may be positive for *E. coli* O157:H7, particularly if the establishment does not have controls in place to ensure that the primal and sub-primal product is not used for non-intact purposes.

If a HEP has occurred, FSIS intends to instruct the EIAO to evaluate whether the establishment verified that all controls in place in the slaughter process that are necessary to prevent *E. coli* O157:H7 are working as intended. Such controls may include measures to reduce the pathogen load on incoming animals, measures to ensure that contamination of the carcass is prevented during slaughter or dressing procedures, effective decontamination or pathogen reduction treatments (also referred to as ''antimicrobial treatments''), and measures to minimize carcass-to-carcass contact and cross contamination.

Also, if a HEP has occurred, FSIS intends to instruct the EIAO to evaluate whether the establishment found the cause for the HEP and has taken corrective action to prevent future HEPs from recurring.

Finally, if the establishment has experienced a HEP during a ''high prevalence season'' (from spring into early autumn), FSIS intends to instruct the EIAO to determine whether the establishment increased the frequency of monitoring and verification of both slaughter and dressing procedures and pathogen reduction treatments, and whether the establishment modified its sampling and verification testing programs during the high prevalence season to increase the likelihood of finding the pathogen.

[6] FSIS selected a minimum of 60 samples for identifying daily HEP because the purpose of this was to determine inconsistencies over a large amount of product produced during the day. The other two criteria apply for less product or shorter periods. FSIS identified the day-specific criterion for large volume establishments that often test more than 100 lots a day.

[7] For the local HEP involving 3 positive results from 10 samples, the confidence is 98.849644%, which FSIS considers to be close to 99%.

As stated above, the EIAO will present to the District Manager the findings concerning HEPs and all other findings and recommendations, including any evidence indicating that adulterated product has likely entered commerce. Similarly, based on the HEP information, as well as other information collected, the EIAO will make recommendations concerning what regulatory or enforcement actions may be warranted. In addition, if the District Manager determines that adulterated product entered commerce, the Recall Management Staff will lead any Agency requests that establishments recall product. FSIS expects to complete the investigation and take all necessary enforcement actions within one month.

We note that this Notice imposes no new requirements for establishments related to HEPs. The new EIAO instructions and investigation procedures described are only intended to improve and expedite FSIS traceback procedures.

*Possible New Procedures To Identify Suppliers:* In response to comments, FSIS intends to assess the merits and resource implications of conducting additional traceback activities. For example, FSIS intends to determine whether it can make better use of the results of establishment (versus FSIS) testing for *E. coli* O157:H7 and other microorganisms and other establishment data that they may collect to evaluate their sanitary dressing procedures. FSIS requests comment on how the Agency could better evaluate this data and use it to inform establishments that problems may be developing or to advise establishments to take action to prevent the creation of insanitary conditions or the production of adulterated product in the future. Inspection program personnel currently review establishment test results on a weekly basis (FSIS Directive 5000.2). FSIS is considering issuing clarifying instructions to these personnel to look for increasing positive results that should be raised to the establishment's attention. FSIS also intends to conduct a study to test product from unopened containers or purge material (that is, remaining liquid, fat, and meat particles in containers or combo bins after trim contents have been removed) from suppliers' product for *E. coli* O157:H7. The purpose of this study will be to identify the source of *E. coli* O157:H7 positive raw ground beef when material from multiple suppliers was used to create the sampled ground beef that FSIS has found positive for *E. coli* O157:H7.

**Availability of Guidance Material**

In October 2008, FSIS issued draft guidance entitled, ''Label Policy Guidance for N60 Testing Claims for Boneless Beef Manufacturing Trimmings ('Trim') Concerning *E. coli* O157:H7,'' and draft guidance entitled, ''Compliance Guideline for Sampling Beef Trimmings for *Escherichia coli* O157:H7'' and requested comments on these documents. FSIS also held a public meeting to discuss the guidance and other topics concerning *E. coli* O157:H7. FSIS carefully considered the comments received and has responded to comments below.

FSIS has posted the revised guidance on its Significant Guidance Documents Web page *http://www.fsis.usda.gov/Significant_Guidance/index.asp.* FSIS encourages those who are interested in using sampled and tested claims to avail themselves of this guidance document when preparing applications for sketch approval, and when using a sketch approved sampled and tested claim. Similarly, FSIS encourages establishments to begin using the trim sampling guidance. FSIS welcomes comments on this guidance document. The Agency will consider carefully all comments submitted and will revise the guidance document as warranted.

**Sampling and Testing Guidelines**

This guidance, entitled ''Compliance Guideline for Establishments Sampling Beef Trimmings for Shiga Toxin-Producing Escherichia coli (STEC) Organisms or Virulence Markers,'' is meant to help slaughter establishments develop and implement sampling and testing programs for *E. coli* O157:H7 (or STEC organisms or virulence markers) in beef manufacturing trimmings that are sampled using the N60 sampling method or similar methods. FSIS recommends that establishments identify HEP criteria so that they can determine whether they need to withhold product from commerce when a HEP has occurred, because a HEP may indicate more widespread adulteration of product, beyond the product found positive. If establishments identify and respond to HEPs, they will minimize the chance that they release adulterated product into commerce.

Although this document also provides general information for non-slaughter establishments that produce or receive trimmings, the HEP information in the guidance only applies to slaughter establishments that manufacture trim. The HEP guidance will be most useful to slaughter and fabrication establishments that manufacture 50,000 pounds or more of trimmings daily because they are likely to conduct sufficient testing on same source trimmings to be able to determine whether a HEP has occurred. Smaller volume slaughter and fabrication establishments can also use the FSIS suggested criteria, particularly those that involve 10 and 30 samples. Non-slaughter establishments will not know if problems with slaughter and dressing procedures have contributed to a HEP because they do not have the necessary information from the establishment that slaughtered the cattle. FSIS recommends that a slaughter and fabrication establishment conduct sampling and testing of trim at a frequency sufficient to find evidence of contamination surviving the slaughter and dressing operation (optimally every production lot) to best ensure that adulterated product does not enter commerce. Verification testing results on trim are likely the best available information a slaughter establishment can use to determine the effectiveness of its slaughter and dressing operation.

*Comment:* Industry commenters disagreed with the ''event day'' or ''hot day'' discussion FSIS presented in the guidance to illustrate the number of positive results within a set number of samples that would indicate that a process is out of control. These commenters were concerned that the criteria would trigger regulatory criteria and recalls. A consumer group was concerned that the compliance guide suggested establishments would not have to investigate every positive but could, instead, just investigate positives during HEPs.

*Response:* Identifying a HEP is an adequate basis for determining whether a process is out of control. A high number of positives within a limited number of samples may indicate that a systemic problem may have occurred. To ensure that FSIS provides guidance for identifying HEPs that would be useful to establishments, FSIS has gathered information from inspectors at the 33 largest beef slaughter establishments and revised the guidance to reflect this information.

The guidance clarifies that establishments are required to investigate all positive results based on 9 CFR 417.3. In addition, the guidance recommends that establishments take additional actions in response to HEPs. The guidance explains that if the establishment has experienced a HEP, it should carefully investigate to find all contributing causes. This type of investigation would be more involved than a follow-up investigation when an occasional positive result is found.

*Comment:* Consumer organizations stated that establishments' testing cannot replace effective prevention strategies and process control. Industry commenters noted that microbiological testing is not designed to test the safety of beef products, but rather, such testing is to verify that controls are in place. One commenter submitted the Beef Industry and Food Safety Council (BIFSCo) ''Best Practices for Using Microbiological Sampling,'' a guidance document in conjunction with its comments.

*Response:* FSIS agrees with the comments that establishment testing is just one verification activity that establishments can use to verify that their food safety system adequately addresses *E. coli* O157:H7. Nonetheless, it is important to underscore that microbiological testing is likely the best method for system verification as it relates to microbial hazards. FSIS agrees that the BIFSCo guidance is useful and has included a link to it in the compliance guidelines so that users can quickly access that guidance.

*Comment:* A consumer group commented that FSIS's N60 program for sampling beef manufacturing trimmings is ineffective because it is not based on an accurately measured prevalence rate. The commenter also stated that N60 sampling does not allow the Agency's testing to detect *E. coli* O157:H7 and, therefore, should not be used to verify product safety or that a process is in control.

*Response:* FSIS agrees that information on national prevalence is important for properly designing a sampling program.[8] However, a national prevalence estimate is not sufficient information to determine how to collect a sample from a lot, owing to the distinction between determining how many lots to test and how to collect a sample from each lot. In other words, prevalence data could inform how many lots to test nationwide, but not how to collect a sample from each lot. A sampling program, such as FSIS's trim sampling program, is a different concept than a sample collection method, such as N60.

FSIS's N60 sampling of beef trim and testing of trim for *E. coli* O157:H7 is only one of a number of verification activities that FSIS conducts regarding establishment process controls for *E. coli* O157:H7. FSIS sampling of beef trim works along with inspection and other verification activities, including FSIS sampling of ground beef and other ground beef components and the review of establishment testing results, to detect and reduce *E. coli* O157:H7 in beef products. FSIS's mission is not to screen the food supply through testing but to verify that safe and wholesome food is produced through inspection activities.

*Comment:* Another industry commenter disagreed that aerobic plate counts (APCs) are an indicator of process control for reducing *E. coli* O157:H7. The commenter stated that there is no significant correlation between *E. coli* O157:H7 and APCs.

*Response:* FSIS agrees that there is not a significant correlation between *E. coli* O157:H7 and APCs. However, as is stated in the guidance, FSIS continues to believe that it is useful for beef establishments to conduct verification testing for associated organisms that include *E. coli* O157:H7 (e.g., a screen methodology for pathogenic *E. coli*) and to maintain records of results as a quality control activity. Measurements of ubiquitous organisms such as Enterobacteriacea, APC, or generic *E. coli* can be used to evaluate the effectiveness of process controls in limiting or eliminating microbial contamination. Frequent measurements of APC counts may represent a short-term trend, which would be useful for quality control, both before and after the sanitary dressing processes. However, such measurements, while helpful for ensuring microbial process control, cannot be used as a substitute for determining the actual presence or absence of *E. coli* O157:H7 in the final product.

*Comment:* Some comments supported changes to traceback activities discussed above. For example, one consumer group supported FSIS capturing information for all positive results, including results for industry sampling programs.

*Response:* See discussion above under ''Improved Traceback Procedures.''

*Sampled and Tested Claims Guidance:* This document provides guidance on the use of labels bearing an FSIS sketch approved *E. coli* O157:H7 sampled and tested claim on beef trim. As is explained in the guidance, such special labeling claims are voluntary. An establishment may use such claims when it demonstrates that they are truthful and not misleading (9 CFR 317.8(a)). FSIS must approve such claims before the establishment may use them on labels (9 CFR 317.4(a)). This guidance document addresses label claims that are not intended to be displayed to consumers. FSIS may approve *E. coli* O157:H7 sampled and tested claims on trim that goes to retail stores, for example to a retailer who purchases the trim for grinding. However, FSIS will not approve such a label claim for display to consumers because it may be misleading to consumers by suggesting that the end product is free of the pathogen or may not need to be cooked thoroughly.

A labeling claim asserting that beef trim has been sampled, tested, and found negative for *E. coli* O157:H7 will provide receiving establishments with information regarding the sampling and testing of beef trim for that pathogen conducted by supplier establishments.

Sampling and testing for *E. coli* O157:H7 is intended to provide evidence regarding the effectiveness of HACCP measures in addressing the pathogen. Therefore, in order for a sampled and tested claim to be truthful and not misleading, the establishment asserting the claim must have incorporated into its HACCP system measures designed to control for *E. coli* O157:H7, and it must use sampling and testing methodologies that are designed to verify the effectiveness of those measures.

The final guidance document provides assistance to establishments on the use of labels bearing an FSIS sketch approved sampled and tested claim. It provides several examples of labeling claim language that may be appropriate under different circumstances. The final guidance also suggests the kind of documentation that establishments seeking sketch approval may submit to demonstrate that a sampled and tested claim would be truthful and not misleading.

*Comment:* Several members of industry questioned the connection between documentation of HACCP measures related to *E. coli* O157:H7 and the truthfulness of a sampled and tested claim. These comments argued that it is not necessary to provide such extensive documentation in order to demonstrate that a sampled and tested claim is truthful and not misleading. They also stated that including extensive documentation as part of an application for sketch approval would be burdensome.

*Response:* A labeling claim that beef trim has been sampled, tested, and found to be negative for *E. coli* O157:H7 is not a representation that the labeled beef trim is free of *E. coli* O157:H7; rather, it is a representation that sampling and testing of the production lot from which the beef trim was derived has demonstrated that the production lot was produced under a HACCP system with measures in place that effectively control for the pathogen.

[8] FSIS recently published the national prevalence estimate of pathogen contamination of trim based on the 2005–07 beef trim baseline study: *http://www.fsis.usda.gov/PDF/Baseline_Data_Domestic_Beef_Trimmings_Rev.pdf.*

Accordingly, a sampled and tested claim is only truthful and not misleading if indeed such measures are in place, and if the sampling and testing program is designed to verify the effectiveness of those measures.

To assist interested establishments to obtain sketch approval of sampled and tested claims, the final guidance retains a description of the HACCP system-related documentation that FSIS believes would demonstrate that a sampled and tested claim is truthful and not misleading. FSIS made some revisions to the guidance for the sake of clarity.

*Comment:* Several industry representatives argued that the information to be included on a label bearing a sampled and tested claim should be simpler than what was described in the draft guidance. Some specific examples of information the commenters argued need not be included are: (1) Lot size information; (2) lot identification information; and (3) information indicating whether a production lot which was formed by combining beef trim from two or more source production lots was sampled after the source lots were combined.

*Response:* In response to the three specific concerns raised above: (1) Lot size information has been removed from the final version of the labeling guidance. This information was initially included as a suggested means of indicating to receiving establishments whether the labeled beef trim they receive consists of all or only a portion of a sampled production lot. In light of industry comments reflecting the practical difficulty of regularly changing labeling text to reflect the varying sizes of production lots, this suggestion has been replaced with guidance recommending a simple statement informing receiving establishments whether the labeled beef trim consists of an entire production lot or a portion of a split lot. (2) Including lot identification information on labels containing sampled and tested claims is important to ensure that such claims are truthful and not misleading because this information allows the labeled beef trim to be traced to a specific production lot. Therefore, the final version of the policy guidance document retains this suggested labeling information. (3) FSIS believes that it is important for a sampled and tested claim to include a statement specifying whether (a) the final formulation of labeled beef trim was sampled and tested, or (b) the source lots were sampled and tested before being combined. This information is relevant to whether a claim is truthful and not misleading because it identifies which production lot or lots have been produced using HACCP measures that effectively control for *E. coli* O157:H7. FSIS agrees with several comments that the Agency needs to clarify this portion of the draft guidance. Therefore, FSIS has removed the ''twice tested'' discussion and replaced it with a suggestion that sampled and tested claims asserted on beef trim product formulated by combining two or more source lots state whether sampling and testing was conducted on the final formulation or on the source lots.

*Comment:* Many comments argued that the guidance should better define what constitutes N60 sampling methodology, and what constitutes an FSIS-equivalent testing method.

*Response:* The draft guidance referred specifically to the use of N60 sampling in connection with use of a sampled and tested claim. The final guidance does not specify that N60 sampling must be done in order to use a sampled and tested claim. Instead, the final guidance emphasizes that, in order for the claim to be truthful and not misleading, the sampling and testing program must be designed to verify the effectiveness of an establishment's HACCP measures that control for *E. coli* O157:H7. FSIS believes that the sampling and testing methodologies it uses, including N60 sampling, achieve this goal. Therefore, the final policy guidance refers to documents that provide detailed descriptions of FSIS sampling and testing methodologies. However, if an establishment uses different sampling or testing methodologies that the establishment believes provide reliable verification of the effectiveness of HACCP measures designed to control for *E. coli* O157:H7, and therefore that use of those methodologies will ensure that a sampled and tested claim is truthful and not misleading, then the establishment may include in its application for sketch approval documentation describing why its methodologies are equivalent to FSIS methodologies. To assist establishments wishing to demonstrate the equivalence of their sampling or testing methodologies, the final policy guidance refers to a separate guidance document that provides assistance to industry in conducting validation studies for pathogen detection methods: *http://www.fsis.usda.gov/PDF/Validation_Studies_Pathogen_Detection_Methods.pdf.*

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Done at Washington, DC, on April 24, 2012.

**Alfred V. Almanza,**

*Administrator.*

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**BILLING CODE 3410–DM–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Uinta-Wasatch-Cache National Forest; Evanston-Mountain View Ranger District; Utah; Smiths Fork Vegetation Restoration Project

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Evanston-Mountain View Ranger District of the Uinta-Wasatch-Cache National Forest proposes to treat approximately 4,300 acres of a variety of vegetation types within the 58,000-acre Smiths Fork project analysis area, located in Uinta County, Wyoming, and Summit County, Utah, approximately 25 miles southwest of Mountain View, Wyoming. Proposed treatment acivities include salvage clearcuts; sanitation salvage; and thin, pile, and burn. This proposal is being developed in direct response to the continuing mountain pine beetle epidemic in the area and its potential long-term impacts on the Smiths Fork area. The project is being undertaken under the auspices of the Healthy Forests Restoration Act (''HFRA'').

**DATES:** Comments concerning the scope of the analysis must be received by May 31, 2012. The draft environmental impact statement is expected in August 2012 and the final environmental impact statement is expected November 2012.

**ADDRESSES:** Send written comments to: Smiths Fork Vegetation Restoration Project, Attn: Rick Schuler, P.O. Box 1880, Evanston, WY 82931. Comments can also be hand delivered Monday through Friday 8 a.m. to 4:30 p.m. at the following physical address: 1565 Highway 150, Suite A, Evanston, Wyoming. In addition, comments can be submitted electronically to: *comments-intermtn-wasatch-cache-evanston-mtnview@fs.fed.us* or submitted via facsimile to 307–783–8639.

Reviewers should provide comments at such times and in such a way that they are useful to the agency's preparation of the EIS. Comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions. Submission of timely and specific comments can affect a reviewer's ability to participate in the objection process or judicial review.

Comments received in response to this solicitation, including names and addresses of those who comment, will become part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the respondent with standing to participate in the objection process associated with this project under the HFRA or judicial review.

**FOR FURTHER INFORMATION CONTACT:** Pete Gomben, Environmental Coordinator, at 801–236–3407.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

#### Purpose and Need for Action

The HFRA recognizes healthy forests or forest health as an integral part of forest management. The proposed action responds directly to forest health objectives as described in the HFRA. The purpose of this project is to reduce the effects from current mountain pine beetle infestation in forested stands dominated by lodgepole pine trees and to reduce the susceptibility of vegetation to high-intensity wildfire and further mountain pine beetle attacks. The project is needed to: (1) Salvage forest products from, and manage stand densities on, forested lands classified as suitable for timber production to keep them positively contributing to the national forest's allowable sale quantity; (2) Reduce the effects of tree mortality associated with the mountain pine beetle epidemic to restore healthy ecological conditions and scenic quality; (3) Accelerate regeneration of forested stands killed by the mountain pine beetle; and (4) Manage hazardous fuel loading associated with the mountain pine beetle epidemic and salvage operations to minimize the potential for large, high intensity/high severity wildfires.

This action responds to the goals and objectives outlined in the Wasatch-Cache National Forest Land and Resource Management Plan (''Forest Plan''), and helps move the project area towards desired conditions described in that plan.

#### Proposed Action

The proposed project includes treatment of approximately 4,300 acres of aspen and lodgepole communities using timber harvest, prescribed fire, and mechanical fuels treatments. Sanitation salvage would be used on approximately 1,730 acres, clearcuts would be used on approximately 1,241 acres, sanitation salvage with pile and burn would be used on approximately 76 acres, clearcut with pile and burn would be used on approximately 40 acres, roadside salvage would occur on approximately 695 acres, and approximately 514 acres would be undergo a thin, pile, and burn prescription.

Proposed treatments are intended to reduce both the amount and continuity of woody fuels, to remove hazard trees, to harvest beetle-killed or infested trees, and to create a mix of tree ages and species.

The proposed action would retain habitat for sensitive and other species, such as northern goshawks, where needed. The proposed action is also expected to make improvements to visual quality. Treatments in the vicinity of private land would be intended to reduce the threat of wildfire to human life and property.

Access to treatment units, as currently mapped, is anticipated to involve approximately 3.1 miles of new specified road construction, approximately 10.7 miles of temporary road construction, approximately 6.7 miles of additional temporary road use on the existing road prism, and approximately 2.6 miles of road reconstruction. Approximately 3.8 miles of easements through private land would be needed for access to units 4, 20, and 79.

#### Possible Alternatives

In addition to the proposed action, a no action alternative will be considered. This alternative would continue current management without the actions of this proposal. Because this project is being analyzed via the HFRA, one additional alternative that addresses the purpose and need for the project may be developed in response to issues generated during the scoping process.

#### Responsible Official

Uinta-Wasatch-Cache National Forest forest supervisor.

#### Nature of Decision To Be Made

The decision to be made is whether or not to implement vegetation restoration treatments in the Smiths Fork project area, and if so, to what degree and where.

#### Preliminary Issues

Preliminary issues are the effects of treatments on wildlife habitat, and the effects of insect and disease outbreaks on current forest health.

#### Scoping Process

This notice of intent initiates the scoping process, which guides the development of the environmental

impact statement. This project is not subject to the notice, comment, and appeal process found at 36 CFR part 215. Rather, it is subject to the predecisional administrative review process found at 36 CFR part 218. This process provides the opportunity to resolve issues raised in an objection and identify potential solutions. Only persons who submit specific written comments on the proposed action during the 30-day comment period will be eligible to file an objection. This comment period represents the only opportunity for the public to comment on this proposal prior to the objection process. The opportunity to comment will end 30 days after a legal notice announcing the request for scoping comments is published in the Salt Lake Tribune, which is the newspaper of record.

Dated: April 26, 2012.

**Cheryl Probert,**

*Acting Forest Supervisor.*

[FR Doc. 2012–10728 Filed 5–4–12; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Forestry Research Advisory Council

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Forestry Research Advisory Council will meet in Washington, DC, on June 6–7, 2012. The purpose of the meeting is to discuss emerging issues in forestry research.

**DATES:** The meeting will be held June 6–7, 2012 from 8:30 a.m. to 5:00 p.m., on both days.

**ADDRESSES:** The meeting will be held at Franklin Court Building, 1099 14th Street NW., Suite 5500W, Washington, DC. Individuals who wish to speak at the meeting or to propose agenda items must send their names and proposals by May 31, 2012 to Daina Apple, Designated Federal Officer, Forestry Research Advisory Council, USDA Forest Service, Research and Development, 1400 Independence Ave. SW., Washington, DC 20250–1120, or fax their names and proposed agenda items to (202) 205–1530.

**FOR FURTHER INFORMATION CONTACT:** Daina Apple, Forest Service, Office of the Deputy Chief for Research and Development, (202) 205–1665.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. Council discussion is limited to Forest Service, National Institute of Food and Agriculture staff and Council members. However, persons who wish to bring forestry research matters to the attention of the Council may file written statements with the Council staff before or after the meeting.

Dated: April 30, 2012.

**Jimmy L. Reaves,**

*Deputy Chief, Research and Development.*

[FR Doc. 2012–10873 Filed 5–4–12; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### National Institute of Food and Agriculture

### Notice of Intent To Extend a Currently Approved Information Collection

**AGENCY:** National Institute of Food and Agriculture, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with Office of Management and Budget (OMB) regulations (5 CFR 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), this notice announces the National Institute of Food and Agriculture's (NIFA) intention to request approval to extend the currently approved information collection for the Expanded Food and Nutrition Education Program (EFNEP). There are no planned revisions.

**DATES:** Written comments on this notice must be received by July 6, 2012, to be assured of consideration. Comments received after that date will be considered to the extent practicable.

**ADDRESSES:** Written comments concerning this notice may be submitted by any of the following methods: Email: *gmendez@nifa.usda.gov;* Fax: 202–720–0857; Mail: Office of Information Technology (OIT), NIFA, USDA, STOP 2216, 1400 Independence Avenue SW., Washington, DC 20250–2216

**FOR FURTHER INFORMATION CONTACT:** Gidel Mendez, eGovernment Program Leader; Email: *gmendez@nifa.usda.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Expanded Food and Nutrition Education Program.

*OMB Number:* 0524–0044.

*Expiration Date of Current Approval:* 07/31/2012.

*Type of Request:* Intent to seek approval to extend the currently approved information collection for three years. There are no planned revisions.

*Abstract:* The USDA's NIFA Expanded Food and Nutrition Education Program (EFNEP) is a unique program that began in 1969 and is designed to reach limited resource audiences, especially youth and families with young children. Extension professionals train and supervise paraprofessionals and volunteers who teach food and nutrition information and skills to limited resources families and youth. EFNEP operates through the 1862 and 1890 Land Grant Universities in all 50 states, the District of Columbia, and in American Samoa, Guam, Micronesia, Northern Marianas, Puerto Rico, and the Virgin Islands.

The objectives of EFNEP are to assist limited resource families and youth in acquiring the knowledge, skills, attitudes, and changed behaviors necessary for nutritionally sound diets, and to contribute to their personal development and the improvement of the total family diet and nutritional well-being.

NIFA sponsors an integrated data collection process that is used at the county, state, and federal level. The current data collection system, the Nutrition Education Evaluation and Reporting System (NEERS), captures EFNEP impacts. Its purpose is to gauge if the federal assistance provided has had an impact on the target audience. It also enables EFNEP staff to make programmatic improvements in delivering nutrition education. Further, the data collected provides information for program management decisions and diagnostic assessments of participant needs. Specifications for this system were developed by a committee of representatives from across the United States and are in compliance with Federal standards for maintaining, collecting, and presenting data on race and ethnicity and protecting personally identifiable information.

NEERS stores information on: (1) Adult program participants, their family structure, and dietary practices; (2) youth group participants; and (3) staff. NEERS consists of separate software sub-systems for the County and the State levels (State also refers to U.S. Territories). Data is exported electronically to the State-level system. University staff generates State-level reports for State-level stakeholders and to guide program management decisions. They also export State-level data electronically to the Federal office for State and National assessments of the program's impact. The State compiled data is aggregated using statistical software and then is used to create National reports which are made available to the public.

There are no revisions to the currently approved collection.

The evaluation processes of EFNEP remain consistent with the requirements of Congressional legislation and OMB. The Government Performance and Results Act (GPRA) of 1993 (Pub. L. 103–62), the Federal Activities Inventory Reform Act (FAIR) (Pub. L. 105–207), and the Agricultural, Research, Extension and Education Reform Act (AREERA) of 1998 (Pub. L. 105–185), together with OMB requirements, support the reporting requirements requested in this information collection. One of the five Presidential Management Agenda initiatives, Budget and Performance Integration, builds on GPRA and earlier efforts to identify program goals and performance measures, and link them to the budget process. The FAIR act requires the development and implementation of a system to monitor and evaluate agricultural research and extension activities in order to measure the impact and effectiveness of research, extension, and education programs. AREERA requires a performance evaluation to be conducted to determine whether federally funded agricultural research, extension, and education programs result in public goods that have national or multistate significance.

*Estimate of Burden:* The number of respondents has increased from 74 to 75 institutions (e.g., state responses), thus constituting a total annual estimated burden of 93,225 hours for this data collection process—for participant education and data entry, aggregation, and reporting. Burden estimates are reflective of the previous version of the data collection system. The burden for respondents was estimated through feedback from a survey sent to nine institute-level EFNEP Coordinators. Six surveys were returned. Burden takes into account only the information collected in aggregate from the institutions and the record keeping activities that take place in order to provide the aggregated data; it does not include burden related to data entry at the local level. Local data is used by the county and institute levels to provide feedback to participants and to guide county and institute level program management, impact and accountability decisions and reporting.

*Comments:* Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will 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 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.

*Obtaining a Copy of the Information Collection:* A copy of the information collection and related instructions may be obtained free of charge by contacting Gidel Mendez as directed above.

Done in Washington, DC, April 11, 2012.

**Catherine E. Woteki,**

*Under Secretary, Research, Education, and Economics.*

[FR Doc. 2012–10934 Filed 5–4–12; 8:45 am]

**BILLING CODE 3410–22–P**

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

### Information Collection Activity; Comment Request

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended), the United States Department of Agriculture (USDA) Rural Development administers rural utilities programs through the Rural Utilities Service (RUS). The USDA Rural Development invites comments on the following information collections for which the Agency intends to request approval from the Office of Management and Budget (OMB).

**DATES:** Comments on this notice must be received by July 6, 2012.

**FOR FURTHER INFORMATION CONTACT:** Michele Brooks, Director, Program Development and Regulatory Analysis, USDA Rural Development, 1400 Independence Ave. SW., STOP 1522, Room 5162, South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078. FAX: (202) 720–8435.

**SUPPLEMENTARY INFORMATION:** The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. This notice identifies information collections that RUS is submitting to OMB for extension.

*Comments are invited on:* (a) Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology. Comments may be sent to: Michele Brooks, Director, Program Development and Regulatory Analysis, USDA Rural Development, Stop 1522, 1400 Independence Ave. SW., Washington, DC 20250–1522. FAX: (202) 720–8435.

*Title:* Operating Reports for Telecommunications and Broadband Borrowers.

*OMB Control Number:* 0572–0031.

*Type of Request:* Revision of an existing information collection package.

*Abstract:* Rural Utilities Service (RUS), an agency delivering the U.S. Department of Agriculture (USDA) Rural Development Utilities Programs, is a credit agency. RUS makes mortgage loans and loan guarantees to finance electric, broadband, telecommunications, and water and waste facilities in rural areas. In addition to providing loans and loan guarantees, one of the Agency's main objectives is to safeguard loan security until the loan is repaid.

This collection of information covers the Telecommunications Operating Report, the Broadband Operating Report, and RUS Form 674, ''Certificate of Authority to Submit or Grant Access to Data.'' The data collected via the Telecommunications Operating Report is collected through the USDA Data Collection System. The data collected via the Broadband Operating Report is collected through the USDA Broadband Collection and Analysis System. The data collected via the Telecommunication and Broadband Operating reports is required by the loan contract and provides Rural Development with vital financial information necessary to ensure the maintenance of the security for the Government's loans, and statistical data to enable the Agency to ensure the provision of quality telecommunications and broadband services as mandated by the Rural Electrification Act (RE Act) of 1936. The data collected via the operating reports provides financial information to ensure loan security

consistent with due diligence. These functions are essential to protect loan security and to achieve objectives of the RE Act.

The data collected via RUS Form 674 provides information to the Agency to allow Rural Development Electric, Telecommunications, and Broadband program Borrowers to file electronic Operating Reports with the Agency using the USDA Data Collection System. RUS Form 674, accompanied by a Board Resolution, identifies the name and USDA eAuthentication ID for a certifier and security administrator who will have access to the USDA Data Collection System for purposes of filing electronic Operating Reports. The information collected on the RUS Form 674 is submitted in hard copy by Borrowers only when revisions are required or, in the case of a first time Borrower, when initially submitting the data.

*Estimate of Burden:* Public reporting for this collection of information is estimated to average 3.45 hours per response.

*Respondents:* Businesses or other for-profit and not-for-profit Institutions.

*Estimated Number of Respondents:* 676.

*Estimated Number of Responses per Respondent:* 1.36.

*Estimated Total Annual Burden on Respondents:* 2,806.

*Title:* Distance Learning and Telemedicine Loan and Grant Program.

*OMB Control Number:* 0572–0096.

*Type of Request:* Revision of a currently approved information collection package.

*Abstract:* The Rural Utilities Service's (RUS) Distance Learning and Telemedicine (DLT) Loan and Grant program provides loans and grants for advanced telecommunications services to improve rural areas' access to educational and medical services. The various forms and narrative statements required are collected from the applicants (rural community facilities, such as schools, libraries, hospitals, and medical facilities, for example). The purpose of collecting the information is to determine such factors as eligibility of the applicant; the specific nature of the proposed project; the purposes for which loan and grant funds will be used; project financial and technical feasibility; and, compliance with applicable laws and regulations. In addition, for grants funded pursuant to the competitive evaluation process, information collected facilitates RUS' selection of those applications most consistent with DLT goals and objectives in accordance with the authorizing legislation and implementing regulation.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 2.45 hours per response.

*Respondents:* Business or other forprofit; not-for-profit institutions; and State, Local or Tribal Government.

*Estimated Number of Respondents:* 210.

*Estimated Number of Responses per Respondent:* 23.33.

*Estimated Total Annual Burden on Respondents:* 12,788 hours.

Dated: April 26, 2012.

**Jonathan Adelstein,**

*Administrator, Rural Utilities Service.*

[FR Doc. 2012–10872 Filed 5–4–12; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* National Oceanic and Atmospheric Administration (NOAA).

*Title:* Permitting, Vessel Identification, and Reporting Requirements for Deepwater Shrimp Fisheries in the Western Pacific Region.

*OMB Control Number:* 0648–0586.

*Form Number(s):* NA.

*Type of Request:* Regular submission (extension of a current information collection).

*Number of Respondents:* 10.

*Average Hours per Response:* Permit applications/renewals, 30 minutes; logbooks, 10 minutes per trip; vessel identification, 45 minutes.

*Burden Hours:* 180.

*Needs and Uses:* This request is for extension of a currently approved information collection.

Under the Code of Federal Regulations in Title 50, Part 665, all vessel owners who fish for deepwater shrimp (*Heterocarpus* spp.), or land these species in ports, in the western Pacific region must obtain a Federal permit from the National Marine Fisheries Service (NMFS). They must also mark their vessels for identification. Vessel operators must submit NMFS logbook reports of their fishing activity to NMFS within 72 hours of the end of each fishing trip.

The information collected is used to identify participants in the fishery, document fishing activities and landings, determine the conditions of the stocks, assess the effectiveness of management measures, evaluate the benefits and costs of changes in management measures, and monitor and respond to accidental takes of protected species, including seabirds, turtles, and marine mammals.

Vessel owners must identify their vessels to assist in aerial and at-sea enforcement of fishing regulations.

*Affected Public:* Business or other for-profit organizations.

*Frequency:* Annually and on occasion.

*Respondent's Obligation:* Mandatory.

*OMB Desk Officer:* *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: May 2, 2012.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2012–10908 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* U.S. Census Bureau.

*Title:* 2012 National Census Test.

*OMB Control Number:* None.

*Form Number(s):* Questionnaire: DA–1; Letters: DA–5(L), DA–16(L)(1), DA–16(L)(2), DA–17(L)(1), DA–17(L)(2), DA–17(L)(3); Reminder Postcards: DA–9, DA–9(2A), DA–9(2B), DA–9(2C); Envelopes: DA–5, DA–6A(IN), DA–6A(1)(IN), DA–8A; Internet Instruction Card: DA–33.

*Type of Request:* New collection.

*Burden Hours:* 16,668.

*Number of Respondents:* 80,000.

*Average Hours per Response:* 10 minutes.

*Needs and Uses:* The Census Bureau has committed to using the Internet as a primary response option in the 2020 Census. However, much research is needed throughout the next decade to develop and implement a successful, secure, and user-friendly online instrument. The Census Bureau must conduct a series of research projects and tests throughout this decade to fulfill its commitment to provide the public with an option to complete their 2020 Decennial Census questionnaire on the Internet. One of the first tests to support this planning effort is the 2012 National Census Test (NCT).

The 2012 NCT seeks to build on previous Internet data collection research in order to set the stage for the Internet testing cycle for the 2020 Census. The main objective is to test new, dynamic approaches for collecting the number of people in a household, which are not feasible on a paper questionnaire. The anticipated use of the Internet as a primary mode of self-response in the 2020 Census offers the unique opportunity to incorporate conditional residence probes. By making optimal use of electronic data collection for delivery of coverage probes, we can gain a better understanding of who was living in a household on Census Day, thereby greatly reducing (or potentially eliminating) the need for the costly Coverage Followup (CFU) operation. The goal is to optimize the residence rules presentation for the Internet mode and identify validated methods for determining residency. We will utilize a real-time, targeted, probing coverage reinterview conducted by telephone to evaluate the accuracy of within-household coverage by comparing the final household population roster for the Internet Test households to the final reinterview roster for the same households.

As a secondary objective of the 2012 NCT, the Census Bureau aims to study the relative response rates associated with various contact strategies under an Internet Push methodology, in an effort to obtain early response rate indicators for the 2020 Census. The 2012 Internet Test sets the stage for future testing by making important strides in obtaining a select subset of contact strategy options that can be validated in later mid-decade tests. Various contact strategies involving optimizing the Internet push strategy are proposed, such as implementing relatively less expensive reminders both before and after the questionnaire mailing, which builds off recent American Community Survey (ACS) results. Also included is the removal of the advance letter mailing, new motivational wording and varying the timing of the questionnaire mailing to optimize self-response.

Additionally, without impact to sample size, the 2012 NCT offers the opportunity to gain knowledge about how to optimize the presentation of the race and Hispanic origin questions.

Results from the 2010 Alternative Questionnaire Experiment reveal that the combination of the race and Hispanic origin question approach appears to be a promising strategy for collecting these data items. As an additional secondary objective, the Census Bureau plans to continue this research by implementing two versions of a combined race and Hispanic origin question as part of the 2012 NCT. In addition, this data collection will incorporate the use of predictive text to automate and streamline the race and Hispanic origin coding processes. This component allows for near-real-time data processing by increasing the speed of automated coding, thus reducing and/or eliminating back-end processing.

*Affected Public:* Individuals or households.

*Frequency:* One time.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* Title 13, United States Code, Section 141, 193, and 225.

*OMB Desk Officer:* Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov).*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or email (*bharrisk@omb.eop.gov*).

Dated: May 2, 2012.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2012–10924 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–07–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[B–31–2012]**

### Foreign-Trade Zone 235—Lakewood, NJ: Notification of Proposed Production Activity; Cosmetic Essence Innovations, LLC (Fragrance Bottling); Holmdel, NJ

Cosmetic Essence Innovations, LLC (CEI) has submitted a notification of proposed production activity for their facility located in Holmdel, New Jersey. The CEI facility is located within Site 8 of FTZ 235. The facility is used for the blending and bottling of fragrances. Components and materials sourced from abroad include: plastic bottles; glass bottles; plastic caps and lids; metal caps and lids; plastic collars; sprayers; pumps; and, decorative charms on chains (duty rate ranges from duty-free to 5.3%).

Production under FTZ procedures could exempt CEI from customs duty payments on the foreign status components used in export production. On its domestic sales, CEI would be able to choose the duty rates during customs entry procedures that apply to bottles of fragrance (duty-free) for the foreign status inputs noted above. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is June 18, 2012.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: May 1, 2012.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2012–10953 Filed 5–4–12; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–570–978]**

### High Pressure Steel Cylinders From the People's Republic of China: Final Affirmative Countervailing Duty Determination

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

**SUMMARY:** The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of high pressure steel cylinders (steel cylinders) from the People's Republic of China (the PRC). For information on the estimated subsidy rates, see the ''Suspension of Liquidation'' section, below.

**DATES:** *Effective Date:* May 7, 2012.

**FOR FURTHER INFORMATION CONTACT:** Christopher Siepmann or Yasmin Nair, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–7958 or (202) 482–3813, respectively.

#### Background

The U.S. producer that filed the petition for this investigation is Norris Cylinder Co. (Petitioner). The mandatory respondent to this investigation is Beijing Tianhai Industry Co., Ltd. (BTIC).

#### Period of Investigation

The period for which we are measuring subsidies, or period of investigation, is January 1, 2010, through December 31, 2010.

#### Case History

The following events have occurred since the *Preliminary Determination*.[1]

On October 14, 2011, the Government of China (GOC) filed a partial response to the Department's second supplemental questionnaire and requested an extension to complete its supplemental questionnaire response. The Department granted the GOC's request, and on October 18, 2011, the GOC submitted its response to the outstanding questions in the second supplemental questionnaire. On October 28, 2011, the Department issued its third supplemental questionnaire to BTIC and the GOC, and on November 14, 2011, it received responses from both.

On November 18, 2011, interested party Zhejiang Jindun Pressure Vessel Co., Ltd. (Jindun) filed a request for a hearing. On November 22, 2011, the Department denied Jindun's request because it was untimely filed, pursuant to section 351.310(c) of the Department's regulations.

The Department conducted verification of BTIC's and the GOC's questionnaire responses from December 7 to December 14, 2011, and issued verification reports for BTIC and the GOC on January 3, and January 17, 2012, respectively.

The Department issued a post-preliminary analysis memorandum regarding three programs on March 14, 2012.

BTIC, the GOC, and Jindun submitted case briefs on March 23, 2012, and Petitioners submitted a rebuttal brief on March 28, 2012.

#### Scope Comments

In accordance with the preamble to the Department's regulations, we set aside a period of time in our *Initiation Notice* for parties to raise issues regarding product coverage, and encouraged all parties to submit comments within 20 calendar days of publication of that notice. *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997), and *Initiation Notice,* 76 FR at 33239. We did not receive any comments.

#### Scope of the Investigation

The merchandise covered by the scope of the investigation is seamless steel cylinders designed for storage or transport of compressed or liquefied gas (''high pressure steel cylinders''). High pressure steel cylinders are fabricated of chrome alloy steel including, but not limited to, chromium-molybdenum steel or chromium magnesium steel, and have permanently impressed into the steel, either before or after importation, the symbol of a U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (''DOT'')-approved high pressure steel cylinder manufacturer, as well as an approved DOT type marking of DOT 3A, 3AX, 3AA, 3AAX, 3B, 3E, 3HT, 3T, or DOT–E (followed by a specific exemption number) in accordance with the requirements of sections 178.36 through 178.68 of Title 49 of the Code of Federal Regulations, or any subsequent amendments thereof. High pressure steel cylinders covered by these investigations have a water capacity up to 450 liters, and a gas capacity ranging from 8 to 702 cubic feet, regardless of corresponding service pressure levels and regardless of physical dimensions, finish or coatings.

Excluded from the scope of the investigation are high pressure steel cylinders manufactured to UN–ISO–9809–1 and 2 specifications and permanently impressed with ISO or UN symbols. Also excluded from the investigation are acetylene cylinders, with or without internal porous mass, and permanently impressed with 8A or 8AL in accordance with DOT regulations.

Merchandise covered by the investigation is classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under subheading 7311.00.00.30. Subject merchandise may also enter under HTSUS subheadings 7311.00.00.60 or 7311.00.00.90. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under the investigation is dispositive.

#### Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this investigation are addressed in the Memorandum to Paul Piquado, Assistant Secretary for Import Administration, entitled ''Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China'' (April 30, 2012) (hereafter, ''Decision Memorandum''), which is hereby adopted by this notice. Attached to this notice as an Appendix is a list of the issues that parties have raised and to which we have responded in the Decision Memorandum. Parties can find a complete discussion of all issues raised in this investigation and the corresponding recommendations in this public memorandum, which is on file electronically via IA ACCESS. In addition, a complete version of the Decision Memorandum is also accessible on the Web at *http://ia.ita.doc.gov/frn/*. The paper copy and electronic version of the Decision Memorandum are identical in content.

#### Suspension of Liquidation

In accordance with section 703(c)(1)(B)(i)(I) of the Tariff Act of 1930 (the ''Act''), we calculated an individual rate for each producer/exporter of the subject merchandise individually investigated. Because only one company

[1] *See High Pressure Steel Cylinders From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination,* 76 FR 64301 (October 18, 2011) (''*Preliminary Determination*'').

was investigated, that company's rate also serves as the All Others rate.

We determine the total net countervailable subsidy rates to be:

| Exporter/Manufacturer | Net subsidy rate |
|---|---|
| Beijing Tianhai Industry Co., Ltd.; Tianjin Tianhai High Pressure Container Co., Ltd.; Langfang Tianhai High Pressure Container Co., Ltd | 15.81 |
| All Others | 15.81 |

As a result of our *Preliminary Determination* and pursuant to section 703(d) of the Act, we instructed U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of subject merchandise from the PRC which were entered or withdrawn from warehouse, for consumption on or after October 18, 2011, the date of the publication of the *Preliminary Determination* in the **Federal Register**. In accordance with section 703(d) of the Act, we later issued instructions to CBP to discontinue the suspension of liquidation for countervailing duty purposes for subject merchandise entered or withdrawn from warehouse, on or after February 15, 2012, but to continue the suspension of liquidation of all entries from October 18, 2011, through February 14, 2012.

We will issue a countervailing duty order and reinstate the suspension of liquidation under section 706(a) of the Act if the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, and will require a cash deposit of estimated countervailing duties for such entries in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated deposits or securities posted as a result of the suspension of liquidation will be refunded or canceled.

## ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an APO, without the written consent of the Assistant Secretary for Import Administration.

## Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under 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 violation which is subject to sanction.

This determination is published pursuant to sections 705(d) and 777(i) of the Act.

Dated: April 30, 2012.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Import Administration.*

## Appendix

### List of Comments and Issues in the Decision Memorandum

Comment 1 Application of the CVD Law to the People's Republic of China
Comment 2 Double Counting/Overlapping Remedies
Comment 3 Whether the Department Should Have Selected Jindun as a Mandatory or Voluntary Respondent
Comment 4 Whether a Certain Producer of Seamless Tube Steel Partially-Owned by SOEs is a Government Authority
Comment 5 Whether a Certain Producer of Seamless Tube Steel Owned by Individuals is a Government Authority
Comment 6 Countervailability of Seamless Tube Steel Produced by One of BTIC's Affiliates
Comment 7 Countervailability of Inputs Purchased from Domestic Trading Companies
Comment 8 Whether to Limit the Benchmark for Seamless Tube Steel to Certain Countries or Diameters
Comment 9 Whether to Incorporate VAT and Import Duties into Input Benchmarks
Comment 10 Application of Adverse Facts Available to the Electricity Benchmark
Comment 11 Alleged Errors in the Department's Calculations for the Provision of Electricity for LTAR

[FR Doc. 2012–10954 Filed 5–4–12; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–977]**

## High Pressure Steel Cylinders From the People's Republic of China: Final Determination of Sales at Less Than Fair Value

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

**DATES:** *Effective Date:* May 7, 2012.

**SUMMARY:** On December 15, 2011, the Department of Commerce (''Department'') published the *Preliminary Determination* of sales at less than fair value (''LTFV'') in the antidumping investigation of high pressure steel cylinders from the People's Republic of China (''PRC'').[1] The period of investigation (''POI'') is October 1, 2010, through March 31, 2011. Based on its analysis of the comments received, the Department has made changes to its *Preliminary Determination.* The Department continues to find that high pressure steel cylinders from the PRC are being, or are likely to be, sold in the United States at LTFV, as provided in section 735 of the Tariff Act of 1930, as amended (''Act''). The estimated margins of sales at LTFV are shown in the ''Final Determination Margins'' section of this notice.

**FOR FURTHER INFORMATION CONTACT:** Alan Ray or Emeka Chukwudebe, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–5403 or 482–0219, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

Since the *Preliminary Determination,* the Department conducted sales and factors of production (''FOP'') verifications for Beijing Tianhai Industry Co., Ltd. (''BTIC''), the mandatory respondent, from January 9 through January 17, 2012, and a sales verification for American Fortune Company (''AFC''), BTIC's U.S. affiliate, on February 9 and 10, 2012.[2] *See* the

[1] *See High Pressure Steel Cylinders From the People's Republic of China: Preliminary Determination of Sales at Less than Fair Value,* 76 FR 77964 (December 15, 2011) (''*Preliminary Determination*'').

[2] We conducted verifications of BTIC and one of its affiliated producers, Langfang Tianhai High Pressure Contain Co., Ltd. (''Langfang Tianhai''), which produced the merchandise under

Continued

''Verification'' section below for additional information. On January 31, 2012, and February 10, 2012, we received surrogate value (''SV'') comments from both BTIC and Petitioner and rebuttal SV comments from BTIC. On March 2, 2011, we issued a post-preliminary supplemental questionnaire.

Upon the February 23, 2012, release of the verification reports, we invited interested parties to comment on the *Preliminary Determination.* On March 6, 2012, we received case briefs from Petitioner,[3] BTIC, and Zhejiang Jindun Pressure Vessel Co., Ltd. (''Jindun''). On March 26, 2012, we received rebuttal briefs from Petitioner and BTIC. On March 16, 2012, we released a new labor calculation and requested that interested parties submit comments.[4] On March 26, 2012, BTIC submitted comments regarding the revised labor calculation. The Department held a public hearing on April 4, 2012, pursuant to 19 CFR 351.310(d).

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties to this investigation are addressed in the ''Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Issues and Decision Memorandum for the Final Determination'' (''Decision Memorandum''), dated concurrently with this notice and which is hereby adopted by this notice. A list of the issues which parties raised, and to which we respond to in the Decision Memorandum, is attached to this notice as Appendix I. The Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). Access to IA ACCESS is available in the Central Records Unit (''CRU''), room 7046 of the main Department of Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the internet at *http://www.trade.gov/ia/.* The signed Decision Memorandum and the electronic versions of the Decision Memorandum are identical in content.

**Changes Since the Preliminary Determination**

Based on our analysis of information on the record of this investigation, we have made changes regarding BTIC and the separate rate companies[5] for the final determination.

- Subsequent to the *Preliminary Determination,* at the Department's request, BTIC provided a revised FOP and sales database.
- We have changed the source used for valuing truck freight.
- We have changed the surrogate financial statements upon which we are relying to calculate financial ratios from Everest Kanto Cylinder Ltd. to Thai Metal Drum Manufacturing Public Company Limited.
- We have excluded water and all of the other energy FOPs from the build-up for normal value as the Thai Metal Drum Manufacturing Public Company Limited financial statement does not provide sufficient detail for the Department to allocate those factors appropriately.
- We are changing the date of sale for constructed export price (''CEP'') sales to reflect the correct date of sale in the ''Targeted Dumping'' section of the margin calculation program.
- We are using the revised labor valuation methodology discussed in our March 16, 2012, memorandum.[6]
- In the *Preliminary Determination,* we assigned the PRC-wide rate of 26.23 percent, the highest transaction-specific rate preliminarily calculated for BTIC. For this final determination, we continue to use BTIC's highest transaction-specific rate, which now is 31.42 percent.

**Scope of Investigation**

The merchandise covered by the scope of the investigation is seamless steel cylinders designed for storage or transport of compressed or liquefied gas (''high pressure steel cylinders''). High pressure steel cylinders are fabricated of chrome alloy steel including, but not limited to, chromium-molybdenum steel or chromium magnesium steel, and have permanently impressed into the steel, either before or after importation, the symbol of a U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (''DOT'') approved high pressure steel cylinder manufacturer, as well as an approved DOT type marking of DOT 3A, 3AX, 3AA, 3AAX, 3B, 3E, 3HT, 3T, or DOT–E (followed by a specific exemption number) in accordance with the requirements of sections 178.36 through 178.68 of Title 49 of the Code of Federal Regulations, or any subsequent amendments thereof. High pressure steel cylinders covered by the investigation have a water capacity up to 450 liters, and a gas capacity ranging from 8 to 702 cubic feet, regardless of corresponding service pressure levels and regardless of physical dimensions, finish or coatings.

Excluded from the scope of the investigation are high pressure steel cylinders manufactured to UN–ISO–9809–1 and 2 specifications and permanently impressed with ISO or UN symbols. Also excluded from the investigation are acetylene cylinders, with or without internal porous mass, and permanently impressed with 8A or 8AL in accordance with DOT regulations.

Merchandise covered by the investigation is classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under subheading 7311.00.00.30. Subject merchandise may also enter under HTSUS subheadings 7311.00.00.60 or 7311.00.00.90. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under the investigation is dispositive.

**Verification**

As provided in section 782(i) of the Act, we conducted verification of the information submitted by BTIC for use in our final determination. We used standard verification procedures, including examination of relevant accounting and production records, as well as original source documents provided by BTIC.[7]

investigation that BTIC sold to the United States, and BTIC's U.S. affiliate which sold merchandise under investigation in the United States. *See* Memo to the File, through Matthew Renkey, Acting Program Manager, Office 9, from Alan Ray and Emeka Chukwudebe, International Trade Analysts, ''Verification of the Sales and Factors of Production Response of Beijing Tianhai Industry Co., Ltd. (''BTIC'') in the Investigation of High Pressure Steel Cylinders from the People's Republic of China,'' dated February 23, 2012 (''BTIC Verification Report''); Memo to the File, through Matthew Renkey, Acting Program Manager, Office 9, from Alan Ray and Ricardo Martinez Rivera, International Trade Analysts,, ''Verification of the Constructed Export Price Sales of American Fortune Company (''AFC'') in the Investigation of High Pressure Steel Cylinders from the People's Republic of China,'' dated February 23, 2012 (''AFC Verification Report'').

[3] Norris Cylinder Company.

[4] *See* ''Memorandum to Christian Marsh, Deputy Assistant Secretary, for Antidumping and Countervailing Duty Operations, through Matthew Renkey, Acting Program Manager, Office 9, from Emeka Chukwudebe, Case Analyst, Office 9: Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Post-Preliminary Analysis Regarding Surrogate Labor Value,'' dated March 16, 2012 (''Surrogate Labor Value Memo'').

[5] Jindun, Shanghai J.S.X. International Trading Corporation (''Shanghai J.S.X.''), and Shijiazhuang Enric Gas Equipment Co., Ltd. (''Enric'') (''Separate Rate Respondents'').

[6] *See* Surrogate Labor Value Memo.

[7] *See* BTIC Verification Report; AFC Verification Report.

**Surrogate Country**

In the *Preliminary Determination,* we selected Ukraine as the primary surrogate country in this investigation because: (1) In accordance with section 773(c)(4) of the Act, we determined that it is a significant producer of comparable merchandise and it is at a level of economic development comparable to the PRC; and (2) Ukraine data satisfy several factors that the Department considers in selecting a primary surrogate country, including whether the SV data are publicly available, contemporaneous with the POI, represent a broad-market average, from an approved surrogate country, are tax- and duty-exclusive, and specific to the input.[8] Interested parties submitted comments regarding our preliminary determinations concerning the selection of surrogate country, which are summarized in the accompanying Decision Memo at Comment I. For this final determination we continue to select Ukraine as the primary surrogate country.

**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 investigation 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.[9] In the *Preliminary Determination,* we found that BTIC, Enric, Jindun, and Shanghai J.S.X., (collectively, ''Separate Rate Companies'') demonstrated their eligibility for, and were hence assigned, separate rate status.[10]

No parties commented on the above companies' eligibility for separate rate status. Consequently, for the final determination, we continue to find that these companies demonstrated both a *de jure* and *de facto* absence of government control with respect to their exports of the merchandise under investigation, and are eligible for separate rate status for the final determination.

**Calculation of the Margin for the Separate Rate Companies**

As in the *Preliminary Determination,* we are basing the antidumping duty margin for those companies receiving a separate rate, but who were not individually examined,[11] on the margin calculated for BTIC.[12]

The Department received comments from Jindun regarding the Department's *Preliminary Determination* and its decision not to examine Jindun as a voluntary respondent, as requested. The Department has addressed these arguments in Comment VI of the Decision Memorandum. For the final determination, we continue not to individually examine Jindun. Accordingly, Jindun will continue to be treated as and receive the rate assigned to the non-selected, Separate Rate Companies.[13]

**The PRC-Wide Entity Rate**

Because we begin with the presumption that all companies within a NME country are subject to government control, and because only the companies listed under the ''Final Determination Margins'' section, below, have overcome that presumption, we are assigning a single weighted-average dumping margin (*i.e.,* the PRC-wide rate) to all other exporters of the merchandise under consideration. These other companies did not demonstrate entitlement to a separate rate.[14] The PRC-wide rate applies to all entries of the merchandise under consideration except for entries from the Separate Rate Companies.

In the *Preliminary Determination,* the Department determined that there were exporters/producers of the merchandise subject to this investigation during the POI from the PRC that did not respond to the Department's request for information.[15] Further, we treated these PRC exporters/producers as part of the PRC-wide entity because they did not qualify for a separate rate. Therefore, we find that the use of facts available (''FA'') is necessary and appropriate to determine the PRC-wide rate pursuant to section 776(a)(2)(A) of the Act.[16]

In the *Preliminary Determination,* the Department also determined that, in selecting from among the FA, an adverse inference is appropriate because the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with requests for information.[17] As adverse facts available (''AFA''), we preliminarily assigned to the PRC-wide entity a rate of 26.23 percent, the highest transaction-specific rate preliminarily calculated for BTIC.[18]

Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 776(b) of the Act provides that, in selecting from among the facts otherwise available, the Department may employ an adverse inference if an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information.[19] We find that, because the PRC-wide entity did not respond to our request for information, it has failed to cooperate to the best of its ability. Therefore, the Department finds that, in selecting from among the facts otherwise available, an adverse inference is appropriate.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) provide that the Department may rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. In selecting a rate for AFA, the Department selects a rate that is sufficiently adverse ''so as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' [20] It is also the Department's practice to select a rate that ensures ''that the party does not obtain a more favorable result by failing

[8] *See Preliminary Determination,* 76 FR at 77967–77968.

[9] *See Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588 (May 6, 1991) (''*Sparklers''*), as amplified by *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 59 FR 22585 (May 2, 1994) (''*Silicon Carbide''*), and 19 CFR 351.107(d).

[10] *See Preliminary Determination,* 76 FR at 77965 n.16 and 77969.

[11] Enric, Jindun, and Shanghai J.S.X.

[12] *See Preliminary Determination,* 76 FR at 77970.

[13] *See* Decision Memorandum at Comment 7.

[14] *See, e.g., Synthetic Indigo From the People's Republic of China; Notice of Final Determination of Sales at Less Than Fair Value,* 65 FR 25706, 25707 (May 3, 2000).

[15] *See Preliminary Determination,* 76 FR at 77970.

[16] *See id.*

[17] *See id.*

[18] *See id.,* at 77971.

[19] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation,* 65 FR 5510, 5518 (February 4, 2000). *See also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103–316, vol. 1, at 870 (1994) (''SAA'').

[20] *See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8932 (February 23, 1998).

to cooperate than if it had cooperated fully.'' [21]

In the *Preliminary Determination,* the Department selected as AFA, a rate of 26.23 percent, the highest transaction-specific rate for BTIC.[22] For the final determination, the Department continues to use the same methodology to determine the AFA rate used in the *Preliminary Determination.*[23] Specifically, the Department continues to use the highest transaction-specific rate calculated for BTIC, which, because of changes to the calculations since the *Preliminary Determination* now is 31.42 percent. No parties commented on the selection of AFA.

**Final Determination Weighted-Average Dumping Margins**

We determine that the following weighted-average dumping margins exist for the following entities for the POI:

| Exporter | Producer | Weighted-Average dumping margin (percent) |
|---|---|---|
| Beijing Tianhai Industry Co., Ltd. | Beijing Tianhai Industry Co., Ltd. | 6.62 |
| Beijing Tianhai Industry Co., Ltd. | Tianjin Tianhai High Pressure Container Co., Ltd. | 6.62 |
| Beijing Tianhai Industry Co., Ltd. | Langfang Tianhai High Pressure Container Co., Ltd. | 6.62 |
| Shanghai J.S.X. International Trading Corporation | Shanghai High Pressure Special Gas Cylinder Co., Ltd. | 6.62 |
| Zhejiang Jindun Pressure Vessel Co., Ltd. | Zhejiang Jindun Pressure Vessel Co., Ltd. | 6.62 |
| Shijiazhuang Enric Gas Equipment Co., Ltd. | Shijiazhuang Enric Gas Equipment Co., Ltd. | 6.62 |
| PRC-Wide Rate [24] | | 31.21 |

**Disclosure**

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

**Continuation of Suspension of Liquidation**

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (''CBP'') to continue to suspend liquidation of all imports of merchandise subject to the investigation entered or withdrawn from warehouse, for consumption for the PRC-wide entity and the Separate Rate Companies on or after December 15, 2011. The Department will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the normal value exceeds U.S. price, as follows: (1) The rate for the exporter/producer combinations listed in the chart above will be the rate we have determined in this final determination; (2) for all PRC exporters of subject merchandise which have not received their own rate, the cash-deposit rate will be the PRC-wide rate; and (3) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash-deposit rate will be the rate applicable to the PRC exporter/producer combination that supplied that non-PRC exporter. The suspension of liquidation instructions will remain in effect until further notice.

**ITC Notification**

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (''ITC'') of our final determination of sales at LTFV. As our final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will, within 45 days, determine whether the domestic industry in the United States is materially injured or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of the subject merchandise. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to collect cash deposits for antidumping duties due on all imports of the subject merchandise entered or withdrawn from warehouse for consumption on or after the effective date of the suspension of liquidation.

**Notification Regarding APO**

This notice also serves as a reminder to the parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination and notice are issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: April 30, 2012.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Import Administration.*

## Appendix I

**General Issues**

Comment I: Selection of Surrogate Country
Comment II: Surrogate Values
- A. Selection of Surrogate Financial Ratios
- B. Truck Freight
- C. Labor

Comment III: Double Remedy
Comment IV: Targeted Dumping Methodology
- A. General Department Targeted Dumping Methodology
- B. Average to Transaction Methodology
- C. Zeroing

**Company-Specific Issues**

Comment V: BTIC
- A. Targeted Dumping—Clerical Error Allegation
- B. Cash Deposit Instructions

Comment VI: Jindun's Voluntary Respondent Status

[FR Doc. 2012–10952 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–DS–P**

[21] *See* SAA at 870.

[22] *See Preliminary Determination,* 76 FR at 77971.

[23] *See* id.

[24] The PRC-Wide entity includes: Shanghai High Pressure Container Co., Ltd.; Heibei Baigong Industrial Co., Ltd.; Nanjing Ocean High-Pressure Vessel Co., Ltd.; Qingdao Baigong Industrial and Trading Co., Ltd.; Shandong Huachen High Pressure Vessel Co., Ltd.; Shandong Province Building High Pressure Vessel Limited Company; Sichuan Mingchuan Chengyu Co., Ltd.; and Zhuolu High Pressure Vessel Co., Ltd.

## DEPARTMENT OF COMMERCE

### International Trade Administration

### The Manufacturing Council: Work Session of the Manufacturing Council

**AGENCY:** International Trade Administration, U.S. Department of Commerce.

**ACTION:** Notice of an Open Work Session.

**SUMMARY:** This notice sets forth the schedule and agenda for an open work session of the Manufacturing Council (Council). The agenda may change to accommodate Council work. The final agenda will be posted on the Department of Commerce Web site for the Council at *http://trade.gov/manufacturingcouncil.*

**DATES:** May 10, 2012, 10:00 a.m.–12:00 p.m. Central Daylight Time (CDT).

**ADDRESSES:** The work session will be held at Freescale Austin Technology and Manufacturing Center, 3501 Ed Bluestein Boulevard, Austin, Texas. All guests are requested to register in advance. This session will be physically accessible to people with disabilities. Seating is limited and is not guaranteed. Requests for sign language interpretation, other auxiliary aids, or pre-registration, should be submitted no later than May 7, 2012, to Jennifer Pilat, the Manufacturing Council, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230, telephone 202–482–4501, *OACIE@trade.gov.* Last minute requests will be accepted, but may be impossible to fill.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Pilat, the Manufacturing Council, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230, telephone: 202–482–4501, email: *OACIE@trade.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background:* The Council was re-chartered on April 5, 2012 to advise the Secretary of Commerce on matters relating to the U.S. manufacturing industry.

*Topics To Be Considered:* The Council will be conducting work regarding possibly advising the Secretary regarding the Trans-Pacific Partnership Agreement negotiations and energy policy and hear updates on the work being conducted by the Council's subcommittees. The Council will also be briefed by the ex-officio members present representing the Secretaries of the Treasury, Labor, and Energy on their respective agency's work in the areas of past Council recommendations.

No time will be available for oral comments from members of the public attending the session. Any member of the public may submit pertinent written comments concerning the Council's affairs at any time before or after the session.

Comments may be submitted to Jennifer Pilat at the contact information indicated above. To be considered during the session, comments must be received no later than 5:00 p.m. Eastern Time on May 7, 2012, to ensure transmission to the Council prior to the session.

Comments received after that date will be distributed to the members but may not be considered at the session.

Dated: May 2, 2012.

**Jennifer Pilat,**

*Executive Secretary, The Manufacturing Council.*

[FR Doc. 2012–10980 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–DR–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Proposed Information Collection; Comment Request; Atlantic Highly Migratory Species Tournament Registration and Reporting

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before July 6, 2012.

**ADDRESSES:** Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Katie Davis, (727) 824–5399 or *Katie.Davis@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

This request is for extension of a currently approved information collection.

Under the provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), NOAA's National Marine Fisheries Service (NMFS) is responsible for management of the nation's marine fisheries. Existing regulations require operators of tournaments involving Atlantic highly migratory species (HMS), specifically Atlantic swordfish, sharks, billfish, and tunas, to register four weeks in advance of the tournament. Operators must provide contact information and the tournament's date(s), location(s), and target HMS. If selected by NMFS, operators are required to submit an HMS tournament summary report within seven days after tournament fishing has ended. Most of the catch data in the summary report is routinely collected in the course of regular tournament operations. NMFS uses the data to estimate the total annual catch of HMS and the impact of tournament operations in relation to other types of fishing activities. In addition, HMS tournament registration provides a method for tournament operators to request educational and regulatory outreach materials from NMFS.

**II. Method of Collection**

Operators have a choice of either electronic or paper forms. Methods of submittal include email of electronic forms, and mail and facsimile transmission of paper forms.

**III. Data**

*OMB Control Number:* 0648–0323.

*Form Number:* None.

*Type of Review:* Regular submission (extension of a current information collection).

*Affected Public:* Not-for-profit institutions; business or other for-profit organizations.

*Estimated Number of Respondents:* 300.

*Estimated Time Per Response:* Tournament registration, 2 minutes; tournament summary reporting, 20 minutes.

*Estimated Total Annual Burden Hours:* 110.

*Estimated Total Annual Cost to Public:* $135 in recordkeeping/reporting costs.

**IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 2, 2012.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2012–10907 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XC017**

### Fishing Capacity Reduction Program for the Southeast Alaska Purse Seine Salmon Fishery

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

**ACTION:** Notice of reduction payment tender of Southeast Alaska purse seine salmon permits.

**SUMMARY:** The National Marine Fisheries Service published regulations implementing a fishing capacity reduction program in the Southeast Alaska purse seine salmon fishery. The program authorizes NMFS to make payments to permit holders who voluntarily relinquish their fishing permits. The Southeast Revitalization Association (SRA) conducted a bid selection process accepting sixty-four bids to remove Southeast Alaska purse seine salmon permits. It then submitted a reduction plan to NMFS to implement the program. NMFS conducted a referendum which approved the reduction loan repayment fees of $13,133,030 which post-reduction harvesters will repay over a 40-year period removing 64 permits. Accordingly, NMFS is preparing to tender reduction payments to the accepted bidders.

**DATES:** The public has until June 6, 2012 to inform NMFS of any holding, owning, or retaining claims that conflict with the representations of bids as presented by the SRA.

**ADDRESSES:** Send comments about this notice to Paul Marx, Chief, Financial Services Division, NMFS, Attn: SE Alaska Purse Seine Salmon Buyback, 1315 East-West Highway, Silver Spring, MD 20910 (see **FOR FURTHER INFORMATION CONTACT**).

**FOR FURTHER INFORMATION CONTACT:** Michael A. Sturtevant at (301) 427–8799, fax (301) 713–1306, or *michael.a.sturtevant@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The Southeast Alaska purse seine salmon fishery is a commercial fishery in Alaska state waters and adjacent Federal waters. It encompasses the commercial taking of salmon with purse seine gear, and participation is limited to fishermen designated by the Alaska Commercial Fisheries Entry Commission (CFEC).

NMFS published proposed program regulations on May 23, 2011 (76 FR 29707), and final program regulations on October 6, 2011 (76 FR 61986), to implement the reduction program. Subsequently, the Southeast Revitalization Association submitted a capacity reduction plan to NMFS. NMFS approved the plan on February 24, 2012. NMFS published the list of eligible voters on March 1, 2012 (77 FR 12568) and the notice of referendum period on March 29, 2012 (77 FR 19004). Interested persons should review these for further program details.

#### II. Present Status

NMFS conducted a referendum to determine the industry's willingness to repay a fishing capacity reduction loan to purchase the permits identified in the reduction plan. NMFS mailed ballots to 379 permanent permit holders in the fishery designated as S01A by CFEC who were eligible to vote in the referendum. The voting period opened on March 30, 2012, and closed on April 30, 2012. NMFS received 269 timely and valid votes. 215 of the votes approved the fees. This exceeded the majority of permit holders (190) required for industry fee system approval. Therefore, the referendum is deemed successful and permit holders are deemed to have approved the industry fee system. Accordingly, the reduction contracts are in full force and effect and NMFS is now preparing to tender and disburse reduction payments to selected bidders.

#### III. Purpose

NMFS publishes this notice to inform the public before tendering reduction payments to the 64 accepted bidders. Upon receiving notice from CFEC that the permit has been relinquished and is no longer valid, NMFS will tender reduction payments on or about June 6, 2012. When NMFS tenders a reduction payment to a selected bidder, the selected bidder must permanently stop all further fishing represented by each reduction permit the bidder has relinquished. The selected bidder, in accordance with section 5 of the relinquishment contract, must notify all creditors or other parties with security interests in the reduction permit, that they have entered into the relinquishment contract.

This notice provides the public (including creditors or other parties) 30 days from publication of this notice to advise NMFS in writing of any holding, owning, or retaining claims that conflict with the representations of bids as presented by the SRA.

#### IV. Selected Bidders and Permits

The table below lists the 64 permit holders who will receive reduction payments when NMFS receives confirmation from CFEC that the specified permits have been relinquished.

| Last name | First name | Permit No. |
|---|---|---|
| Alfieri | Joe | S01A60791I |
| Alfieri | Anthony | S01A55646M |
| Barrett | Davis | S01A58501W |
| Beritich | Mitchell | S01A58923M |
| Bill | David | S01A58338U |
| Blair | Andrew | S01A59085F |
| Botsford | Wallace | S01A63175B |
| Buschmann | Ronn | S01A55479D |
| Christensen | Dale | S01A60803V |
| DeGroen | Johnny | S01A58505S |
| Demmert | Nicholas | S01A56948W |
| Dontos | Larry | S01A59705K |
| Fanning | Christine | S01A60909J |
| Finney | Paul | S01A64933S |
| Gruenheit | Michael | S01A55083V |
| Haldane | Robert | S01A56620L |
| Haltiner | Fred | S01A55617L |
| Hansen | William | S01A55442A |
| Hanson | Jeff | S01A57976 |
| Haynes | Bradley | S01A574950 |
| Jensen | Douglas | S01A59714N |
| Johns | Justna | S01A55403 |
| Jolibois | Timothy | S01A56018A |
| Jurlin | Marie | S01A58547R |
| Kohlase | Ernest | S01A56199V |
| Krieger | Kenneth | S01A59613M |
| Krigbaum | Michael | S01A58031W |
| Kvernvik | Carolyn | S01A55231R |
| MacDonald | Clifford | S01A55545L |
| Mann | Bruce | S01A56187 |
| Manos | Andrew | S01A59222I |
| Manos | Thomas | S01A60642C |
| Maricich | Timothy | S01A59569W |
| Markusen | Kenneth | S01A55584K |

| Last name | First name | Permit No. |
|---|---|---|
| Marrese | Andrew | S01A57909W |
| Marvin-Denkinger. | Victoria | S01A58429X |
| McGee | Gary | S01A56559 |
| McLean | John | S01A56270P |
| Menten | Erik | S01A57726X |
| Michael | Mercury | S01A55386C |
| Nash | Paul | S01A57907M |
| Nugent | Matthew | S01A55689G |
| Olney | Virginia | S01A57720 |
| Peterman | Chad | S01A55986F |
| Pfundt | Michele | S01A56392F |
| Reifenstuhl | Ivan | S01A55171A |
| Reimnitz | Hartmut | S01A578995 |
| Rocheleau | Rick | S01A58478 |
| Schonberg | Peter | S01A56601I |
| Schonberg | Mart | S01A56882A |
| Scudder | Bradley | S01A56000N |
| Selivanoff | Douglas | S01A57856A |
| Sorensen | Paige | S01A58511U |
| Spearin | James | S01A59372G |
| Suydam | Antril | S01A57910N |
| Svensson | John | S01A56492N |
| Tarabochia | Dominick | S01A56600P |
| Thorstenson | Peder | S01A59806J |
| Veerhusen | Daniel | S01A56638X |
| Wallace | Bruce | S01A55827B |
| Wamser | William | S01A60071B |
| Wills | Charles | S01A58070V |
| Zuanich | Michelle | S01A57849F |
| Zuanich | Michelle | S01A568811 |

Dated: May 2, 2012.

**Lindsay Fullenkamp,**

*Acting Director, Office of Management and Budget, National Marine Fisheries Service.*

[FR Doc. 2012–10984 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XC016**

### Marine Fisheries Advisory Committee Meeting

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

**ACTION:** Notice of open public meeting.

**SUMMARY:** This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Marine Fisheries Advisory Committee (MAFAC). The members will discuss and provide advice on issues outlined under **SUPPLEMENTARY INFORMATION** below.

**DATES:** The meeting will be held May 22–24, 2012, from 8 a.m. to 5 p.m.

**ADDRESSES:** The meeting will be held at the Sheraton Seattle Hotel, 1400 Sixth Avenue, Seattle, WA 98101; 206–447–5564.

**FOR FURTHER INFORMATION CONTACT:** Mark Holliday, MAFAC Executive Director; (301) 427–8004; email: *Mark.Holliday@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** As required by section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, notice is hereby given of a meeting of MAFAC. The MAFAC was established by the Secretary of Commerce (Secretary), and, since 1971, advises the Secretary on all living marine resource matters that are the responsibility of the Department of Commerce. The complete charter and summaries of prior meetings are located online at *http://www.nmfs.noaa.gov/ocs/mafac/.*

#### Matters To Be Considered

This agenda is subject to change.

The meeting is convened to hear presentations and discuss policies and guidance on the following topics: NMFS budget and legislative issues, aquaculture policy implementation and the Washington State aquaculture initiative, National Standard 1 advanced notice of proposed rulemaking, fisheries certification and sustainability, working waterfronts, revisions to MAFAC's *Vision 2020* report, and current protected resources issues. Updates will be presented on Gulf of Mexico restoration activities, National Ocean Policy, recreational fisheries initiatives, and outlooks for 2012 regulatory and science activities. The meeting will include discussion of various MAFAC administrative and organizational matters and meetings of the standing subcommittees.

#### Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mark Holliday, MAFAC Executive Director; 301–427–8004 by May 16, 2012.

Dated: May 1, 2012.

**Paul Doremus,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

[FR Doc. 2012–10963 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Gulf of Mexico Fishery Management Council; Public Meeting

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

**ACTION:** Council to convene public meetings.

**SUMMARY:** The Gulf of Mexico Fishery Management Council will convene a Web based meeting of the ABC Control Rule Working Group.

**DATES:** The webinar meeting will convene on Thursday, May 24, 2012. The webinar will begin at 9 a.m. and is expected end by 12 noon, Eastern time.

**ADDRESSES:** The webinar will be accessible via Internet. Please go to the Gulf of Mexico Fishery Management Council's Web site at *www.gulfcouncil.org* for instructions.

*Council address:* Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

**FOR FURTHER INFORMATION CONTACT:** Steven Atran, Population Dynamics Statistician; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

**SUPPLEMENTARY INFORMATION:** The ABC Control Rule Working Group will meet to review the results of applying the Ralston et al. (2011) method of calculating ABC when the variances used are computed from GOM stocks, to review discussion on linking Tier 3 ABCs to data collection actions, continue reviews and edits to the ABC control rule, and decide what recommendation to carry forward to the Scientific and Statistical Committee for its June 2012 meeting.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630. Materials will also be available to download from the ABC Control Rule Working Group folder of the Council's FTP site, which is accessible from the Quick Links section of the Council Web site (*http://www.gulfcouncil.org*).

Although other non-emergency issues not on the agenda may come before the ABC Control Rule Working Group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Working Group will be

restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

**Special Accommodations**

This webinars are accessible to people with disabilities. For assistance with any of our webinars contact Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the webinar.

Dated: May 2, 2012.

**Tracey L. Thompson,**

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

[FR Doc. 2012–10899 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Fisheries of the Caribbean; Southeast Data, Assessment, and Review (SEDAR); Public Meetings

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

**ACTION:** Notice of SEDAR Data Scoping, Assessment, and Review Workshops for Caribbean blue tang and queen triggerfish.

**SUMMARY:** The SEDAR assessments of the Caribbean stocks of blue tang and queen triggerfish will consist of a series of workshops: three Data scoping Workshops, an Assessment Workshop, and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

**DATES:** The Data Scoping Workshops will take place July 17–19, 2012; the Assessment Workshop will take place October 16–18, 2012; and the Review Workshop will take place February 4–7, 2013. See **SUPPLEMENTARY INFORMATION**.

**ADDRESSES:** A series of Data Scoping Workshops will be held throughout the U.S. Caribbean. The location information for each workshop is included in the table below:

| | Data Scoping—STX | Data Scoping—STT | Data Scoping—PR |
|---|---|---|---|
| Start | 7/17/12 @ 3pm | 7/18/12 @ 3pm | 7/19/12 @ 3pm. |
| End | 7/17/12 @ 7pm | 7/18/12 @ 7pm | 7/19/12 @ 7pm. |
| Location | The Buccaneer | Frenchman's Reef | Rincon Beach Hotel. |
| Address | 5007 Estate Shoys<br>St. Croix, USVI | 5 Estate Bakkeroe,<br>St. Thomas, USVI | Rd 115, Km 5.8,<br>Anasco, PR. |
| Phone | 800–255–3881 | 800–228–9290 | 866–589–0009. |

The Assessment Workshop will be held at the Courtyard Miami Coconut Grove, 2649 South Bayshore Drive, Miami, FL 33133; telephone: (800) 321–2211. The Review Workshop will be held at the Hotel El Convento, 100 Cristo Street, Old San Juan, PR 00901; telephone: (181) 723–9036.

**FOR FURTHER INFORMATION CONTACT:** Julie A. Neer, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366.

**SUPPLEMENTARY INFORMATION:** The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR includes three workshops: (1) Data Workshop, (2) Stock Assessment Workshop and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Stock Assessment Workshop is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Consensus Summary documenting Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

SEDAR 30 Workshop Schedule:

**July 17–19, 2012; SEDAR 30 Data Scoping Workshops**

July 17–19, 2012: 3 p.m.–7 p.m.

An assessment data set and associated documentation will be developed during the Data Scoping Workshops. Participants will evaluate available data and select appropriate sources for providing information on life history characteristics, catch statistics, discard estimates, length and age composition, and fishery dependent and fishery independent measures of stock abundance.

**October 16–18, 2012, 2011; SEDAR 30 Assessment Workshop**

October 16–18, 2012: 9 a.m.–8 p.m.

Using datasets provided by the Data Scoping Workshops, participants will develop population models to evaluate stock status, estimate population benchmarks and stock status criteria, and project future conditions. Participants will recommend the most appropriate methods and configurations for determining stock status and estimating population parameters. Participants will prepare a workshop report, compare and contrast various assessment approaches, and determine whether the assessments are adequate for submission to the review panel.

**February 4–7, 2013; SEDAR 30 Review Workshop**

February 4, 2013: 1 p.m.–8 p.m.; February 5–7, 2013: 8 a.m.–8 p.m.

The Review Workshop is an independent peer review of the assessment developed during the Data and Assessment Workshops. Workshop Panelists will review the assessment and document their comments and recommendations in a Consensus Summary.

The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from, or completed prior to the time established by this notice.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 10 business days prior to each workshop.

Dated: May 2, 2012.

**Tracey L. Thompson,**

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

[FR Doc. 2012–10900 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA288**

### Marine Mammals; File No. 15748

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

**ACTION:** Notice; receipt of application for permit amendment.

**SUMMARY:** Notice is hereby given that the Alaska SeaLife Center (ASLC), Seward, AK, has applied for an amendment to Scientific Research Permit No. 15748.

**DATES:** Written, telefaxed, or email comments must be received on or before June 6, 2012.

**ADDRESSES:** The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the *Features* box on the Applications and Permits for Protected Species home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 15748 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562) 980–4001; fax (562) 980–4018.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

**FOR FURTHER INFORMATION CONTACT:** Joselyd Garcia-Reyes or Tammy Adams, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:** The subject amendment to Permit No. 15748 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Permit No. 15748, issued on May 25, 2011 (76 FR 31942), authorizes the permit holder to capture and harass free-living Weddell seals (*Leptonychotes weddellii*) in McMurdo Sound and along the shore of Ross Island, Antarctica to study thermoregulation. The research involves capture and restraint of adult females and pups/juveniles of either sex for attachment of scientific instruments, morphometric measurements, ultrasound, and tissue sampling. Harassment of additional seals in the vicinity of captured animals is also authorized, as is research-related mortality. Tissue samples collected may be exported from Antarctica for analysis in the U.S. The permit is valid through August 30, 2015.

The permit holder is requesting the permit be amended to include changes to the terms and conditions of the permit related to numbers of animals taken and manner of taking to include: increasing takes for the deployment of instrumentation on weaned pups/juveniles from 20 over the life of the permit to 35 over the life of the permit; increasing the number of takes per animal of weaned pups/juveniles and adult females from 2 to 3; adding nasal, oral, and rectal swab collection (one of each per animal) in weaned pups/juveniles and adult females; adding the use of spray lidocaine or similar agent; adding stable isotope analysis to compare stable isotope values of Weddell seals in the Ross Sea in the early 1900s to today; and adding an influenza A analysis using the requested swab collection to understand the exposure of pathogens to Antarctic marine mammals.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: May 1, 2012.

**Tammy C. Adams,**

*Acting Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2012–10966 Filed 5–4–12; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Defense Science Board; Notice of Advisory Committee Meetings

**AGENCY:** Department of Defense.

**ACTION:** Notice of Advisory Committee Meetings.

**SUMMARY:** The Defense Science Board will meet in closed session on May 23–24, 2012, at the Pentagon, Room 3E863, Washington, DC. The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting, the Board will discuss interim finding and recommendations resulting from ongoing Task Force activities. The Board will also discuss plans for future consideration of scientific and technical aspects of specific strategies, tactics, and policies as they may affect the U.S. national defense posture and homeland security.

**DATES:** May 23–24, 2012.

**ADDRESSES:** The Pentagon, Room 3E863, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Ms. Debra Rose, Executive Officer, Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301–3140, via email at *debra.rose@osd.mil,* or via phone at (703) 571–0084.

**SUPPLEMENTARY INFORMATION:** In accordance with section 10(d) of the Federal Advisory Committee Act, Public

Law 92–463, as amended (5 U.S.C. App. 2) and 41 CFR 102–3.155, the Department of Defense has determined that these Defense Science Board quarterly meetings will be closed to the public. Specifically, the Under Secretary of Defense (Acquisition, Technology and Logistics), with the coordination of the DoD Office of General Counsel, has determined in writing that all sessions of these meetings will be closed to the public because they will be concerned throughout with matters listed in 5 U.S.C. 552b(c)(1) and (4). Interested persons may submit a written statement for consideration by the Defense Science Board. Individuals submitting a written statement must submit their statement to the Designated Federal Official at the address detailed in **FOR FURTHER INFORMATION CONTACT**, at any point; however, if a written statement is not received at least 10 calendar days prior to the meeting, which is the subject of this notice, then it may not be provided to or considered by the Defense Science Board. The Designated Federal Official will review all timely submissions with the Defense Science Board Chairperson, and ensure they are provided to members of the Defense Science Board before the meeting that is the subject of this notice.

Dated: May 1, 2012.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2012–10844 Filed 5–4–12; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Department of Defense Wage Committee; Notice of Closed Meetings

**AGENCY:** Department of Defense (DoD).

**ACTION:** Notice of closed meetings.

**SUMMARY:** Pursuant to the provisions of section 10 of Public Law 92–463, the Federal Advisory Committee Act, notice is hereby given that closed meeting of the Department of Defense Wage Committee will be held.

**DATES:** Tuesday, May 29, 2012, at 10:00 a.m.

**ADDRESSES:** 1400 Key Boulevard, Level A, Room A101, Rosslyn, Virginia 22209.

**FOR FURTHER INFORMATION CONTACT:** Additional information concerning the meetings may be obtained by writing to the Chairman, Department of Defense Wage Committee, 4000 Defense Pentagon, Washington, DC 20301–4000.

**SUPPLEMENTARY INFORMATION:** Under the provisions of section 10(d) of Public Law 92–463, the Department of Defense has determined that the meetings meet the criteria to close meetings to the public because the matters to be considered are related to internal rules and practices of the Department of Defense and the detailed wage data to be considered were obtained from officials of private establishments with a guarantee that the data will be held in confidence.

However, members of the public who may wish to do so are invited to submit material in writing to the chairman concerning matters believed to be deserving of the Committee's attention.

Dated: May 2, 2012.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2012–10920 Filed 5–4–12; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Department of Defense Wage Committee; Notice of Closed Meetings

**AGENCY:** Department of Defense (DoD).

**ACTION:** Notice of closed meetings.

**SUMMARY:** Pursuant to the provisions of section 10 of Public Law 92–463, the Federal Advisory Committee Act, notice is hereby given that a closed meeting of the Department of Defense Wage Committee will be held.

**DATES:** Tuesday, June 12, 2012, at 10:00 a.m.

**ADDRESSES:** 1400 Key Boulevard, Level A, Room A101, Rosslyn, Virginia 22209.

**FOR FURTHER INFORMATION CONTACT:** Additional information concerning the meetings may be obtained by writing to the Chairman, Department of Defense Wage Committee, 4000 Defense Pentagon, Washington, DC 20301–4000.

**SUPPLEMENTARY INFORMATION:** Under the provisions of section 10(d) of Public Law 92–463, the Department of Defense has determined that the meetings meet the criteria to close meetings to the public because the matters to be considered are related to internal rules and practices of the Department of Defense and the detailed wage data to be considered were obtained from officials of private establishments with a guarantee that the data will be held in confidence.

However, members of the public who may wish to do so are invited to submit material in writing to the chairman concerning matters believed to be deserving of the Committee's attention.

Dated: May 2, 2012.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2012–10921 Filed 5–4–12; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Renewal of Department of Defense Federal Advisory Committees

**AGENCY:** DoD.

**ACTION:** Renewal of Federal Advisory Committee.

**SUMMARY:** Under the provisions of 10 U.S.C. 2166(e), the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and 41 CFR 102–3.50(a), the Department of Defense gives notice that it is renewing the charter for the Chief of Engineers Environmental Advisory Board (hereafter referred to as ''the Board'').

The Board shall provide independent advice and recommendations on matters relating to environmental issues facing the U.S. Army Corps of Engineers.

The Board shall report to the Secretary of Defense, through the Secretary of the Army, the Assistant Secretary of the Army (Civil Works), and the U.S. Army Corps of Engineers.

The Board shall be composed of not more than ten members who are eminent authorities in the field of natural (e.g. biological, ecological), social (e.g. anthropologist, community planner), and related sciences.

All Board members shall be appointed by the Secretary of Defense and all member appointments require annual renewal by the Secretary of Defense. The Secretary of Defense may approve the appointments of Board members for three year terms of service; however, no member, unless authorized by the Secretary of Defense may serve more than two consecutive terms of service. This same term of service limitation also applies to any DoD authorized subcommittees.

The Board Membership shall select the Board's Chairperson from the total membership. Board Members appointed by the Secretary of Defense, who are not full-time Federal officers or employees, shall be appointed under the authority of 5 U.S.C. 3109, and serve as special government employees. Board Members shall, with the exception of travel and per diem for official travel, serve without compensation.

Each Board member is appointed to provide advice on behalf of the government on the basis of his or her best judgment without representing any particular point of view and in a manner that is free from conflict of interest.

The Department, when necessary, and consistent with the Board's mission and DoD policies and procedures, may establish subcommittees deemed necessary to support the Board. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the advisory committee's sponsor.

Such subcommittees shall not work independently of the chartered Board, and shall report all their recommendations and advice to the Board for full deliberation and discussion. Subcommittees have no authority to make decisions on behalf of the chartered Board; nor can any subcommittee or its members update or report directly to the Department of Defense or any Federal officers or employees.

All subcommittee members shall be appointed in the same manner as the Board members; that is, the Secretary of Defense shall appoint subcommittee members even if the member in question is already a Board member. Subcommittee members, with the approval of the Secretary of Defense, may serve a term of service on the subcommittee of three years; however, no member shall serve more than two consecutive terms of service on the subcommittee.

Subcommittee members, if not full-time or part-time government employees, shall be appointed to serve as experts and consultants under the authority of 5 U.S.C. 3109, and shall serve as special government employees, whose appointments must be renewed by the Secretary of Defense on an annual basis. With the exception of travel and per diem for official Board related travel, subcommittee members shall serve without compensation.

All subcommittees operate under the provisions of FACA, the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), governing Federal statutes and regulations, and governing DoD policies/procedures.

**FOR FURTHER INFORMATION CONTACT:** Jim Freeman, Deputy Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

**SUPPLEMENTARY INFORMATION:** The Board shall meet at the call of the Designated Federal Officer, in consultation with the Board's Chairperson. The estimated number of Board meetings is two per year.

In addition, the Designated Federal Officer is required to be in attendance at all Board and subcommittee meetings for the entire duration of each and every meeting; however, in the absence of the Designated Federal Officer, the Alternate Designated Federal Officer shall attend the entire duration of the Board or subcommittee meeting.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to Chief of Engineers Environmental Advisory Board membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Chief of Engineers Environmental Advisory Board.

All written statements shall be submitted to the Designated Federal Officer for the Chief of Engineers Environmental Advisory Board, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Chief of Engineers Environmental Advisory Board Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Chief of Engineers Environmental Advisory Board. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: May 2, 2012.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2012–10938 Filed 5–4–12; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF ENERGY

### Agency Information Collection Extension

**AGENCY:** U.S. Department of Energy.

**ACTION:** Notice and Request for Comments.

**SUMMARY:** The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years, an information collection request with the Office of Management and Budget (OMB). Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Comments regarding this proposed information collection must be received on or before July 6, 2012. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

**ADDRESSES:** Written comments may be sent to: Eva Auman, GC–63, Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585; Fax: 202–586–0971; or email at: *eva.auman@hq.doe.gov.*

**FOR FURTHER INFORMATION CONTACT:** Eva Auman, GC–63, Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585; Fax: 202–586–0971; or email at: *eva.auman@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:** This information collection request contains: (1) OMB No. 1910–5143; (2) Information Collection Request Title: Labor Relations. This information collection was originally titled Legacy Management Labor Relations, but due to transfer of this function to the Office of General Counsel, the title has been shortened to Labor Relations; (3) Type of Review: Renewal; (4) Purpose: To obtain information from the Department of Energy Management and Operation, and Facilities Management Contractors for contract administration, management oversight and cost control; (5) Annual Estimated Number of Respondents: 35; (6) Annual Estimated Number of Total Responses: 35; (7) Annual Estimated Number of Burden Hours: 193; (8) Annual Estimated Reporting and Recordkeeping Cost Burden: $0.00 annually.

**Statutory Authority:** 42 U.S.C. 7254, 7256.

Issued in Washington, DC on April 30, 2012.

**Jean S. Stucky,**

*Assistant General Counsel for Labor and Pension Law, Office of the General Counsel.*

[FR Doc. 2012–10936 Filed 5–4–12; 8:45 am]

**BILLING CODE 6450–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPPT–2012–0258; FRL–9344–5]**

## Agency Information Collection Activities; Proposed Collection; Comment Request

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR, entitled: ''Notification of Chemical Exports—TSCA Section 12(b)'' and identified by EPA ICR No. 0795.14 and OMB Control No. 2070–0030, is scheduled to expire on March 31, 2013. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the information collection renewal.

**DATES:** Comments must be received on or before July 6, 2012.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2012–0258, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East, Rm. 6428, 1201 Constitution Ave. NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2012–0258. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPPT–2012–0258. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless 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 regulations.gov or email. The 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 regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* 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 electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:** *For technical information contact:* Mike Mattheisen, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–3077; fax number: (202) 564–4755; email address: *mattheisen.mike@epa.gov.*

For general information contact: The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA–Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. What information is EPA particularly interested in?

Pursuant to PRA section 3506(c)(2)(A) (44 U.S.C. 3506(c)(2)(A)), EPA specifically solicits comments and information to enable it 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 estimates 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.

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

### II. What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the collection activity.

7. Make sure to submit your comments by the deadline identified under **DATES**.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

**III. What information collection activity or ICR does this action apply to?**

*Affected entities:* Entities potentially affected by this ICR are companies that export from the United States to foreign countries, or that engage in wholesale sales of, chemical substances or mixtures.

*Title:* Notification of Chemical Exports—TSCA Section 12(b).

*ICR number:* EPA ICR No. 0795.14.

*OMB control number:* OMB Control No. 2070–0030.

*ICR status:* This ICR is currently scheduled to expire on March 31, 2013. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* Section 12(b)(2) of the Toxic Substances Control Act (TSCA) requires that any person who exports or intends to export to a foreign country a chemical substance or mixture that is regulated under TSCA sections 4, 5, 6, and/or 7 submit to EPA notification of such export or intent to export. Upon receipt of notification, EPA will advise the government of the importing country of the U.S. regulatory action with respect to that chemical substance or mixture. EPA uses the information obtained from the submitter via this collection to advise the government of the importing country. This information collection addresses the burden associated with industry reporting of export notifications.

Responses to the collection of information are mandatory (see 40 CFR part 707). Respondents may claim all or part of a notice confidential. EPA will disclose information that is covered by a claim of confidentiality only to the extent permitted by, and in accordance with, the procedures in TSCA section 14 and 40 CFR part 2.

*Burden statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1.3 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of this estimate, which is only briefly summarized here:

*Estimated total number of potential respondents:* 240.

*Frequency of response:* On occasion.

*Estimated total average number of responses for each respondent:* 12.9.

*Estimated total annual burden hours:* 4,025 hours.

*Estimated total annual costs:* $245,246. This includes an estimated burden cost of $245,246 and an estimated cost of $0 for capital investment or maintenance and operational costs.

**IV. Are there changes in the estimates from the last approval?**

There is a decrease of 825 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This decrease reflects the net effect of a decrease in the estimated number of TSCA section 12(b) notices sent to EPA and a decrease in the number of firms sending notices, based on EPA's recent experience with those submissions. This change is an adjustment.

**V. What is the next step in the process for this ICR?**

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

**List of Subjects**

Environmental protection, Chemicals, Exports, Reporting and recordkeeping requirements.

Dated: April 25, 2012.

**James Jones,**

*Acting Assistant Administrator, Office of Chemical Safety and Pollution Prevention.*

[FR Doc. 2012–10940 Filed 5–4–12; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9670–2; Docket ID No. EPA–HQ–ORD–2007–0664]**

## Integrated Risk Information System (IRIS); Announcement of 2012 Program

**AGENCY:** Environmental Protection Agency.

**ACTION:** Announcement of 2012 Program; request for information.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is announcing the IRIS 2012 agenda and requesting scientific information on health effects that may result from exposure to the chemical substances on the agenda, including assessments that EPA is starting this year.

**DATES:** While EPA is not expressly soliciting comments on this notice, the Agency will accept information related to the substances included herein. Please submit any information in accordance with the instructions provided below.

**ADDRESSES:** Please submit relevant scientific information identified by docket ID number EPA–HQ–ORD–2007–0664, online at *www.regulations.gov* (EPA's preferred method); by email to *ord.docket@epa.gov;* by mail to Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. The telephone number for the EPA Docket Center is 202–566–1744. Detailed instructions are

provided below under How to Submit Information to the Docket.

*Background:* EPA's IRIS Program is a human health assessment program that evaluates quantitative and qualitative risk information on effects that may result from exposure to chemical substances found in the environment. Through the IRIS Program, EPA provides high quality science-based human health assessments to support the Agency's regulatory activities. The IRIS database contains information for more than 540 chemical substances that can be used to support the first two steps (hazard identification and dose-response evaluation) of the risk assessment process. When supported by available data, IRIS provides oral reference doses (RfDs) and inhalation reference concentrations (RfCs) for chronic noncancer health effects and cancer assessments. Combining IRIS toxicity values with specific exposure information, government and private entities use IRIS to help characterize public health risks of chemical substances in site-specific situations and thereby support risk management decisions designed to protect public health.

EPA' s process for developing IRIS assessments consists of: (1) A comprehensive search of the current scientific literature, a data call-in, and development of a draft IRIS health assessment; (2) internal EPA-wide review; (3) science consultation on the draft assessment with other Federal agencies and White House offices; (4) independent expert peer review, public review and comment, and public listening session; (5) revision of the assessment to address peer review and public comments; (6) internal EPA-wide review and interagency science discussion of EPA's disposition of peer review and public comments; and (7) clearance and posting of the final assessment on IRIS (*www.epa.gov/iris*).

*The Iris Agenda:* As part of the IRIS process, EPA solicited nominations of chemicals for IRIS assessment or reassessment from EPA Program Offices and Regions, other Federal agencies and White House offices, and the public (75 FR 63827). EPA announced six general criteria for selection of chemicals for assessment or reassessment: (1) Potential public health impact; (2) EPA statutory, regulatory, or program-specific implementation needs; (3) availability of new scientific information or methodology that might significantly change the current IRIS information; (4) interest to other governmental agencies or the public; (5) availability of other scientific assessment documents that could serve as a basis for development of an IRIS assessment; and (6) other factors such as widespread exposure. The decision of when to start assessments of the selected high-priority chemical substances depends on available Agency resources. Availability of risk assessment guidance, guidelines, and science policy decisions may also have an impact on the timing of EPA's decision to assess a chemical substance.

In developing the IRIS agenda for 2012, EPA conducted literature searches for the nominated chemicals and made a determination as to whether a particular chemical had sufficient information to develop at least one toxicity value. EPA offices were asked to indicate which chemicals with sufficient data were priorities for their offices. EPA then considered the other criteria as listed in the **Federal Register** Notice (75 FR 63827) and the capacity of the IRIS Program to begin draft development for each chemical under consideration.

EPA is soliciting public involvement in assessments on the IRIS agenda, including new assessments starting in 2012, 2013, and 2014. While EPA conducts a thorough literature search for each chemical substance, there may be unpublished studies or other primary technical sources that are not available through the open literature. EPA is soliciting scientific information from the public during the information gathering stage for the list of new assessments provided in this notice. Interested persons should provide scientific analyses, studies, and other pertinent scientific information. While EPA is primarily soliciting information on new assessments announced in this notice, the public may submit information on any chemical substance at any time.

This notice provides: (1) A list of assessments completed since the IRIS agenda was last published in October 2010 (75 FR 63827); (2) a list of IRIS assessments in progress; (3) a list of IRIS assessments that will start in 2012, 2013, and 2014; and (4) instructions to the public for submitting scientific information to EPA pertinent to the development of assessments.

**Assessments Completed**

The following assessments have been completed since the last IRIS agenda was published in a **Federal Register** Notice on October 18, 2010 (75 FR 63827).

| Chemical | Cas No. |
|---|---|
| dichloromethane (methylene chloride) | 75–09–2 |
| hexachloroethane | 67–72–1 |
| 2,3,7,8-tetrachlorodibenzo-*p*-dioxin (noncancer) | 1746–01–6 |
| tetrachloroethylene (perchloroethylene) | 127–18–4 |
| tetrahydrofuran | 109–99–9 |
| trichloroacetic acid | 76–03–9 |
| trichloroethylene | 79–01–6 |
| urea | 57–13–6 |

**Assessments in Progress**

The following assessments are underway. The status and planned milestone dates for each assessment can be found on the IRIS Track system, accessible from the IRIS database home page (www.epa.gov/iris). IRIS assessments for all substances listed as in progress in 2012 will be provided on the IRIS Web site at *www.epa.gov/iris* as they are completed. This publicly available Web site is EPA's primary location for IRIS documents. In addition, external peer review drafts of IRIS assessments are posted for public information and comment. These drafts will continue to be accessible via the IRIS and NCEA Web sites. Note that these drafts are intended for public information only, and do not represent the Agency's final position.

All health endpoints, cancer and noncancer, due to chronic exposure are being assessed unless otherwise noted. For all endpoints assessed, both qualitative and quantitative assessments are being developed where information is available.

| Chemical | Cas No. |
|---|---|
| acetaldehyde [1] | 75–07–0. |
| acrylonitrile [1] | 107–13–1. |
| ammonia [1] | 7664–41–7. |
| arsenic, inorganic [1] | 7440–38–2. |
| benzo(a)pyrene [1] | 50–32–8. |
| beryllium [1] | 7440–41–7. |
| biphenyl [1] | 92–52–4. |
| n-butanol [1] | 71–36–3. |
| tert-butanol | 75–65–0. |
| butyl benzyl phthalate [1] | 85–68–7. |
| cadmium [1] | 7440–43–9. |
| chloroethane | 75–00–3. |
| chloroform [1] | 67–66–3. |
| chromium VI [1] | 18540–29–9. |
| cobalt | 7440–48–4. |
| copper [1] | 7440–50–8. |
| cumulative assessment for 6 phthalates. | various. |
| di-n-butyl phthalate [1] | 84–74–2. |
| 1,2-dichlorobenzene [1] | 95–50–1. |
| 1,3-dichlorobenzene [1] | 541–73–1. |
| 1,4-dichlorobenzene [1] | 106–46–7. |
| diethyl phthalate [1] | 84–66–2. |
| di(2-ethylhexyl) adipate [1] | 103–23–1. |
| di(2-ethylhexyl) phthalate [1] | 117–81–7. |
| diisobutyl phthalate | 84–69–5. |
| diisononyl phthalate | 58033–90–2. |
| 1,4-dioxane (inhalation) [1] | 123–91–1. |
| dipentyl phthalate | 131–18–0. |

| Chemical | Cas No. |
|---|---|
| ethyl tertiary butyl ether (ETBE). | 637–92–3. |
| ethylbenzene [1] | 100–41–4. |
| ethylene oxide (cancer) | 75–21–8. |
| formaldehyde [1] | 50–00–0. |
| hexabromocyclododecane (mixed stereoisomers). | 3194–55–6, 25637–99–5. |
| hexachlorobutadiene [1] | 87–68–3. |
| hexahydro-1,3,5-trinitro-triazine (RDX) [1]. | 121–82–4. |
| Libby amphibole asbestos | 1332–21–4. |
| methanol (cancer) | 167–56–1. |
| methanol (noncancer) [1] | 167–56–1. |
| methyl tert-butyl ether (MTBE) [1]. | 1634–04–4. |
| naphthalene [1] | 91–20–3. |
| nickel (soluble salts) [1] | various. |
| halogenated platinum salts and platinum compounds. | various. |
| polychlorinated biphenyls (PCBs) (noncancer) [1]. | various. |
| polycyclic aromatic hydrocarbon (PAH) mixtures. | various. |
| styrene [1] | 100–42–5. |
| 2,3,7,8-tetrachlorodibenzo-*p*-dioxin (cancer). | 1746–01–6. |
| 1,2,3-trimethylbenzene | 526–73–8. |
| 1,2,4-trimethylbenzene | 95–63–6. |
| 1,3,5-trimethylbenzene | 108–67–8. |
| uranium (natural) [1] | 7440–61–1. |
| vanadium pentoxide [1] | 1314–62–1. |
| vinyl acetate [1] | 108–05–4. |

[1] Reassessment of chemical currently on IRIS.

The cancer and noncancer assessments for inorganic arsenic, treated as two separate assessments in previous agendas, will be combined and proceed through the IRIS review process as one assessment. Similarly, the oral and inhalation assessments for chromium VI will be combined and proceed through the IRIS process as one assessment. EPA will update both the noncancer and cancer beryllium assessments, rather than just the cancer assessment.

In January 2010, the IRIS assessment for methanol was released for external peer review and public comment. In June 2010, EPA decided to put the IRIS cancer assessment for methanol on hold pending a review of an underlying study by the Ramazzini Institute (RI). This review was conducted by an independent Pathology Working Group (PWG), jointly sponsored by EPA and the National Institute of Environmental Health Sciences (NIEHS), which was established to conduct a review of several RI studies including the methanol study. Based on differences of opinion between the RI and PWG scientists in diagnosing leukemias and lymphomas, EPA has decided not to rely on RI data on leukemias and lymphomas in IRIS assessments. This decision impacts the methanol cancer assessment. EPA will discontinue the peer review of the draft methanol cancer assessment and develop a new draft that does not rely on the RI study. A schedule for the development and review of the cancer assessment will be announced on IRIS track (*www.epa.gov/iris*). The assessment of methanol's noncancer health effects does not rely on data from the RI. Therefore, the assessment for the noncancer effects of methanol will continue through remaining steps as a separate assessment.

EPA is adding 1,2,3-trimethylbenzene (TMB) to the IRIS agenda to complete the set of three TMB isomers. Two other isomers of TMB are already included on the IRIS agenda and undergoing review (1,2,4–TMB and 1,3,5–TMB). 1,2,3–TMB is often found in the environment with 1,2,4- and 1,3,5–TMB. Given this situation, and in response to comments received in the Agency Review and Interagency Science Consultation for 1,2,4- and 1,3,5–TMB, EPA is adding 1,2,3–TMB to the agenda and will conduct assessments of all three isomers at the same time. Because the 1,2,4- and 1,3,5–TMB assessments are already underway, EPA would appreciate notification of any additional literature as soon as possible so that this information can be included in the 1,2,3–TMB assessment prior to public comment and external peer review.

The ethanol assessment is on the IRIS agenda but has not been started. Taking into account the complexity of the ethanol dataset, EPA is considering various approaches to conducting the ethanol assessment. EPA will revisit the priority of the ethanol assessment in FY13.

**New Assessments for 2012 Agenda**

EPA developed a list of priority chemicals for 2012 from two sources: (1) Chemicals nominated for IRIS assessment by EPA programs, other Federal agencies, and the public; and (2) chemicals already on the IRIS agenda but delayed because of resource limitations. For newly nominated chemicals, EPA first considered whether sufficient data are available to support development of one or more IRIS toxicity values. For chemicals with sufficient data, EPA considered statutory, regulatory, or programmatic need based on the stated priorities of EPA's Program and Regional Offices; potential public health impact of the assessment; interest to other levels of government or the public; and whether a partially completed draft for delayed assessments or an assessment by another organization is available that could serve as a basis for developing an IRIS assessment.

The following chemicals have been selected for inclusion in the 2012 IRIS agenda. The projected start dates included in the table below indicate the U.S. fiscal year in which EPA will start or update literature searches for these chemicals.

EPA is requesting information from the public for consideration in the development of these assessments. Instructions on how to submit information are provided below under How to Submit Information to the Docket.

| Chemical | Cas No. | Projected start |
|---|---|---|
| antimony [1,3] | 7440–36–0 | FY13. |
| carbonyl sulfide [1,3] | 463–58–1 | FY12. |
| chlorobenzene [2,3] | 108–90–7 | FY13. |
| decamethylcyclopentasiloxane (D5) [2] | 541–02–6 | FY13. |
| octamethylcyclotetrasiloxane (D4) [2] | 556–67–2 | FY13. |
| 1,2-dichloroethane (ethylene dichloride) [1,3] | 107–06–2 | FY14. |
| diisopropyl ether (DIPE) [1] | 108–20–3 | FY12. |
| tert-amyl methyl ether (TAME)"[1] | 994–05–8 | FY12. |
| 4,4'-dimethyl-3-oxahexane (TAEE) [1] | 919–94–8 | FY12. |
| isopropanol [1] | 67–63–0 | FY13. |
| manganese [1,3] | 7439–9 | FY13. |
| mercury, elemental [2,3] | 7439–96–5 | FY14. |
| methyl mercury [2,3] | 22967–92–6 | FY14. |
| tungsten and related compounds [1] | 7440–33–7, various | FY14. |
| vanadium, elemental and compounds [2] various | | FY13 |

[1] Chemical was previously on the IRIS agenda but assessment was delayed due to resource limitations.

[2] Chemical is a new addition to IRIS agenda.
[3] Reassessment of chemical currently on IRIS.

By FY14, EPA will have started all of the chemicals that were previously on the IRIS agenda, but delayed because of resource limitations, except for the chemicals that are being withdrawn from the agenda as described below under Withdrawn Assessments and the ethanol assessment, described above under Assessments in Progress. Among the new additions to the IRIS agenda, chlorobenzene, mercury, methyl mercury, and vanadium were selected for assessment because they are priorities for multiple EPA Program Offices and Regions and all chemicals have the potential for high impact on public health. While only two EPA Offices indicated that the siloxanes are priorities, D4 and D5 were selected for IRIS assessment because they met other criteria including high potential for impact on public health and widespread exposure and because of the opportunity afforded to perform a cumulative assessment of emerging contaminants.

One of the highest priority substances nominated for assessment was lead. EPA will defer a decision on the development of an IRIS assessment for lead until the end of 2012. EPA anticipates publication of a final Integrated Science Assessment (ISA) for lead during the summer of 2012. The ISA offers a comprehensive summary of the health and ecological scientific evidence and also includes information on lead sources, ambient air concentrations, fate and transport, exposure, and toxicokinetics. A draft ISA is available at *http://epa.gov/ncea/isa/lead.htm.* In addition, the National Toxicology Program (NTP) anticipates completion in 2012 of a draft *Monograph on Health Effects of Low-Level Lead,* which summarizes the health evidence in humans related to major effects with a focus on blood lead levels <10 ug/dL. A draft NTP report, available at *http://ntp.niehs.nih.gov/go/36639,* has been reviewed by an NTP Peer Review Panel. Upon completion, these documents will be evaluated to determine if an IRIS assessment is needed.

In FY2013, before beginning draft development, EPA will conduct a state-of-the-science workshop on manganese. Similarly, in FY2014, EPA will conduct a state-of-the-science workshop on elemental mercury and methyl mercury. These meetings will be open to the public.

**Withdrawn Assessments**

The following chemicals are withdrawn from the IRIS agenda:

| Chemical | Cas No. |
|---|---|
| alkylates | various. |
| bisphenol A | 80–05–7. |
| mirex | 2385–85–5. |
| refractory ceramic fibers | not applicable. |

The alkylates are a distillation fraction of petroleum and are present in gasoline. Common alkylates found in gasoline for which IRIS assessments have not been recently completed include n-heptane, methylcyclohexane, 2-methylbutane, 2-methylpentane, 3-methylpentane, n-octane, 2,3,3-trimethylpentane, 2,3,4-trimethylpentane, and 2,2,5-trimethylhexane. This class of chemicals is withdrawn from the IRIS agenda because there are multiple chemicals in the class, many with limited databases. If individual alkylates with sufficient data to support an IRIS assessment are nominated in the future, the IRIS Program will consider these nominations individually. Bisphenol A is withdrawn because EPA is awaiting further analysis and results from the U.S. Food and Drug Administration and the NIEHS prior to determining whether Agency action under the Toxic Substances Control Act is required for protection of human health. Refractory ceramic fibers and mirex are withdrawn because they are no longer priorities for EPA.

We continue to request the submission of any scientific information that you would like EPA to consider for any assessment on the IRIS agenda. Instructions for submitting information are provided below.

*How to Submit Information to the Docket:* Submit your information, identified by Docket ID No. EPA–HQ–ORD–2007–0664, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: ORD.Docket@epa.gov.*
- *Facsimile:* 202–566–1753.
- *Mail:* Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460. The telephone number is 202–566–1752. If you provide comments by mail, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The EPA Docket Center 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. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. If you provide comments by hand delivery, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *http://www.regulations.gov,* including any personal information provided, unless comments include 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 that EPA will not know your identity or contact information unless you provide it in the body of your comments. If you send email comments directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comments that are placed in the public docket and made available on the Internet. If you submit electronic comments, EPA recommends that you include your name and other contact information in the body of your comments and with any disk or CD–ROM you submit. If EPA cannot read your comments due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comments. Electronic files should avoid the use of special characters and 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.*

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 at *http://www.regulations.gov* or in hard copy at the OEI Docket in the EPA Headquarters Docket Center.

*Additional Information:* For information on the docket or *www.regulations.gov*, please contact the Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone: 202–566–1752; facsimile: 202–566–1753; or email: *ORD.Docket@epa.gov.*

For information on the IRIS program, contact Karen Hammerstrom, IRIS Program Deputy Director, National Center for Environmental Assessment, (Mail Code: 8601P), Office of Research and Development, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone: 703–347–8642; or email: FRN *Questions@epa.gov.*

For general questions about access to IRIS, or the content of IRIS, please call the IRIS Hotline at 202–566–1676 or send electronic mail inquiries to *hotline.iris@epa.gov.*

Dated: April 30, 2012.

**Darrell A. Winner,**

*Acting Director, National Center for Environmental Assessment.*

[FR Doc. 2012–10935 Filed 5–4–12; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9669–6]**

### Underground Injection Control Program; Hazardous Waste Injection Restrictions; Petition for Exemption—Class I Hazardous Waste Injection; Diamond Shamrock Refining Company, LP, Sunray, TX

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of a final decision on a no migration petition reissuance.

**SUMMARY:** Notice is hereby given that a reissuance of an exemption to the land disposal Restrictions, under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act, has been granted to Diamond Shamrock for three Class I injection wells located at Sunray, Texas. The company has adequately demonstrated to the satisfaction of the Environmental Protection Agency by the petition reissuance application and supporting documentation that, to a reasonable degree of certainty, there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This final decision allows the continued underground injection by Diamond Shamrock, of the specific restricted hazardous wastes identified in this exemption, into Class I hazardous waste injection wells WDW–102, WDW–192, and WDW–332 at the Sunray, Texas facility until December 31, 2025, unless EPA moves to terminate this exemption. Additional conditions included in this final decision may be reviewed by contacting the Region 6 Ground Water/UIC Section. A public notice was issued February 27, 2012. The public comment period closed on April 12, 2012. No comments were received. This decision constitutes final Agency action and there is no Administrative appeal. This decision may be reviewed/appealed in compliance with the Administrative Procedure Act.

**DATES:** This action was effective as of April 18, 2012.

**ADDRESSES:** Copies of the petition and all pertinent information relating thereto are on file at the following location: Environmental Protection Agency, Region 6, Water Quality Protection Division, Source Water Protection Branch (6WQ–S), 1445 Ross Avenue, Dallas, Texas 75202–2733.

**FOR FURTHER INFORMATION CONTACT:** Philip Dellinger, Chief Ground Water/UIC Section, EPA—Region 6, telephone (214) 665–8324.

Dated: April 26, 2012.

**William K. Honker,**

*Acting Director, Water Quality Protection Division.*

[FR Doc. 2012–10939 Filed 5–4–12; 8:45 am]

**BILLING CODE 6560–50–P**

## EXPORT-IMPORT BANK OF THE UNITED STATES

**[EXIM–OIG–2011–0010]**

### Office of Inspector General; Privacy Act of 1974; Systems of Records

**AGENCY:** The Export-Import Bank of the United States, Office of Inspector General.

**ACTION:** Notice of New Privacy Act System of Records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Export-Import Bank of the United States (hereafter known as ''Ex-Im Bank''), Office of Inspector General (hereafter known as ''OIG'' or ''Ex-Im Bank OIG'') is giving notice of a new system of records entitled, ''EIB-35-Office of Inspector General Investigative Records.'' The information in the new system of records will be used by the Ex-Im Bank OIG to conduct criminal, civil, and administrative investigations, and will contain identifying information about potential subjects, sources, and other individuals related to these investigations.

**DATES:** *Effective Date:* This system of records will become effective on June 15, 2012.

*Comment Date:* Comments should be received on or before June 6, 2012 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by Docket Number EIB–2011–0010 by one of the following methods:

1. Electronically through the eRulemaking Portal at *http://www.regulations.gov*. Please search for EIB-–2011–0010.

2. *By Mail/Hand Delivery/Courier:* Alberto Rivera-Fournier, Ex-Im Bank, Office of Inspector General/811 Vermont Avenue NW., Rm. 976, Washington, DC 20571. Please allow sufficient time for mailed comments to be received before the close of the comment period.

All comments received before the end of the comment period will be posted on *http://www.regulations.gov* for public viewing. Hard copies of comments may also be obtained by writing to Counsel to the Inspector General, Ex-Im Bank, Office of Inspector General/811 Vermont Avenue NW., Rm. 976, Washington, DC 20571.

**FOR FURTHER INFORMATION CONTACT:** Alberto Rivera-Fournier, Ex-Im Bank, Office of Inspector General, 811 Vermont Avenue NW, Rm. 976, Washington, DC 20571 or by telephone (202) 565–3908 or facsimile (202) 565–3988.

**SUPPLEMENTARY INFORMATION:** Ex-Im Bank OIG is establishing a new system

of records entitled ''EIB-35-Office of Inspector General Investigative Records''. The system of records is necessary for Ex-Im Bank OIG to carry out its investigative responsibilities pursuant to the Inspector General Act of 1978, as amended.

The Ex-Im Bank OIG was statutorily created in 2002 and organized in 2007. Ex-Im Bank OIG is statutorily directed to conduct and supervise investigations relating to programs and operations of Ex-Im Bank and to prevent and detect fraud, waste, and abuse in such programs and operations. Accordingly, the records in this system are used in the course of investigating individuals and entities suspected of having committed illegal or unethical acts and in conducting related criminal prosecutions, civil proceedings, and administrative actions. The records may contain information about civil, criminal, or administrative wrongdoing, or about fraud, waste, mismanagement, or other violations of law or regulation. This information could be the basis for referrals to appropriate prosecutorial authorities for consideration of criminal or civil prosecution or Ex-Im Bank management for administrative action.

The collection and maintenance of records subject to this system is based on paper records and an electronic records management system, the ''Inspector General Information System'' (IGIS). IGIS allows the retrieval of records by name or other personal identifier. In accordance with 5 U.S.C. 552a(r), a report of this system of records has been provided to the Office of Management and Budget (OMB) and to the Congress. Concurrent with this system of records notice, Ex-Im Bank is proposing a rule to exempt portions of this system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. In addition, Ex-Im Bank OIG is publishing a Privacy Impact Assessment of IGIS.

**SYSTEM NAME:**

EIB-35-Office of Inspector General Investigative Records.

**SECURITY CLASSIFICATION:**

The vast majority of the information in the system is Controlled Unclassified Information.

**SYSTEM LOCATION:**

This system of records is located in the Ex-Im Bank OIG, 811 Vermont Avenue NW., Washington, DC 20571.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

1. Persons who are named individuals in investigations conducted by the Ex-Im Bank OIG.

2. Complainants and subjects of complaints collected through the Ex-Im Bank OIG Hotline or other sources.

3. Other individuals who have been identified as possibly relevant to, or who are contacted as part of an OIG investigation, including witnesses, confidential or non-confidential informants, and members of the general public who are named individuals in connection with investigations conducted by the Ex-Im Bank OIG.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The system contains records related to complaints, and administrative, civil, and criminal investigations. These records include: (a) Letters, memoranda, emails, and other documents citing complaints or alleged criminal, civil, or administrative misconduct. (b) Investigative files which include reports of investigation with related exhibits, statements, affidavits, or records obtained during the investigation, information from subjects, targets, witnesses; material from governmental investigatory or law enforcement organizations (federal, state, local or international) and intelligence information; information of criminal, civil, or administrative referrals and/or results of investigations; public source materials; and reports and associated materials filed with Ex-Im Bank or other government agencies from, for example, exporters, lenders and other financial institutions, brokers, shippers, contractors, employers or other financial service providers.

Personal data in the system may consist of names, addresses, Social Security Numbers, fingerprints, physical identifying data, individual personnel and payroll information, and other evidence and background material existing in any form (i.e., photographs, reports, criminal histories, etc.).

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The Inspector General Act of 1978, as amended, 5 U.S.C. App. 3; 5 U.S.C. 301; 44 U.S.C. 3101.

**PURPOSE(S):**

This system of records is established under the Inspector General Act of 1978, as amended, to maintain information and document OIG work related to investigations of criminal, civil, or administrative matters.

**ROUTINE USES OF THESE RECORDS:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside Ex-Im Bank OIG as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

(A) To an appropriate Federal, State, territorial, tribal, local, or foreign law enforcement agency, licensing entity, or other appropriate authority charged with investigating, enforcing, prosecuting, or implementing a law (criminal, civil, administrative, or regulatory), where Ex-Im Bank OIG becomes aware of an indication of a violation or potential violation of such law or where required in response to compulsory legal process.

(B) To Federal intelligence community agencies and other Federal agencies to further the mission of those agencies relating to persons who may pose a risk to homeland security.

(C) To international governmental authorities in accordance with law and formal or informal international agreement;

(D) To any individual or entity when necessary to elicit information that will assist an OIG investigation, inspection, or audit.

(E) To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil or criminal discovery or proceedings, litigation, and settlement negotiations.

(F) To Federal, State, local, or foreign government entities or professional licensing authorities responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, or where Ex-Im Bank OIG becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation, or where Ex-Im Bank OIG has received a request for information that is relevant or necessary to the requesting entity's hiring or retention of an employee, or the issuance of a security clearance, license, contract, grant, or other benefit.

(G) To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government, when necessary to accomplish an agency function related to this system of records.

(H) To the United States Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when: (i) Ex-Im Bank; (ii) any employee of Ex-Im Bank

in his/her official capacity; (iii) any employee of Ex-Im Bank in his/her individual capacity where the Department of Justice or Ex-Im Bank has agreed to represent the employee; or, (iv) the United States or any agency thereof, is a party to the litigation or has an interest in such litigation.

(I) To third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation.

(J) To a Member of Congress, or staff acting upon the Member's behalf, when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

(K) To an actual or potential party to litigation or the party's authorized representative for the purpose of negotiation or discussion of such matters as settlement, plea bargaining, or in informal discovery proceedings.

(L) To the news media and the public, including disclosures pursuant to 28 CFR 50.2, unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

(M) To complainants and/or victims to the extent necessary to provide such persons with information and explanations concerning the progress and/or results of the investigation or case arising from the matters of which they complained and/or of which they were a victim.

(N) To appropriate agencies, entities, and persons when (1) the OIG suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the OIG has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the OIG or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the OIG's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

(O) To the National Archives and Records Administration or other Federal Government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

(P) To appropriate persons engaged in conducting and reviewing internal and external peer reviews of the Ex-Im Bank OIG to ensure adequate internal safeguards and management procedures exist or to ensure that auditing standards applicable to Government audits are applied and followed.

(Q) To the Council of Inspectors General on Integrity and Efficiency (''CIGIE'') and other Offices of Inspectors General, as necessary, if the records respond to an audit, investigation, or review which is conducted pursuant to an authorizing law, rule or regulation, and in particular those conducted at the request of the CIGIE pursuant to 5 U.S.C. App. 3, § 11.

(R) In an appropriate proceeding before a court, grand jury, or an administrative or adjudicative body, when the OIG determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

(S) To appropriate officials and employees of a federal agency or entity which requires information relevant to a decision concerning the hiring, appointment, or retention of an individual; the issuance, renewal, suspension, or revocation of a security clearance; the execution of a security or suitability investigation; the letting of a contract; or the issuance or revocation of a grant or other benefit.

(T) To federal, state, local, tribal, foreign, or international licensing agencies or associations which require information concerning the suitability or eligibility of an individual for a license or permit.

(U) To such recipients and under such circumstances and procedures as are mandated by federal statute or treaty.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

The records in this system are maintained in a variety of media, including paper, digital media (hard drives and magnetic tapes or discs), and an automated database. The records are maintained in limited access areas during duty hours and in locked offices at all other times.

**RETRIEVABILITY:**

Paper media are retrieved numerically by investigation number. Electronic media are retrieved numerically by investigation number, by the name or identifying number for a complainant, subject, victim, or witness; by case number; by special agent, or other personal identifier.

**SAFEGUARDS:**

All paper and electronic records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. Ex-Im Bank facilities are protected from the outside by security personnel. Direct access to investigative records is restricted to authorized staff members of the OIG. Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Manual records are in locked cabinets or in safes and can be accessed by key or combination formula only. Electronic records are protected by computer-logon identifications and password protection.

**RETENTION AND DISPOSAL:**

OIG is in the process of developing a records retention schedule in conjunction with the National Archives and Records Administration (NARA). Closed files relating to a specific investigation are destroyed after ten years. Closed files containing information of an investigative nature but not relating to a specific investigation are destroyed after five years. Records existing on computer storage media are destroyed according to applicable OIG media sanitization practice.

**SYSTEM MANAGER(S) AND ADDRESSES:**

The System Manager is the Inspector General, Ex-Im Bank OIG, 811 Vermont Avenue NW., Rm. 976, Washington, DC 20571.

**NOTIFICATION PROCEDURES:**

Pursuant to a concurrent notice of proposed rulemaking by Ex-Im Bank, this system of records will be generally exempt from the notice, access, and contest requirements of the Privacy Act. However, the Ex-Im Bank OIG will entertain written requests to the systems manager on a case-by-case basis for notification regarding whether this system of records contains information about an individual. Individuals seeking notification of any record contained in this system of records may submit a request in writing to the System Manager identified above. Individuals requesting notification must comply with the Ex-Im Bank Privacy Act regulations (12 CFR 404.4).

**RECORD ACCESS PROCEDURES:**

Same as ''Notification Procedures''' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedures'' and ''Record access procedures'' stated above.

**RECORD SOURCE CATEGORIES:**

The information in this system of records is obtained from sources including, but not limited to, the individual record subjects; Ex-Im Bank officials and employees; employees of Federal, State, local, and foreign agencies; and other persons and entities; and public source materials.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

In general, the exemptions claimed are necessary in order to accomplish the law enforcement function of the OIG, to prevent subjects of investigations from frustrating the investigatory process, to prevent the disclosure of investigative techniques, to fulfill commitments made to protect the confidentiality of sources, to maintain access to sources of information, and to avoid endangering these sources and law enforcement personnel.

A. Pursuant to 5 U.S.C. 552a(j)(2) and a proposed rulemaking by Ex-Im Bank, this system is proposed to be exempt from the following provisions of the Privacy Act: 5 U.S.C. 552a (c)(3) and (4); (d)(1) through (4); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f); and (g). The reasons for asserting such exemptions are the following:

(i) Disclosure to the individual named in the record pursuant to subsections (c)(3), (c)(4), or (d)(1) through (4) could seriously impede or compromise the investigation by alerting the target(s), subjecting a potential witness or witnesses to intimidation or improper influence, and leading to destruction of evidence. Disclosure could enable suspects to take action to prevent detection of criminal activities, conceal evidence, or escape prosecution.

(ii) Application of subsection (e)(1) is impractical because the relevance of specific information might be established only after considerable analysis and as the investigation progresses. Effective law enforcement requires the OIG to keep information that may not be relevant to a specific OIG investigation, but which may provide leads for appropriate law enforcement and to establish patterns of activity that might relate to the jurisdiction of the OIG and/or other agencies.

(iii) Application of subsection (e)(2) would be counterproductive to the performance of a criminal investigation because it would alert the individual to the existence of an investigation. In any investigation, it is necessary to obtain evidence from a variety of sources other than the subject of the investigation in order to verify the evidence necessary for successful litigation.

(iv) Application of subsection (e)(3) could discourage the free flow of information in a criminal law enforcement inquiry.

(v) Applications of subsections (e)(4)(G) and (H), and (f) would be counterproductive to the performance of a criminal investigation. To notify an individual at the individual's request of the existence of records in an investigative file pertaining to such individual, or to grant access to an investigative file could interfere with investigative and enforcement proceedings, deprive co-defendants of a right to a fair trial or other impartial adjudication, constitute an unwarranted invasion of personal privacy of others, disclose the identity or confidential sources, reveal confidential information supplied by these sources and disclose investigative techniques and procedures. Nevertheless, Ex-Im Bank OIG has published notice of its notification, access, and contest procedures because access may be appropriate in some cases.

(vi) Although the Office of Inspector General endeavors to maintain accurate records, application of subsection (e)(5) is impractical because maintaining only those records that are accurate, relevant, timely, and complete and that assure fairness in determination is contrary to established investigative techniques. Information that may initially appear inaccurate, irrelevant, untimely, or incomplete may, when collated and analyzed with other available information, become more pertinent as an investigation progresses.

(vii) Application of subsection (e)(8) could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(viii) The provisions of subsection (g) do not apply to this system if an exemption otherwise applies.

B. Pursuant to 5 U.S.C. 552a (k)(2) and a proposed rulemaking by Ex-Im Bank, this system is proposed to be exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a (c)(3), (d)(1) through (4), (e)(1), (e)(4)(G), (e)(4)(H), and (f). These exemptions are claimed for the same reasons as stated in paragraph (a)(2) of this section, that is, because the system contains investigatory material compiled for law enforcement purposes other than material within the scope of subsection 552a(j)(2). In addition, the reasons for asserting this exemption are because the disclosure and other requirements of the Privacy Act could substantially compromise the efficacy and integrity of the OIG operations. Disclosure could invade the privacy of other individuals and disclose their identity when they were expressly promised confidentiality. Disclosure could interfere with the integrity of information which would otherwise be subject to privileges (see, e.g., 5 U.S.C. 552(b)(5)), and which could interfere with other important law enforcement concerns (see, e.g., 5 U.S.C. 552(b)(7)).

C. Pursuant to 5 U.S.C. 552a(k)(5) and a proposed rulemaking by Ex-Im Bank, this system is proposed to be exempt from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3), (d)(1) through (4), (e)(1), (e)(4)(G) and (H), and (f). The reason for asserting this exemption is because the system contains investigatory material compiled for the purpose of determining eligibility or qualifications for federal civilian or contract employment.

Dated: May 1, 2012.

**Osvaldo L. Gratacos,**

*Inspector General.*

**Sharon A. Whitt,**

*Agency Clearance Officer.*

[FR Doc. 2012–10897 Filed 5–4–12; 8:45 am]

**BILLING CODE 6690–01–P**

## FARM CREDIT ADMINISTRATION

### Sunshine Act Meeting; Farm Credit Administration Board

**AGENCY:** Farm Credit Administration.

**SUMMARY:** Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the regular meeting of the Farm Credit Administration Board (Board).

**DATES:** *Date and Time:* The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on May 10, 2012, from 9:00 a.m. until such time as the Board concludes its business.

**FOR FURTHER INFORMATION CONTACT:** Dale L. Aultman, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

**ADDRESSES:** Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

**SUPPLEMENTARY INFORMATION:** Parts of this meeting of the Board will be open to the public (limited space available) and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in

advance. The matters to be considered at the meeting are:

**Open Session**

*A. Approval of Minutes*

- April 12, 2012.

*B. Reports*

- Dodd-Frank Implementation, Update.

**Closed Session***

- Office of Secondary Market Oversight Quarterly Report.

*Session Closed—Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

Dated: May 3, 2012.

**Dale L. Aultman,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. 2012–11058 Filed 5–3–12; 4:15 pm]

**BILLING CODE 6705–01–P**

## FEDERAL ELECTION COMMISSION

### Sunshine Act Meeting

**AGENCY:** Federal Election Commission.

**DATE AND TIME:** Thursday, May 10, 2012 at 10:00 a.m.

**PLACE:** 999 E Street NW., Washington, DC (Ninth Floor).

**STATUS:** This Meeting Will Be Open to the Public.

**Items To Be Discussed**

Correction and Approval of the Minutes for the Meeting of April 26, 2012.

Draft Advisory Opinion 2012–07: Feinstein for Senate.

Draft Advisory Opinion 2012–16: Angus King for U.S. Senate Campaign and Pierce Atwood LLP.

Audit Division Recommendation Memorandum on The Legacy Committee Political Action Committee (A09–22).

Revised Guidebook for Complainants and Respondents on the FEC Enforcement Process.

2012 Legislative Recommendations.

Management and Administrative Matters.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Shawn Woodhead Werth, Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the meeting date.

**PERSON TO CONTACT FOR INFORMATION:** Judith Ingram, Press Officer, Telephone: (202) 694–1220.

**Shawn Woodhead Werth,**

*Secretary and Clerk of the Commission.*

[FR Doc. 2012–11079 Filed 5–3–12; 4:15 pm]

**BILLING CODE 6715–01–P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than May 29, 2012.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. *Gerald F. Smith, Jr. Revocable Trust, (trustee, Gerald F. Smith, Jr.) Winchester, Virginia,* to individually acquire voting shares of First National Corporation, Strasburg, Virginia. Additionally, Gerald F. Smith, Jr. Revocable Trust, (trustee, Gerald F. Smith, Jr.) Gerald F. Smith, Jr., Evan A. Smith, Kaye DeHaven Smith Irrevocable Trust FBO Evan A. Smith (trustee, Gerald F. Smith, Jr.), Kaye DeHaven Smith Irrevocable Trust FBO Elise D. Smith (trustee, Gerald F. Smith, Jr.), Kaye DeHaven Smith Irrevocable Trust FBO Emily N. Smith (trustee, Gerald F. Smith, Jr.), and other family members all of Winchester, Virginia, as a group acting in concert to collectively acquire voting shares of First National Corporation and thereby acquire voting shares of First Bank, Strasburg, Virginia.

2. *James R. Wilkins, III, Wilkins Investments, L.P., James R. Wilkins, Jr., Elizabeth Wilkins Talley, Wilkins Shoe Center, Inc. Profit Sharing Trust FBO Wilkins Shoe Center, Inc., and other family members, all of Winchester, Virginia,* as a group acting in concert to acquire voting shares of First National Corporation, Strasburg, Virginia and thereby acquire voting shares of First Bank, Strasburg, Virginia.

Board of Governors of the Federal Reserve System.

Dated: May 2, 2012.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2012–10926 Filed 5–4–12; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 31, 2012.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Vintage Bancorp, Inc., Wichita, Kansas,* to become a bank holding company by acquiring 100 percent of the voting shares of Vintage Bank Kansas, Leon, Kansas and CornerBank, N.A., Winfield, Kansas

Board of Governors of the Federal Reserve System, May 1, 2012.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 2012–10832 Filed 5–4–12; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 1, 2012.

A. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *First Foundation Inc., Irvine, California,* to become a bank holding company upon the conversion of its wholly owned subsidiary First Foundation Bank, Irvine, California, from a federal savings bank to a commercial bank.

Board of Governors of the Federal Reserve System, May 2, 2012.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2012–10927 Filed 5–4–12; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL TRADE COMMISSION

**[File No. 121 0014]**

### Kinder Morgan, Inc.; Analysis of Proposed Agreement Containing Consent Orders To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed Consent Agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before June 4, 2012.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write AEl Paso Kinder Morgan, File No. 121 0014'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/elpasokindermorganconsent,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Philip M. Eisenstat (202) 326–2769, FTC, Bureau of Consumer Protection, 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for May 1, 2012), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 16, 2012. Write AEl Paso Kinder Morgan, File No. 121 0014'' on your comment. Your comment B including your name and your state B will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any A[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).

result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/elpasokindermorganconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write AEl Paso Kinder Morgan, File No. 121 0014'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before June 4, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

**Analysis of Agreement Containing Consent Order To Aid Public Comment**

**I. Introduction**

The Federal Trade Commission (the ''Commission''), subject to its final approval, has accepted for public comment an Agreement Containing Consent Orders (Consent Agreement) with Kinder Morgan, Inc. (''KMI'' or ''Respondent'') and El Paso Corporation (''El Paso''). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that otherwise would likely result from Respondent's acquisition of El Paso. Under the terms of the agreement, Respondent will divest its own Rockies Express (REX), Kinder Morgan Interstate Gas Transmission, and Trailblazer pipelines, as well as associated processing and storage capacity.

On October 16, 2011, KMI announced that it had entered into a definitive agreement whereby KMI will acquire all of the outstanding shares of El Paso for approximately $38 billion, including the assumption of $17 billion in debt (the ''Acquisition''). The Acquisition would combine the nation's largest two natural gas pipeline owners. Separately from any Commission action, El Paso will sell its exploration and production (''E&P'') assets to another company, delivering its midstream components and the proceeds from the E&P sale to KMI.

Without some form of relief, the Acquisition is likely to result in anticompetitive effects in areas in the Rocky Mountains where the combination of the KMI pipelines and the El Paso pipelines threatens to lessen competition substantially in pipeline transportation. The Acquisition is also likely to result in anticompetitive effects in other markets related to pipelines: Gas processing and ''no-notice'' service. The proposed Consent Agreement effectively remedies these possible anticompetitive effects by requiring KMI to divest three of its natural gas pipelines and two natural gas processing plants.

**II. The Parties**

*A. Kinder Morgan, Inc.*

KMI is a publicly traded corporation principally engaged in midstream petroleum and natural gas services. KMI is the general partner in the master-limited partnership (''MLP'') Kinder Morgan Energy Partners (KMEP) (collectively, ''Kinder Morgan''). KMEP owns over 38,000 miles of pipelines and 180 terminals in North America for the transportation and storage of natural gas, refined petroleum products, crude oil, and carbon dioxide.

*B. El Paso Corporation*

El Paso is a publically traded corporation principally engaged in natural gas transportation, natural gas gathering and processing, and E&P. El Paso is the general partner in the MLP, El Paso Pipeline Partners (EPPP), into which El Paso placed some of its pipelines. Between El Paso and EPPP, El Paso owns or has interests in over 43,000 miles of natural gas pipelines and gathering systems.

**III. Market Structure and Competitive Effects in Pipeline Transportation**

Natural gas pipelines provide the critical connection between natural gas wells, which produce natural gas, and consumers who use natural gas to generate heat and power. Pipeline transportation is the only economical means to transport natural gas between the producers and consumers. Pipelines that cross state lines are regulated by the Federal Energy Regulatory Commission (''FERC''). FERC regulates maximum-allowable interstate natural gas pipeline transportation fees, but does not eliminate competition between pipelines. So long as the pipelines comply with their tariffs, they are otherwise free to compete by offering prices below their maximum tariff rate, as well as competing on other terms of service.

The competitive overlaps between Kinder Morgan and El Paso in pipeline transportation are in the Rocky Mountain gas production areas in and around Wyoming, Colorado, and Utah. Kinder Morgan and El Paso pipelines dominate the transportation options for five production areas in the Rockies: (1) The Denver/Julesburg/Niobrara Production Basin; (2) the Powder River Production Basin; (3) the Wind River Production Basin; (4) the Western Wyoming Production areas including the Green River Production Basin, the Red Desert Production Basin, and the Washakie Production Basins; and (5) the Piceance Production Basin. Each of these production areas is a relevant geographic market for the transportation of natural gas.

Production areas are connected to more than one pipeline and some pipelines connect to more than one production area. Some pipelines do not connect directly to the basins but interconnect with the pipelines leaving the basins and are necessary to get natural gas from the basins to consuming markets. There are four Kinder Morgan pipelines that serve the basins and interconnections in the Rockies and four El Paso pipelines that serve those same basins and interconnections.

In each of these relevant geographic markets, the pipeline transportation of natural gas is highly concentrated. The Acquisition would significantly increase concentration and eliminate direct competition between the pipelines owned by the two companies, leading to higher prices for pipeline transportation of natural gas to the detriment of producers and consumers of natural gas.

One consumption area in the Rockies is also a relevant geographic market. The Colorado Front Range, which runs from Fort Collins, Colorado in the north to Pueblo, Colorado in the south, contains the major population centers in the Rockies. It overlaps the Denver/Julesburg/Niobrara Production Basin but requires substantial additional natural gas from the other production areas in the Rockies, particularly in the winter. The pipeline transportation of natural gas into this market from the other production areas is highly concentrated. The Acquisition would significantly increase concentration and eliminate direct and potential competition between the pipelines owned by the two companies, leading to higher prices for pipeline transportation of natural gas to

the detriment of consumers of natural gas along the Colorado Front Range.

**IV. Other Markets Impacted by the Proposed Acquisition**

Two other markets, the processing of natural gas and the provision of no-notice pipeline transportation services, would also be impacted by the Acquisition. Both services are related to the pipeline transportation of natural gas.

Natural gas must meet certain standards before an interstate pipeline can accept it. In some areas, natural gas contains heavy hydrocarbons, commonly referred to as natural gas liquids or NGLs. Interstate pipelines have a limit on how much NGLs natural gas can contain and be transported on a pipeline. Gas that contains excessive amounts of NGLs must be treated at a gas processing plant to remove those liquids before it can be transported on interstate pipelines. Currently, the high value of NGLs, relative to the natural gas, would cause the gas to be processed regardless of the specifications of the pipelines. There is no substitute for gas processing to remove the NGLs. The relevant geographic market for processing gas is in the Wind River Production Basin and surrounding areas. For some wells in areas around that basin, only El Paso and Kinder Morgan have processing plants to treat gas before it goes onto interstate pipelines. The Acquisition would eliminate direct competition between the processing plants owned by the two companies, leading to higher prices for gas processing to the detriment of producers of natural gas.

No-notice service is also a relevant market. Interstate pipelines typically require advance notice before a customer transports gas on a pipeline. Some customers' demand for natural gas fluctuates so much that the customers cannot give the required notice to the pipeline and still obtain the natural gas that they need. No-notice service is the term that refers to gas transportation where the customer is not obligated to provide advance notice before shipping gas. Utility customers whose natural gas demand can shift suddenly due to changes in the weather often require no-notice service. No-notice service is provided by pipelines at a premium price. It is not economical for each utility that has need for no-notice service to build sufficient storage to meet all of its peak needs through building its own storage facility. Many utilities are dependent on pipeline companies to provide no-notice service utilizing pipeline owned or third party storage. The relevant geographic market for no-notice service is the Colorado Front Range. Only those pipelines that currently serve this area can offer no-notice service. Currently only El Paso offers no-notice service in that area, but Kinder Morgan is a likely potential entrant into the market. The acquisition by Kinder Morgan of El Paso would eliminate potential competition for no-notice service to the detriment of utility customers.

**V. The Proposed Agreement Containing Consent Orders**

Under the Proposed Agreement Containing Consent Orders (the ''Consent Order'') Kinder Morgan has 180 days from the closing date of its acquisition of El Paso to completely divest three KMI pipelines and two processing plants in the Rockies. The fourth KMI pipeline, the TransColorado, does not raise competitive concerns because its competition with El Paso is limited and there are viable alternatives for transporting natural gas from the San Juan Basin. Accordingly, the TransColorado was not included in the divested assets. These divestitures maintain the competitive status quo ante in the Rockies. Pursuant to the Consent Order, Kinder Morgan may complete its acquisition of El Paso, while the divestiture of pipelines and processing plants already owned by Kinder Morgan will maintain the level of competition that already existed. The Order to Hold Separate and Maintain Assets (discussed in the next section) will protect the competitive status quo until Kinder Morgan successfully finds a buyer for the assets to be divested.

The Consent Order requires Kinder Morgan to provide transitional assistance and support services to the buyer of the divested services. Kinder Morgan must also license any key software and intellectual property to the buyer. The Consent Order allows the buyer to recruit Kinder Morgan employees who work on the divested assets. For a period of two years, Kinder Morgan may not solicit employees that accept employment offers from the buyer to rejoin Kinder Morgan. The Consent Order also limits Kinder Morgan's access to, and use of, confidential business information pertaining to the divestiture assets.

If Kinder Morgan fails to fully divest the assets within the 180-day time period, the Order grants the Commission power to appoint a divestiture trustee to complete the divestiture. The Consent Order also governs the divestiture trustee's duties, privileges, and powers.

The Consent Order requires Kinder Morgan, or the divestiture trustee, if appointed, to file periodic reports detailing efforts to divest the assets and the status of that undertaking. Commission representatives may gain reasonable access to Kinder Morgan's business records related to compliance with the consent agreement. The Consent Order terminates when all requirements of the divestiture order outlined in Paragraphs II and IV of the Consent Order are satisfied.

**VI. The Order To Hold Separate and Maintain Assets**

The Order to Hold Separate and Maintain Assets (''Hold Separate Order'') requires KMI to separate out the divestiture assets from its remaining businesses and assets. Pursuant to the Hold Separate Order, Kinder Morgan will not exercise any control or influence over the divestiture assets while seeking a buyer. The Hold Separate Order seeks to preserve the divestiture assets as viable, competitive, ongoing businesses, and it assures that Kinder Morgan does not access the confidential business information belonging to those businesses.

The Hold Separate Order also empowers the Commission to appoint a hold separate trustee to monitor the divestiture assets and requires the Respondent to appoint a hold separate manager, subject to approval of the hold separate trustee in concurrence with Commission staff, to manage day-to-day operations. The Hold Separate Order outlines the rights, duties, and responsibilities of both the trustee and the manager, including access to business records, hiring necessary consultants and attorneys, and any other thing reasonably necessary to carry out their duties. The hold separate manager reports to the hold separate trustee and not to Kinder Morgan.

The Hold Separate Order prohibits Kinder Morgan from interfering with the hold separate trustee and requires it to indemnify the trustee. The Hold Separate Order requires Kinder Morgan to provide certain support services and financial assistance to the divestiture assets to ensure they operate as they did before the merger.

The hold separate trustee must submit periodic reports to the Commission concerning compliance with the Hold Separate Order. The Commission may appoint a different hold separate trustee if the original trustee fails to carry out his duties. The hold separate manager has authority to hire staff, maintain the assets, continue on-going capital projects, and ensure employees of the divestiture assets are not involved in Kinder Morgan's other businesses.

The Hold Separate Order terminates either (1) one day after the divestiture is completed or (2) three business days after the Commission withdraws acceptance of the consent agreement.

**VII. Opportunity for Public Comment**

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. The Commission has also issued its Complaint in this matter. Comments received during this comment period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received and will decide whether it should withdraw from the Agreement or make final the Agreement's proposed Order.

By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed Order to aid the Commission in its determination of whether it should make final the proposed Order contained in the Agreement. This analysis is not intended to constitute an official interpretation of the proposed Order, nor is it intended to modify the terms of the proposed Order in any way.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

By direction of the Commission, Commissioner Ramirez recused.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2012–10870 Filed 5–4–12; 8:45 am]

**BILLING CODE 6750–01–P**

## GENERAL SERVICES ADMINISTRATION

**[OMB Control No. 3090–0080; Docket 2011–0016; Sequence 9]**

### General Services Administration Acquisition Regulation; Submission for OMB Review; Contract Financing Final Payment (GSAR Parts 532 and 552.232–72; GSA Form 1142 Release of Claims)

**AGENCY:** Office of the Chief Acquisition Officer, GSA.

**ACTION:** Notice of request for 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 and the reinstatement of GSA Form 1142, Release of Claims, regarding final payment under construction and building services contract. GSA Form 1142 was inadvertently deleted as part of the rewrite of GSAR regulations on Contract Financing. GSA Contracting Officers have used this form to achieve uniformity and consistency in the release of claims process. A notice was published in the **Federal Register** at 77 FR 2726, January 19, 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: June 6, 2012.

**FOR FURTHER INFORMATION CONTACT:** Ms. Dana Munson, General Services Acquisition Policy Division, GSA, (202) 357–9652 or email *Dana.Munson@gsa.gov.*

**ADDRESSES:** Submit comments identified by Information Collection 3090–0080, Contract Financing Final Payment; (GSAR Part 532 and 552.232–72; GSA Form 1142, Release of Claims) 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 3090–0080, Contract Financing Final Payment; (GSAR Part 532 and 552.232–72; GSA Form 1142, Release of Claims).'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–0080, Contract Financing Final Payment; (GSAR Part 532 and 552.232–72; GSA Form 1142, Release of Claims),'' 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 3090–0080, Contract Financing Final Payment; (GSAR Part 532 and 552.232–72; GSA Form 1142, Release of Claims).

*Instructions:* Please submit comments only and cite Information Collection 3090–0080, Contract Financing Final Payment; (GSAR Part 532 and 552.232–72; GSA Form 1142, Release of Claims), 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 Acquisition Regulation (GSAR) clause 552.232–72 requires construction and building services contractors to submit a release of claims before final payment is made to ensure contractors are paid in accordance with their contract requirements and for work performed. GSA Form 1142, Release of Claims is used to achieve uniformity and consistency in the release of claims process.

**B. Annual Reporting Burden**

*Respondents:* 2000.
*Responses per Respondent:* 1
*Hours per Response:* .1
*Total Burden Hours:* 200.
*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. 3090–0080, Contract Financing Final Payment; (GSAR Part 532 and 552.232–72; GSA Form 1142, Release of Claims), in all correspondence.

Dated: April 25, 2012.

**Joseph A. Neurauter,**

*Director, Office of Acquisition Policy, Senior Procurement Officer.*

[FR Doc. 2012–10981 Filed 5–4–12; 8:45 am]

**BILLING CODE 6820–61–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–10169]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revised collection; *Title of Information Collection:* Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Competitive Bidding Program; *Use:* The Centers for Medicare & Medicaid Services (CMS) will conduct competitive bidding programs in which certain suppliers will be awarded contracts to provide competitively bid DMEPOS items to Medicare beneficiaries in a competitive bidding area (CBA). CMS conducted its first round of bidding in 2007 which was implemented on July 1, 2008. The first round of bidding was subsequently delayed by section 154 of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA).

As required by MIPPA, CMS conducted the competition for the Round 1 Rebid in 2009. The Round 1 Rebid contract and prices became effective on January 1, 2011. The Medicare Modernization Act (MMA) requires the Secretary to recompete contracts not less often than once every 3 years; therefore, CMS is preparing to recompete competitive bidding contracts in the Round 1 Rebid areas. *Form Number:* CMS–10169 (OCN: 0938–1016); *Frequency:* Reporting—Occasionally; *Affected Public:* Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 16,003; *Total Annual Responses:* 20,047; *Total Annual Hours:* 34,795. (For policy questions regarding this collection contact James Cowher at 410–786–1948. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by July 6, 2012:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: May 2, 2012.

**Martique Jones**

*Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2012–10947 Filed 5–4–12; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* Assets for Independence (AFI) Program Evaluation.

*OMB No.:* New Collection.

*Description:* The U.S. Department of Health and Human Services, Administration for Children and Families (ACF) is proposing a data collection activity as part of an experimental evaluation of the Assets for Independence (AFI) Program. The purpose of this study is to assess the impact of participation in AFI-funded individual development account (IDA) projects on the savings, asset purchases, and economic well-being of low-income individuals and families. The two primary research questions are:

- What is the impact of AFI project participation on short-term outcomes such as savings, asset purchases, and avoidance of material hardship?
- How do specific AFI project design features affect short-term participant outcomes?

While some evaluations suggest that IDAs help low-income families save, rigorous experimental research is limited. Few studies have focused on AFI-funded IDAs, and few have tested alternative design features.

This evaluation—the first experimental evaluation of IDA projects operating under the Assets for Independence Act—will contribute importantly to understanding the effects of IDA project participation on project participants, particularly effects that occur within the first 12 months of participation, and how these short-term effects differ under alternative project designs. The evaluation will be conducted in two sites, with the random assignment of AFI-eligible cases to program and control groups. The evaluation consists of both an impact study and an implementation study. Data collection activities will span a three-year period.

**Respondents**

Respondent groups will include: (1) AFI-eligible participants and (2) AFI project administrators and staff members of the participating AFT grantees and their partnering organizations.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondent | Number of response per respondents | Average burden hours per response | Estimated burden hours |
|---|---|---|---|---|
| AFI Baseline Questionnaire | 567 | 1 | .50 | 284 |
| AFT Follow-Up Questionnaire | 482 | 1 | .50 | 241 |

ANNUAL BURDEN ESTIMATES—Continued

| Instrument | Number of respondent | Number of response per respondents | Average burden hours per response | Estimated burden hours |
|---|---|---|---|---|
| AFT Implementation Interview Instrument | 10 | 1 | 1.00 | 10 |
| Estimated Total Annual Burden Hours: | | | | 535 |

**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: OPRE Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *OPREinfocollection@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, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Dated: April 30, 2012.

**Steven M. Hanmer,**

*OPRE Reports Clearance Officer.*

[FR Doc. 2012–10735 Filed 5–4–12; 8:45 am]

**BILLING CODE 4184–24–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0879]**

### David H.M. Phelps: Debarment Order

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The U.S. Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) debarring David H.M. Phelps for a period of 20 years from importing articles of food or offering such articles for importation into the United States. FDA bases this order on a finding that Mr. Phelps was convicted, as defined in section 306(l)(1)(B) of the FD&C Act (21 U.S.C. 335a(l)(1)(B)), of 10 felony counts under Federal law for conduct relating to the importation into the United States of an article of food. Mr. Phelps was given notice of the proposed debarment and an opportunity to request a hearing within the timeframe prescribed by regulation. As of March 31, 2012 (30 days after receipt of the notice), Mr. Phelps had not responded. Mr. Phelps's failure to respond constitutes a waiver of his right to a hearing concerning this action.

**DATES:** This order is effective May 7, 2012.

**ADDRESSES:** Submit applications for termination of debarment to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Kenny Shade, Office of Regulatory Affairs, Food and Drug Administration, 12420 Parklawn Drive, Rockville, MD 20857, 301–796–4640.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 306(b)(1)(C) of the FD&C Act (21 U.S.C. 335a(b)(1)(C)) permits FDA to debar an individual from importing an article of food or offering such an article for import into the United States if FDA finds, as required by section 306(b)(3)(A) of the FD&C Act (21 U.S.C. 335a(b)(3)(A)), that the individual has been convicted of a felony for conduct relating to the importation into the United States of any food.

On May 4, 2011, Mr. Phelps was convicted, as defined in section 306(l)(1)(B) of the FD&C Act, when the U.S. District Court for the Southern District of Alabama accepted his plea of guilty and entered judgment against him for the following offenses: One count of conspiracy to commit offenses against the laws of the United States, in violation of 18 U.S.C. 371; nine counts of false labeling under the Lacey Act, in violation of 16 U.S.C. 3372(d)(2) and 3373(d)(3)(A); two counts of receipt of merchandise imported contrary to law, in violation of 18 U.S.C. 545; and one count of misbranding, in violation of 21 U.S.C. 331(a), 333(a)(2), and 343(a)(1) and (b).

FDA's finding that debarment is appropriate is based on the felony convictions referenced herein for conduct relating to the importation into the United States of any food. The factual basis for these convictions is as follows: As stated in the factual resume accompanying the plea agreement referenced above and alleged in the indictment filed against Mr. Phelps, Mr. Phelps was co-owner, vice president, and secretary of CSE Inc., which was used to buy and sell seafood. He was also a co-owner and vice president of RF Inc. RF Inc. also sold seafood, including but not limited to shrimp, oysters, Lake Victoria perch, and types of catfish, commonly called basa, swai, and sutchi.

Beginning on or about January 1, 2004, and continuing through on or about November 8, 2006, Mr. Phelps knowingly, willingly, and unlawfully combined, conspired, confederated, and agreed with his coconspirators to commit offenses against the laws of the United States related to importation of food. This conduct was in violation of 18 U.S.C. 371. Specifically, Mr. Phelps received and bought 81,000 pounds of fish of the genus *Pangasius* (a type of catfish commonly called basa, swai, or sutchi) that he knew had been unlawfully imported from Vietnam. He knew that the fish was falsely labeled as sole when it was imported, and that it was imported without the required antidumping duty having been paid. He created or caused others to create false invoices and labeling for this fish, and other fish of the genus *Pangasius* bought and sold to customers, totaling approximately 101,078 pounds. Mr. Phelps sold and invoiced the fish as grouper or sole, allowing him to sell the fish in interstate commerce at higher profit margins and more readily than if the fish had been accurately labeled and described.

From on or about February 9, 2005, through on or about June 27, 2005, Mr. Phelps knowingly made and caused to be made a false record, account, and label for, and false identification of fish, that had been and was intended to be

transported in interstate and foreign commerce, having a market value greater than $350, and that involved the sale and purchase, the offer of sale and purchase, and the intent to sell and purchase fish, and the importation of fish, in that he created and caused to be created invoices, boxes, and other documents that falsely identified the fish. Specifically, Mr. Phelps falsely identified fish as sole and *Cynoglossus bilineatus,* when in fact it was fish of the genus *Pangasius,* a type of catfish. This conduct was in violation of 16 U.S.C. 3372(d)(2) and 3373(3)(A).

From about March 30, 2005, through April 4, 2005, Mr. Phelps knowingly received, concealed, bought, sold, and facilitated the transportation, concealment, and sale of merchandise after importation, specifically frozen fish fillets of the genus *Pangasius,* knowing it to have been imported and brought into the United States contrary to law, that is falsely declared and with applicable duties having been paid. This conduct was in violation of 18 U.S.C. 545.

From approximately March 30, 2005, through approximately June 22, 2005, with intent to defraud and mislead, Mr. Phelps introduced and delivered and caused to be introduced and delivered into interstate commerce food, specifically frozen fish fillets, that was misbranded in that it had been falsely and misleadingly labeled and described as sole and *Cynoglossus bilineatus,* when in fact the fish was of the genus *Pangasius.* This conduct in violation of 21 U.S.C. 331(a), 333(a)(2), and 343(a)(1) and (b).

As a result of his conviction, on February 17, 2012, FDA sent Mr. Phelps a notice by certified mail proposing to debar him for a period of 20 years from importing articles of food or offering such articles for import into the United States. The proposal was based on a finding under section 306(b)(1)(C) of the FD&C Act that Mr. Phelps was convicted of 10 felony counts under Federal law for conduct relating to the importation into the United States of an article of food because he: Conspired to and committed offenses related to the importation of fish into the United States; falsely identified fish; concealed, bought, sold, and facilitated the transportation, concealment, and sale of frozen fish fillets after importation, knowing it to have been imported and brought into the United States contrary to law; and introduced and delivered misbranded fish into interstate commerce. The proposal was also based on a determination, after consideration of the factors set forth in section 306(c)(3) of the FD&C Act (21 U.S.C. 335a(c)(3)), that Mr. Phelps should be subject to a 20-year period of debarment. The proposal also offered Mr. Phelps an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. Mr. Phelps failed to respond within the timeframe prescribed by regulation and has, therefore, waived his opportunity for a hearing and waived any contentions concerning his debarment (21 CFR part 12).

## II. Findings and Order

Therefore, the Director, Office of Enforcement, Office of Regulatory Affairs, under section 306(b)(1)(C) of the FD&C Act, and under authority delegated to the Director (Staff Manual Guide 1410.35), finds that Mr. David H.M. Phelps has been convicted of 10 felony counts under Federal law for conduct relating to the importation of an article of food into the United States and that he is subject to a 20-year period of debarment.

As a result of the foregoing finding, Mr. Phelps is debarred for a period of 20 years from importing articles of food or offering such articles for import into the United States, effective (see **DATES**). Pursuant to section 301(cc) of the FD&C Act (21 U.S.C. 331(cc)), the importing or offering for import into the United States of an article of food by, with the assistance of, or at the direction of Mr. Phelps is a prohibited act.

Any application by Mr. Phelps for termination of debarment under section 306(d)(1) of the FD&C Act should be identified with Docket No. FDA–2011–N–0879 and sent to the Division of Dockets Management (see **ADDRESSES**). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j).

Publicly available submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: April 24, 2012.

**Armando Zamora,**

*Acting Director, Office of Enforcement, Office of Regulatory Affairs.*

[FR Doc. 2012–10958 Filed 5–4–12; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0880]**

### Karen L. Blyth: Debarment Order

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The U.S. Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) debarring Karen L. Blyth for a period of 20 years from importing articles of food or offering such articles for importation into the United States. FDA bases this order on a finding that Ms. Blyth was convicted, as defined in section 306(l)(1)(B) of the FD&C Act (21 U.S.C. 335a(l)(1)(B)), of 10 felony counts under Federal law for conduct relating to the importation into the United States of an article of food. Ms. Blyth was given notice of the proposed debarment and an opportunity to request a hearing within the time frame prescribed by regulation. As of March 23, 2012 (30 days after receipt of the notice), Ms. Blyth had not responded. Ms. Blyth's failure to respond constitutes a waiver of her right to a hearing concerning this action.

**DATES:** This order is effective May 7, 2012.

**ADDRESSES:** Submit applications for termination of debarment to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Kenny Shade, Office of Regulatory Affairs, Food and Drug Administration, 12420 Parklawn Drive, Rockville, MD 20857, 301–796–4640.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Section 306(b)(1)(C) of the FD&C Act (21 U.S.C. 335a(b)(1)(C)) permits FDA to debar an individual from importing an article of food or offering such an article for import into the United States if FDA finds, as required by section 306(b)(3)(A) of the FD&C Act (21 U.S.C. 335a(b)(3)(A)), that the individual has been convicted of a felony for conduct relating to the importation into the United States of any food.

On May 4, 2011, Ms. Blyth was convicted, as defined in section 306(l)(1)(B) of the FD&C Act, when the U.S. District Court for the Southern District of Alabama accepted her plea of

guilty and entered judgment against her for the following offenses: One count of conspiracy to commit offenses against the laws of the United States, in violation of 18 U.S.C. 371; nine counts of false labeling under the Lacey Act, in violation of 16 U.S.C. 3372(d)(2) and 3373(d)(3)(A); two counts of receipt of merchandise imported contrary to law, in violation of 18 U.S.C. 545; and one count of misbranding, in violation of 21 U.S.C. 331(a), 333(a)(2) and 343(a)(1) and (b).

FDA's finding that debarment is appropriate is based on the felony convictions referenced herein for conduct relating to the importation into the United States of any food. The factual basis for these convictions is as follows: As stated in the factual resume accompanying the plea agreement referenced above and alleged in the indictment filed against Ms. Blyth, Ms. Blyth was a co-owner, president, and treasurer of CSE Inc., which was used to buy and sell seafood. She was also a co-owner, president, and chief executive officer of RF Inc. from on or about October 1, 2004, through on or about March 2007. RF Inc. also sold seafood, including but not limited to shrimp, oysters, Lake Victoria perch, and types of catfish, commonly called basa, swai, and sutchi.

Beginning on or about January 1, 2004, and continuing through on or about November 8, 2006, Ms. Blyth knowingly, willingly, and unlawfully combined, conspired, confederated, and agreed with her coconspirators to commit offenses against the laws of the United States related to importation of food. This conduct was in violation of 18 U.S.C. 371. Specifically, Ms. Blyth received and bought 81,000 pounds of fish of the genus *Pangasius* (a type of catfish commonly called basa, swai, or sutchi) that she knew had been unlawfully imported from Vietnam. She knew that the fish was falsely labeled as sole when it was imported, and that it was imported without the required antidumping duty having been paid. She created or caused others to create false invoices and labeling for this fish, and other fish of the genus *Pangasius* bought and sold to customers, totaling approximately 101,078 pounds. Ms. Blyth sold and invoiced the fish as grouper or sole, allowing her to sell the fish in interstate commerce at higher profit margins and more readily than if the fish had been accurately labeled and described.

From on or about February 9, 2005, through on or about June 27, 2005, Ms. Blyth knowingly made and caused to be made a false record, account, and label for, and false identification of fish, that had been and was intended to be transported in interstate and foreign commerce, having a market value greater than $350, and that involved the sale and purchase, the offer of sale and purchase, and the intent to sell and purchase fish, and the importation of fish, in that she created and caused to be created invoices, boxes, and other documents that falsely identified the fish. Specifically, Ms. Blyth falsely identified fish as sole and *Cynoglossus bilineatus,* when in fact it was fish of the genus *Pangasius,* a type of catfish. This conduct was in violation of 16 U.S.C. 3372(d)(2) and 3373(3)(A).

From about March 30, 2005, through April 4, 2005, Ms. Blyth knowingly received, concealed, bought, sold, and facilitated the transportation, concealment, and sale of merchandise after importation, specifically frozen fish fillets of the genus *Pangasius,* knowing it to have been imported and brought into the United States contrary to law, that is falsely declared and with applicable duties having been paid. This conduct is in violation of 18 U.S.C. 545.

From approximately March 30, 2005, through approximately June 22, 2005, with intent to defraud and mislead, Ms. Blyth introduced and delivered and caused to be introduced and delivered into interstate commerce food, specifically frozen fish fillets, that was misbranded in that it had been falsely and misleadingly labeled and described as sole and *Cynoglossus bilineatus,* when in fact the fish was of the genus *Pangasius.* This conduct is in violation of 21 U.S.C. 331(a), 333(a)(2) and 343(a)(1) and (b).

As a result of her conviction, on February 17, 2012, FDA sent Ms. Blyth a notice by certified mail proposing to debar her for a period of 20 years from importing articles of food or offering such articles for import into the United States. The proposal was based on a finding under section 306(b)(1)(C) of the FD&C Act that Ms. Blyth was convicted of 10 felony counts under Federal law for conduct relating to the importation into the United States of an article of food because she: Conspired to and committed offenses related to the importation of fish into the United States; falsely identified fish; concealed, bought, sold, and facilitated the transportation, concealment, and sale of frozen fish fillets after importation, knowing it to have been imported and brought into the United States contrary to law; and introduced and delivered misbranded fish into interstate commerce. The proposal was also based on a determination, after consideration of the factors set forth in section 306(c)(3) of the FD&C Act (21 U.S.C. 335a(c)(3)) that Ms. Blyth should be subject to a 20-year period of debarment. The proposal also offered Ms. Blyth an opportunity to request a hearing, providing her 30 days from the date of receipt of the letter in which to file the request, and advised her that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. Ms. Blyth failed to respond within the timeframe prescribed by regulation and has, therefore, waived her opportunity for a hearing and waived any contentions concerning her debarment (21 CFR part 12).

## II. Findings and Order

Therefore, the Director, Office of Enforcement, Office of Regulatory Affairs, under section 306(b)(1)(C) of the FD&C Act, and under authority delegated to the Director (Staff Manual Guide 1410.35), finds that Ms. Karen L. Blyth has been convicted of 10 felony counts under Federal law for conduct relating to the importation of an article of food into the United States and that she is subject to a 20-year period of debarment.

As a result of the foregoing finding, Ms. Blyth is debarred for a period of 20 years from importing articles of food or offering such articles for import into the United States, effective (see **DATES**). Pursuant to section 301(cc) of the FD&C Act (21 U.S.C. 331(cc)), the importing or offering for import into the United States of an article of food by, with the assistance of, or at the direction of Ms. Blyth is a prohibited act.

Any application by Ms. Blyth for termination of debarment under section 306(d)(1) of the FD&C Act (21 U.S.C. 335a(d)(1)) should be identified with Docket No. FDA–2011–N–0880 and sent to the Division of Dockets Management (see **ADDRESSES**). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j).

Publicly available submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: April 24, 2012.

**Armando Zamora,**

*Acting Director, Office of Enforcement, Office of Regulatory Affairs.*

[FR Doc. 2012–10960 Filed 5–4–12; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket Nos. FDA–2011–E–0014, FDA–2010–E–0660, and FDA–2010–E–0659]**

### Determination of Regulatory Review Period for Purposes of Patent Extension; PROLIA

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) has determined the regulatory review period for PROLIA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human biological product.

**ADDRESSES:** Submit electronic comments to *http://www.regulations.gov.* Submit written petitions along with three copies and written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6284, Silver Spring, MD 20993–0002, 301–796–3602.

**SUPPLEMENTARY INFORMATION:** The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human biological product PROLIA (denosumab). PROLIA is indicated for treatment of postmenopausal women with osteoporosis at high risk for fracture. Subsequent to this approval, the Patent and Trademark Office received patent term restoration applications for PROLIA (U.S. Patent Nos. 6,740,522; 7,097,834; and 7,411,050) from Amgen, Inc., and the Patent and Trademark Office requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated April 27, 2011, FDA advised the Patent and Trademark Office that this human biological product had undergone a regulatory review period and that the approval of PROLIA represented the first permitted commercial marketing or use of the product. Thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for PROLIA is 3,269 days. Of this time, 2,739 days occurred during the testing phase of the regulatory review period, while 530 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* June 21, 2001. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on June 21, 2001.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* December 19, 2008. FDA has verified the applicant's claim that the biologics license application (BLA) for PROLIA (BLA125320) was submitted on December 19, 2008.

3. *The date the application was approved:* June 1, 2010. FDA has verified the applicant's claim that BLA125320 was approved on June 1, 2010.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,365 days; 952 days; and 595 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments and ask for a redetermination by July 6, 2012. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by November 5, 2012. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments and written petitions. It is only necessary to send one set of comments. However, if you submit a written petition, you must submit three copies of the petition. Identify comments with the docket numbers found in brackets in the heading of this document.

Comments and petitions that have not been made publicly available on *http://www.regulations.gov* may be viewed in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: April 16, 2012.

**Jane A. Axelrad,**

*Associate Director for Policy, Center for Drug Evaluation and Research.*

[FR Doc. 2012–10959 Filed 5–4–12; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2012–N–0001]**

### Food and Drug Administration/ International Society for Pharmaceutical Engineering Cosponsorship Educational Workshop: Redefining the 'C' in CGMP: Creating, Implementing, and Sustaining a Culture of Compliance

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of public workshop.

The Food and Drug Administration (FDA) Center for Drug Evaluation and Research, in cosponsorship with the International Society for Pharmaceutical Engineering (ISPE), is planning a multiday, educational public workshop entitled ''Redefining the 'C' in CGMP: Creating, Implementing, and Sustaining a Culture of Compliance.''

**DATES:** *Date and Time:* The public workshop will be held on June 4, 2012, 9 a.m. to 5 p.m. and June 5, 2012, 8 a.m. to 5 p.m.

*Location:* The public workshop will be held at the Renaissance Baltimore Harborplace Hotel, 202 E. Pratt St., Baltimore, MD 21202, 1–800–535–1201.

*Contact Persons: FDA Contact:* Rhonda Hill, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 4341, Silver Spring, MD 20993, 301–796–3267, *rhonda.hill@fda.hhs.gov.*

*ISPE Contact:* Julianne Rill, Continuing Education Program Manager, 600 N. Westshore Blvd., Suite 900, Tampa, FL 33609; Web site: *http://www.ispe.org/2012-gmp-conference;* email: *jrill@ispe.org.* (FDA has verified the Web site address in this announcement but we are not responsible for any subsequent changes to the Web site in this announcement after this document publishes in the **Federal Register.**)

*Accommodations:* Attendees are responsible for their own accommodations. Please mention ISPE/FDA Conference to receive the hotel room rate of $195.00 plus applicable taxes (available until May 7, 2012, or until the ISPE room block is filled).

If you need special accommodations due to a disability, please contact ISPE (see *Contact Persons*) at least 7 days in advance of the meeting.

*Registration:* The ISPE registration fees cover the cost of facilities, materials, and refreshments. Seats are limited; please submit your registration as soon as possible. Workshop space will be filled in order of receipt of registration. Those accepted for the workshop will receive confirmation. Registration will close after the workshop is filled.

COST OF REGISTRATION

| | |
|---|---|
| ISPE member | $1,695 |
| ISPE nonmember (includes membership). | 2,035 |
| Federal Government | 750 |
| FDA Planning Committee members and invited speakers. | Fee waived. |

Please visit ISPE's Web site to confirm the prevailing registration fees.

To register, please submit a registration form with your name, affiliation, mailing address, telephone, fax number, and email, along with a check or money order payable to ''ISPE.'' To register via the Internet, go to *http://www.ispe.org/2012-gmp-conference.* The registrar will accept payment by major credit card (Visa/MasterCard/AMEX only). For more information on the meeting registration, or for questions on the workshop, contact ISPE (see *Contact Persons*).

**SUPPLEMENTARY INFORMATION:** The workshop helps fulfill the Department of Health and Human Services' and FDA's important mission to protect the public health. The workshop will provide those engaged in FDA-regulated drug manufacturing operations with information on a number of topics concerning FDA requirements and expectations related to current good manufacturing practice (CGMP). The joint public workshop offers the opportunity for participants to join FDA representatives and industry experts in face-to-face dialogues. Each year, FDA speakers provide updates on current efforts affecting the development of global regulatory strategies, while industry professionals from some of today's leading pharmaceutical companies present case studies on how they employ strategies to manufacture high quality drugs in their daily processes. Through a series of sessions and meetings, the conference will provide participants with the opportunity to hear directly from FDA experts and representatives of global regulatory authorities on best practices. Topics for discussion include the following: (1) The Business Case For Change; (2) Quality Risk Management—When, What, and How; (3) Sustaining Compliance Consistency Throughout Your Company and Supplier Network; (4) IT Strategies—Cloud Computing, RFID, and Beyond; (5) The Future of Drug Manufacturing. To help ensure the quality of FDA regulated products, the workshop helps to achieve objectives set forth in section 406 of the FDA Modernization Act of 1997 (Pub. L. 105–115), which includes working closely with stakeholders and maximizing the availability and clarity of information to stakeholders and the public. The workshop also is consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), as outreach activities by Government Agencies to small businesses.

Dated: May 1, 2012.

**Leslie Kux,**

*Assistant Commissioner for Policy.*

[FR Doc. 2012–10894 Filed 5–4–12; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2012–N–0001]**

### Educational Forum on Medical Device Reporting, Complaint Files, and Recalls, Corrections, and Removals; Public Workshop

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of public workshop.

The Food and Drug Administration (FDA), Office of Regulatory Affairs (ORA), Southwest Region (SWR), Dallas District Office (DALDO), in collaboration with the FDA Medical Device Industry Coalition (FMDIC), is announcing a public workshop entitled ''Educational Forum on Medical Device Reporting, Complaint Files, and Recalls, Corrections, and Removals.'' The purpose of the public workshop is to provide information about FDA's Medical Device Quality Systems Regulation (QSR) to the regulated industry, particularly small businesses.

**DATES:** *Date and Time:* The public workshop will be held on June 15, 2012, from 8 a.m. to 5 p.m.

*Location:* The public workshop will be held at the Renaissance Dallas Hotel, 2222 Stemmons Freeway, Dallas, TX 75207. Directions and lodging information are available at the FMDIC Web site at *http://www.fmdic.org/.*

*Contact Person:* David Arvelo, Food and Drug Administration, 4040 North Central Expressway, Suite 900, Dallas, TX 75204, 214–253–4952, FAX: 214–253–4970, email *david.arvelo@fda.hhs.gov.*

*Registration:* FMDIC has a $250 early registration fee. Discounts for full-time students and government employees with valid identification are available. Early registration ends June 1, 2012. Registration is $300 thereafter. For more information on fees and/or to register online, please visit *http://www.fmdic.org/.* As an alternative, you may send registration information including name, title, firm name, address, telephone and fax numbers, and email, along with a check or money order for the appropriate amount payable to the FMDIC, to FMDIC Registrar, 4447 N. Central Expressway, Suite 110 PMB197, Dallas, TX 75205.

Registration on site will be accepted on a space available basis on the day of the public workshop beginning at 7:30 a.m. Please note that due to popularity, similar past events have reached maximum capacity well before the day of the event. The cost of registration at the site is $300 payable to the FMDIC. The registration fee will be used to offset expenses of hosting the event including continental breakfast, lunch, refreshments, venue, materials, audiovisual equipment, and other logistics associated with this event.

If you need special accommodations due to a disability, please contact David Arvelo (see *Contact Person*) at least 21 days in advance.

**SUPPLEMENTARY INFORMATION:** The workshop is being held in response to the interest in the topics discussed from small medical device manufacturers in the Dallas District area. This workshop helps achieve objectives set forth in section 406 of the Food and Drug Administration Modernization Act of 1997 (21 U.S.C. 393), which include working closely with stakeholders and maximizing the availability and clarity of information to stakeholders and the public. This is also consistent with the purposes of FDA's Regional Small Business Program, which are in part to respond to industry inquiries, develop educational materials, sponsor workshops and conferences to provide firms, particularly small businesses, with firsthand working knowledge of FDA's requirements and compliance policies. This workshop is also consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), as an outreach activity by Government agencies to small businesses.

The goal of the workshop is to present information that will enable manufacturers and regulated industry to better comply with the Medical Device QSR. The following topics will be discussed at the workshop: (1) The role of complaint files, (2) medical device reporting, (3) medical device recalls, corrections, and removals, and (4) Corrective and Preventive Actions as They Relate to Complaints.

*Transcripts:* Transcripts of this event will not be available due to the format of this workshop. Handouts will be posted online at *http://www.fmdic.org/* or may be requested in writing from David Arvelo (see *Contact Person*), after the public workshop.

Dated: May 1, 2012.

**Leslie Kux,**

*Assistant Commissioner for Policy.*

[FR Doc. 2012–10893 Filed 5–4–12; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Aging Special Emphasis Panel; Presenilin and Alzheimer's Disease.

*Date:* June 4, 2012.

*Time:* 12:00 p.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call).

*Contact Person:* Alexander Parsadanian, Ph.D., Scientific Review Officer, National Institute on Aging, Gateway Building 2C/212, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–496–9666, *parsadaniana@nia.nih.gov.*

*Name of Committee:* National Institute on Aging Special Emphasis Panel; Signal Transduction and AD.

*Date:* June 20, 2012.

*Time:* 11:45 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call).

*Contact Person:* Alexander Parsadanian, Ph.D., Scientific Review Officer, National Institute on Aging, Gateway Building 2C/212, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–496–9666, *parsadaniana@nia.nih.gov.*

*Name of Committee:* National Institute on Aging Special Emphasis Panel Cognitive Decline in Aging Monkeys.

*Date:* June 29, 2012.

*Time:* 11:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call).

*Contact Person:* Alexander Parsadanian, Ph.D., Scientific Review Officer, National Institute on Aging, Gateway Building 2c/212, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–496–9666, *parsadaniana@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: May 1, 2012.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012–10965 Filed 5–4–12; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; 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 on Alcohol Abuse and Alcoholism Special Emphasis Panel; Review of RFA AA–12–008.

*Date:* May 23–24, 2012.

*Time:* 9:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* NIAAA, National Institutes of Health, 5635 Fishers Lane, Rockville, MD 20852 (Virtual Meeting).

*Contact Person:* Ranga Srinivas, Ph.D., Chief, Extramural Project Review Branch EPRB, NIAAA, National Institutes of Health, 5365 Fishers Lane, Room 2085, Rockville, MD 20852, (301) 451–2067, *srinivar@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: April 30, 2012.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012–10978 Filed 5–4–12; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Office of the Director, National Institutes of Health Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Scientific Management Review Board.

The NIH Reform Act of 2006 (Pub. L. 109–482) provides organizational authorities to HHS and NIH officials to: (1) Establish or abolish national research institutes; (2) reorganize the offices within the Office of the Director, NIH including adding, removing, or transferring the functions of such offices or establishing or terminating such offices; and (3) reorganize, divisions, centers, or other administrative units within an NIH national research institute or national center including adding, removing, or transferring the functions of such units, or establishing or terminating such units. The purpose of the Scientific Management Review Board (also referred to as SMRB or Board) is to advise appropriate HHS and NIH officials on the use of these organizational authorities and identify the reasons underlying the recommendations. The meeting will be open to the public through teleconference at the number listed below.

*Name of Committee:* Scientific Management Review Board.

*Date:* May 29, 2012.

*Time:* 12:15 p.m. to 2:15 p.m.

*Agenda:* Presentation and discussion will focus on the most recent charge to the SMRB, which entails recommending strategies for how NIH can optimize its utilization on the Small Business Innovation Research and Small Business Technology Transfer programs in keeping with the NIH mission. The Board will also discuss next steps regarding future SMRB activities. Further information for this meeting, including the agenda will be available at *http://smrb.od.nih.gov.* Time will be allotted on the agenda for public comment. To sign up for public comment, please submit your name and affiliation to the contact person listed below by May 25, 2012. Sign up will be restricted to one sign up per email. In the event that time does not allow for all those interested to present oral comments, anyone may file written comments using the contact person's address below.

The toll-free number to participate in the teleconference is 1–800–779–1545. Indicate to the conference operator that your Participant pass code is ''NIH.''

*Place:* National Institutes of Health, Office of the Director, NIH, Office of Science Policy, 6705 Rockledge Drive, Suite 750, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Lyric Jorgenson, Ph.D., Office of Science Policy, Office of the Director, NIH, National Institutes of Health, 6705 Rockledge Drive, Suite 750, Bethesda, MD 20892, *smrb@mail.nih.gov*, (301) 496–6837.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

The draft meeting agenda, meeting materials, dial-in information, and other information about the SMRB, will be available at *http://smrb.od.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: May 1, 2012.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012–10967 Filed 5–4–12; 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; Program Project: Statistical Genetics.

*Date:* May 24, 2012.

*Time:* 1:00 p.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:* Richard Panniers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2212, MSC 7890, Bethesda, MD 20892, (301) 435–1741, *pannierr@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Motor Coordination.

*Date:* May 25, 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:* Priscilla B Chen, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4104, MSC 7814, Bethesda, MD 20892, (301) 435–1787, *chenp@csr.nih.gov.*

*Name of Committee:* Emerging Technologies and Training Neurosciences Integrated Review Group; Bioengineering of Neuroscience, Vision and Low Vision Technologies Study Section.

*Date:* May 30, 2012.

*Time:* 8:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Mayflower Park Seattle, 405 Olive Way, Seattle, WA 98101.

*Contact Person:* Robert C Elliott, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5190, MSC 7846, Bethesda, MD 20892, 301–435–3009, *elliotro@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR 10–234: Neurotechnology Bioengineering Research Partnerships.

*Date:* May 30, 2012.

*Time:* 4:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Mayflower Park Seattle, 405 Olive Way, Seattle, WA 98101.

*Contact Person:* Robert C Elliott, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3130, MSC 7850, Bethesda, MD 20892, 301–435–3009, *elliotro@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR 12–053: Advanced Neural Prosthetics R&D.

*Date:* May 30, 2012.

*Time:* 5:00 p.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Mayflower Park Seattle, 405 Olive Way, Seattle, WA 98101.

*Contact Person:* Robert C Elliott, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3130, MSC 7850, Bethesda, MD 20892, 301–435–3009, *elliotro@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR Panel: FIRCA and GRIP Review.

*Date:* May 31–June 1, 2012.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hotel Monaco Washington DC, 700 F Street NW., Washington, DC 20004.

*Contact Person:* Hilary D Sigmon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5222, MSC 7852, Bethesda, MD 20892, (301) 594–6377, *sigmonh@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Obesity-Clinical Research.

*Date:* June 1, 2012.

*Time:* 10:00 a.m. to 3:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Krish Krishnan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892, (301) 435–1041, *krishnak@csr.nih.gov.*

*Name of Committee:* Healthcare Delivery and Methodologies Integrated Review Group; Societal and Ethical Issues in Research Study Section.

*Date:* June 4, 2012.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Karin F Helmers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3166, MSC 7770, Bethesda, MD 20892, 301–254–9975, *helmersk@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: May 1, 2012.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012–10969 Filed 5–4–12; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Cancer Institute; Notice of 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 meeting of the NCI-Frederick Advisory Committee.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

A portion of the meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended. The premature disclosure of information to be discussed during the meeting would significantly frustrate implementation of a proposed agency action.

*Name of Committee:* NCI-Frederick Advisory Committee.

*Open:* May 30, 2012, 9:00 a.m. to 11:00 a.m.

*Agenda:* Ongoing and New Business and Scientific Presentations.

*Place:* National Institutes of Health, 9000 Rockville Pike, Building 31, C Wing, 6th Floor, Conference Room 10, Bethesda, MD 20892.

*Closed:* May 30, 2012, 11:00 a.m. to 3:00 p.m.

*Agenda:* Discussion of Proposed Frederick National Laboratory Strategic Plan.

*Place:* National Institutes of Health, 9000 Rockville Pike, Building 31, C Wing, 6th Floor, Conference Room 10, Bethesda, MD 20892.

*Contact Person:* Thomas M. Vollberg, Sr., Ph.D., Executive Secretary, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 7th Floor, Room 7142, Bethesda, MD 20892–8327, (301) 694–9582.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/fac/fac.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: April 27, 2012.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012–10964 Filed 5–4–12; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Prospective Grant of Exclusive License: Ocular Therapeutics Agent Delivery Devices and Methods for Making and Using Such Devices

**AGENCY:** National Institutes of Health, Public Health Service, HHS.

**ACTION:** Notice.

**SUMMARY:** This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i), that the National Institutes of Health (NIH), Department of Health and Human Services, is contemplating the grant of an exclusive patent license to practice the inventions embodied in Patent Applications USSN 09/808,149, filed Mar 15, 2001, issued Mar 30, 2004; PCT/US02/07836, filed Mar 14, 2002, designated EP, 02723446,7 and US 10/471,468, issued Feb 9, 2010; USSN 11/739,540, filed Apr 29, 2007; and USSN 12/647,980, filed Dec 28, 2009; entitled ''Ocular Therapeutic Agent Delivery Devices and Methods For Making and Using Such Devices'', by Michael R. Robinson *et al* (NEI, CC, and NIBIB) (E–241–1999/0), to ODIN Biotech having a place of business in 4000 Hanover Street, Dallas, TX. The patent rights in this invention have been assigned to the United States of America. The exclusive patent license is one which qualifies under the Start-up Exclusive Patent License Agreement program, which is in place from October 1, 2011 through September 30, 2012.

**DATES:** Only written comments and/or application for a license that are received by the NIH Office of Technology Transfer on or before May 22, 2012 will be considered.

**FOR FURTHER INFORMATION CONTACT:** Requests for a copy of the patent application, inquiries, and comments relating to the contemplated license should be directed to: Susan Ano, Ph.D., Branch Chief, IDME, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Email: *anos@mail.nih.gov;* Telephone: 301–435–5515; Facsimile: 301–402–0220.

**SUPPLEMENTARY INFORMATION:** The invention relates to a drug delivery system, compositions of, methods of making the drug delivery system, and methods of use as a drug delivery platform. Ocular therapeutics that require repeated intravitreal injections are associated with eye infections, retinal detachment, hemorrhaging, endophthalmitis, and/or cataracts, while topical solutions that require daily application are associated with patient non-compliance. This technology describes a drug delivery platform that can be designed to deliver therapeutics to the eye over months to years. Therefore, this technology can be used to design a therapeutic implant that reduces or eliminates patient non-compliance and/or improve patient safety. The therapeutic implant has the following advantages: (a) It is bioerodible which makes it more noninvasive than repeated intravitreal injections and non-bioerodible implants; (b) has a dual release system that allows the release of two distinct therapeutics or a single therapeutic at different rates; (c) prolongs the therapeutic dose of an agent across the surface of the eye compared to topical solutions; (d) reduces the risk of additional eye damage compared to repeated intravitreal injections; (e) dispenses a therapeutic agent over a long period of time resulting in increase patient compliance and patient health; and (f) is associated with reduced systemic drug side-effects compared to drugs applied systemically. Data are available for rodents, rabbits, dogs, and horses.

The field of use may be limited to ''Episcleral Therapeutic Implant for Ophthalmic Diseases''.

The prospective worldwide exclusive license will be royalty bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within fifteen (15) days from the date of this published Notice, NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Properly filed competing applications for a license filed in response to this notice will be treated as objections to the contemplated license. Comments and objections submitted in response to this notice will not be made available for public inspection, and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: May 1, 2012.

**Richard U. Rodriguez,**

*Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.*

[FR Doc. 2012–10836 Filed 5–4–12; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are 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.

**Proposed Project: Healthy Transitions Initiative Cross-Site Evaluation—NEW**

The Substance Abuse and Mental Health Services Administration (SAMHSA), Center of Mental Health Services is responsible for the cross-site evaluation of the Cooperative Agreements for State/Community Partnerships to Integrate Services and Supports for Youth and Young Adults 16–25 with Serious Emotional Disturbances (SED) or Serious Mental Illness (SMI), and Their Families (Healthy Transitions Initiative—HTI) that will collect data on program implementation and youth and young adult outcomes in the areas of education, employment, housing, mental health and co-occurring disorders, and involvement with the juvenile and criminal justice systems. This cross-site evaluation design includes a process and an outcome evaluation and data will be collected over a 3-year period from 7 grantee sites.

The cross-site evaluation is designed to address the following questions.

*Process Evaluation Questions*

1. How closely does implementation match the plan proposed in the grant?
2. What types of deviation from the plan occur?
3. What effect do the deviations have on the planned intervention and performance assessment?
4. What facilitates a successful transition between youth and adult systems?
5. Is there a change from a ''youth-guided'' model to a ''youth and young adult consumer-driven'' model?
6. What is the extent of interagency coordination and collaboration?
7. How are state and local-level systems changing in response to the HTI implementation? How does state and local-level policy change affect the implementation of the Initiative?
8. Who provides services (i.e., program staff, agency site)?
9. What services are being provided (i.e., modality, type, intensity, duration)?
10. Is there a viable cultural and linguistic competence plan?
11. What are the individual characteristics of the youth and young adults (i.e., who is being served)?
12. In what settings (i.e., system, community) are they being served?

*Outcome Evaluation Questions*

1. What is the effect of the HTI intervention on the participants?
2. What is the effect of the HTI intervention, compared to a sample of similar young adults not participating in the HTI intervention?
3. What program factors are associated with the observed outcomes?
4. What individual factors are associated with the observed outcomes?
5. How durable are the effects over 24 months?

*Process Evaluation*

The process evaluation is designed to assess the fidelity of grantees to implement their proposed program model, and consists of young person focus groups, young person surveys, youth mentor focus groups, transitional program personnel interviews and surveys, and local and state administrator interviews. Process evaluation data will be collected in two waves during FY 2012 and during FY 2014 and, with the exception of the state administrator interviews, participants are not expected to participate more than one time during the 2 waves of data collection.

*Outcome Evaluation*

The outcome evaluation is designed to assess outcomes of youth and young adults in regards to education, employment, housing, mental health and co-occurring disorders, and involvement with the juvenile and criminal justice systems. The outcome evaluation will utilize both an enhanced and standard data collection and a longitudinal cohort design, and will include a comparative study to assess the effectiveness of HTI relative to a similar sample of young persons who did not receive HTI services. In the standard data collection protocol, outcome data will be collected for each HTI young adult participant, at a minimum of, at baseline at least every 6 months for up to 24 months for as long as the participant remains in HTI services. Enhanced outcome data will be collected on a subsample of young adults at 6 month intervals. The enhanced protocol will continue even after the young person from the subsample has left or has been discharged from HTI services, for up to 24 months. The baseline and follow up outcome instruments include the following key indicators: Demographic information, service use, education, employment/vocational training, housing and living situation, clinical outcomes, behavioral and other health, trauma-related experiences, life skills, parenting skills and supports, involvement with juvenile or criminal justice systems, and social and peer relationships. While participants are enrolled in HTI services, these data collected by the HTI grantees as specified in the RFA.

The HTI Data Center (HTI DC) will be developed for data collection and management. The HTI DC will be a secure Web site that allows uploading of data, real-time access to data by grantees, and production of automated reports for the sites. It is flexible for local use and simplifies the management, monitoring, and reporting of data.

The summary burden reflects the distinct number of respondents, total annual burden, and total hourly cost of the study.

SUMMARY BURDEN TABLE

| | Number of distinct respondents | Average annual number responses/ respondent | Total annual number of responses | Average 3-year burden per response (hours) | Total annual burden (hours) | Hourly wage cost | Total hourly cost* |
|---|---|---|---|---|---|---|---|
| Young Persons ..... | 320 | 1.10 | 796 | 1.55 | 547 | [a] $7.25 | $3966 |
| Youth Mentors ..... | 84 | 0.33 | 28 | 1.25 | 35 | [b] 10.74 | 376 |
| Transitional Program Personnel ..... | 49 | 0.33 | 23 | 1.41 | 23 | [c] 15.24 | 351 |
| Local Administrators .... | 21 | 0.67 | 14 | 1.50 | 21 | [d] 22.69 | 476 |
| State Administrators ..... | 7 | 0.67 | 9 | 0.54 | 3 | [e] 23.54 | 220 |
| Total Summary ..... | 481 | 3 | 871 | ..... | 629 | ..... | 5,389 |

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 8–1099, One Choke Cherry Road, Rockville, MD 20857 or email a copy to *summer.king@samhsa.hhs.gov.* Written comments must be received before 60 days after the date of the publication in the **Federal Register**.

**Summer King,**

*Statistician.*

[FR Doc. 2012–10882 Filed 5–4–12; 8:45 am]

**BILLING CODE 4162–20–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2012–0021]**

### Homeland Security Advisory Council

**AGENCY:** The Office of Policy, DHS.

**ACTION:** Notice of partially closed federal advisory committee meeting.

**SUMMARY:** The Homeland Security Advisory Council (HSAC) will meet in person and members of the public may participate by conference call on May 24, 2012. The meeting will be partially closed to the public.

**DATES:** The HSAC will meet on Thursday, May 24, 2012, from 9:00 a.m. to 3:00 p.m. EDT. The portion of the meeting from 9:00 a.m. to 12:45 p.m. will be closed to the public. The meeting will be open to the public from 1:00 p.m. to 3:00 p.m.

**ADDRESSES:** Written comments must be submitted and received by May 22, 2012. Comments must be identified by Docket No. DHS–2012–0021 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: HSAC@dhs.gov*. Include docket number in the subject line of the message.
- *Fax:* (202) 282–9207.
- *Mail:* Homeland Security Advisory Council, Department of Homeland Security, Mailstop 0450, 245 Murray Lane SW., Washington, DC 20528.

*Instructions:* All submissions received must include the words ''Department of Homeland Security'' and DHS–2012–0021, the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received by the DHS Homeland Security Advisory Council, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** HSAC Staff at *hsac@dhs.gov* or 202–447–3135.

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App.

The HSAC provides organizationally independent, strategic, timely, specific and actionable advice and recommendations for the consideration of the Secretary of the Department of

Homeland Security on matters related to homeland security. The Council is comprised of leaders of local law enforcement, first responders, state and local government, the private sector, and academia.

The HSAC will meet from 9:00 a.m. to 3:00 p.m. The HSAC will receive updates from the U.S. Coast Guard on ''Counterterrorism Efforts Around the World'' and from the Transportation Security Administration on threats to airport security, receive observations and remarks from DHS senior leadership, and review and deliberate on recommendations from the HSAC Faith-based Security and Communications Advisory Committee.

The HSAC will meet in closed session from 9:00 a.m. to 12:45 p.m. to receive sensitive operational information from senior DHS leadership on threats to our homeland security, border security, U.S. Coast Guard counterterrorism efforts, and an operational overview of the Transportation Security Administration's (TSA) airport security.

*Basis for Partial-Closure:* In accordance with Section 10(d) of the Federal Advisory Committee Act, it has been determined that the meeting requires closure as the disclosure of the information would not be in the public interest.

The HSAC will receive briefings on domestic and international threats to the homeland from DHS Intelligence and Analysis and other senior leadership, and a briefing on the Transportation Security Administration's (TSA) airport security program that will include lessons learned, and screening techniques associated with airport security. Specifically, there will be material presented regarding the latest viable threats against the United States, and how DHS and other Federal agencies plan to address those threats. Under 5 U.S.C. 552b(c)(7)(E), disclosure of that information could reveal investigative techniques and procedures not generally available to the public, allowing those with interests against the United States to circumvent the law. Additionally, under 5 U.S.C. 552b(c)(9)(B), disclosure of these techniques and procedures could frustrate the successful implementation of protective measures designed to keep our country safe.

Members will also be provided a briefing from the U.S. Coast Guard on counterterrorism efforts being made around the world. Providing this information to the public would provide terrorists with a road map regarding the Department's plan to counter their actions, and thus, allow them to take different actions to avoid counterterrorism efforts. Under 5 U.S.C. 552b(c)(7)(E), disclosure of that information could endanger the life or physical safety of law enforcement personnel. Additionally, under 5 U.S.C. 552b(c)(9)(B), disclosure of this plan could frustrate the successful implementation of measures designed to counter terrorist acts.

*Public Participation:* Members of the public will be in listen-only mode. The public may register to participate in this HSAC conference call aforementioned procedures. Each individual must provide his or her full legal name, email address and phone number no later than 5:00 p.m. EDT on May 22, 2012, to a staff member of the HSAC via email at *HSAC@dhs.gov* or via phone at (202) 447–3135. HSAC webcast details and the Faith-based Security and Communications Advisory Committee report will be provided to interested members of the public at the time they register.

*Identification of Services for Individuals with Disabilities:* For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, contact the HSAC as soon as possible.

Dated: May 1, 2012.

**Becca Sharp,**

*Executive Director, Homeland Security Advisory Council, DHS.*

[FR Doc. 2012–10930 Filed 5–4–12; 8:45 am]

**BILLING CODE 9110–9M–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–4057–DR; Docket ID FEMA–2012–0002]**

### Kentucky; Amendment No. 6 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–4057–DR), dated March 6, 2012, and related determinations.

**DATES:** *Effective Date:* April 12, 2012.

**FOR FURTHER INFORMATION CONTACT:** Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

**SUPPLEMENTARY INFORMATION:** The notice of a major disaster declaration for the Commonwealth of Kentucky is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of March 6, 2012.

Adair County for Public Assistance.

Bath County for Public Assistance (already designated for Individual Assistance).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2012–10905 Filed 5–4–12; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–4061–DR; Docket ID FEMA–2012–0002]**

### West Virginia; Amendment No. 1 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of West Virginia (FEMA–4061–DR), dated March 22, 2012, and related determinations.

**DATES:** *Effective Date:* March 31, 2012.

**FOR FURTHER INFORMATION CONTACT:** Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the incident period for this disaster is closed effective March 31, 2012.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030,

Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2012–10901 Filed 5–4–12; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–4059–DR; Docket ID FEMA–2012–0002]**

### West Virginia; Amendment No. 1 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of West Virginia (FEMA–4059–DR), dated March 16, 2012, and related determinations.

**DATES:** *Effective Date:* April 18, 2012.

**FOR FURTHER INFORMATION CONTACT:** Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

**SUPPLEMENTARY INFORMATION:** The notice of a major disaster declaration for the State of West Virginia is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of March 16, 2012.

Harrison, Preston, and Taylor Counties for Individual Assistance (already designated for Public Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2012–10902 Filed 5–4–12; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### Agency Information Collection Activities: Declaration of Persons Who Performed Repairs or Alterations

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** 30-Day notice and request for comments; Extension of an existing information collection.

**SUMMARY:** U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Declaration of Persons Who Performed Repairs or Alterations. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This information collection was previously published in the **Federal Register** (77 FR 10762) on February 23, 2012, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

**DATES:** Written comments should be received on or before June 6, 2012.

**ADDRESSES:** Interested persons are invited to submit written comments on this information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for U.S. Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components 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 collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

*Title:* Declaration of Persons Who Performed Repairs or Alterations.

*OMB Number:* 1651–0048.

*Form Number:* None.

*Abstract:* The ''Declaration of Persons Who Performed Repairs or Alterations,'' as required by 19 CFR 10.8, is used in connection with the entry of articles entered under subheadings 9802.00.40 and 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS). Articles entered under these HTSUS provisions are articles that were in the U.S. and were exported temporarily for repairs. Upon their return, duty is only assessed on the value of the repairs performed abroad and not on the full value of the article. The declaration under 19 CFR 10.8 includes information such as a description of the article and the repairs, the value of the article and the repairs, and a declaration by the owner, importer, consignee, or agent having knowledge of the pertinent facts. The information in this declaration is used by CBP to determine the value of the repairs and assess duty only on the value of those repairs.

*Current Actions:* CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

*Type of Review:* Extension (without change).

*Affected Public:* Businesses.

*Estimated Number of Respondents:* 10,236.

*Estimated Number of Total Annual Responses:* 20,472.

*Estimated Number of Annual Responses per Respondent:* 2.

*Estimated Time per Response:* 30 minutes.

*Estimated Total Annual Burden Hours:* 10,236.

Dated: May 1, 2012.

**Tracey Denning,**

*Agency Clearance Officer, U.S. Customs and Border Protection.*

[FR Doc. 2012–10906 Filed 5–4–12; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R9–IA–2012–N109; FXIA16710900000P5–123–FF09A30000]**

### Endangered Species; Marine Mammals; Issuance of Permits

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of issuance of permits.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), have issued the following permits to conduct certain activities with endangered species, marine mammals, or both. We issue these permits under the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA).

**ADDRESSES:** Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email *DMAFR@fws.gov.*

**FOR FURTHER INFORMATION CONTACT:** Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

**SUPPLEMENTARY INFORMATION:** On the dates below, as authorized by the provisions of the ESA (16 U.S.C. 1531 *et seq.*), as amended, and/or the MMPA, as amended (16 U.S.C. 1361 *et seq.*), we issued requested permits subject to certain conditions set forth therein. For each permit for an endangered species, we found that (1) the application was filed in good faith, (2) The granted permit would not operate to the disadvantage of the endangered species, and (3) The granted permit would be consistent with the purposes and policy set forth in section 2 of the ESA.

| Permit No. | Applicant | Receipt of application **Federal Register** notice | Permit issuance date |
|---|---|---|---|
| | **Endangered Species** | | |
| 758093 | Florida Fish & Wildlife Conservation Commission, Fish and Wildlife Research Institute. | 76 FR 52965; August 24, 2011 | October 21, 2011. |
| 47878A | Nicole Smolensky | 76 FR 57757; September 16, 2011 | November 15, 2011. |
| 56912A | Nashville Zoo | 76 FR 72434; November 23, 2011 | March 12, 2012. |
| 50819A | San Diego Zoo Global | 76 FR 77006; December 9, 2011 | March 12, 2012. |
| 692283 | Busch Gardens | 76 FR 77006; December 9, 2011 | January 18, 2012. |
| 197162 | Stephen Chan | 76 FR 77006; December 9, 2011 | January 18, 2012. |
| 676511 | Virginia Zoological Park | 76 FR 77006; December 9, 2011 | January 18, 2012. |
| 091931 | Jeffrey Hunter | 76 FR 77006; December 9, 2011 | January 18, 2012. |
| 192404 | Ricardo Longoria | 76 FR 77006; December 9, 2011 | January 18, 2012. |
| 59781A | New England Aquarium | 76 FR 77006; December 9, 2011 | January 18, 2012. |
| 201582 | James Pfarr | 76 FR 77006; December 9, 2011 | January 18, 2012. |
| 19818A | Phoenix Herpetological Society, Inc | 76 FR 77006; December 9, 2011 | January 18, 2012. |
| 096048 | Matson's Laboratory | 76 FR 77006; December 9, 2011 | March 16, 2012. |
| 57273A | University of Georgia Research Foundation, Inc. | 76 FR 78308; December 16, 2011 | February 6, 2012. |
| 57939A | Phoenix Herpetological Society | 76 FR 78308; December 16, 2011 | February 23, 2012. |
| 60140A | Daniel Arenas | 76 FR 80384; December 23, 2011 | January 31, 2012. |
| 60356A | Giordi Evenson | 76 FR 80384; December 23, 2011 | January 31, 2012. |
| 60965A | Stephan Haller | 76 FR 80384; December 23, 2011 | February 2, 2012. |
| 033580 | Curt Harbsmeier | 76 FR 80384; December 23, 2011 | March 22, 2012. |
| 812907 | Disney's Animal Kingdom | 77 FR 298; January 4, 2012 | March 9, 2012. |
| 52995A | Topeka Zoological Park | 77 FR 298; January 4, 2012 | March 9, 2012. |
| 675214 | Zoological Society of Buffalo, Inc | 77 FR 298; January 4, 2012 | March 9, 2012. |
| 62256A | Xiaobo Chu | 77 FR 298; January 4, 2012 | March 9, 2012. |
| 012505 | Akron Zoological Park | 77 FR 298; January 4, 2012 | March 9, 2012. |
| 720230 | Feld Entertainment Inc | 77 FR 2314; January 17, 2012 | March 15, 2012. |
| 62429A | ADL Seven Hunting Ranch | 77 FR 2314; January 17, 2012 | March 9, 2012. |
| 697763 | Houston Zoo, Inc | 77 FR 2314; January 17, 2012 | March 9, 2012. |
| 62113A | Zoological Society of San Diego | 77 FR 2314; January 17, 2012 | March 8, 2012. |
| 62434A | Omaha's Henry Doorly Zoo | 77 FR 2314; January 17, 2012 | March 23, 2012. |
| 826561 | Hill Country Aviaries, LLC | 77 FR 3493; January 24, 2012 | March 9, 2012. |
| 58990A | Rhodes Russell Bobbitt | 77 FR 3493; January 24, 2012 | March 9, 2012. |
| 681588 | Kansas City Zoo | 77 FR 3493; January 24, 2012 | March 9, 2012. |
| 57466A | Metro Richmond Zoo | 77 FR 3493; January 24, 2012 | March 15, 2012. |
| 101634 | Tom Chiang | 77 FR 3493; January 24, 2012 | March 9, 2012. |
| 63141A | ADL Seven Hunting Ranch | 77 FR 3493; January 24, 2012 | March 9, 2012. |
| 685105 | Denver Zoological Gardens | 77 FR 6139; February 7, 2012 | March 9, 2012. |
| 63673A | Matthew Kirkwood | 77 FR 6139; February 7, 2012 | March 9, 2012. |
| 196626 | Peter Lee | 77 FR 6139; February 7, 2012 | March 9, 2012. |
| 115344 | Forrest Simpson | 77 FR 6139; February 7, 2012 | March 9, 2012. |
| 115345 | Forrest Simpson | 77 FR 6139; February 7, 2012 | March 9, 2012. |

| Permit No. | Applicant | Receipt of application **Federal Register** notice | Permit issuance date |
|---|---|---|---|
| 63871A | Bar H Bar Land & Cattle Company | 77 FR 6816; February 9, 2012 | March 12, 2012. |
| 63872A | Bar H Bar Land & Cattle Company | 77 FR 6816; February 9, 2012 | March 12, 2012. |
| 128054 | Leslie Barnhart | 77 FR 6816; February 9, 2012 | March 12, 2012. |
| 128056 | Leslie Barnhart | 77 FR 6816; February 9, 2012 | March 12, 2012. |
| 63868A | Cedar Hill Birds | 77 FR 6816; February 9, 2012 | March 12, 2012. |
| 64775A | Diamond J Game Ranch | 77 FR 6816; February 9, 2012 | March 12, 2012. |
| 64776A | Diamond J Game Ranch | 77 FR 6816; February 9, 2012 | March 12, 2012. |
| 690098 | Thomas Moore | 77 FR 6816; February 9, 2012 | March 12, 2012. |
| 64742A | Bamberger Ranch Preserve | 77 FR 6816; February 9, 2012 | March 13, 2012. |
| 64481A | Indianhead Ranch INC | 77 FR 6816; February 9, 2012 | March 13, 2012. |
| 64482A | Indianhead Ranch INC | 77 FR 6816; February 9, 2012 | March 13, 2012. |
| 731315 | Kyle Wildlife Limited | 77 FR 6816; February 9, 2012 | March 13, 2012. |
| 828861 | Kyle Wildlife Limited | 77 FR 6816; February 9, 2012 | March 13, 2012. |
| 64654A | Double Springs Partnership Ltd | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 64656A | Double Springs Partnership Ltd | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 64723A | Larry Friesenhahn | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 64724A | Larry Friesenhahn | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 667872 | H & L Sales | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 704025 | H & L Sales | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 64740A | Jetton Ranch | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 64741A | Jetton Ranch | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 64652A | Kent Creek Ranch Inc | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 64653A | Kent Creek Ranch Inc | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 192403 | Ricardo Longoria | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 192404 | Ricardo Longoria | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 64743A | Mathias Family Investments LLC | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 64744A | Mathias Family Investments LLC | 77 FR 6816; February 9, 2012 | March 14, 2012. |
| 64737A | Palfam Ranch Management LLC | 77 FR 6816; February 9, 2012 | March 27, 2012. |
| 64164A | NH&S Holdings, LLC | 77 FR 6816; February 9, 2012 | March 26, 2012. |
| 64161A | Recordbuck Ranch | 77 FR 6817; February 9, 2012 | March 26, 2012. |
| 65116A | 5F Ranch-Ford Ranch Corp | 77 FR 9687; February 17, 2012 | March 23, 2012. |
| 013008 | 777 Ranch, Inc | 77 FR 9687; February 17, 2012 | March 23, 2012. |
| 017404 | 777 Ranch, Inc | 77 FR 9687; February 17, 2012 | March 23, 2012. |
| 17533A | Earl Bruno | 77 FR 9687; February 17, 2012 | March 23, 2012. |
| 28015A | Earl Bruno | 77 FR 9687; February 17, 2012 | March 23, 2012. |
| 64781A | Gregory Cerullo | 77 FR 9687; February 17, 2012 | March 23, 2012. |
| 180803 | Laguna Vista Ranch, Ltd | 77 FR 9687; February 17, 2012 | March 23, 2012. |
| 180804 | Laguna Vista Ranch, Ltd | 77 FR 9687; February 17, 2012 | March 23, 2012. |
| 65009A | William Battle Montgomery | 77 FR 9687; February 17, 2012 | March 23, 2012. |
| 812816 | Triple D Game Farm Inc | 77 FR 9687; February 17, 2012 | March 23, 2012. |
| 64163A | NH&S Holdings, LLC | 77 FR 9687; February 17, 2012 | March 26, 2012. |
| 64797A | Recordbuck Ranch | 77 FR 9687; February 17, 2012 | March 26, 2012. |
| 65292A | Buck Valley Ranch | 77 FR 9687; February 17, 2012 | March 27, 2012. |
| 65368A | Buck Valley Ranch | 77 FR 9687; February 17, 2012 | March 27, 2012. |
| 64028A | Double D Ranch | 77 FR 9687; February 17, 2012 | March 27, 2012. |
| 64029A | Double D Ranch | 77 FR 9687; February 17, 2012 | March 27, 2012. |
| 64738A | Palfam Ranch Management LLC | 77 FR 9687; February 17, 2012 | March 27, 2012. |
| 65090A | Eslabon Ranch, Ltd | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 65091A | Eslabon Ranch, Ltd | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 65096A | Ronald Grant | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 65097A | Ronald Grant | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 65320A | Guajolote Ranch, Inc | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 65321A | Guajolote Ranch, Inc | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 200207 | KJC Holdings | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 200211 | KJC Holdings | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 65017A | Kothman Ranch Company | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 65019A | Kothman Ranch Company | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 64986A | Ranch Vedado, Inc | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 64987A | Ranch Vedado, Inc | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 65092A | Turkey Creek Ranch Ltd | 77 FR 9687; February 17, 2012 | March 28, 2012. |
| 65093A | Turkey Creek Ranch Ltd | 77 FR 9687; February 17, 2012 | March 28, 2012 |
| 60971A | University of Tennessee, College of Veterinary Medicine. | 77 FR 12870; March 2, 2012 | April 10, 2012. |
| **Marine Mammals** | | | |
| 791721 | U.S. Geological Survey—Sirenia Project | 76 FR 30386; May 25, 2011 | April 20, 2012. |

**Availability of Documents**

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280.

**Brenda Tapia,**

*Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.*

[FR Doc. 2012–10859 Filed 5–4–12; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R9–IA–2012–N110; FXIA16710900000P5–123–FF09A30000]**

### Endangered Species; Receipt of Applications for Permit

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of receipt of applications for permit.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities.

**DATES:** We must receive comments or requests for documents on or before June 6, 2012.

**ADDRESSES:** Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email *DMAFR@fws.gov.*

**FOR FURTHER INFORMATION CONTACT:** Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

**SUPPLEMENTARY INFORMATION:**

**I. Public Comment Procedures**

*A. How do I request copies of applications or comment on submitted applications?*

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

*B. May I review comments submitted by others?*

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**II. Background**

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken.

**III. Permit Applications**

*A. Endangered Species*

Applicant: Robert Eaves, McCamey, TX; PRT–66615A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Robert Eaves, McCamey, TX; PRT–66614A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Star B Property Co., Brownwood, TX; PRT–69575A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Star B Property Co., Brownwood, TX; PRT–69576A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Canyon Exotic Game Ranch LLC, Strawn, TX; PRT–71353A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the dama gazelle (*Nanger dama*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Canyon Exotic Game Ranch LLC, Strawn, TX; PRT–71354A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess dama gazelle (*Nanger dama*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Blex Exchange III LP, Somervile, TX; PRT–71823A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Hays City Ranch, Driftwood, TX; PRT–72328A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: W.B. Stagecoach Ranch, LLC, George West, TX; PRT–72653A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: W.B. Stagecoach Ranch, LLC, George West, TX; PRT–72654A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Ripley's Aquarium, LLC, Gatlinburg, TN; PRT–72630A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the jackass penguin (*Spheniscus demersus*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Micke Grove Zoo, Lodi, CA; PRT–723430

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for the following families, genus, and species, to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

*Families:*
- Cebidae
- Cervidae
- Hylobatidae
- Lemuridae
- Pteropodidae
- Suidae
- Cracidae
- Psittacidae (does not include thick-billed parrot)
- Sturnidae (does not include *Aplonis pelzelni*)
- Testudinidae
- Boidae

*Genera:*
- *Panthera*
- *Tragopan*

*Species:*
- snow leopard (*Uncia uncia*)
- black-footed cat (*Felis nigripes*)
- Chinese alligator (*Alligator sinensis*)

Applicant: Charles Musgrave, Pilot Point, TX; PRT–816624

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for the radiated tortoise (*Astrochelys radiata)* and Galapagos tortoise (*Chelonoidis nigra*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Virginia Safari Park & Preservation Center, Inc., Natural Bridge, VA; PRT–213382

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for the following families, genus, and species, to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

*Species:*
- Parma wallaby (*Macropus parma*)
- ring-tailed lemur (*Lemur catta*)
- black-and-white ruffed lemur (*Varecia variegata*)
- brown lemur (*Eulemur fulvus*)
- black lemur (*Eulemur macaco*)
- cottontop tamarin (*Saguinus oedipus*)
- Diana monkey (*Cercopithecus diana*)
- mandrill (*Mandrillus sphinx*)
- lar gibbon (*Hylobates lar*)
- siamang (*Symphalangus syndactylus*)
- snow leopard (*Uncia uncia*)
- leopard (*Panthera pardus*)
- cheetah (*Acinonyx jubatus*)
- South American tapir (*Tapirus terrestris*)
- Baird's tapir (*Tapirus bairdii*)
- African wild ass (*Equus africanus*)
- Asian wild ass (*Equus hemionus*)
- Przewalski's horse (*Equus przewalskii*)
- Grevy's zebra *(Equus grevyi*)
- Eld's deer (*Rucervus eldii*)
- barasingha (*Rucervus duvaucelii*)
- Formosan sika deer (*Cervus nippon taiouanus*)
- bontebok (*Damaliscus pygargus pygargus)*
- addax (*Addax nasomaculatus*)
- red lechwe (*Kobus leche*)
- scimitar-horned oryx (*Oryx dammah*)
- Arabian oryx (*Oryx leucoryx*)
- dama gazelle (*Nanger dama*)
- slender-horned gazelle (*Gazella leptoceros*)
- anoa (*Bubalus depressicornis*)
- selandang (*Bos gaurus*)
- banteng (*Bos javanicus*)
- hooded crane (*Grus monacha*)
- white-naped crane (*Grus vipio*)
- golden parakeet (*Guarouba guarouba*)
- Galapagos tortoise (*Chelonoidis nigra*)
- radiated tortoise (*Astrochelys radiata*)

Applicant: Wild Acres Ranch, Sandusky, OH; PRT–15387A

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include red ruffed lemur (*Varecia rubra*), black lemur (*Eulemur macaco*), scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Jerad Dabney, Beaumont, TX; PRT–72265A

The applicant requests a permit to import a sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

**Brenda Tapia,**

*Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.*

[FR Doc. 2012–10858 Filed 5–4–12; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R6–R–2011–N269; FF06R06000–FXRS1266066CCP0S3–123]**

### Charles M. Russell National Wildlife Refuge and UL Bend National Wildlife Refuge, MT

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability: Final comprehensive conservation plan and final environmental impact statement.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of a final comprehensive conservation plan (CCP) and final environmental impact statement (EIS) for Charles M. Russell and UL Bend National Wildlife Refuges (NWRs, Refuges). In these documents, we describe alternatives, including our preferred alternative, to manage these refuges for the 15 years following approval of the final CCP.

**ADDRESSES:** You may request copies (hard copies or a CD–ROM) or more information by any of the following methods:

*Agency Web site:* Download a copy of the documents at *www.fws.gov/cmr/planning.*

*Email: cmrplanning@fws.gov.* Include ''Request copy of Charles M. Russell NWR Final CCP/EIS'' in the subject line of the message.

*Mail:* Charles M. Russell NWR Final CCP/EIS, P.O. Box 110, Lewistown, MT 59457.

*In-Person Viewing or Pickup:* Call (406) 538–8706 to make an appointment during regular business hours at Charles M. Russell NWR Headquarters, Airport Road, Lewistown, MT 59457.

*Local Library or Libraries:* The final documents are available for review at the libraries listed under **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** Richard Potts, Project Leader, at (406) 538–8706, or Laurie Shannon, Planning Team Leader, (303) 236–4317; *laurie_shannon@fws.gov* (email).

**SUPPLEMENTARY INFORMATION:**

#### Introduction

With this notice, we announce the availability of the final CCP and final EIS for Charles M. Russell and UL Bend NWRs. We started this process through a notice in the **Federal Register** (72 FR 68174, December 4, 2007). Following a lengthy scoping and alternatives development period, we published a second notice in the **Federal Register** (75 FR 54381, September 7, 2010) announcing the availability of the draft CCP and draft EIS and our intention to hold public meetings, and requested comments. We published a third notice in the **Federal Register** (75 FR 67095, November 1, 2010) extending the comment period by 24 days to December 10, 2010.

Charles M. Russell and UL Bend NWRs encompass nearly 1.1 million acres, including Fort Peck Reservoir in north central Montana. The Refuges extend about 125 air miles west from Fort Peck Dam to the western edge at the boundary of the Upper Missouri Breaks National Monument. UL Bend NWR lies within Charles M. Russell NWR. In essence, UL Bend is a refuge within a refuge, and the two refuges are managed as one unit and referred to as Charles M. Russell NWR. Refuge habitat includes native prairie, forested coulees, river bottoms, and badlands. Wildlife is as diverse as the topography and includes Rocky Mountain elk, mule deer, white-tailed deer, pronghorn, Rocky Mountain bighorn sheep, sharp-tailed grouse, greater sage-grouse, Sprague's pipit, black-footed ferrets, prairie dogs, and more than 236 species of birds.

#### Background

*The CCP Process*

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, which is consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

*Public Outreach*

The formal scoping period began on December 4, 2007, with the publication of a notice of intent in the **Federal Register** (72 FR 68174). Prior to this and early in the preplanning phase, we outlined a process that would be inclusive of diverse stakeholder interests and would involve a range of activities for keeping the public informed and ensure meaningful public input. This process was summarized in a planning update titled Public Involvement Summary (October 2007). Soon after, a project Web site was created, and since then the Public Involvement Summary, five additional planning updates, and other information have been posted to the Web site. We have mailed all planning updates to the project mailing list.

We began the process with formal notification to Native American tribes and other Federal and State agencies. Subsequently, there are a number of cooperating agencies participating on the planning project, including the U.S. Army Corps of Engineers; Bureau of Land Management; Montana Fish, Wildlife, and Parks; Montana Department of Natural Resources and Conservation; Fergus, Petroleum, Garfield, McCone, Valley, and Phillips Counties; and the Missouri River Council of Conservation Districts. We also formally consulted with the Fort Belknap and Fort Peck tribes in July 2009 and have encouraged their participation in the process.

During the initial scoping period, we received nearly 24,000 written responses. Hundreds of people attended seven public meetings across Montana, providing many verbal comments. Following the comment period, we summarized the information we learned and prepared a scoping report, which was posted to the project Web site. In the fall of 2008, we again reached out to the public and the cooperating agencies and sought additional input on four potential draft alternatives prior to fully developing and analyzing them. We held seven additional public meetings during this time and received hundreds of additional written and oral responses. On September 7, 2010, we announced the availability of the draft CCP and draft EIS (75 FR 54381). During September and October 2010, we held seven public meetings across Montana. During the comment period, we received 20,600 letters, emails, or verbal comments. In total, we have held 21 public meetings since the planning process began.

We have considered all public comments throughout the process and have incorporated them in numerous ways. The significant issues for the project include several issues related to habitat and wildlife, water resources, public use and access, wilderness, socioeconomics, partnerships and

collaboration, and cultural values, traditions, and resources. We have considered and evaluated all of these comments, with many incorporated into the various alternatives addressed in the final CCP and final EIS.

**CCP Alternatives Considered**

Our draft CCP and draft EIS (75 FR 54381) addressed several issues that were raised during the scoping process. To address these issues, we developed, evaluated, and subsequently published four alternatives which are summarized below. A full description of each alternative is described in the final CCP and final EIS.

Alternative A—No Action. Few changes would occur in the management of existing wildlife populations and habitats. Wildlife-dependent public and economic uses would continue at current levels. Key actions follow:

- There would be continued emphasis on big game management; annual livestock grazing; the use of fencing for pastures; invasive species control; and water development. Habitats would be managed in 65 habitat units that were originally established by the Bureau of Land Management.
- Prescriptive grazing would be implemented as habitat units became available and within 15 years, we expect that 50 percent of the refuge would transition to prescriptive-type grazing. Currently about 34 percent of the units are prescriptively grazed. This regimen consists of long-term rest and/or short-term grazing to meet specific habitat objectives.
- We would manage big game to achieve the target levels identified in an earlier EIS developed in 1986. There could be more restrictive regulations for rifle mule deer harvest on portions of the refuge as compared with State regulations.
- Select stock ponds would be maintained and rehabilitated. Riparian habitat would be restored where possible.
- The public would continue to access the Refuge on 670 miles of roads. In addition to the designated wilderness within UL Bend National Wildlife Refuge, about 155,288 acres of proposed wilderness within 15 units of the Charles M. Russell NWR would be managed in accordance with Service policy.

Alternative B—Wildlife Population Emphasis. We would manage the landscape, in cooperation with our partners, to emphasize the abundance of wildlife populations using balanced natural ecological processes such as fire and grazing by wild ungulates and responsible farming practices and tree planting. Wildlife-dependent public use would be encouraged, and economic uses would be limited when they compete for habitat resources. Key actions follow:

- Habitat would be actively managed and manipulated, thus creating a diverse plant community of highly productive wildlife food and cover plants. The emphasis would be on habitat for targeted species of wildlife in separate parts of the Refuge. We would consolidate the 65 habitat units into fewer units that are ecologically similar and subsequently write new habitat management plans. Former agricultural fields in river bottom areas would be aggressively restored, and we would restore the functioning condition of riparian areas. Prescriptive livestock grazing would be implemented across 50–75 percent of the Refuge within 4–7 years, and interior fencing would be removed, if necessary. We would increase the use of prescribed fire to enhance fire-adapted plants. We would also implement several research projects to determine what impacts are occurring on the Refuge as a result of climate.
- Additional habitat suitable for Rocky Mountain bighorn sheep would be identified, and new populations would be established. Quality hunting experiences for harvesting elk, deer, bighorn sheep, and other big game would be promoted.
- About 106 miles of roads would be closed. The Service would work with partners to develop a travel plan and to secure access to the Refuge through other lands.
- The acreage of proposed wilderness would be expanded by 25,869 acres in 9 existing units.

Alternative C—Public Use and Economic Use Emphasis. We would manage the landscape, in cooperation with our partners, to emphasize and promote the maximum compatible wildlife-dependent public use and economic uses while protecting wildlife populations and habitats to the extent possible. Any damaging effects on wildlife habitat would be minimized while using a variety of management tools to enhance and diversify public and economic opportunities. Key actions follow:

- In addition to the habitat elements identified in Alternative A, habitats would be managed to provide more opportunities for wildlife-dependent recreation. This could require a compromise between providing wildlife food and cover and livestock forage needs. Where needed, fencing and water gaps would be used to manage livestock use and prevent further degradation of riparian habitat.
- There would be a gradual move to a prescriptive livestock grazing program when current grazing permits become available due to a change in ranch ownership (50 percent in 15 years). Prescribed fire would be used primarily to reduce hazardous fuels. An aggressive initial attack would be used in identified habitat units to minimize economic losses from wildfire. We would also implement several research projects to determine what impacts are occurring on the Refuge as a result of climate.
- Natural and constructed water sources would be allowed for livestock use, public fishing, and hunting. Future water developments would be allowed on a site-specific basis.
- A balance would be maintained between the numbers of big game and livestock in order to sustain habitats and populations of big game and sharp-tailed grouse. Similar balancing might be needed for nongame or migratory birds and livestock needs.
- Hunting opportunities would be expanded and maximized to include new species and traditional or niche (primitive weapon) hunting, mule deer season, predator hunting, trapping, and opportunities for young hunters.
- We would manage Refuge access to benefit public and economic uses. Access to boat ramps would be improved, and roads could be improved or seasonally closed where needed. The numbers of visitors participating in wildlife observation and other activities would be increased by a moderate amount through increased programs and facilities.
- There would be no expansions to existing proposed wilderness areas.

Alternative D—Preferred Alternative—Ecological Processes Emphasis. In cooperation with our partners, we would use natural, dynamic, ecological processes, and management activities in a balanced, responsible manner to restore and maintain the biological diversity, biological integrity, and environmental health of the Refuge. Once natural processes are restored, a more passive approach (less human assistance) would be favored. There would be quality wildlife-dependent public uses and experiences. Economic uses would be limited when they are injurious to ecological processes. Key actions follow:

- Management practices that mimic and restore natural processes, as well as maintain a diversity of plant species in upland and riparian areas on the Refuge, will be applied.

• Plant diversity and health would be maintained by using natural and prescribed fire in combination with wild ungulate herbivory (wildlife feeding on plants) or prescriptive livestock grazing, or both, to ensure the viability of sentinel plants (those plants that decline first when management practices are injurious). To achieve this goal, prescriptive livestock grazing, on up to 75 percent of the Refuge within 9 years, would be implemented to reduce the number of habitat units, remove unnecessary fencing, and to restore degraded riparian areas. The Service would work with partners to combat invasive weeds. We would also implement several research projects to determine what impacts are occurring on the Refuge as a result of climate change, focusing on the resiliency of plants to adapt to climate change.

• The Service would collaborate with Montana Department of Fish, Wildlife, and Parks and others, to maintain the health and diversity of all species' populations, including game, nongame, and migratory bird species. These efforts will focus on restoring and maintaining balanced, self-sustaining populations. Limited hunting for predators would be considered only after population levels could be verified and sustained. The Service would provide for a variety of quality hunting opportunities, including those with population objectives that have diverse male age structures.

• Refuge access would be managed to benefit natural processes and habitat. Permanent and seasonal road closures would be implemented on at least 21 miles of roads as needed, to encourage free movement of animals, permit prescribed fire activities, harvest wildlife ungulates, or allow other activities that contribute to ecological health. The numbers of visitors participating in wildlife observation and other activities would be increased through increased quality programs and facilities.

• The Service would recommend expanding 8 of the proposed wilderness units by 19,942 acres.

**Comments**

We solicited comments on the draft CCP and draft EIS from September 7, 2010 (75 FR 54381) (following an extension of the comment period, 75 FR 67095) through December, 10, 2010. During the comment period, we received about 20,600 letters, emails, or verbal comments, and we thoroughly evaluated them all.

**Changes to the Final CCP and Final EIS**

We made the following changes in the final CCP and final EIS from the draft CCP and draft EIS:

• Wilderness. We clarified that the proposed additions to the existing proposed wilderness areas would become wilderness study areas. These were transmitted to the U.S. Congress in 1974 but have not been acted upon. We determined that there is not sufficient justification for recommending the removal of any existing proposed wilderness area as previously considered in alternatives C and D. Subsequently, the wilderness appendix (E) was revised. As a result, the acreage for the wilderness study areas in alternative B was changed to 25,869 acres and in alternative D to 19,942 acres. We noted a mapping error in the draft CCP and EIS where 640 acres in East Seven Blackfoot was mislabeled as State land. We identified it as a wilderness study area in alternatives B and D as it is surrounded entirely by a Service proposed wilderness area or a Bureau of Land Management wilderness study area.

• Roads. We made several changes to alternative D as a result of significant public comment about roads. This included changing Road 315 in Petroleum County to a seasonal closure from a permanent closure in the draft EIS. We also identified 13 miles of roads to be closed seasonally during hunting season in Valley County (Roads 331, 332, 333, and 440). These roads would be opened several hours a day for game retrieval only. This will encourage free movement of wildlife and permit effective harvest of ungulates, while allowing access for hunters who are not physically able to carry out their game over the rugged terrain found on the refuge. In the draft CCP and draft EIS, we evaluated a full closure of these roads under alternative B.

• Wildlife objectives. We adjusted and clarified that the objectives for big game in alternative D would meet or exceed the objectives approved in State plans. Refuge-specific abundance and population composition objectives would be established through the habitat management planning process and would be tailored to regional habitat conditions, productivity, and other considerations including functioning ecosystem processes; biological integrity; and high quality hunting opportunities and experiences.

• Habitat objectives and strategies. We clarified and expanded our discussion about the use of prescriptive grazing including a discussion of how it is currently applied and how it would be applied in the future. Under all alternatives, we will continue to transition towards implementing prescriptive grazing and reducing annual grazing. This transition has been occurring over 20 years and is consistent with Service policies. The alternatives vary on how quickly this would occur. We expanded the discussion on our plant monitoring which we identified as sentinel plant monitoring to identify plants that are important for wildlife and are sensitive to changes in management or environmental conditions. We have been monitoring these changes since 2003. We also clarified the miles of streams under each alternative that will be improved as a result of restoration efforts.

• Focal bird species. We identified focal bird species for three of the refuge's broad habitat categories (upland, river bottoms, and riparian). We have tied the plant monitoring in alternative D and to a lesser extent in alternative B to focal bird species monitoring on the refuge. Previously we identified several birds as potential sentinel bird species. In order to be more consistent with the terminology being used by other program areas within the Service, we have changed it to focal bird species, and expanded our discussion about the importance of these species on the refuge.

• Minerals, land acquisition, water and air quality, climate change, and legal mandates. We made a number of clarifications or expanded the discussion on all of these topics. For example, we clarified that under all alternatives we will continue to acquire land from willing sellers within the approved refuge boundary or in accordance with the provisions of Title VIII of the Water Resources Development Act of 2000 (known as the Charles M. Russell National Wildlife Refuge Enhancement Act; Public Law 106–541). We added climate change to several of the goal statements, including habitat and wildlife and research.

**Public Availability of Documents**

You can view or obtain documents at the following locations:

• *Our Web site: www.fws.gov/cmr/planning.*

• *The following public libraries:*

| Library | Address | Phone No. |
|---|---|---|
| Garfield County | 228 E. Main, Jordan, MT 59337 | (406) 557–2297 |

| Library | Address | Phone No. |
|---|---|---|
| Glasgow | 408 3rd Avenue, Glasgow, MT 59230 | (406) 228–2731 |
| Great Falls | 301 2nd Avenue, Great Falls, MT 59401 | (406) 453–0349 |
| Lewistown | 701 W. Main, Lewistown, MT 59457 | (406) 538–5212 |
| McCone County | 1101 C Avenue, Circle, MT 59215 | (406) 485–2350 |
| Petroleum County | 205 S. Broadway, Winnett, MT 59087 | (406) 429–2451 |
| Phillips County | 10 S. 4th Street E., Malta, MT 59538 | (406) 542–2407 |
| Montana State University-Billings | 1500 University Drive, Billings, MT 59101 | (406) 657–2011 |
| Montana State University-Bozeman | Roland R. Renne Library, Centennial Mall, Bozeman, MT 59717 | (406) 994–3171 |
| Montana State University-Havre | Northern Vande Bogart Library, Cowan Drive, Havre, MT 59501 | (406) 265–3706 |
| University of Montana | Mansfield Library, 32 Campus Drive, Missoula, MT 59812 | (406) 243–6860 |
| Colorado State University | Morgan Library, 501 University Avenue, Fort Collins, CO 80523 | (970) 491–1841 |

**Next Steps**

We will document the final decision in a record of decision, which will be published in the **Federal Register** no sooner than 30 days after publishing this notice.

Dated: May 1, 2012.

**Matt Hogan,**

*Acting, Deputy Regional Director, Mountain-Prairie Region, U.S. Fish and Wildlife Service.*

[FR Doc. 2012–10886 Filed 5–4–12; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R9–EA–2012–N105; FF09X60000–FVWF979209000005D–XXX]**

### Sport Fishing and Boating Partnership Council

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of teleconference.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a public teleconference of the Sport Fishing and Boating Partnership Council (Council).

**DATES:** *Teleconference:* Friday, May 18, 2012; 12:30 p.m. to 1:30 p.m. (Eastern daylight time). For deadlines and directions on registering to listen to the teleconference, submitting written material, and giving an oral presentation, please see ''Public Input'' under **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** Douglas Hobbs, Council Coordinator, 4401 North Fairfax Drive, Mailstop 3103–AEA, Arlington, VA 22203; telephone (703) 358–2336; fax (703) 358–2548; or email *doug_hobbs@fws.gov*.

**SUPPLEMENTARY INFORMATION:** In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., we announce that Sport Fishing and Boating Partnership Council will hold a teleconference.

**Background**

The Council was formed in January 1993 to advise the Secretary of the Interior, through the Director of the Service, on nationally significant recreational fishing, boating, and aquatic resource conservation issues. The Council represents the interests of the public and private sectors of the sport fishing, boating, and conservation communities and is organized to enhance partnerships among industry, constituency groups, and government. The 18-member Council, appointed by the Secretary of the Interior, includes the Service Director and the president of the Association of Fish and Wildlife Agencies, who both serve in ex officio capacities. Other Council members are directors from State agencies responsible for managing recreational fish and wildlife resources and individuals who represent the interests of saltwater and freshwater recreational fishing, recreational boating, the recreational fishing and boating industries, recreational fisheries resource conservation, Native American tribes, aquatic resource outreach and education, and tourism. Background information on the Council is available at *http://www.fws.gov/sfbpc.*

**Meeting Agenda**

The Council will hold a teleconference to consider:

- Comments on the FWS proposed rule for the Boating Infrastructure Grant Program (**Federal Register**, Vol. 77, No. 60; March 28, 2012);
- The Council effort to assist the FWS Fisheries Program revise and update its program ''Vision'' and Strategic Plan;
- Possible strategic issues for the Council to consider over the new 2-year term; and
- Other miscellaneous Council business.

The final agenda will be posted on the Internet at *http://www.fws.gov/sfbpc.*

PUBLIC INPUT

| If you wish to | You must contact the Council Coordinator (see **FOR FURTHER INFORMATION CONTACT**) no later than |
|---|---|
| Listen to the teleconference | Wednesday, May 16, 2012. |
| Submit written information or questions before the teleconference for the council to consider during the teleconference. | Wednesday, May 16, 2012. |
| Give an oral presentation during the teleconference | Wednesday, May 16, 2012. |

*Submitting Written Information or Questions*

Interested members of the public may submit relevant information or questions for the Council to consider during the teleconference. Written statements must be received by the date listed in ''Public Input'' under **SUPPLEMENTARY INFORMATION**, so that the information may be made available to the Council for their consideration prior to this teleconference. Written statements must be supplied to the Council Coordinator in one of the following formats: One hard copy with

original signature, and one electronic copy via email (acceptable file formats are Adobe Acrobat PDF, MS Word, MS PowerPoint, or rich text file).

*Giving an Oral Presentation*

Individuals or groups requesting to make an oral presentation during the teleconference will be limited to 2 minutes per speaker, with no more than a total of 30 minutes for all speakers. Interested parties should contact the Council Coordinator, in writing (preferably via email; see **FOR FURTHER INFORMATION CONTACT**), to be placed on the public speaker list for this teleconference. To ensure an opportunity to speak during the public comment period of the teleconference, members of the public must register with the Council Coordinator. Registered speakers who wish to expand upon their oral statements, or those who had wished to speak but could not be accommodated on the agenda, may submit written statements to the Council Coordinator up to 30 days subsequent to the teleconference.

**Meeting Minutes**

Summary minutes of the teleconference will be maintained by the Council Coordinator (see **FOR FURTHER INFORMATION CONTACT**) and will be available for public inspection within 90 days of the meeting and will be posted on the Council's Web site at *http://www.fws.gov/sfbpc.*

**David Cottingham,**

*Acting Director.*

[FR Doc. 2012–10957 Filed 5–4–12; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Implementation of Indian Reservation Roads Program and Streamlining the Federal Delivery of Tribal Transportation Services

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of Tribal Consultations and Informational Meetings.

**SUMMARY:** The Bureau of Indian Affairs (BIA) is announcing tribal consultations to discuss the following topics: (1) Changes in calculation of the Relative Needs Distribution Formula (RNDF) used to allocate Indian Reservation Roads (IRR) funding among tribes; (2) streamlining BIA delivery of transportation program services to tribal governments; and (3) update on implementation of ''Question 10.'' The BIA and the Federal Highway Administration (FHWA) will also present an update on legislation involving the Indian Reservation Roads program.

**DATES:** See the **SUPPLEMENTARY INFORMATION** section of this notice for consultation dates.

**ADDRESSES:** See the **SUPPLEMENTARY INFORMATION** section of this notice for locations where the consultations will be held.

**FOR FURTHER INFORMATION CONTACT:** LeRoy M. Gishi, Chief, Division of Transportation, Bureau of Indian Affairs, 1849 C Street NW., MS–4513, Washington, DC 20240, telephone (202) 513–7711; or Robert W. Sparrow, Jr., IRR Program Manager, Federal Highway Administration, 1200 New Jersey Ave. SE., Room E61–311, Washington, DC 20159, telephone (202) 366–9483.

**SUPPLEMENTARY INFORMATION:** Federally recognized tribes are invited to attend consultation and informational sessions regarding:

- A joint BIA and FWHA recommendation for changing how the Proposed Roads and Access Roads will contribute to the calculation of the RNDF for IRR Program funds. The recommendation is significant because it clarifies the criteria required for certain transportation facilities to generate RNDF funding and may affect the allocation of IRR Program funding among tribes. Proposed roads are defined by 25 CFR 170.5 as, ''a road which does not currently exist and needs to be constructed.'' A primary access route is the shortest feasible route connecting two points, including roads between villages, roads to landfills, roads to drinking water sources, roads to natural resources identified for economic development, and roads that provide access to intermodal termini, such as airports, harbors, or boat landings. *See* 23 U.S.C. 202(d)(2)(G).
- Your recommendations on how BIA could streamline its delivery and efficiency of transportation program services provided to tribal governments. Changes enacted in the Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users, Public Law 109–59 (SAFETEA–LU), expanded options for tribes to carry out the IRR program, including entering into agreements directly with FHWA. Recently, BIA has developed an additional method for tribes to carry out the IRR program that is similar to FHWA's agreements. These changes have affected certain aspects of how the Federal functions of the IRR program are carried out by BIA. As a result, BIA has begun considering options for changing its IRR program management structure and oversight, as well as how technical assistance is provided to tribal transportation entities.
- An update on the implementation of ''Question 10'' from appendix C to subpart C of 25 CFR part 170. This question addresses the weight assigned a transportation facility's costs to construct (CTC) and vehicle miles traveled (VMT) in calculating the RNDF. In 2010, BIA and FHWA presented a joint recommendation for how a transportation facility should be calculated at the non-Federal share under Question 10 and consulted with tribes over three months at ten locations across the country on this subject. Question 10 states, in part:

> 10. Do All IRR Transportation Facilities in the IRR Inventory Count at 100 Percent of their CTC and VMT?
>
> No. The CTC and VMT must be computed at the non-Federal share requirement for matching funds for any transportation facility that is added to the IRR inventory and is eligible for funding for construction or reconstruction with Federal funds, other than Federal Lands Highway Program funds.

After consulting with tribes in 2010, BIA and FHWA began clarification of Question 10, including a review of the IRR inventory and its compatibility with the Federal-aid highways functional classification system. For additional information regarding the Question 10 consultations, please see 75 FR 40849 (July 14, 2010). The update will include discussion about implementation of the Question 10 recommendation since 2010, and BIA and FHWA will invite additional input from tribal leaders and the public about their views on its effectiveness.

**Meeting Dates and Locations**

The consultation sessions will be held on the following dates, at the following locations:

| Meeting date | Location | Time |
|---|---|---|
| June 5, 2012 | Anchorage, AK | 9 a.m.–4:30 p.m. |
| June 7, 2012 | Spokane, WA | 9 a.m.–4:30 p.m. |
| June 12, 2012 | Albuquerque, NM | 9 a.m.–4:30 p.m. |

| Meeting date | Location | Time |
|---|---|---|
| June 13, 2012 | Phoenix, AZ | 9 a.m.–4:30 p.m. |
| June 14, 2012 | Sacramento, CA | 9 a.m.–4:30 p.m. |
| June 19, 2012 | Nashville, TN | 9 a.m.–4:30 p.m. |
| June 20, 2012 | Oklahoma City, OK | 9 a.m.–4:30 p.m. |
| June 21, 2012 | Lincoln, NE | 9 a.m.–4:30 p.m. |
| June 26, 2012 | Billings, MT | 9 a.m.–4:30 p.m. |
| June 27, 2012 | Rapid City, SD | 9 a.m.–4:30 p.m. |
| June 28, 2012 | Mount Pleasant, MI | 9 a.m.–4:30 p.m. |

**Meeting Agenda (All Times Local)**

9:00 a.m.–9:15 a.m. Welcome and Introductions
9:15 a.m.–10:45 a.m. Proposed/Access Roads (Recommendation, Expectations, Implementation)
10:45 a.m.–11:00 a.m. Break
11:00 a.m.–11:45 a.m. Reauthorization Update
11:45 a.m.–1:00 p.m. Lunch
1:00 p.m.–3:00 p.m. Tribal Transportation Program Streamlining
3:00 p.m.–3:15 p.m. Break
3:15 p.m.–4:00 p.m. Question 10 Update
4:00 p.m.–4:30 p.m. Closing Comments
4:30 p.m. Adjourn

Dated: May 1, 2012.

**Donald E. Laverdure,**

*Acting Assistant Secretary—Indian Affairs.*

[FR Doc. 2012–10948 Filed 5–4–12; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCAN00000.L18200000.XZ0000]**

### Notice of Public Meeting: Northeast California Resource Advisory Council

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U. S. Department of the Interior, Bureau of Land Management (BLM) Northeast California Resource Advisory Council will meet as indicated below.

**DATES:** The committee will meet Wednesday and Thursday, June 13 and 14, 2012, in Cedarville, California. On June 13, the RAC will convene at 10 a.m. at the Bureau of Land Management Surprise Field Office, 602 Cressler St., and depart immediately for a field tour. Members of the public are welcome. They must provide their own transportation in a high clearance vehicle, food and beverages. On June 14, the council meeting begins at 8 a.m. in the Conference Room of the BLM Surprise Field Office. The public is welcome.

**FOR FURTHER INFORMATION CONTACT:** Nancy Haug, BLM Northern California District manager, (530) 224–2160; or Joseph J. Fontana, BLM public affairs officer, (530) 252–5332.

**SUPPLEMENTARY INFORMATION:** The 15-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in northeast California and the northwest corner of Nevada. Agenda items at this meeting include an update on the Bly Tunnel at Eagle Lake, public land access, travel management provisions in current resource management plans, BLM policy on deed restrictions on acquired lands, an update on geothermal development proposals and an acquisition strategy for Infernal Caverns. Public comments will be accepted at 11 a.m. Depending on the number of persons wishing to speak, and the time available, the time for individual comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM as provided above.

Dated: April 26, 2012.

**Joseph J. Fontana,**

*Public Affairs Officer.*

[FR Doc. 2012–10888 Filed 5–4–12; 8:45 am]

**BILLING CODE 4310–40–P**

## INTERNATIONAL TRADE COMMISSION

**[Docket No. 2894]**

### Certain Products Containing Interactive Program and Parental Control Technology; Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Products Containing Interactive Program and Parental Control Technology,* DN 2894; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

**FOR FURTHER INFORMATION CONTACT:** James R. Holbein, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Rovi Corporation, Rovi Guides, Inc., Rovi Technologies Corporation, Starsight Telecast, Inc., United Video Properties, Inc. and Index Systems, Inc. on May 1, 2012. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain products containing interactive

program and parental control technology. The complaint names as respondents LG Electronics, Inc. of Korea; LG Electronics U.S.A., Inc. of NJ; Mitsubishi Electric Corp. of Japan; Mitsubishi Electric US Holdings, Inc. of CA; Mitsubishi Electric and Electronics USA, Inc.; Mitsubishi Electric Visual Solutions America, Inc. of CA; Mitsubishi Digital Electronics America, Inc. of CA; Netflix Inc. of CA; Roku, Inc. of CA; and Vizio, Inc. of CA.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) Identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) Indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) Explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 2894'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: May 2, 2012.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2012–10890 Filed 5–4–12; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Docket No. 2895]**

### Certain CMOS Image Sensors and Products Containing Same; Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain CMOS Image Sensors and Products Containing Same,* DN 2895; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

**FOR FURTHER INFORMATION CONTACT:** James R. Holbein, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*, and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of California Institute of Technology on May 1, 2012. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain CMOS image sensors and products containing same. The complaint names as respondents STMicroelectronics NV of Switzerland; STMicroelectronics Inc. of TX; Nokia Corp. of Finland; Nokia, Inc. of NY; Research in Motion Ltd. of Canada; and Research in Motion Corp. of TX.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) Identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) Indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) Explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 2895'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf).* Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

Issued: May 2, 2012.

By order of the Commission.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2012–10889 Filed 5–4–12; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–800]**

### Certain Wireless Devices With 3G Capabilities and Components Thereof Determination Not To Review Initial Determination To Amend the Notice of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (''ALJ'') initial determination (''ID'') (Order No. 19) granting Complainants' motion for leave to amend the complaint and notice of investigation.

**FOR FURTHER INFORMATION CONTACT:** Panyin A. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–3042. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on August 31, 2011, based on a complaint filed by InterDigital Communications, LLC of King of Prussia, Pennsylvania; InterDigital Technology Corporation of Wilmington, Delaware; and IPR Licensing, Inc. of Wilmington, Delaware (collectively, ''InterDigital''). 76 FR 54252 (Aug. 31, 2011). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain wireless devices with 3G capabilities and components thereof by reason of infringement of various claims of United States Patent Nos. 7,349,540; 7,502,406; 7,536,013; 7,616,970; 7,706,332; 7,706,830; and 7,970,127. The notice of investigation named the following entities as respondents: Huawei Technologies Co., Ltd. of Guangdong Province, China; FutureWei Technologies, Inc. d/b/a Huawei, Technologies (USA) of Plano, Texas; Nokia Corporation of Espoo, Finland; Nokia Inc. of White Plains, New York; ZTE Corporation of Guangdong Province, China; and ZTE (USA) Inc. of Richardson, Texas. The complaint and notice of investigation were subsequently amended to allege infringement of certain claims of United States Patent No. 8,009,636 and to add as respondents LG Electronics, Inc. of Seoul Korea; LG Electronics U.S.A., Inc. of Englewood Cliffs, New Jersey; and LG Electronics Mobilecomm U.S.A., Inc. of San Diego, California. 76 FR 81527 (Dec. 28, 2011).

On March 21, 2012, InterDigital filed a renewed motion for leave to amend the complaint and notice of investigation to add as respondent Huawei Device USA of Plano, Texas. On April 5, 2012, the parties filed a joint status update stating that they do not oppose the motion.

On April 11, 2012, the ALJ issued the subject ID, granting the motion. The ALJ found that, pursuant to Commission Rule 210.14(b) (19 CFR 210.14(b)), good cause exists to amend the complaint and notice of investigation. None of the parties petitioned for review of the ID.

The Commission has determined not to review the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.

Issued: May 1, 2012.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2012–10833 Filed 5–4–12; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–661]**

### Certain Semiconductor Chips Having Synchronous Dynamic Random Access Memory Controllers and Products Containing Same; Determination Rescinding the Exclusion Order and Cease and Desist Orders

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to rescind the exclusion order and cease and desist orders issued in the above-captioned investigation.

**FOR FURTHER INFORMATION CONTACT:** Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–2532. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on December 10, 2008, based on a complaint filed by Rambus Inc. of Los Altos, California (''Rambus''), alleging a violation of section 337 in the infringement of certain patents. 73 FR 75131. The principal respondent was NVIDIA Corporation of Santa Clara, California (''NVIDIA''). Joining NVIDIA as respondents were approximately twenty of NVIDIA's customers. The Commission found a violation of section 337 by reason of the infringement of some of the asserted patents, and on July 26, 2010, the Commission issued a limited exclusion order. 75 FR 44989–90 (July 30, 2010). The Commission also issued cease and desist orders against those respondents who maintained significant inventory of the accused products in the United States: NVIDIA; Hewlett-Packard Co. of Palo Alto, California; ASUS Computer International, Inc. of Peitou Taipei, Taiwan; Palit Multimedia Inc. of Ontario, Canada; Palit Microsystems Ltd. of Taipei, Taiwan; MSI Computer Corp. of City of Industry, California; Micro-Star International of Taipei, Taiwan; EVGA Corp. of Brea, California; DiabloTek, Inc. of Alhambra, California; Biostar Microtech Corp. of City of Industry, California; and BFG Technologies, Inc. of Lake Forest, Illinois. *Id.* The parties appealed the Commission determination to the U.S. Court of Appeals for the Federal Circuit.

Rambus and NVIDIA have since settled their patent dispute, and on February 10, 2012, jointly moved to rescind the Commission's remedial orders on the basis of settlement. No oppositions were filed. In addition, on April 3, 2012, the court of appeals dismissed the last-remaining appeal of the Commission determination, in an order that remanded the appeal ''to the ITC with instructions to vacate the exclusion orders at issue in this appeal.'' Order at 3.

The Commission has determined to rescind the exclusion order and cease and desist orders.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.76 of the Commission's Rules of Practice and Procedure (19 CFR 210.76).

By order of the Commission.

Issued: May 1, 2012.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2012–10834 Filed 5–4–12; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Settlement Agreement Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on April 30, 2012, a proposed Consent Decree and Settlement Agreement (the ''Lower Ley Creek Non-Owned Site Settlement Agreement'') in the bankruptcy matter, *In re Motors Liquidation Corp, et al., f/k/a General Motors Corp., et al.,* Jointly Administered Case No. 09–50026 (REG), was lodged with the United States Bankruptcy Court for the Southern District of New York. The Parties to the Lower Ley Creek Non-Owned Site Settlement Agreement are the Motors Liquidation General Unsecured Creditors Trust (''Old GM''), the State of New York, and the United States of America. The Lower Ley Creek Non-Owned Site Settlement Agreement resolves claims and causes of action of the Environmental Protection Agency (''EPA'') against Old GM under the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9601–9675, with respect to the portion of Ley Creek that is downstream from the Route 11 Bridge at the Onondaga Lake Superfund Site in New York.

Under the Lower Ley Creek Non-Owned Site Settlement Agreement, EPA will receive an allowed general unsecured claim of $38,344,177, and the State of New York will receive an allowed general unsecured claim of $859,257.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the Lower Ley Creek Non-Owned Site Settlement Agreement. 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 *In re Motors Liquidation Corp., et al.,* D.J. Ref. 90–11–3–09754.

The Non-Owned Site Settlement Agreement may be examined at the Office of the United States Attorney, 86 Chambers Street, 3rd Floor, New York, New York 10007, and at the U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue NW., Washington, DC 20460. During the public comment period, the Lower Ley Creek Non-Owned Site Settlement Agreement may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* Copies of the Lower Ley Creek Non-Owned Site Settlement Agreement 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 $5.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, please forward a check in that amount to the

Consent Decree Library at the address given above.

**Karen Dworkin,**

*Assistant Chief, Environmental Enforcement Section. Environment and Natural Resources Division.*

[FR Doc. 2012–10874 Filed 5–4–12; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Settlement Agreement under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on April 30, 2012, a proposed Consent Decree and Settlement Agreement (the ''Onondaga Non-Owned Site Settlement Agreement'') in the bankruptcy matter, *In re Motors Liquidation Corp, et al., f/k/a General Motors Corp., et al.,* Jointly Administered Case No. 09–50026 (REG), was lodged with the United States Bankruptcy Court for the Southern District of New York. The Parties to the Onondaga Non-Owned Site Settlement Agreement are the Motors Liquidation General Unsecured Creditors Trust (''Old GM''), and the United States of America. The Settlement Agreement resolves claims and causes of action of the Environmental Protection Agency (''EPA'') against Old GM under the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9601–9675, with respect to the following portions of the Onondaga Lake Superfund Site in New York:

1. Onondaga Lake Bottom;
2. Salina Landfill;
3. Inland Fisher Guide Facility; and
4. PCB Dredgings Area.

Under the Onondaga Non-Owned Site Settlement Agreement, EPA will receive a total allowed general unsecured claim as provided in the Onondaga Non-Owned Site Settlement Agreement of $896,566 from Old GM for its future oversight costs at Onondaga Lake Bottom, its unreimbursed past costs and future costs at the Salina Landfill, its unreimbursed past costs at the Inland Fisher Guide Facility, and its unreimbursed past costs at the PCB Dredgings Area.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the Onondaga Non-Owned Site Settlement Agreement. 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 *In re Motors Liquidation Corp., et al.,* D.J. Ref. 90–11–3–09754.

The Onondaga Non-Owned Site Settlement Agreement may be examined at the Office of the United States Attorney, 86 Chambers Street, 3rd Floor, New York, New York 10007, and at the U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue NW, Washington, DC 20460. During the public comment period, the Onondaga Non-Owned Site Settlement Agreement may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* Copies of the Onondaga Non-Owned Site Settlement Agreement 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 $4.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, please forward a check in that amount to the Consent Decree Library at the address given above.

**Karen Dworkin,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2012–10875 Filed 5–4–12; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF JUSTICE

### Office of Justice Programs

**[OJP (BJA) Docket No. 1588]**

### Meeting of the Public Safety Officer Medal of Valor Review Board

**AGENCY:** Office of Justice Programs (OJP), Bureau of Justice Assistance (BJA), Department of Justice.

**ACTION:** Notice of meeting.

**SUMMARY:** This is an announcement of a meeting (via conference call-in) of the Public Safety Officer Medal of Valor Review Board (''Board'') to vote on the position of Board Chairperson, review issues relevant to the nomination review process, discuss pending ceremonies and upcoming activities and other relevant Board issues related thereto. The meeting/conference call date and time are listed below.

**DATES:** June 14, 2012, 2:00 p.m. to 3:00 p.m. ET.

**ADDRESSES:** This meeting will take place in the form of a conference call. This meeting/conference call is open to the public at the offices of the Bureau of Justice Assistance, Office of Justice Programs; 810 7th Street NW., Washington, DC, 20531.

**FOR FURTHER INFORMATION CONTACT:** Gregory Joy, Policy Advisor, Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street NW., Washington, DC 20531, by telephone at (202) 514–1369, toll free (866) 859–2687, or by email at *gregory.joy@usdoj.gov.*

**SUPPLEMENTARY INFORMATION:** The Public Safety Officer Medal of Valor Review Board carries out those advisory functions specified in 42 U.S.C. 15202. Pursuant to 42 U.S.C. 15201, the President of the United States is authorized to award the Public Safety Officer Medal of Valor, the highest national award for valor by a public safety officer.

The purpose of this meeting/conference call is vote of the position of Board Chairperson, review issues relevant to the nomination review process, pending ceremonies and upcoming activities and other relevant Board issues related thereto.

This meeting/conference call is open to the public at the offices of the Bureau of Justice Assistance. For security purposes, members of the public who wish to participate must register at least seven (7) days in advance of the meeting/conference call by contacting Mr. Joy. All interested participants will be required to meet at the Bureau of Justice Assistance, Office of Justice Programs; 810 7th Street NW., Washington, DC and will be required to sign in at the front desk. **Note:** Photo identification will be required for admission. Additional identification documents may be required.

Access to the meeting/conference call will not be allowed without prior registration. Anyone requiring special accommodations should contact Mr. Joy at least seven (7) days in advance of the meeting. Please submit any comments or written statements for consideration by the Review Board in writing at least seven (7) days in advance of the meeting date.

**Denise E. O'Donnell,**

*Director, Bureau of Justice Assistance.*

[FR Doc. 2012–10850 Filed 5–4–12; 8:45 am]

**BILLING CODE 4410–18–P**

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Records Schedules; Availability and Request for Comments

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice of availability of proposed records schedules; request for comments.

**SUMMARY:** The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

**DATES:** Requests for copies must be received in writing on or before June 6, 2012. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

**ADDRESSES:** You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

*Mail:* NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001.

Email: *request.schedule@nara.gov.*

*FAX:* 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

**FOR FURTHER INFORMATION CONTACT:** Margaret Hawkins, Director, National Records Management Program (ACNR), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1799. Email: *request.schedule@nara.gov.*

**SUPPLEMENTARY INFORMATION:** Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

**Schedules Pending**

1. Department of Agriculture, Risk Management Agency (N1–258–08–9, 2 items, 1 temporary item). Records of the Federal Crop Insurance Corporation Board of Directors, including background materials, working files, drafts, and notes. Proposed for permanent retention are official documentation records, such as bylaws, annual reports, budget presentations, and docket files.

2. Department of Defense, Defense Finance and Accounting Service, (DAA–0507–2012–0001, 1 item, 1 temporary item). Notices from management identifying military pay transactions that require manual rather than electronic processing.

3. Department of Defense, Defense Threat Reduction Agency (N1–374–09–7, 1 item, 1 temporary item). Master files of an electronic information system containing information used to award grants, including solicitation materials, user registration data, submissions, award and post-award data, and related reports.

4. Department of Energy, National Nuclear Security Administration (N1–434–12–1, 1 item, 1 temporary item). Records and inventories of medicine maintained at medical facilities.

5. Department of Health and Human Services, Centers for Medicare & Medicaid Services (DAA–0440–2012–0006, 1 item, 1 temporary item). Master files of an electronic information system used to document training received by contractors responsible for surveying and certifying health facilities.

6. Department of the Interior, Office of the Secretary (DAA–0048–2011–0001, 10 items, 10 temporary items). Records relating to the administrative operation of the headquarters museum. Included are collection management records, exhibit records, annual inventory reports, research requests, reproduction requests, sign-in logs, monitoring records, evaluation files, and brochures.

7. Department of Justice, Civil Division (DAA–0060–2012–0001, 2 items, 2 temporary items). Master files and outputs of an electronic information system used to track the status of requests for collection of evidence in the United States made by foreign countries.

8. Department of Justice, Federal Bureau of Investigation (N1–65–11–17, 1 item, 1 temporary item). Records

relating to the administration of the foreign language program.

9. Department of the Navy, Chief of Naval Operations (DAA–0428–2011–0001, 1 temporary item). Copies of records relating to Privacy Impact Assessments and System of Records Notices, including forms, instructions, copies of replies to original requests, and copies of final work product.

10. Department of State, Bureau of East Asian and Pacific Affairs (N1–59–10–15, 5 items, 5 temporary items). Records of the Executive Office, including general administrative and management files of the Executive Director, as well as staff budget records and subject files for post management.

11. Department of Transportation, Federal Motor Carrier Safety Administration (N1–557–11–1, 7 items, 7 temporary items). Master and other files of electronic information systems used to store insurance-related documents, track inspection of hazardous material packaging, and provide for a repository of hazardous materials transportation routes.

12. Department of Transportation, Federal Motor Carrier Safety Administration (N1–557–11–3, 4 items, 4 temporary items). Master and other files of electronic information systems used to track data quality in Federal and non-Federal transportation information systems. Included are data and web files.

13. Department of the Treasury, Internal Revenue Service (N1–58–11–23, 1 item, 1 temporary item). Records consist of a form used by tax payers to acknowledge receipt and responsibility of their personal identification number.

14. Department of the Treasury, Internal Revenue Service (N1–58–11–24, 3 items, 3 temporary items). Master files, outputs, and system documentation of an electronic information system used to control incoming submissions and correspondence.

15. Department of the Treasury, Internal Revenue Service (N1–58–11–25, 2 items, 2 temporary items). Master files and system documentation of an electronic information system used to maintain applications and registration records of professional tax preparers.

16. Department of the Treasury, Office of the Deputy Assistant Secretary for Human Resources and Chief Human Capital Officer (N1–56–11–2, 2 items, 2 temporary items). Records of the Office of Civil Rights and Diversity, including discrimination complaint review files and statistical data monitoring compliance.

17. Social Security Administration, Deputy Commissioner of Operations (DAA–0047–2011–0003, 4 items, 3 temporary items). Records of the Office of Public Service and Operations Support related to the implementation of requirements set in the Coal Act of 1992. Includes administrative materials related to the assignment of miners to the appropriate employer for benefits, as well as copies of Statement of Earnings forms. Proposed for permanent retention are records related to origins of the legislation and its implementation, including indexes, correspondence, and background files.

Dated: April 23, 2012.

**Paul M. Wester, Jr.,**

*Chief Records Officer for the U.S. Government.*

[FR Doc. 2012–10949 Filed 5–4–12; 8:45 am]

**BILLING CODE 7515–01–P**

## NATIONAL SCIENCE FOUNDATION

### Advisory Committee for Polar Programs; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

*Name:* Advisory Committee for Polar Programs (1130).

*Date and Time:* May 30, 2012, 12:30 p.m. to 5:00 p.m..

*Place:* National Science Foundation, 4201 Wilson Boulevard, Room 1235, Arlington, VA 22230. Advisory committee members will be attending virtually.

*Type of Meeting:* Open.

*Contact Person:* Dr. Fae Korsmo, Office of Polar Programs (OPP). National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. (703) 292–8030.

*Minutes:* May be obtained from the contact person listed above.

*Purpose of Meeting:* To advise NSF on the impact of its policies, programs, and activities on the polar research community, to provide advice to the Director of OPP on issues related to merit review and long-range planning.

*Agenda:* Staff presentations and discussion on opportunities and challenges for polar research, education and infrastructure; discussion of OPP Strategic Vision and Committee of Visitors process.

Dated: May 2, 2012.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. 2012–10881 Filed 5–4–12; 8:45 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–483–LR; ASLBP No. 12–919–06–LR–BD01]**

### Union Electric Company; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28710 (1972), and the Commission's regulations, *see, e.g.,* 10 CFR 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

**Union Electric Company**

*(Callaway Nuclear Power Plant, Unit 1)*

This proceeding involves an application by Union Electric Company to renew for twenty years its operating license for Callaway Nuclear Power Plant, Unit 1, which is located in Callaway County, Missouri. In response to a Notice of Opportunity for Hearing published in the **Federal Register** on February 24, 2012 (77 FR 11173), a request for hearing and petition to intervene was submitted by the Missouri Coalition for the Environment on April 24, 2012.

The Board is comprised of the following administrative judges: G. Paul Bollwerk, III, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. William J. Froehlich, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Dr. Nicholas G. Trikouros, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007 (72 FR 49139).

Issued at Rockville, Maryland, May 1, 2012.

**E. Roy Hawkens,**

*Chief Administrative Judge, Atomic Safety and Licensing Board Panel.*

[FR Doc. 2012–10925 Filed 5–4–12; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–389; NRC–2011–0194]**

## Florida Power and Light Company, St. Lucie Plant, Unit No. 2, Exemption

### 1.0 Background

The Florida Power & Light Company (FPL, the licensee) is the holder of Renewed Facility Operating License No. NPF–16, which authorizes operation of St. Lucie Plant, Unit No. 2 (St. Lucie, Unit 2). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC or the Commission) now or hereafter in effect. The facility consists of two pressurized-water reactors located in Jensen Beach, Florida. However, this exemption is applicable only to St. Lucie, Unit 2.

By letter dated April 28, 2011 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML11119A136), the licensee submitted a request for an exemption from Title 10 of the Code of Federal Regulations (10 CFR) Part 50, Appendix G, to implement a revision of the pressure-temperature (P–T) operating limits for St. Lucie, Unit 2. In requesting the revisions to the P–T operating limits, the licensee referenced a topical report with a methodology for the P–T curves that did not meet some of the requirements of 10 CFR part 50, Appendix G, thus requiring the exemption pursuant to 10 CFR 50.12.

### 2.0 Request/Action

Part 50 of 10 CFR, Appendix G, ''Fracture Toughness Requirements,'' which is invoked by 10 CFR 50.60, requires that P–T limits be established for the reactor coolant pressure boundary during normal operating and hydrostatic or leak rate testing conditions. Specifically, 10 CFR part 50, Appendix G, Section IV.A.2, states that ''[t]he appropriate requirements on both the pressure-temperature limits and the minimum permissible temperature must be met for all conditions,'' and ''[t]he pressure-temperature limits identified as 'ASME [American Society for Mechanical Engineers] Appendix G limits' in [T]able 3 require that the limits must be at least as conservative as limits obtained by following the methods of analysis and the margins of safety of Appendix G of Section XI of the ASME Code [Boiler and Pressure Vessel Code].'' The regulations in 10 CFR part 50, Appendix G also specify the use of the applicable editions and addenda of the ASME Code, Section XI, which are incorporated by reference in 10 CFR 50.55a. In the 2009 Edition of 10 CFR, the 1977 Edition through the 2004 Edition of the ASME Code, Section XI, are incorporated by reference in 10 CFR 50.55a. Finally, 10 CFR 50.60(b) states that, ''[p]roposed alternatives to the described requirements in Append[ix] G of this part or portions thereof may be used when an exemption is granted by the Commission under [10 CFR] 50.12.''

In its January 23, 2008, LAR to implement the current St. Lucie 2 technical specification (TS) P–T limits, the licensee provided the technical basis document for developing these P–T limits, Westinghouse Commercial Atomic Power report WCAP–16817–NP, Revision 2, ''St. Lucie Unit 2 RCS [reactor coolant system] Pressure and Temperature Limits and Low Temperature Overpressure Protection Report for 55 Effective Full Power Years'' (ADAMS Accession No. ML080290135). WCAP–16817–NP, Revision 2, references Combustion Engineering (CE) Owners Group Topical Report CE NPSD–683–A, Revision 6, ''Development of a RCS Pressure and Temperature Limits Report (PTLR) for the Removal of P–T Limits and LTOP Requirements from the Technical Specifications'' (ADAMS Accession No. ML011350387), as the methodology for determining the P–T limits. While WCAP–16917–NP, Revision 2, did not develop a separate PTLR for removal of the P–T limits from the St. Lucie 2 TSs, this report did utilize the methodology of CE NPSD–683–A, Revision 6, as the basis for calculating the P–T limits currently established in the St. Lucie 2 TSs. Use of the CE topical report requires an exemption.

By letter dated April 28, 2011, the licensee requested an exemption from 10 CFR part 50, Appendix G, consistent with the requirements of 10 CFR 50.12 and 50.60, to apply the $K_{Im}$ calculational methodology of CE NPSD–683–A, Revision 6, in the development of the St. Lucie, Unit 2, P–T limits. If a licensee proposes to use the methodology in CE NPSD–683–A, Revision 6, for the calculation of $K_{Im}$, an exemption is required since the methodology for the calculation of $K_{Im}$ values in CE NPSD–683–A, Revision 6, cannot be shown to be equally or more conservative than the methodology for the determination of $K_{Im}$ provided in editions and addenda of the ASME Code, Section XI, Appendix G, through the 2004 Edition.

The NRC staff evaluated the specific PTLR methodology in CE NPSD–683, Revision 6. This evaluation was documented in the NRC safety evaluation (SE) of March 16, 2001 (ADAMS Accession No. ML010780017), which specified additional licensee actions that are necessary to support a licensee's adoption of CE NPSD–683, Revision 6. The final approved version of this report was reissued as CE NPSD–683–A, Revision 6, which included the NRC SE and the required additional action items as an attachment to the report. One of the additional specified actions (#21) stated, ''(applicable only if the CE NSSS [nuclear steam supply system] methods for calculating $K_{Im}$ and $K_{It}$ factors, as stated in Section 5.4 of CE NPSD–683, Revision 6, are being used as the basis for generating the P–T limits for their facilities) [licensees will need to] apply for an exemption against requirements of Section IV.A.2. of Appendix G to Part 50 to apply the CE NSSS methods to their P–T curves.'' The action item further stated, ''Exemption requests to apply the CE NSSS to the generation of P–T limit curves should be submitted pursuant to the provision of 10 CFR 50.60(b) and will be evaluated on a case-by-case basis against the exemption request acceptance criteria of 10 CFR 50.12.''

An exemption to use the methodology of CE NPSD–683–A to calculate the $K_{It}$ factors is no longer necessary because editions and addenda of the ASME Code, Section XI, that have been incorporated by reference into 10 CFR 50.55a subsequent to the issuance of the final SE of CE NPSD–683–A, allow methods for determining the $K_{It}$ factors that are equivalent to the methods described in CE NPSD–683–A.

During the NRC staff's review of CE NPSD–683, Revision 6, the NRC staff evaluated the $K_{Im}$ calculational methodology of that report versus the methodologies for the calculation of $K_{Im}$ given in the ASME Code, Section XI, Appendix G. In the NRC's March 16, 2001, SE., the staff noted, ''[t]he CE NSSS methodology does not invoke the methods in the 1995 edition of Appendix G to the Code for calculating $K_{Im}$ factors, and instead applies FEM [finite element modeling] methods for estimating the $K_{Im}$ factors for the RPV [reactor pressure vessel] shell * * * the staff has determined that the $K_{Im}$ calculation methods apply FEM modeling that is similar to that used for the determination of the $K_{It}$ factors [as codified in the ASME Code, Section XI, Appendix G]. The staff has also determined that there is only a slight non-conservative difference between the P–T limits generated from the 1989 edition of [the ASME Code, Section XI,] Appendix G to the Code and those generated from CE NSSS methodology as documented in [CE/ABB] Evaluation

No. 063–PENG–ER–096, Revision 00, ['Technical Methodology Paper Comparing ABB/CE PT Curve to ASME Section III, Appendix G,' dated January 22, 1998 (ADAMS Accession No. ML100500514, nonproprietary version)]. The staff considers this difference to be reasonable and should be consistent with the expected improvements in P–T generation methods that have been incorporated into the 1995 edition of Appendix G to the Code.'' This conclusion regarding the comparison between the CE NSSS methodology and the 1995 Edition of the ASME Code, Section XI, Appendix G, methodology also applies to the 2004 Edition of the ASME Code, Section XI, Appendix G, methodology because there were no significant changes in the method of calculating the $K_{Im}$ factors required by the ASME Code, Section XI, Appendix G, between the 1995 edition (through 1996 addenda) and the 2004 editions of the ASME Code. In summary, the staff concluded in its March 16, 2001, SE that the calculation of $K_{Im}$ using the CE NPSD–683, Revision 6 methodology would lead to the development of P–T limit curves that may be slightly nonconservative with respect to those that would be calculated using the ASME Code, Section XI, Appendix G, methods, and that such a difference was to be expected with the development of more refined calculational techniques. Furthermore, the staff concluded in its March 16, 2001, SE that P–T limit curves that would be developed using the methodology of CE NPSD–683, Revision 6, would be adequate for protecting the RPV from brittle fracture under all normal operating and hydrostatic/leak test conditions.

**3.0 Discussion**

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, are consistent with the common defense and security; and (2) when special circumstances are present.

*Authorized by Law*

This exemption allows the use of an alternative methodology for calculating flaw stress intensity factors in the RPV due to membrane stress from pressure loadings in lieu of meeting the requirements in 10 CFR 50.60 and 10 CFR part 50, Appendix G. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR part 50. In addition, the granting of the exemption will not result in violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

*No Undue Risk to Public Health and Safety*

The underlying purpose of 10 CFR 50.60 and 10 CFR part 50, Appendix G, is to provide an acceptable margin of safety against brittle failure of the RCS during any condition of normal operation to which the pressure boundary may be subjected over its service lifetime. Appropriate P–T limits are necessary to achieve this underlying purpose. The licensee's alternative methodology for establishing the P–T limits and the LTOP setpoints is described in CE NPSD–683–A, Revision 6, which has been approved by the NRC staff. Based on the above, no new accident precursors are created by using the alternative methodology. Thus, the probability of postulated accidents will not increase. Also, based on the above, the consequences of postulated accidents will not increase. In addition, the licensee used an NRC-approved methodology for establishing P–T limits and minimum permissible temperatures for the RPV. Therefore, there is no undue risk to the public health and safety.

*Consistent With Common Defense and Security*

The exemption results in changes to the plant by allowing an alternative methodology for calculating flaw stress intensity factors in the RPV. This change to the calculation of stress intensity factors in the RPV material has no negative implications for security issues. Therefore, this exemption is consistent with the common defense and security.

*Special Circumstances*

Special circumstances, pursuant to 10 CFR 50.12(a)(2)(ii), are present in that continued operation of St. Lucie, Unit 2, with P–T limit curves developed in accordance with the ASME Code, Section XI, Appendix G, is not necessary to achieve the underlying purpose of 10 CFR part 50, Appendix G. Application of the $K_{Im}$ calculational methodology of CE NPSD–683–A, Revision 6, in lieu of the calculational methodology specified in the ASME Code, Section XI, Appendix G, provides an acceptable alternative evaluation procedure that will continue to meet the underlying purpose of 10 CFR part 50, Appendix G. The underlying purpose of the regulations in 10 CFR part 50, Appendix G, is to provide an acceptable margin of safety against brittle failure of the reactor coolant system during any condition of normal operation to which the pressure boundary may be subjected over its service lifetime.

Based on the staff's March 16, 2001, SE regarding CE NPSD–683, Revision 6, and the licensee's rationale to support the exemption request, the staff determined that an exemption is required to approve the use of the $K_{Im}$ calculational methodology of CE NPSD–683–A, Revision 6. By letter dated January 29, 2009, in response to the licensee's January 23, 2008, LAR, the NRC staff issued an SE that provided its review of the licensee's calculations in WCAP–16917–NP, Revision 2, which referenced CE NPSD–683–A, Revision 6. Informed by these previous evaluations, the staff concludes that the application of the $K_{Im}$ calculational methodology of CE NPSD–683–A, Revision 6, for St. Lucie, Unit 2, provides sufficient margin in the development of RPV P–T limit curves such that the underlying purpose of the regulations (10 CFR part 50, Appendix G) continues to be met. Therefore, the NRC staff concludes that the exemption requested by the licensee is justified based on the special circumstances of 10 CFR 50.12(a)(2)(ii), ''[a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule.'' Based upon a consideration of the conservatism that is incorporated into the methodologies of 10 CFR part 50, Appendix G, and ASME Code, Section XI, Appendix G, the staff concludes that application of the $K_{Im}$ calculational methodology of CE NPSD–683–A, Revision 6, as described, would provide an adequate margin of safety against brittle failure of the RPV. Therefore, the staff concludes that the exemption is appropriate under the special circumstances of 10 CFR 50.12(a)(2)(ii), and that the application of the $K_{Im}$ calculational methodology of CE NPSD–683–A, Revision 6, is acceptable for use as the basis for generating the St. Lucie, Unit 2, P–T limits.

**4.0 Conclusion**

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present under 10 CFR 50.12(a)(2)(ii). Therefore, the Commission hereby grants FPL an exemption from the requirements of 10 CFR part 50, Appendix G, to allow application of the $K_{Im}$ calculational

methodology of CE NPSD–683–A, Revision 6, as the basis for the St. Lucie, Unit 2, P–T limits.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (76 FR 53497; August 26, 2011). This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 30th day of April 2012.

For the Nuclear Regulatory Commission.

**Michele G. Evans,**

*Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2012–10928 Filed 5–4–12; 8:45 am]

**BILLING CODE 7590–01–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. MC2012–13; Order No. 1328]**

### Product List Changes

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recently-filed Postal Service request to remove Parcel Post from the market dominant product list and to add a nearly identical ''Parcel Post'' to the competitive product list. Alaska Bypass Service would remain on the market dominant product list. This notice addresses procedural steps associated with this filing.

**DATES:** *Comments are due:* May 31, 2012.

*Reply Comments are due:* June 15, 2012.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** by telephone for advice on alternatives to electronic filing.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, *stephen.sharfman@prc.gov* or 202–789–6820.

**SUPPLEMENTARY INFORMATION:** On April 26, 2012, the Postal Service filed a notice with the Commission under 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* requesting that certain changes be made to the market dominant and competitive product lists.[1] Specifically, the Postal Service proposes to (1) remove Parcel Post from the market dominant product list; (2) add ''Parcel Post,'' a nearly identical product, to the competitive product list; and (3) leave Alaska Bypass Service, which is currently part of Parcel Post, on the market dominant product list.[2] *Id.* at 1.

Parcel Post is an economical ground package delivery service for less-than-urgent and oversize packages that competes with comparable products offered by competitors. *Id.* at 1–2. The Postal Service asserts that Parcel Post fulfills all criteria for competitive products under 39 U.S.C. 3642. *Id.* at 2. It requests that Parcel Post be removed from the market dominant product list and that a similar product called Parcel Post be added to the competitive product list. The Postal Service states that the new competitive Parcel Post product would be nearly identical to the current Parcel Post offering, except that Alaska Bypass Service would remain on the market dominant product list. *Id.*

*Supporting materials.* To support its Request, the Postal Service filed the following attachments:

- Attachment A—Resolution of the Governors of the United States Postal Service, March 21, 2012 (Resolution No. 12–02);
- Attachment B—Statement of Supporting Justification; and
- Attachment C—Proposed Mail Classification Schedule changes.

In its Statement of Supporting Justification, the Postal Service states that Alaska shippers will still have access to Alaska Bypass Service on the market dominant product list after Parcel Post is removed. Thus, it asserts that the proposed changes will continue to meet the objectives and factors in 39 U.S.C. 3622(b) and (c). *Id.,* Attachment B at 2.

The Postal Service explains why the proposed changes will not violate the standards of 39 U.S.C. 3633. It notes that in FY 2011, Parcel Post had an estimated cost coverage of 89.2 percent. It recognizes that a price increase will be necessary to ensure that Parcel Post covers its attributable costs and prohibits market dominant products from subsidizing competitive products. It asserts that the proposed changes should also cover an appropriate share of its institutional costs assuming that the current 5.5 percent contribution rate remains the same.[3] Request, Attachment B at 3.

The Postal Service contends that Parcel Post has small market shares in both the ground package retail market (17.6 percent) and the broader ground package market (1.1 percent), even though Parcel Post prices are lower than those charged by UPS and FedEx for comparable products.[4] *Id.,* Attachment B at 5. It notes that a comparison of the service standards indicates that UPS and FedEx provide faster guaranteed delivery times than those currently offered by Parcel Post. *Id.* For these reasons, the Postal Service contends that current Parcel Post customers would have viable alternatives from competitors if the Postal Service were to raise prices, degrade service, or decrease output. *Id.,* Attachment B at 6.

In describing the views of current Parcel Post customers, the Postal Service asserts that their major concern would likely be the price increases resulting from the proposed changes. The Postal Service acknowledges that a modest price increase will be necessary to attain full cost coverage. However, it contends that Priority Mail prices will effectively serve as a price cap because the Postal Service cannot raise Parcel Post prices above Priority Mail prices without shifting Parcel Post volume to Priority Mail. It explains that Parcel Post will continue to have the same service standards if the proposed changes are implemented, ensuring that customers in rural communities will continue to receive reliable ground package delivery service. *Id.,* Attachment B at 8.

The Postal Service estimates that only 15 percent of Parcel Post's volume is attributable to small businesses. Thus, it concludes that most small businesses should not see significant changes to their mailing options as a result of the proposed changes. *Id.,* Attachment B at 9. The Postal Service contends that the contents of Parcel Post will fall outside the scope of the letter monopoly and that any letters contained in these parcels will fall within the scope of the exceptions or suspensions to the Private Express Statutes. *Id.,* Attachment B at 6–7.

*Notice of filings.* The Commission establishes Docket No. MC2012–13 to consider the Postal Service's proposals described in its Request. Interested persons may submit comments on

[1] Request of the United States Postal Service to Transfer Parcel Post to the Competitive Product List, April 26, 2012 (Request).

[2] Alaska Bypass Service allows shippers to send shrink-wrapped pallets of goods intra-Alaska at Parcel Post rates from designated ''hub points'' to designated ''bush points.'' *Id.,* Attachment B at 2.

[3] *See* 39 U.S.C. 3633(a)(3); 39 CFR 3015.7(c). The Commission is currently re-evaluating the institutional cost contribution requirement for competitive products. *See* Docket No. RM2012–3, Order No. 1108, Notice of Proposed Rulemaking to Evaluate the Institutional Cost Contribution Requirement for Competitive Products, January 6, 2012.

[4] The Postal Service states that Parcel Post primarily competes in the ground package retail market, which includes households and small businesses with fewer than nine employees. *Id.,* Attachment B at 4.

whether the Request is consistent with the policies of 39 U.S.C. 3642, 3633, and 39 CFR 3020.30 *et seq.* Comments are due by May 31, 2012. Reply comments are due by June 15, 2012.

The Request and related filings are available on the Commission's Web site (*http://www.prc.gov*). The Commission encourages interested persons to review the Request for further details.

The Commission appoints Kenneth E. Richardson to serve as Public Representative in this proceeding.

*It is ordered:*

1. The Commission establishes Docket No. MC2012–13 to consider matters raised by the Request.

2. Pursuant to 39 U.S.C. 505, Kenneth E. Richardson is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments by interested persons are due by May 31, 2012.

4. Reply comments are due by June 15, 2012.

5. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

[FR Doc. 2012–10945 Filed 5–4–12; 8:45 am]

**BILLING CODE 7710–FW–P**

## POSTAL SERVICE

### Product Change—Standard Mail Saturation Flats Negotiated Service Agreement

**AGENCY:** Postal Service ™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service hereby provides notice of filing of a request with the Postal Regulatory Commission to add a Standard Mail Saturation Flats negotiated service agreement to the market-dominant product list within the Mail Classification Schedule.

**DATES:** May 7, 2012.

**FOR FURTHER INFORMATION CONTACT:** Brandy Osimokun, 202–268–2982.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that on April 30, 2012, it filed with the Postal Regulatory Commission a *Notice of the United States Postal Service of Filing of Contract and Supporting Data and Request to Add Valassis Direct Mail, Inc. Negotiated Service Agreement to the Market-Dominant Product List,* pursuant to 39 U.S.C. 3642 and 3622(c)(10). Documents are available at *www.prc.gov,* Docket Nos. MC2012–14, R2012–8.

**Stanley F. Mires,**

*Attorney, Legal Policy & Legislative Advice.*

[FR Doc. 2012–10860 Filed 5–4–12; 8:45 am]

**BILLING CODE 7710–12–P**

## SECURITIES AND EXCHANGE COMMISSION

**[File No. 500–1]**

### HydroGenetics, Inc.; Order of Suspension of Trading

May 2, 2012.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of HydroGenetics, Inc. (''HydroGenetics'') because it has not filed a periodic report since its Form 10 registration statement became effective in January 2005.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of HydroGenetics. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of HydroGenetics is suspended for the period from 9:30 a.m. EDT on May 2, 2012, through 11:59 p.m. EDT on May 15, 2012.

By the Commission.

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 2012–10985 Filed 5–2–12; 4:15 pm]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[File No. 500–1]**

### Order of Suspension of Trading; Airtrax, Inc., Amedia Networks, Inc., American Business Financial Services, Inc., Appalachian Bancshares, Inc., and Ariel Way, Inc.

May 3, 2012.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Airtrax, Inc. because it has not filed any periodic reports since the period ended March 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Amedia Networks, Inc. because it has not filed any periodic reports since the period ended September 30, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of American Business Financial Services, Inc. because it has not filed any periodic reports since the period ended September 30, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Appalachian Bancshares, Inc. because it has not filed any periodic reports since the period ended June 30, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Ariel Way, Inc. because it has not filed any periodic reports since the period ended June 30, 2008.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 3, 2012, through 11:59 p.m. EDT on May 16, 2012.

By the Commission.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2012–11020 Filed 5–3–12; 11:15 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66894; File No. SR–DTC–2012–03]**

### Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Proposed Rule Change To Implement a Change in the Practices of The Depository Trust Company as They Relate to Post-Payable Adjustments

May 1, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 25, 2012, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared primarily by DTC.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The purpose of the proposed rule change is to implement a change in the practices of DTC as they relate to post-payable adjustments of principal and income payments (''P&I'').[3]

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[4]

*(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

(i) Historically, DTC has accommodated issuers and/or their agents (''Paying Agents'') by facilitating the collection and in many cases the reallocation of certain misapplied, misdirected, or miscalculated P&I.[5] Under today's practices, DTC will process requests for these types of post-payable adjustments up to one year after the initial payment is made. Subject to Commission approval, effective November 1, 2012, DTC will no longer accommodate Paying Agent requests to process these types of post-payable adjustments beyond 60 calendar days after the initial payment date. This change in practice will allocate assignment of accountability appropriately and will mitigate the risk associated with the reallocation of such principal and income payments.

Background

Several years ago, DTC formed a cross-industry working group to study the severity of P&I processing problems and to analyze possible solutions. The working group at that time focused mainly on the timeliness of rate information submitted to DTC by paying agents and recommended several changes to DTC's Operational Arrangements. Those changes were approved by the Commission and implemented in 2008 (''2008 changes'').[6] Implementation of the 2008 changes resulted in a 75% decrease in late rate information and a significant increase in the allocation of P&I on payment date. More recently, the working group has suggested that, among other things, DTC create a time limit for processing post-payable adjustments received from Paying Agents.

Under current practice, DTC processes post-payable adjustments received from Paying Agents up to one year after the initial payment is made. After DTC processes the debits and credits for the misapplied P&I, DTC participants must process trade adjustments against any customer who traded the security since the error occurred. Participants must also process adjustments to their customers' accounts for the misapplied principal and associated interest. DTC has been requested a number of times by the Association of Global Custodians to focus more closely on the risks associated with income adjustments and to look for ways to reduce that risk.[7]

In an effort to further reduce the inherent risks associated with these types of post-payable adjustments and to compel all parties in the payment chain to confront and minimize the challenges associated with principal and income adjustments, subject to Commission approval effective November 1, 2012, DTC will implement a practice whereby no adjustments for P&I will be accepted or processed by DTC from Paying Agents beyond 60 calendar days from the initial payment date. This practice will apply to all security types. DTC will continue to accommodate Paying Agents by facilitating the collection and in many cases the reallocation of certain misapplied, misdirected, or miscalculated P&I on all security types where the adjustments are within sixty calendar days from payment date. Issuers and Agents wishing to modify certain principal and income payments beyond sixty calendar days may do so by obtaining a ''P&I Allocation Register'' and making adjustments and payment arrangements directly with the affected DTC Participants.

(ii) The proposed rule change is consistent with the provisions of the Act, and the rules and regulations thereunder applicable to DTC and in particular to Section 17A(b)(3)(F)[8] because limiting the ambiguity surrounding payment finality will help DTC remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

DTC does not believe that the proposed rule change will have any impact or impose any burden on competition.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments relating to the proposed rule change have not been solicited or received. DTC will notify the Commission of any written comments received by DTC.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[3] In addition, DTC is updating its Operational Arrangements with a clarification regarding notifications.

[4] The Commission has modified the text of the summaries prepared by DTC.

[5] P&I include Principal Pass-Thru payments, Full Calls, Partial Calls, Maturities, Pre-Refundings and all interest and dividend payments.

[6] Securities Exchange Act Release Number 34–57542 (March 20, 2008), 73 FR 16403 (March 27, 2008).

[7] In fact, the Association of Global Custodians' recommendation was to adopt a new practice in which DTC would state that: (i) Misapplied, misdirected, or miscalculated principal payments must be reversed within two business days after the initial payment; and (ii) misapplied, misdirected, or miscalculated interest payments and cash dividend payments must be reversed within seven business days after payment. However, at this time, DTC is establishing an interim policy, which will put it closer to such an end state.

[8] 15 U.S.C. 78g–1(b)(3)(F).

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–DTC–2012–03 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–DTC–2012–03. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of DTC and on DTC's Web site at *http://www.dtcc.com/downloads/legal/rule_filings/2012/dtc/2012-03.pdf.*

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2012–03 and should be submitted on or before May 29, 2012.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Kevin O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–10911 Filed 5–4–12; 8:45 am]

**BILLING CODE 8011–01–P**

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66887; File No. SR–NYSEAmex–2012–24]**

## Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing of Proposed Rule Change to List Shares of the Nuveen Long/Short Commodity Total Return Fund Under NYSE Amex Rule 1600 et seq.

May 1, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on April 18, 2012, NYSE Amex LLC (''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list shares of the Nuveen Long/Short Commodity Total Return Fund under NYSE Amex Rule 1600 *et seq.* The text of the proposed rule change is available at the Exchange, *www.nyse.com,* and the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

NYSE Amex Rule 1600 *et seq.* permits the listing of Trust Units, which are defined as securities that are issued by a trust or other similar entity that is constituted as a commodity pool that holds investments comprising or otherwise based on any combination of futures contracts, options on futures contracts, forward contracts, swap contracts, and/or commodities. Commentary .01 to Rule 1602 provides that the Exchange will file separate proposals under Section 19(b)[3] of the Securities Exchange Act of 1934 (''Act'')[4] before listing and trading separate and distinct Trust Units designated on different underlying investments, commodities, assets, and/or portfolios. Consequently, the Exchange is submitting this rule filing in connection with the proposed listing under Rule 1600 as Trust Units of shares (''Shares'') of the Nuveen Long/Short Commodity Total Return Fund (''Fund'').[5]

*Nuveen Long/Short Commodity Total Return Fund*

The Fund was organized as a statutory trust under Delaware law on May 25, 2011, and will be operated pursuant to a Trust Agreement.[6] The Fund's investment objective will be to generate attractive total returns. The Fund will be actively managed and will seek to outperform its benchmark, the Morningstar® Long/Short Commodity℠ Index (''Index'').[7]

In pursuing its investment objective, the Fund will invest directly in a diverse portfolio of exchange-traded commodity futures contracts that represent the main commodity sectors and are among the most actively traded futures contracts in the global commodity markets. Generally, individual commodity futures positions may be either long or short (or flat in the case of energy futures contracts) depending upon market conditions. The Fund's Commodity Sub-Advisor (as

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b).

[4] 15 U.S.C. 78a.

[5] For a complete description of the Fund and its proposed offering, *see* Pre-Effective Amendment No. 3 to the Fund's Form S–1 as filed with the Commission on December 20, 2011 (Registration No. 333–174764) (''Registration Statement'').

[6] The Fund, as a commodity pool, will not be subject to registration and regulation under the Investment Company Act of 1940 (''1940 Act'').

[7] Morningstar, Inc., the Index sponsor, owns a dually-registered investment advisor and broker-dealer subsidiary, Morningstar Investment Services, Inc., which maintains a broker-dealer registration for the limited purpose of receiving 12b–1 fees directly from the underlying funds that make up the portfolios managed by it. The Manager (as defined below) has advised the Exchange that it has been informed by Morningstar, Inc., that it has erected and maintains information firewalls between the group which is responsible for the Index and employees of the broker-dealer to prevent the flow and/or use of material non-public information regarding the Index from the personnel responsible for the Index to employees of the broker-dealer.

defined below) will use various rules to determine the commodity futures contracts in which the Fund will invest, their respective weightings, and whether the futures positions in each commodity are held long, short, or flat (in the case of energy futures contracts). The Fund's commodity investments will, at all times, be fully collateralized. The Fund's investments will be consistent with its investment objective and will not be used to create or enhance leverage. The Fund also will employ a commodity option writing strategy that seeks to produce option premiums for the purpose of enhancing the Fund's risk-adjusted total return over time. Option premiums generated by this strategy may also enable the Fund to more efficiently implement its distribution policy.

*The Fund is a commodity pool.* The Fund is managed by Nuveen Commodities Asset Management, LLC (''Manager''). The Manager is registered as a commodity pool operator (''CPO'') and a commodity trading advisor (''CTA'') with the Commodity Futures Trading Commission (''CFTC'') and is a member of the National Futures Association (''NFA'').

*The Manager will serve as the CPO and a CTA of the Fund.* The Manager will determine the Fund's overall investment strategy, including: (i) The selection and ongoing monitoring of the Fund's sub-advisors; (ii) the assessment of performance and potential needs to modify strategy or change sub-advisors; (iii) the determination of the Fund's administrative policies; (iv) the management of the Fund's business affairs; and (v) the provision of certain clerical, bookkeeping, and other administrative services. Gresham Investment Management LLC (''Commodity Sub-Advisor'') will be responsible for the Fund's commodity futures investment strategy and options strategy. The Commodity Sub-Advisor is a Delaware limited liability company and is registered with the CFTC as a CTA and a CPO and is a member of the NFA. The Commodity Sub-Advisor is also registered with the SEC as an investment adviser. Nuveen Asset Management, LLC (''Collateral Sub-Advisor''), an affiliate of the Manager, will invest the Fund's collateral in short-term, high-grade debt securities. The Collateral Sub-Advisor is registered with the SEC as an investment adviser.

*Commodity Investments.* The Fund's investment strategy will utilize the Commodity Sub-Advisor's proprietary long/short commodity investment program, which has three principal elements:

- An actively managed long/short portfolio of exchange-traded commodity futures contracts;
- A portfolio of exchange-traded commodity option contracts; and
- A collateral portfolio of cash equivalents and short-term, high-grade debt securities.

The Manager has advised the Exchange that the Commodity Sub-Advisor has represented that it does not believe that position limits will be an issue for its firm, but that it has reserved firm-wide capacity for the Fund so that the Fund will be able to continue to invest in futures contracts without hitting any position limits.

*Long/Short Commodity Investment Program.* The Fund's long/short commodity investment program will be an actively managed, fully collateralized, rules-based commodity investment strategy that seeks to capitalize on opportunities in both up and down commodity markets. The Fund will invest in a diverse portfolio of exchange-traded commodity futures contracts with an aggregate notional value substantially equal to the net assets of the Fund. To provide diversification, the Fund will invest initially in approximately 20 commodities, and the long/short commodity investment program rules will limit weights for any individual commodity futures contract. The Fund expects to make investments in the most actively traded commodity futures contracts in the four main commodity sectors in the global commodities markets:

- Energy;
- Agriculture;
- Metals; and
- Livestock.

During temporary defensive periods or during adverse market circumstances,[8] the Fund may deviate from its investment objective and policies. The Sub-Advisor may invest 100% of the total assets of the Fund in short-term, high-quality debt securities and money market instruments to respond to adverse market circumstances. The Fund may invest in such instruments for extended periods, depending on the Sub-Advisor's assessment of market conditions. These debt securities and money market instruments may include shares of mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. Government securities, repurchase agreements, and bonds that are rated AAA.

Generally, the program rules will be used to determine the specific commodity futures contracts in which the Fund will invest, the relative weighting for each commodity, and whether a position is either long or short (or flat in the case of energy futures contracts).

The commodity markets are dynamic and as such the long/short commodity investment program may require frequent adjustments in the Fund's commodity positions. The Commodity Sub-Advisor expects to trade each position no less frequently than once per month. The relative balance of the Fund's long/short commodity investments may vary significantly over time, and at certain times, the Fund's aggregate exposure may be all long, all short and flat, or may consist of various combinations (long, short, and/or flat) thereof. The Commodity Sub-Advisor intends to manage its overall strategy so that the notional amount of the Fund's combined long, short, and flat futures positions will not exceed 100% of the Fund's net assets. The Index had 61.85% long, 24.08% short and 14.07% flat exposure as of September 30, 2011.

The Fund has no intention to short energy futures contracts because the prices of energy futures contracts are generally more sensitive to geopolitical events than to economic factors and, as a result, significant price variations are often driven by factors other than supply-demand imbalances. References to a flat position mean that instead of shorting energy futures contracts when market signals dictate, the Fund will have no futures contracts positions, either long or short, for that energy commodity. In that circumstance, the sum of the notional value of the portfolio's futures contracts will be less than the sum of the collateral assets. The difference quantitatively equals the notional value of what would have been the short portion in energy and is generally referred to as the ''flat'' position in energy. Because the Fund will hold no futures contracts to express a flat position, commodity traders customarily say that being flat is the equivalent of being invested in cash. The amounts that otherwise would have been allocated to an energy futures contract will be held in cash as collateral for the Fund.

The specific commodities and the total number of futures contracts in which the Fund will invest, and the relative weighting of those contracts, will be determined annually by the Commodity Sub-Advisor based upon the composition of the Index at that

[8] Adverse market circumstances would include large downturns in the broad market value of two or more times current average volatility, where the Sub-Advisor views such downturns as likely to continue for an extended period of time.

time. The selected commodity futures contracts are expected to remain unchanged until the next annual reconstitution each December. Upon annual reconstitution, the target weight of any individual commodity futures contract will be set and will be limited to 10% of the Fund's net assets to provide for diversification. The Commodity Sub-Advisor expects the actual portfolio weights to vary during the year due to market movements. If price movements cause an individual commodity futures contract to represent more than 10% of the Index at any time between monthly rebalancing, the Fund would seek to match the target weighting at the time of the monthly rebalancing. Generally, the Fund expects to invest in short-term commodity futures contracts with terms of one to three months, but may invest in commodity futures contracts with terms of up to six months.

*Eligible Contracts.* The Fund will invest in those commodity futures contracts and option contracts that are listed on an exchange with the greatest dollar volume traded in those contracts. Listed below are the main categories of eligible commodity futures contracts. The related options contracts are traded on the same exchanges as the futures contracts on which they are based. Each commodity may have several different types of individual commodity futures contracts (*e.g.,* hard winter wheat and soft red wheat). The Commodity Sub-Advisor will have discretion over commodity futures contract selection and may choose from the available contract types.

| Group | Commodity | Primary exchange | Trading hours (eastern time) |
|---|---|---|---|
| Energy | Coal | New York Mercantile Exchange | 18:00–15:00. |
| | Crude Oil | New York Mercantile Exchange | 9:00–14:30. |
| | Crude Oil | ICE Futures Europe | 1:00–23:00. |
| | Ethanol | New York Mercantile Exchange | 8:50–12:05. |
| | Ethanol | Chicago Board of Trade | 9:30–13:15. |
| | Gas Oil | ICE Futures Europe | 1:00–23:00. |
| | Gasoline | New York Mercantile Exchange | 9:00–14:30. |
| | Heating Oil | New York Mercantile Exchange | 9:00–14:30. |
| | Natural Gas | New York Mercantile Exchange | 9:00–14:30. |
| | Propane | New York Mercantile Exchange | Delisted. |
| Agriculture | Butter | Chicago Mercantile Exchange | 12:05–12:15. |
| | Cocoa | ICE Futures US | 8:00–11:50. |
| | Coffee | ICE Futures US | 8:00–13:30. |
| | Corn | Chicago Board of Trade | 10:30–14:15. |
| | Cotton | ICE Futures US | 10:30–14:15. |
| | Diamonium Phosphate | Chicago Mercantile Exchange | Delisted. |
| | Lumber | Chicago Mercantile Exchange | 10:00–14:05. |
| | Milk | Chicago Mercantile Exchange | 10:05–14:10. |
| | Oats | Chicago Board of Trade | 10:30–14:15. |
| | Orange Juice | ICE Futures US | 10:00–13:30. |
| | Pulp | ICE Futures US | 7:00–15:15. |
| | Pulp | Chicago Mercantile Exchange | 17:00–16:00. |
| | Rice | Chicago Board of Trade | 9:30–13:15. |
| | Soybean Meal | Chicago Board of Trade | 10:30–14:15. |
| | Soybean Oil | Chicago Board of Trade | 10:30–14:15. |
| | Soybeans | Chicago Board of Trade | 10:30–14:15. |
| | Sugar | ICE Futures US | 8:10–13:30. |
| | Urea | Chicago Mercantile Exchange | Delisted. |
| | Urea Ammonium Nitrate | Chicago Mercantile Exchange | Delisted. |
| | Wheat | Chicago Board of Trade | 10:30–14:15. |
| | Wheat | Kansas City Board of Trade | 10:30–14:15. |
| Metals | Aluminum | New York Mercantile Exchange | Delisted. |
| | Copper | New York Commodities Exchange | 8:10–13:00. |
| | Gold | New York Commodities Exchange | 8:20–13:30. |
| | Palladium | New York Mercantile Exchange | 8:30–13:00. |
| | Platinum | New York Mercantile Exchange | 8:20–13:05. |
| | Silver | New York Commodities Exchange | 8:25–13:25. |
| Livestock | Broilers | Chicago Mercantile Exchange | Delisted. |
| | Feeder Cattle | Chicago Mercantile Exchange | 10:05–14:00. |
| | Hogs | Chicago Mercantile Exchange | 10:05–14:00. |
| | Live Cattle | Chicago Mercantile Exchange | 10:05–14:00. |
| | Pork Bellies | Chicago Mercantile Exchange | Delisted. |

Sources: Gresham Investment Management LLC, Bloomberg L.P., *https://www.theice.com,* and *http://www.cmegroup.com.*

*Current Index Composition.* The actual signals (direction) and weights of the Morningstar® Long/Short Commodity℠ Index as of September 30, 2011 are as follows:

| | % |
|---|---|
| Long Commodity Futures Positions | 61.85 |
| Short Commodity Futures Positions | 24.08 |
| Flat Commodity Futures Positions | 14.07 |
| | 100.00 |

| Commodity | Signal | Weight % |
|---|---|---|
| *Energy* | | |
| Crude Oil Brent | Long | 8.18 |
| Gas-Oil-Petroleum | Long | 6.50 |
| Heating Oil #2/Fuel Oil | Long | 5.43 |
| Gasoline Blendstock | Long | 5.28 |
| Long Energy Positions | | 25.39 |
| Crude Oil WTI | Flat | 8.45 |
| Natural Gas Henry Hub | Flat | 5.62 |
| Flat Energy Positions | | 14.07 |
| Total Energy Positions | | 39.46 |
| *Agriculture* | | |
| Corn | Long | 5.20 |
| Soybeans | Long | 4.33 |
| Sugar #11 | Long | 4.08 |
| Coffee 'C'/Colombian | Long | 3.70 |
| Soybean Oil | Long | 3.30 |
| Soybean Meal | Long | 3.10 |
| Long Agriculture Positions | | 23.71 |
| Wheat/No. 2 Soft Red | Short | 5.58 |
| Wheat/No. 2 Hard Winter | Short | 3.60 |
| Cotton/1 1/16 | Short | 3.59 |
| Short Agriculture Positions | | 12.77 |
| Total Agriculture Positions | | 36.48 |
| *Metals* | | |
| Gold | Long | 8.58 |
| Silver | Long | 4.17 |
| Long Metals Positions | | 12.75 |
| Copper High Grade | Short | 4.64 |
| Short Metals Positions | | 4.64 |
| Total Metals Positions | | 17.39 |
| *Livestock* | | |
| Cattle Live | Short | 3.87 |
| Hogs Lean | Short | 2.80 |
| Short Livestock Positions | | 6.67 |

Shown above are the actual signals and weights of the Index as of September 30, 2011. These are not the actual signals or weights of the Fund.

The Index construction rules and other information about the Index can be found on Morningstar's Web site at *http://indexes.morningstar.com,* which is publicly available at no charge.[9]

*Long/Short Portfolio of Commodity Futures.* The Fund will invest directly in a diverse portfolio of exchange-traded commodity futures contracts that provide long/short exposure to the global commodity markets. By investing long/short, the Fund will seek to generate attractive total returns from positive or negative commodity price changes and positive or negative roll yield. Like most commodity futures investors, the Fund will replace expiring futures contracts with more distant contracts to avoid taking physical delivery of a commodity. This replacement of expiring contracts with more distant contracts is referred to as ''roll.'' To maintain exposure to commodity futures over an extended period, before contracts expire, the Commodity Sub-Advisor will roll the futures contracts throughout the year into new contracts so as to maintain a fully invested position.

The Commodity Sub-Advisor will employ a proprietary methodology in assessing commodity market movements and in determining the Fund's long/short commodity futures positions. Generally, the Commodity Sub-Advisor will employ momentum-based modeling (quantitative formulas that evaluate trend relationships between the changes in prices of futures contracts and trading volumes for a specific commodity) to estimate forward-looking prices and to evaluate

[9] Source: Morningstar, Inc.

the return impact of futures contract rolls. To determine the direction of the commodity futures position, either long or short (or flat in the case of energy futures contracts), the Commodity Sub-Advisor will calculate a roll-adjusted price that accounts for the current spot price and the impact of roll yield. The futures price for a commodity that has positive roll yield (described as ''backwardation'') is adjusted up and the price for a commodity that has negative roll yield (described as ''contango'') is adjusted down. Generally, if a commodity's roll-adjusted price exceeds its 12-month moving average, the Fund expects to be long the commodity futures contract. Conversely, if the roll-adjusted price is below its 12-month moving average, the Fund expects to be short the commodity futures contract except for energy contracts which will be flat, *i.e.,* in cash. The Commodity Sub-Advisor may exercise discretion in its long/short decisions and the timing and implementation of the Fund's commodity investments to seek to benefit from trading on commodity price momentum.

The Commodity Sub-Advisor's long/short commodity investment program rules are proprietary, were developed by its senior portfolio management team, and expand upon the rules governing the Index. Upon completing the initial investment of the net proceeds of the offering, the Fund expects that the commodity futures contracts, their relative weights, and long/short direction will substantially replicate the constituent holdings and weights of the Index. Although the Commodity Sub-Advisor may exercise discretion in deciding which commodities to invest in, typically, the Fund expects to follow certain rules pertaining to eligible commodity futures contracts, weights, diversification, rebalancing, and annual reconstitution that are the same as those for the Index in order to minimize the divergence between the price behavior of the Fund's commodity futures portfolio and the price behavior of the benchmark Index (referred to as ''tracking error''). Over time, the Fund's commodity investments managed pursuant to the Commodity Sub-Advisor's long/short commodity investment program may differ from those of the Index.

In addition, in actively managing the Fund's long/short portfolio of commodity futures contracts, the Commodity Sub-Advisor will seek to add value compared with the Index by implementing the following proprietary investment methods: (i) Trading contracts in advance of monthly index rolls; (ii) individual commodity futures contract selection; and (iii) active implementation. As a result, the roll dates, terms, underlying contracts, and contract prices selected by the Commodity Sub-Advisor may vary significantly from the Index based upon the Commodity Sub-Advisor's implementation of the long/short commodity investment program in light of the relative value of different contract terms. The Commodity Sub-Advisor's active management approach will be market-driven and opportunistic and is intended to minimize market impact and avoid market congestion during certain days of the trading month. The Manager has entered into a non-exclusive license agreement with Morningstar, Inc. relating to the Index which serves as the Fund's performance benchmark. The license agreement provides that, in exchange for the payment of a one-time set-up fee and an annual fee to Morningstar, the Fund is entitled to refer to the Index in the Fund's prospectus and other documents, and to receive and utilize information concerning the Index, including the constituents thereof. The license agreement has an initial term of three years, and will renew automatically for subsequent one-year periods unless either party gives notice of termination. The license agreement provides that the Manager will indemnify Morningstar for third party claims arising out of or relating to the Fund.

*Integrated Options Strategy.* The Fund will employ a commodity option writing strategy that seeks to produce option premiums for the purpose of enhancing the Fund's risk-adjusted total return over time. Option premiums generated by this strategy may also enable the Fund to more efficiently implement its distribution policy. There can be no assurance that the Fund's options strategy will be successful.

Pursuant to the options strategy, the Fund may sell commodity call or put options, which will all be exchange-traded, on a continual basis on up to approximately 25% of the notional value of each of its corresponding commodity futures contracts that, in the Commodity Sub-Advisor's determination, have sufficient option trading volume and liquidity. Initially, the Fund expects to sell commodity options on approximately 15% of the notional value of each of its commodity futures contracts. If the Commodity Sub-Advisor buys the commodity futures contract, they will sell a call option on the same underlying commodity futures contract. If the Commodity Sub-Advisor shorts the commodity futures contract, they will sell a put option on the same underlying commodity futures contract (except in the case of energy futures contracts). The Commodity Sub-Advisor may exercise discretion with respect to commodity futures contract selection. Due to trading and liquidity considerations, the Commodity Sub-Advisor may determine that it is in the best interest of Fund shareholders to sell options on like commodities (for example, gas oil and heating oil are like commodities) and not matched commodity futures contracts.

Since the Fund's option overwrite is initially expected to represent 15% of the notional value of each of its commodity futures contract positions, the Fund will retain the ability to benefit from the full capital appreciation potential beyond the strike price on the majority (85% or more) of its long and/or short commodity futures contracts. An important objective of the Fund's long/short commodity investment strategy will be to retain capital appreciation potential with respect to the major portion of the Fund's portfolio.

When initiating new trades, the Fund expects to sell covered in-the-money options. Because the Fund will hold options until expiration, the Fund may have uncovered out-of-the-money options in its portfolio depending on price movements of the underlying futures contracts.[10] This element of the Fund's options strategy increases the Fund's gap risk, which is the risk that a commodity price will change from one level to another with no trading in between. In the event of an extreme market change or gap move in the price of a single commodity, the Fund's options strategy may result in increased exposure to that commodity from any uncovered options.

Generally, the Fund expects to sell short-term commodity options with

[10] While the Fund intends to only write covered options, in certain circumstances as described below, the Fund may continue to hold options that due to subsequent trades become out-of-the-money and would be uncovered options. An out-of-the-money option becomes worthless after its expiration and there is no expectation that it will be exercised (and there is no resulting exposure risk for the Fund). For example, if the Fund is long wheat futures and sells covered call options on wheat futures, subsequent price movements in wheat futures may result in the Commodity Sub-Advisor, on behalf of the Fund, reversing from a long position to a short position. In this example, the Commodity Sub-Advisor would then sell its long wheat futures contracts and hold onto the out-of-the-money call option. At the same time, to effect its short position, the Commodity Sub-Advisor would short wheat futures contracts and sell covered put options on wheat futures. The Fund will rebalance its positions no less frequently than monthly and as such it is anticipated that no out-of-the-money option position would be uncovered for longer than one month.

terms of one to three months. Subject to the foregoing limitations, the implementation of the options strategy will be within the Commodity Sub-Advisor's discretion. Over extended periods of time, the ''moneyness'' of the commodity options may vary significantly. Upon sale, the commodity options may be ''in-the-money,'' ''at-the-money,'' or ''out-of-the-money.'' A call option is said to be ''in-the-money'' if the exercise price is below current market levels, ''out-of-the-money'' if the exercise price is above current market levels, and ''at-the-money'' if the exercise price is at current market levels. Conversely, a put option is said to be ''in-the-money'' if the exercise price is above the current market levels and ''out-of-the-money'' if the exercise price is below current market levels.

If the Commodity Sub-Advisor determines the Fund should have long exposure to an individual commodity futures contract, it will invest long in the commodity futures contract and sell call options on the same underlying commodity futures contract with the same strike price and expiration date. If the Commodity Sub-Advisor determines the Fund should have short exposure to an individual commodity futures contract, it will short the commodity futures contract and sell put options on the same underlying commodity futures contract with the same strike price and expiration date.

An exception is made for commodities in the energy sector since prices of those contracts are extremely sensitive to geopolitical events and not necessarily driven by supply-demand imbalances. If the Commodity Sub-Advisor determines the Fund should have long exposure to an energy futures contract, the Fund will only sell call options on that contract. If the Commodity Sub-Advisor determines the Fund should have short exposure to an energy futures contract, the Fund will move to cash (*i.e.,* a flat position) for that contract and will not sell call or put options on that contract.

*Collateral Portfolio.* The Fund's commodity investments will, at all times, be fully collateralized. The notional value of the Fund's commodity exposure is expected to be approximately equal to the market value of the collateral. The Fund's commodity investments generally will not require significant outlays of principal. Approximately 25% of the Fund's net assets will be initially committed as ''initial'' and ''variation'' margin to secure the futures contracts. These assets will be placed in one or more commodity futures accounts maintained by the Fund at Barclays Capital Inc. (''BCI'') and will be held in cash or invested in U.S. Treasury bills and other direct or guaranteed debt obligations of the U.S. government maturing within less than one year at the time of investment. The remaining collateral (approximately 75% of the Fund's net assets) will be held in a separate collateral investment account managed by the Collateral Sub-Advisor.

The Fund's assets held in this separate collateral account will be invested in cash equivalents or short-term debt securities with final terms not exceeding one year at the time of investment. These collateral investments shall be rated at all times at the applicable highest short-term or long-term debt or deposit rating or money market fund rating as determined by at least one nationally recognized statistical rating organization. These collateral investments will consist primarily of direct and guaranteed obligations of the U.S. government and senior obligations of U.S. government agencies and may also include, among others, money market funds and bank money market accounts invested in U.S. government securities, as well as repurchase agreements collateralized with U.S. government securities.

*Commodity Futures Contracts and Related Options*

Investments in individual commodity futures contracts and options on futures contracts historically have had a high degree of price variability and may be subject to rapid and substantial price changes, which could affect the value of the Shares. The Fund will invest in a diverse portfolio of exchange-traded commodity futures contracts and exchange-traded options on commodity futures contracts. The Fund expects to make investments in the most actively traded commodity futures contracts in the four main commodity sectors in the global commodities markets, as described above. Options on commodity futures contracts are contracts giving the purchaser the right, as opposed to the obligation, to acquire or to dispose of the commodity futures contract underlying the option on or before a future date at a specified price.

The potential Fund investments in futures contracts and options on such futures contracts are traded on U.S. and non-U.S. exchanges, including the Chicago Board of Trade (''CBOT''), the Chicago Mercantile Exchange (''CME''), the ICE Futures Europe, the ICE Futures U.S., the New York Mercantile Exchange (''NYMEX'') and the New York Commodities Exchange (''COMEX''), and the Kansas City Board of Trade (''KBOT'').

*Structure of the Fund*

*The Fund.* The Fund is a statutory trust formed pursuant to the Delaware Statutory Trust Act and will issue Shares that represent units of fractional undivided beneficial interest in and ownership of the Fund.

*Trustee.* Wilmington Trust Company is the Delaware Trustee of the Fund. The Delaware Trustee is unaffiliated with the Manager.

*Independent Committee of the Manager.* The Manager has established within its organization an independent committee, comprised of three members who are unaffiliated with the Manager, which will fulfill the audit committee and nominating committee functions for the Fund, those functions required under the NYSE Amex listing standards, and certain other functions as set forth in the Trust Agreement.

*Manager.* The Manager is a Delaware limited liability company that is registered with the CFTC as a CPO and a CTA and is a wholly-owned subsidiary of Nuveen Investments, Inc. (''Nuveen Investments''). The Manager will serve as the CPO and a CTA of the Fund and through the Commodity Sub-Advisor will be responsible for determining the Fund's overall investment strategy and its implementation. Pursuant to the Fund's Trust Agreement, the Manager will possess and exercise all authority (other than the limited functions performed by the independent committee of the Manager which will fulfill the Fund's audit committee and nominating committee functions) to operate the business of the Fund and will be responsible for the conduct of the Fund's commodity affairs. As a registered CPO and CTA, the Manager is required to comply with various regulatory requirements under the Commodities Exchange Act (''CEA'') and the rules and regulations of the CFTC and the NFA.

*Commodity Sub-Advisor.* The Commodity Sub-Advisor is a Delaware limited liability company that is registered with the CFTC as a CTA and a CPO and is a member of the NFA. As a registered CPO and CTA, the Commodity Sub-Advisor is required to comply with various regulatory requirements under the CEA and the rules and regulations of the CFTC and the NFA. The Commodity Sub-Advisor is also registered with the SEC as an investment adviser. Nuveen Investments and the Commodity Sub-Advisor have announced the execution of an agreement pursuant to which Nuveen

Investments would acquire a 60% interest in the Commodity Sub-Advisor, which would make the Commodity Sub-Advisor an affiliate of the Manager.

*Collateral Sub-Advisor.* The Collateral Sub-Advisor is an affiliate of the Manager and a wholly-owned subsidiary of Nuveen Investments. The Collateral Sub-Advisor is registered with the Commission as an investment adviser.

*Custodian, Transfer Agent, and Registrar.* State Street Bank and Trust Company (''State Street'') will be the Custodian and Accounting Agent for the assets of the Fund and its affiliate, Computershare Shareholder Services, Inc., will be the Transfer Agent and Registrar for the Shares of the Fund.

*Commodity Broker.* BCI will serve as the Fund's clearing broker to execute and clear the Fund's futures transactions and provide other brokerage-related services. BCI is a registered securities broker-dealer and futures commission merchant. BCI is wholly owned by Barclays Bank PLC, which is authorized and regulated by the U.K. Financial Services Authority.

The Exchange notes that each of the Manager, BCI, the Commodity Sub-Advisor and the Collateral Sub-Advisor has represented to the Exchange that it has erected and maintains firewalls within its respective institution to prevent the flow and/or use of non-public information regarding the portfolio of underlying securities from the personnel involved in the development and implementation of the investment strategy to others such as sales and trading personnel. In the event that there is any new manager, adviser, sub-adviser, or commodity broker, such new entity will maintain a firewall within its respective institution to prevent the flow and/or use of non-public information regarding the portfolio of underlying commodity futures contracts.[11]

*Product Description*

The Shares represent units of fractional undivided beneficial interest in and ownership of the Fund. Following the original issuance, the Shares will be traded on the Exchange similar to other equity securities.

Commencing with the Fund's first distribution, the Fund intends to make regular monthly distributions to its shareholders (stated in terms of a fixed cents per share distribution rate) based on the past and projected performance of the Fund. Among other factors, the Fund will seek to establish a distribution rate that roughly corresponds to the Manager's projections of the total return that could reasonably be expected to be generated by the Fund over an extended period of time. Each monthly distribution will not be solely dependent on the amount of income earned or capital gains realized by the Fund, and such distributions may from time to time represent a return of capital and may require that the Fund liquidate investments. As market conditions and portfolio performance may change, the rate of distributions on the Shares and the Fund's distribution policy could change. The Fund reserves the right to change its distribution policy and the basis for establishing the rate of its monthly distributions, or may temporarily suspend or reduce distributions without a change in policy, at any time and may do so without prior notice to shareholders.

Under the Fund's intended operational procedures, the Fund's net asset value (''NAV'') will be calculated after the close of the Exchange (normally 4:00 p.m. E.T.), on each day that the Exchange is open.[12] The normal trading hours for those investments of the Fund traded on the various commodity exchanges may differ from the normal trading hours of the Exchange, which are from 9:30 a.m. to 4:00 p.m. ET. Therefore, there may be time periods during the trading day where the Shares will be trading on the Exchange, but the futures contracts on various commodity exchanges will not be trading. The value of the Shares may accordingly be influenced by the non-concurrent trading hours between the Exchange and the various futures exchanges on which the futures contracts based on the underlying commodities are traded.

The Fund will not continuously offer Shares and will not provide daily redemptions. Rather, if a shareholder determines to buy additional Shares or sell Shares already held, the shareholder may do so by trading on the Exchange through a broker or otherwise. Shares of the Fund may trade on the Exchange at prices higher or lower than NAV. Because the market value of the Fund's Shares may be influenced by such factors as distribution levels (which are in turn affected by expenses), distribution stability, NAV, relative demand for and supply of such Shares in the market, general market and economic conditions, and other factors beyond the Fund's control, the Fund cannot guarantee that Shares will trade at a price equal to or higher than NAV in the future.

Shares will be registered in book entry form through the Depository Trust & Clearing Corporation.

*Underlying Commodity Interests Information*

The daily settlement prices for the commodity futures contracts and options contracts which will be held by the Fund are publicly available on the Web sites of the futures exchanges trading the particular contracts. Various data vendors and news publications publish futures prices and data. Futures and related exchange-traded options quotes and last-sale information for the commodity futures contracts are widely disseminated through a variety of market data vendors worldwide, including Bloomberg and Reuters. Complete real-time data for such futures and exchange traded options is available

[11] The Commodity Sub-Advisor and the Collateral Sub-Advisor are each registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Commodity Sub-Advisor, the Collateral Sub-Advisor, any sub-adviser of either, and the respective related personnel of both are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted there under; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[12] NAV per Share will be computed by dividing the value of all assets of the Fund (including any accrued interest and dividends), less all liabilities (including accrued expenses and distributions declared but unpaid), by the total number of Shares outstanding. The Fund will publish its NAV on its Web site on a daily basis, rounded to the nearest cent.

For purposes of determining the NAV of the Fund, portfolio instruments will be valued primarily by independent pricing services approved by the Manager at their market value. The Manager will review the values as determined by the independent pricing service and discuss those valuations with the pricing service if appropriate based on pricing oversight guidelines established by the Manager that it believes are consistent with industry standards. If the pricing services are unable to provide a market value or if a significant event occurs such that the valuation(s) provided are deemed unreliable, the Fund may value portfolio instruments(s) at their fair value, which will be generally the amount that the Fund might reasonably expect to receive upon the current sale or closing of a position. The fair value of an instrument will be based on the Manager's good faith judgment and may differ from subsequent quoted or published prices.

by subscription from Reuters and Bloomberg. The relevant futures exchanges also provide intraday trading prices (some exchanges have real-time data and others publish prices with short time delays) and commodity futures contract and options contract information on current and past trading sessions and market news free of charge on their respective Web sites.

*Index Information*

Daily returns for the Index (*i.e.,* percentage change from the previous day) are posted on the Morningstar Web site by 8:00 a.m. E.T. on the following business day. The Index value is disseminated through Bloomberg and other market data vendors every 15 seconds from 9:30 a.m. to 5:15 p.m. E.T. The Index construction rules and other information about the Index can be found on Morningstar's Web site at *http://indexes.morningstar.com,* which is publicly available at no charge.

Availability of Information Regarding the Shares

The Web site for the Fund and the Manager, *http://www.nuveen.com/CTF,* which will be publicly accessible at no charge, will contain the following information: (a) The prior business day's NAV and the reported closing price; (b) calculation of the premium or discount of such price against such NAV; and (c) other applicable quantitative information. The Fund will not publish an intraday indicative value for the Shares.[13] The Fund's intraday price per Share will be published and available on public Web sites or on-line information services such as Bloomberg or Reuters. Depending on the source, the Fund's intraday price per Share data is available real-time or with short time delays (*i.e.,* 15 minute delay). The Fund's prospectus or a disclosure document complying with relevant CFTC rules and regulations also will be available on the Fund's Web site.

The Fund's monthly account statement and the Fund's total portfolio composition and the composition of the collateral portfolio will be disclosed on its Web site at *http://www.nuveen.com/CTF* on each business day that the Exchange is open for trading.[14] This Web site disclosure of portfolio holdings and the Fund's NAV per Share (as of the previous day's close) will be made daily and will include, as applicable: (a) The name, number of contracts or options, value per contract or option, and total value and percentage of the Fund's total value represented by each individual commodity futures contract or option to purchase a commodity futures contract invested in by the Fund; (b) the total value of the collateral as represented by cash; (c) cash equivalents; and (d) debt securities rated at the applicable highest short-term or long-term debt or deposit rating or money market fund rating as determined by at least one nationally recognized statistical rating organization held in the Fund's portfolio. The values of the Fund's portfolio holdings will, in each case, be determined in accordance with the Fund's valuation policies.

As described above, the NAV for the Fund will be calculated and disseminated daily. The Manager has represented to the Exchange that the NAV will be disseminated to all market participants at the same time. The Exchange will also make available on its Web site daily trading volume, closing prices, and the NAV. The closing price and settlement prices of the futures contracts and options on futures contracts held by the Fund are also readily available from the relevant futures exchanges, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. In addition, the Exchange will provide a hyperlink on its Web site at *http://www.nyse.com* to the Manager's Web site. Quotation and last-sale information regarding the Shares will be available through the facilities of the Consolidated Tape Association (''CTA'').

*Criteria for Initial and Continued Listing*

The Fund will be subject to the criteria in Rule 1602 for initial and continued listing of the Shares. A minimum of 2,000,000 Shares will be required to be publicly distributed at the start of trading. It is anticipated that the initial price of a Share will be approximately $25. The Fund will accept subscriptions for a minimum of 100 Shares during the initial offering which is expected to last no more than 60 days. After the completion of the initial offering, Shares can be bought and sold throughout the trading day like any other publicly-traded security.

The Fund has represented to the Exchange that, for initial and continued listing of the Shares, it will be in compliance with Section 803 of the NYSE Amex Company Guide (Independent Directors and Audit Committee) and Rule 10A–3 under the Act.

*Suitability*

The Information Circular (described below) will inform member organizations of the characteristics of the Fund and of applicable Exchange rules, as well as of the requirements of Rule 405—NYSE Amex Equities (Diligence as to Accounts).

The Exchange notes that, pursuant to Rule 405—NYSE Amex Equities, member organizations are required in connection with recommending transactions in the Shares to have a reasonable basis to believe that a customer is suitable for the particular investment given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member.

*Information Circular*

The Exchange will distribute an Information Circular (''Circular'') to its members in connection with the trading of the Shares. The Circular will discuss the special characteristics and risks of trading this type of security. Specifically, the Circular, among other things, will discuss what the Shares are, the requirement that members and member firms deliver a prospectus to investors purchasing the Shares prior to or concurrently with the confirmation of a transaction during the initial public offering, applicable NYSE Amex rules, and trading information and applicable suitability rules. The Circular will also explain that the Fund is subject to various fees and expenses described in the Registration Statement. The Circular will also reference the fact that there is no regulated source of last-sale information regarding physical commodities and note the respective jurisdictions of the SEC and CFTC.

The Circular will advise members of their suitability obligations with respect to recommended transactions to

[13] Exchange traded funds (''ETFs'') (and commodity pools that seek to replicate an ETF structure) publish intraday indicative values generally every 15 seconds (along with full transparency of portfolio holdings) in order to facilitate the arbitrage mechanism that is intended to minimize any deviation between the ETF's market price and the per share NAV of the ETF shares, which in turn facilitates the creation/redemption mechanism that is fundamental to ETFs. The creation/redemption mechanism is the process by which institutional investors make and redeem investments in large ''Creation Units'' of ETF Shares. Unlike ETFs, the Fund will not redeem its Shares, and therefore will not rely on a creation/redemption mechanism to create an arbitrage mechanism. Instead, the Manager has advised the Exchange that it expects the Shares to have trading characteristics similar to those of exchange-traded closed-end funds. Because the Fund has no creation/redemption mechanism, the Manager has advised the Exchange that it believes that the publishing of an intraday indicative value for the Fund would serve no useful purpose for investors or the market as a whole, and because the Fund is actively managed, publication of its trades in advance would be harmful to the Fund and its shareholders.

[14] The total portfolio holdings will be disseminated to all market participants at the same time.

customers in the Shares. The Circular will also discuss any relief, if granted, by the Commission or the staff from any rules under the Act.

The Circular will also disclose the trading hours of the Shares and that the NAV for the Shares is calculated after 4:00 p.m. E.T. each trading day. The Circular will disclose that information about the Shares is publicly available on the Fund's Web site.

*Surveillance*

The Exchange intends to utilize its existing surveillance procedures to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillances focus on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange will be able to obtain information regarding trading in the Shares, the physical commodities underlying the futures or options on futures held by the Fund, or options, futures or options on futures held by the Fund, through member organizations, in connection with such member organizations' proprietary or customer trades through member organizations which they effect on any relevant market.[15] The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions occurring on exchanges that are members of the Intermarket Surveillance Group (''ISG''), including CME, CBOT, COMEX, NYMEX (all of which are part of CME Group, Inc.), and ICE Futures US. In addition, the Exchange currently has in place a comprehensive surveillance sharing agreement with each of CME, NYMEX, ICE Futures Europe, and KCBOT for the purpose of providing information in connection with trading in or related to futures contracts or options on futures contracts traded on those markets. A list of ISG members is available at *www.isgportal.org.*[16]

The Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

*Trading Halts*

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Rule 1602—NYSE Amex Equities provides that the Exchange will halt trading in a series of Trust Units, such as the Shares, if the circuit breaker parameters of Rule 80B—NYSE Amex Equities have been reached. In exercising its discretion to halt or suspend trading in the Shares, the Exchange may consider factors such as those set forth in Exchange Rule 953NY(a),[17] in addition to other factors that may be relevant. In particular, if the portfolio holdings and NAV per Share are not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the portfolio holdings or NAV per Share occurs. If the interruption to the dissemination of the portfolio holdings or NAV per Share persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

*Trading Rules*

The Shares will be equity securities subject to NYSE Amex Rules governing the trading of equity securities, including, among others, rules governing priority, parity and precedence of orders, Designated Market Makers (''DMM'') responsibilities and account opening, and customer suitability (Rule 405—NYSE Amex Equities). Initial equity margin requirements of 50% will apply to transactions in the Shares. Shares will trade on the Exchange between 9.30 a.m. and 4.00 p.m. ET each business day and will trade in the minimum price variants established under Rule 62—NYSE Amex Equities. Trading rules pertaining to odd-lot trading in NYSE Amex equities (Rule 124—NYSE Amex Equities) will also be applicable. Rule 15A—NYSE Amex Equities complies with Rule 611 of Regulation NMS, which requires among other things, that the Exchange adopt and enforce written policies and procedures that are reasonably designed to prevent trade-throughs of protected quotations. The trading of the Shares will be subject to certain conflict of interest provisions set forth in NYSE Amex Equities Rules 1603 and 1604.

Rule 1603—NYSE Amex Equities provides that, if a DMM unit is operating under Rule 98 (Former)—NYSE Amex Equities, Rule 105(b) (Former)—NYSE Amex Equities and Section (m) of the Guidelines thereunder shall be deemed to prohibit a DMM, his or her member organization, other member, or approved person of such member organization or employee or officer thereof from acting as a market maker or functioning in any capacity involving market-marking responsibilities in an underlying asset or commodity, related futures or options on futures, or any related derivative. If an approved person of a DMM unit is entitled to an exemption from Rule 105(b) (Former) under Rule 98 (Former), such approved person may act in a market making capacity, other than as a specialist in Trust Units on another market center, in the underlying asset or commodity, related futures or options on futures, or any other related derivatives. NYSE Amex Equities Rule 1603 provides that, if a DMM unit is operating under Rule 98—NYSE Amex Equities, Rule 105(b)—NYSE Amex Equities and section (m) of the Guidelines thereunder shall be deemed to prohibit the DMM unit or officer or employee thereof from acting as a market maker or functioning in any capacity involving market-marking responsibilities in an underlying asset or commodity, related futures or options on futures, or any other related derivatives.

Rule 1604—Amex Equities provides that DMMs handling the Shares must maintain in a readily accessible place and provide to the Exchange upon request, and keep current a list identifying all accounts for trading the underlying physical assets or commodities, related futures or options on futures, or any other related

[15] *See* discussion of Rules 1603 and 1604 under the heading ''Trading Rules'' below.

[16] The Exchange notes that in the future the Fund may invest in futures contracts or options on futures contracts which trade on markets that are not members of ISG or with which the Exchange does not have in place a comprehensive surveillance sharing agreement. The Manager has represented to the Exchange that such instruments will never represent more than 10% of the Fund's holdings.

[17] Rule 953NY(a) is an NYSE Amex Options rule. It provides that trading on the Exchange in any option contract shall be halted or suspended whenever the Exchange deems such action appropriate in the interests of a fair and orderly market and to protect investors. Among the factors that may be considered are that:

(1) Trading in the underlying stock or Exchange-Traded Fund Share has been halted or suspended in the primary market;

(2) the opening of such underlying stock or Exchange-Traded Fund Share in the primary market has been delayed because of unusual circumstances;

(3) the Exchange has been advised that the issuer of the underlying stock or Exchange-Traded Fund Share is about to make an important announcement affecting such issuer; or

(4) other unusual conditions or circumstances are present.

derivatives, which the DMM may have or over which it may exercise investment discretion.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) [18] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in Rule 1600 *et seq.* All of the commodity futures contracts and options on commodity futures contracts in which the Fund will invest will be traded on regulated exchanges. The Fund will not invest in swaps or over-the-counter derivatives. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement (the Manager has represented to the Exchange that, while the Fund may invest in futures contracts or options on futures contracts which trade on markets that are not members of ISG or with which the Exchange does not have in place a comprehensive surveillance sharing agreement, such instruments will never represent more than 10% of the Fund's holdings). The daily settlement prices of the futures contracts and options on futures contracts held by the Fund are readily available from the Web sites of the relevant futures exchanges, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. The relevant futures exchanges also provide delayed futures information on current and past trading sessions and market news free of charge on their respective Web sites. Quotation and last-sale information for the Shares will be available via CTA. In addition, the Fund's Web site will display the daily NAV, Morningstar's Web site will display the daily returns for the Index, and an up-to-date Index value will be available through Bloomberg and other market data vendors every 15 seconds. The Fund's total portfolio composition and the composition of the collateral portfolio will be disclosed on the Fund's Web site. Each of the Manager, BCI, the Commodity Sub-Advisor, and the Collateral Sub-Advisor has erected and maintains firewalls within its respective institution to prevent the flow and/or use of non-public information regarding the portfolio of underlying securities from the personnel involved in the development and implementation of the investment strategy to others such as sales and trading personnel. In addition, the Commodity Sub-Advisor, the Collateral Sub-Advisor, any sub-adviser of either, and the respective related personnel of both are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. Morningstar, Inc. has erected and maintains information firewalls between the group which is responsible for the Index and employees of its broker-dealer subsidiary to prevent the flow and/or use of material non-public information regarding the Index from the personnel responsible for the Index to employees of the broker-dealer.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that a large amount of information is publicly available regarding the Fund and the Shares, thereby promoting market transparency. With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Rule 1602—NYSE Amex Equities provides that the Exchange will halt trading in a series of Trust Units, such as the Shares, if the circuit breaker parameters of Rule 80B–NYSE Amex Equities have been reached. In exercising its discretion to halt or suspend trading in the Shares, the Exchange may consider factors such as those set forth in Exchange Rule 953NY(a), in addition to other factors that may be relevant. In particular, if the portfolio holdings and NAV per Share are not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the portfolio holdings or NAV per Share occurs. Moreover, prior to the commencement of trading, the Exchange will inform its member organizations in the Circular of the special characteristics and risks associated with trading the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional series of Trust Units that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings and quotation and last-sale information for the Shares.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[18] 15 U.S.C. 78f(b)(5).

*Electronic Comments*

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAmex–2012–24 on the subject line.

*Paper Comments*

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex-2012–24. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex-2012–24 and should be submitted on or before May 29, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–10876 Filed 5–4–12; 8:45 am]

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[19] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66890; File No. SR–BYX–2012–008]**

## Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Exchange Rule 11.9 To Allow Optional Attribution of Orders

May 1, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 25, 2012, BATS Y–Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to amend Rule 11.9, entitled ''Orders and Modifiers'', to allow optional attribution of orders submitted to the Exchange in Exchange data feeds.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this filing is to allow Users to optionally enter orders into the Exchange's systems that will be displayed in Exchange data feeds with such User's market participant identifiers or ''MPIDs''. Specifically, the Exchange proposes to amend Rule 11.9 to add a definition of an Attributable Order, which shall mean an order that is designated for display (price and size) including the User's MPID. The Exchange also proposes to adopt a definition in Rule 11.9 for a Non-Attributable Order, which shall mean an order that is designated for display (price and size) on an anonymous basis by the Exchange. The proposed definitions of Attributable Order and Non-Attributable Order are substantively identical to definitions contained in the Rules of The NASDAQ Stock Market LLC (''Nasdaq''), as described in further detail below.

All display-eligible orders entered into the Exchange are currently displayed by the Exchange on an anonymous basis without attribution to the entering User. The Exchange is proposing to allow Users to utilize Attributable Orders to include their MPID on published quotations in the Exchange's data feeds. The Exchange believes that such display is consistent with traditional market making on the floor of an exchange as well as existing rules of at least one of the Exchange's competitors.[3] The addition of Attributable Orders will allow a party engaged in market making to identify itself as the party willing to buy or sell securities on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[4] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[5] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the proposal will benefit market participants and help to

[3] *See* Nasdaq Rule 4751(e)(1) and (2).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

promote transparency by providing additional information regarding quotations displayed on the Exchange. Specifically, any User that wishes to publicly disclose their identity when quoting on the Exchange will be permitted to do so, and such attributed quotations will be analogous to the quotations they provide in other contexts (e.g., on the floor of a floor-based stock exchange or in the over-the-counter market through direct interaction). The proposal also promotes transparency in that other Users will be able to see with whom they are interacting when trading against displayed, attributed orders.

The proposed rule change is also consistent with Section 11A(a)(1) of the Act[6] in that it seeks to assure fair competition among brokers and dealers by providing functionality that is consistent with that of functionality offered by at least one of the Exchange's competitors.[7] The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes uniformity across markets concerning the ability to display an attributed order on an exchange.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change imposes any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action**

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

The Exchange has requested that the Commission waive the 30-day operative delay. The Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest because it would permit the Exchange to immediately implement the proposed rule change that would allow the Exchange to compete with other exchanges that offer a similar optional attribution of quotations functionality.[10] The Exchange represented that the proposed rule is substantially similar to and based on rules of other exchanges and that the waiver of the 30-day operative delay would help ensure uniformity across market centers concerning the display of attributed quotations. Further, the Exchange believes that because the attribution functionality is optional, there will be no need for a phased implementation as Users that do not wish to avail themselves of the options functionality would not have to make any systems changes. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Such waiver would allow the Exchange to offer a functionality to market participants that is substantially similar other exchanges without delay. The Commission notes that the proposed rule change is based on and similar to NASDAQ Rule 4751(e)(1) and (2).[11] Additionally, the Commission notes that this attribution functionality is optional. Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BYX–2012–008 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BYX–2012–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–BYX–2012–008 and should be submitted on or before May 29, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

**Kevin M. O'Neill,**

*Deputy Secretary.*

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[6] 15 U.S.C. 78k–1(a)(1).

[7] *See supra* note 4.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] *See* SR–BYX–2012–008, Item 7.

[11] *See supra* note 3.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66895; File No. SR–ICC–2012–07]**

## Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Schedule 502 of the ICC Rules To Update the Contract Reference Obligation ISINs Associated With Four Single Name Contracts

May 1, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4[2] thereunder, notice is hereby given that on April 20, 2012, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II, and III below, which Items have been prepared primarily by ICC. ICC filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act,[3] and Rule 19b–4(f)(3)[4] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the rule change from interested parties.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of proposed rule change is to update the Contract Reference Obligation International Securities Identification Numbers (''Contract Reference Obligation ISIN'') in Schedule 502 of the ICC Rules in order to be consistent with the industry standard reference obligations for four single name contracts that ICC currently clears (Amgen Inc., Freeport-McMoRan Copper & Gold Inc., Kinder Morgan Energy Partners, L.P., and Southwest Airlines Co.) (collectively, ''Contracts'').

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[5]

*(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

ICC is updating the Contract Reference Obligation ISINs for the Contracts in order to remain consistent with the industry standard reference obligations. The Contract Reference Obligation ISIN update does not require any changes to the body of the ICC Rules. Also, the Contract Reference Obligation ISIN update does not require any changes to the ICC risk management framework. The only change being submitted is the update to the Contract Reference Obligation ISIN for the Contracts in Schedule 502 of the ICC Rules.

Section 17A(b)(3)(F) of the Act[6] 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. ICC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to ICC, in particular, to Section 17A(b)(3)(F), because the update to the Contract Reference Obligation ISIN for the Contracts will facilitate the prompt and accurate settlement of securities transactions and assure the safeguarding of securities and funds associated with securities transactions which are in the custody or control of ICC or for which it is responsible.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

ICC does not believe that the proposed rule change will have any impact or impose any burden on competition.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii)[7] of the Act and Rule 19b–4(f)(3)[8] thereunder because it is concerned solely with the administration of the self-regulatory organization. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICC–2012–07 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ICC–2012–07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(3).

[5] The Commission has modified the text of the summaries prepared by ICC.

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(3).

Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of ICC and on ICC's Web site at *https://www.theice.com/publicdocs/regulatory_filings/ICEClearCredit_042012.pdf.*

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICC–2012–07 and should be submitted on or before May 29, 2012.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Kevin O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–10912 Filed 5–4–12; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66891; File No. SR–BATS–2012–016]**

## Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Exchange Rule 11.9 and Rule 21.1 To Allow Optional Attribution of Orders

May 1, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 25, 2012, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to amend Rule 11.9, entitled ''Orders and Modifiers'' and Rule 21.1, entitled ''Definitions'', to allow optional attribution of orders submitted to the Exchange in Exchange data feeds.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this filing is to allow Users to optionally enter orders into the Exchange's systems that will be displayed in Exchange data feeds with such User's market participant identifiers or ''MPIDs''. Specifically, the Exchange proposes to amend Rule 11.9, which is applicable to the Exchange's equities platform (''BATS Equities'') to add a definition of an Attributable Order, which shall mean an order that is designated for display (price and size) including the User's MPID. The Exchange also proposes to adopt a definition in Rule 11.9 for a Non-Attributable Order, which shall mean an order that is designated for display (price and size) on an anonymous basis by the Exchange. Similarly, the Exchange propose to amend Rule 21.1, which is applicable to the Exchange's equity options platform (''BATS Options'') to add a definition of an Attributable Order, shall mean an order that is designated for display (price and size) next to the User's MPID. The Exchange also proposes to adopt a definition in Rule 21.1 for a Non-Attributable Order, which shall mean an order that is designated for display (price and size) on an anonymous basis by the Exchange. The proposed definitions of Attributable Order and Non-Attributable Order are virtually identical between BATS Equities and BATS Options, and are also substantively identical to definitions contained in the Rules of The NASDAQ Stock Market LLC (''Nasdaq'') and the Nasdaq Options Market (''NOM''), respectively, as described in further detail below.

All display-eligible orders entered into BATS Equities and BATS Options are currently displayed by the Exchange on an anonymous basis without attribution to the entering User. The Exchange is proposing to allow Users to utilize Attributable Orders to include their MPID on published quotations in the Exchange's data feeds. The Exchange believes that such display is consistent with traditional market making on the floor of an exchange as well as existing rules of the Exchange's competitors.[3] The addition of Attributable Orders will allow a party engaged in market making to identify itself as the party willing to buy or sell securities on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[4] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[5] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the proposal will benefit market participants and help to promote transparency by providing additional information regarding quotations displayed on the Exchange. Specifically, any User that wishes to publicly disclose their identity when quoting on the Exchange will be permitted to do so, and such attributed quotations will be analogous to the quotations they provide in other contexts (e.g., on the floor of a floor-based stock exchange or in the over-the-counter market through direct interaction). The proposal also promotes transparency in that other Users will be able to see with whom they are interacting when trading against displayed, attributed orders.

The proposed rule change is also consistent with Section 11A(a)(1) of the Act[6] in that it seeks to assure fair competition among brokers and dealers by providing functionality that is

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Nasdaq Rule 4751(e)(1) and (2) and NOM Chapter VI, Section (1)(d)(1) and (2); *see also* NYSE Arca Options Rule 6.62(x).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78k–1(a)(1).

consistent with that of functionality offered by the Exchange's competitors.[7] The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning the ability to display an attributed order on an exchange.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change imposes any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action**

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

The Exchange has requested that the Commission waive the 30-day operative delay. The Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest because it would permit the Exchange to immediately implement the proposed rule change that would allow the Exchange to compete with other exchanges that offer a similar optional attribution of quotations functionality.[10] The Exchange represented that the proposed rule is substantially similar to and based on rules of other exchanges and that the waiver of the 30-day operative delay would help ensure uniformity across market centers concerning the display of attributed quotations. Further, the Exchange believes that because the attribution functionality is optional, there will be no need for a phased implementation as Users that do not wish to avail themselves of the options functionality would not have to make any systems changes. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Such waiver would allow the Exchange to offer a functionality to market participants that is substantially similar other exchanges without delay. The Commission notes that the proposed rule change is based on and similar to NASDAQ Rule 4751(e)(1) and (2).[11] Additionally, the Commission notes that this attribution functionality is optional. Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BATS–2012–016 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2012–016. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–BATS–2012–016 and should be submitted on or before May 29, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–10880 Filed 5–4–12; 8:45 am]

**BILLING CODE 8011–01–P**

[7] *See supra* note 4.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] *See* SR–BATS–2012–016, Item 7.

[11] *See supra* note 3.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66889; File No. SR–ISE–2012–22]**

## Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Add an Index Option Product for Trading on the Exchange

May 1, 2012.

On March 9, 2012, International Securities Exchange, LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade options on the ISE Max SPY index. The proposed rule change was published for comment in the **Federal Register** on March 22,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

2012.[3] The Commission received three comment letters on this proposal.[4]

Section 19(b)(2) of the Act[5] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is May 6, 2012. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change, which would allow the listing of a new option product, the comment letters that have been submitted in connection with this proposed rule change, and any response to the comment letters submitted by the Exchange.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates June 20, 2012 as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–ISE–2012–22).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–10878 Filed 5–4–12; 8:45 am]

**BILLING CODE 8011–01–P**

[3] *See* Securities Exchange Act Release No. 66614 (March 16, 2012), 77 FR 16883.

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission, from Janet McGinness, EVP & Corporate Secretary, NYSE Euronext, dated April 2, 2012; Kenneth M. Vittor, Executive Vice President and General Counsel, McGraw-Hill Companies, Inc., dated April 11, 2012; and Edward T. Tilly, President and Chief Operating Officer, Chicago Board Options Exchange, Incorporated, dated April 13, 2012.

[5] 15 U.S.C. 78s(b)(2).

[6] 15 U.S.C. 78s(b)(2).

[7] 17 CFR 200.30–3(a)(31).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–66888; File No. SR–CBOE–2012–038]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

May 1, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 20, 2012, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

On November 23, 2011, the Exchange amended its Fees Schedule to provide that FLEX Options[3] transactions for the account of non-Trading Permit Holder broker-dealers (which use the ''C'' order origin code) would be subject to the same transaction fee rates that are applicable to public customers (which also use the ''C'' order origin code).[4] The rationale behind that change was that FLEX Options transactions for the account of non-Trading Permit Holder broker-dealers were being identified using the same ''C'' origin code as such transactions for public customers, so the Exchange wanted to avoid any potential billing discrepancies.[5]

Beginning as soon as April 24, 2012, the Exchange will begin rolling out its newly-enhanced FLEX Hybrid Trading System (the ''CFLEX System'') for FLEX Options trading. The Exchange intends to transition a few classes at a time and anticipates full implementation within approximately one to three weeks of the initial transition. This enhanced CFLEX System will allow for the entry of non-Trading Permit Holder broker-dealer transactions using a different order origin code than the ''C'' origin code used for public customers (and currently, for non-Trading Permit Holder broker-dealers). As such, the Exchange proposes deleting from the Fees Schedule the language that states that for FLEX Options only, customer transaction fees apply to non-Trading Permit Holder broker-dealer orders (orders with ''C'' origin code), as those fees are only applicable for non-Trading Permit Holder broker-dealer executions on the old CFLEX System. Going forward as FLEX Options are rolled out to the newly-enhanced CFLEX System, broker-dealer fees would apply to non-Trading Permit Holder broker-dealer FLEX Options transactions, as they do for all other non-Trading Permit Holder broker-dealer transactions, and as they

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Flexible Exchange Options (''FLEX Options'') provide investors with the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices. FLEX Options can be FLEX Index Options or FLEX Equity Options. In addition, other products are permitted to be traded pursuant to the FLEX trading procedures. For example, credit options are eligible for trading as FLEX Options pursuant to the FLEX rules in Chapters XXIVA and XXIVB. *See* CBOE Rules 24A.1(e) and (f), 24A.4(b)(1) and (c)(1), 24B.1(f) and (g), 24B.4(b)(1) and (c)(1), and 28.17. The rules governing the trading of FLEX Options on the FLEX Request for Quote (''RFQ'') System platform (which is limited to open outcry trading only) are contained in Chapter XXIVA. The rules governing the trading of FLEX Options on the FLEX Hybrid Trading System platform (which combines both open outcry and electronic trading) are contained in Chapter XXIVB. The Exchange notes that, currently, all FLEX Options are traded on the FLEX Hybrid Trading System platform.

[4] *See* Securities Exchange Act Release No. 65875 (December 2, 2011), 76 FR 76783 (December 8, 2011) (SR–CBOE–2011–112).

[5] *Id.*

did prior to the above-referenced rule change.

The proposed change is to take effect on April 24, 2012.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[7] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The proposed change is reasonable because non-Trading Permit Holder broker-dealers will be assessed the same FLEX Options transaction fees as Trading Permit Holder broker-dealers, as they were prior to November 23, 2012 [sic]. The proposed change is equitable and not unfairly discriminatory because it will place non-Trading Permit Holder broker-dealers trading FLEX Options on the same footing, transaction fees-wise, as Trading Permit Holder broker-dealers.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)[8] of the Act and paragraph (f)(2) of Rule 19b–4[9] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2012–038 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2012–038. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2012–038 and should be submitted on or before May 29, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–10877 Filed 5–4–12; 8:45 am]

**BILLING CODE 8011–01–P**

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF STATE

**[Public Notice 7870]**

### Culturally Significant Objects Imported for Exhibition Determinations: ''Modern Landscapes''

**SUMMARY:** Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Modern Landscapes,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Pennsylvania Academy of the Fine Arts, Philadelphia, Pennsylvania, from on or about June 12, 2012 until on or about September 16, 2012, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), and Washington, DC 20522–0505.

Dated: May 2, 2012.

**J. Adam Ereli,**

*Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2012–10979 Filed 5–4–12; 8:45 am]

**BILLING CODE 4710–05–P**

## TENNESSEE VALLEY AUTHORITY

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Tennessee Valley Authority.

**ACTION:** 60-Day notice of submission of information collection approval and request for comments.

**SUMMARY:** The proposed information collection described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended). The Tennessee Valley Authority is soliciting public comments on this proposed collection as provided by 5 CFR 1320.8(d)(1).

**ADDRESSES:** Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer: Mark Winter, Tennessee Valley Authority, 1101 Market Street (MP–3C), Chattanooga, Tennessee 37402–2801; (423) 751–6004.

**DATES:** Comments should be sent to the Agency Clearance Officer no later than July 6, 2012.

**SUPPLEMENTARY INFORMATION:**

*Type of Request:* Regular submission; reinstatement of a previously approved collection.

*Title of Information Collection:* Salary Surveys for Engineering Association (EA), Office and Professional Employees International Union (OPEIU), and United Government Security Officers of America (UGSOA) bargaining unit employees.

*Frequency of Use:* Once every three years for each bargaining unit.

*Type of Affected Public:* State or local governments, Federal agencies, non-profit institutions, businesses, or other for-profit.

*Small Businesses or Organizations Affected:* No.

*Federal Budget Functional Category Code:* 999.

*Estimated Number of Annual Responses:* 61.

*Estimated Total Annual Burden Hours:* 165.5.

*Estimated Average Burden Hours per Response:* 2.75.

*Need For and Use of Information:* TVA conducts salary surveys once every three years for each bargaining unit to be used as a basis for labor negotiations in determining prevailing rates of pay for represented salary policy employees. TVA surveys firms, and Federal, State and local governments whose employees perform work similar to that of TVA's salary policy employees.

**Michael T. Tallent,**

*Director, Enterprise Information Security & Policy.*

[FR Doc. 2012–10855 Filed 5–4–12; 8:45 am]

**BILLING CODE 8120–08–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Opportunity To Comment on the Draft Airport Design Advisory Circular 150/5300–13A

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice.

**SUMMARY:** The Federal Aviation Administration (FAA), DOT invites airports consultants, industry representatives and all other interested parties to review and comment on the Draft ''Airport Design'' Advisory Circular, AC 150/5300–13A. The Advisory Circular provides standards and recommendations for airport design. The FAA has posted the AC on the Internet at: *http://www.faa.gov/airports/resources/advisory_circulars/*.

**FOR FURTHER INFORMATION CONTACT:** Khalil Elias Kodsi, P.E. PMP, Airport Engineering Division, (AAS–100), Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591; telephone (202) 267–7553.

**DATES:** Comments must be received on or before July 6, 2012—60 Days after publication date. Comments that are received after that date will be considered to the extent possible.

**ADDRESSES:** Comments must be submitted by:

- *Hand Delivery/Courier:* Federal Aviation Administration, 800 Independence Avenue SW., AAS–100, Room 621, Washington, DC 20590.
- *FAX:* (202) 267–3688.

**SUPPLEMENTARY INFORMATION:** Title 49 of the United States Code, section 47108(a), provides that the Secretary may impose terms on the offer that the Secretary considers necessary to carry out this subchapter and regulations to be assumed by the sponsor. Uniform design standards for airports can be found in the Federal Aviation Administration advisory circular and mandatory use is required on all Federal Airport Improvement Program projects. This draft AC incorporates all previous changes and numerous technical updates within a new format. This AC was substantially revised to fully incorporate all previous changes to AC 150/5300–13, as well as new standards and technical requirements. This document was reformatted to simplify and clarify the FAA's airport design standards and improve readability. Therefore, change bars were not used to signify what has changed from the previous document. Users should review the entire document to familiarize themselves with the new format. Principal changes include:

a. An introduction of the Runway Reference Code (RRC) and the Runway Design Code (RDC).

b. An expanded discussion on Declared Distances.

c. A clarified discussion on the Runway Protection Zone (RPZ).

d. The introduction of a Taxiway Design Group (TDG) concept for fillet design.

e. The establishment of better guidelines for the separation between non-intersecting runways and intersecting runways.

f. The inclusion of Runway Incursion prevention geometry for taxiway to taxiway intersections and taxiway to runway interface.

g. The consolidation of numerous design tables into one Runway Design Standards Matrix (*Table 3–5*).

Issued in Washington, DC on April 30, 2012.

**Michael J. O'Donnell,**

*Director, Office of Airport Safety & Standards.*

[FR Doc. 2012–10896 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2006–26367]**

### Motor Carrier Safety Advisory Committee (MCSAC): Public Meeting

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

**ACTION:** Notice of Meeting of Motor Carrier Safety Advisory Committee (MCSAC).

**SUMMARY:** FMCSA announces that MCSAC will hold a meeting on Monday –Wednesday, May 21–23, 2012. On Monday and Tuesday, May 21 and 22, MCSAC will consider ideas and concepts to address certain open recommendations of the National Transportation Safety Board (NTSB). Wednesday, May 23, will be reserved for MCSAC's Cross-Border trucking subcommittee and the Motorcoach Hours-of-Service (HOS) subcommittee. All three days of the meeting will be open to the public.

**DATES:** *Time and Dates:* The meetings will be held on Monday–Tuesday, May 21–22, 2012, from 8:30 a.m. to 5 p.m., Eastern Daylight Time (E.D.T.), and on Wednesday, May 23, 2012, from 8:30 a.m. to 3:00 p.m., E.D.T. The meetings will be held at the Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314 in the Washington and Jefferson Rooms on the 2nd floor. The Hilton Alexandria Old Town is located across the street from the King Street Metro station.

Copies of all MCSAC Task Statements and an agenda for the entire meeting will be made available in advance of the meeting at *http://mcsac.fmcsa.dot.gov.*

**FOR FURTHER INFORMATION CONTACT:** Ms. Shannon L. Watson, Senior Advisor to the Associate Administrator for Policy, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, (202) 385–2395, *mcsac@dot.gov.*

**Services for Individuals With Disabilities**

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Elizabeth Turner at (617) 494–2068, *elizabeth.turner@dot.gov,* by Wednesday, May 9, 2012.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*MCSAC*

Section 4144 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, Pub. L. 109–59, 119 Stat. 1144, August 10, 2005) required the Secretary of Transportation to establish the MCSAC. The MCSAC provides advice and recommendations to the FMCSA Administrator on motor carrier safety programs and regulations, and operates in accordance with the Federal Advisory Committee Act (FACA, 5 U.S.C. App 2).

*Recommendations of the National Transportation Safety Board (NTSB)*

At this meeting, the MCSAC will hear presentations and deliberate on Task 12–02, soliciting ideas, concepts, and suggestions for alternative strategies the Agency could pursue to address certain NTSB recommendations that are classified as ''Open-Unacceptable.'' Specifically, the Agency will focus its efforts and seek strategies to address 11 such recommendations, which relate to such issues as measuring tire pressure, inspection procedures for drivers and carriers, and ensuring that vehicles operated by motor carriers comply with the Federal Motor Vehicle Safety Standards (FMVSS) in effect on the date the vehicle was manufactured. These recommendations are as follows: H–05–003—005; H–08–013; H–09–019—020; and H–09–037—041.

*Long-Haul Cross Border Trucking Pilot Program Task*

During the MCSAC's March 2011 meeting, FMCSA tasked the Committee with designating a subcommittee to provide independent monitoring for the program (MCSAC Task 11–03). The subcommittee will continue its work from previous meetings.

*Hours-of-Service (HOS) for Drivers of Passenger-Carrying CMVs*

The MCSAC subcommittee will continue its consideration of Task 11–06, concerning ideas and concepts the Agency should consider in deciding whether to initiate a rulemaking to amend or revise the HOS requirements for drivers of passenger-carrying CMVs.

**II. Meeting Participation**

Oral comments from the public will be heard during the last half-hour of the meetings on Monday and Tuesday and during the last 15 minutes of the meeting on Thursday. Should all public comments be exhausted prior to the end of the specified period, the comment period will close. Members of the public may submit written comments on the topics to be considered during the meeting by Wednesday, May 16, 2012, to Federal Docket Management System (FDMC) Docket Number FMCSA–2006–26367 using any of the following methods:

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

Issued on: May 1, 2012.

**Larry W. Minor,**

*Associate Administrator for Policy.*

[FR Doc. 2012–10932 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–1999–6156; FMCSA–1999–6480; FMCSA–2001–11426; FMCSA–2005–22727; FMCSA–2005–23099; FMCSA–2005–23238; FMCSA–2006–24015; FMCSA–2007–0071; FMCSA–2008–0021]**

### Qualification of Drivers; Exemption Applications; Vision

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

**ACTION:** Notice of renewal of exemptions; request for comments.

**SUMMARY:** FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 16 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

**DATES:** This decision is effective May 25, 2012. Comments must be received on or before June 6, 2012.

**ADDRESSES:** You may submit comments bearing the Federal Docket Management System (FDMS) numbers: FMCSA–1999–6156; FMCSA–1999–6480; FMCSA–2001–11426; FMCSA–2005–22727; FMCSA–2005–23099; FMCSA–2005–23238; FMCSA–2006–24015; FMCSA–2007–0071; FMCSA–2008–0021, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

*Instructions:* Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any

personal information included in a comment. Please see the Privacy Act heading below.

*Docket:* For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

*Privacy Act:* Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

**FOR FURTHER INFORMATION CONTACT:** Elaine M. Papp, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

## Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

## Exemption Decision

This notice addresses 16 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 16 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Paul D. Crouch (OR), John M. Doney (MO), Curtis N. Fulbright (NC), Joshua G. Hansen (ID), Daniel W. Henderson (TN), Edward W. Hosier (MO), Craig T. Jorgensen (WI), Jose A. Lopez (CT), Earl E. Martin (VA), Brian E. Monaghan (IL), William P. Murphy (TX), Roy J. Oltman (IL), Albert L. Remsburg, III (MD), Antonio A. Ribeiro (CT), Justin T. Richman (IN), Frankie A. Wilborn (GA)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

## Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 16 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (64 FR 54948; 64 FR 68195; 65 FR 159; 65 FR 20251; 66 FR 66969; 67 FR 10471; 67 FR 17102; 67 FR 19798; 68 FR 69432; 69 FR 17267; 69 FR 19611; 70 FR 71884; 71 FR 644; 71 FR 16410; 71 FR 19604; 71 FR 4632; 71 FR 4194; 71 FR 13450; 71 FR 5105; 71 FR 19600; 71 FR 14566; 71 FR 30227; 73 FR 6242; 73 FR 16950; 73 FR 27014; 73 FR 15567; 73 FR 27015; 75 FR 27622). Each of these 16 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

## Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by June 6, 2012.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 16 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of

the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: April 18, 2012.

**Larry W. Minor,**

*Associate Administrator for Policy.*

[FR Doc. 2012–10929 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### Notice of Limitation on Claims Against Proposed Public Transportation Projects

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of Limitation on Claims.

**SUMMARY:** This notice announces final environmental actions taken by the Federal Transit Administration (FTA) for projects in the following locations: Minneapolis, MN; Coatesville, PA; City of St. Louis and University City, MO; and West Fitchburg, MA. The purpose of this notice is to announce publicly the environmental decisions by FTA on the subject projects and to activate the limitation on any claims that may challenge these final environmental actions.

**DATES:** By this notice, FTA is advising the public of final agency actions subject to Section 139(l) of Title 23, United States Code (U.S.C.). A claim seeking judicial review of the FTA actions announced herein for the listed public transportation project will be barred unless the claim is filed on or before November 2, 2012.

**FOR FURTHER INFORMATION CONTACT:** Nancy-Ellen Zusman, Assistant Chief Counsel, Office of Chief Counsel, (312) 353–2577, or Terence Plaskon, Environmental Protection Specialist, Office of Human and Natural Environment, (202) 366–0442. FTA is located at 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 9:00 a.m. to 5:30 p.m., EST, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that FTA has taken final agency actions by issuing certain approvals for the public transportation projects listed below. The actions on these projects, as well as the laws under which such actions were taken, are described in the documentation issued in connection with the project to comply with the National Environmental Policy Act (NEPA) and in other documents in the FTA administrative record for the projects. Interested parties may contact either the project sponsor or the relevant FTA Regional Office for more information on the project. Contact information for FTA's Regional Offices may be found at *http://www.fta.dot.gov.*

This notice applies to all FTA decisions on the listed projects as of the issuance date of this notice and all laws under which such actions were taken, including, but not limited to, NEPA [42 U.S.C. 4321–4375], Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303], Section 106 of the National Historic Preservation Act [16 U.S.C. 470f], and the Clean Air Act [42 U.S.C. 7401–7671q]. This notice does not, however, alter or extend the limitation period of 180 days for challenges of project decisions subject to previous notices published in the **Federal Register**. The projects and actions that are the subject of this notice are:

1. *Project name and location:* Minneapolis Interchange Project, Minneapolis, MN. *Project sponsor:* Metropolitan Council and Hennepin County Regional Railroad Authority. *Project description:* The project proposes to provide transportation infrastructure improvements near the existing Hiawatha Light Rail Transit Target Field Station, including elevated track, a second platform, storage track, construction of two connected pedestrian plaza areas, and reconfiguration of the 5th Street North/6th Avenue North intersection. *Final agency actions:* No use of Section 4(f) resources; Section 106 Programmatic Agreement; project-level air quality conformity; and Finding of No Significant Impact (FONSI), dated March 2012. *Supporting documentation:* Environmental Assessment, dated January 2012.

2. *Project name and location:* Coatesville Train Station Relocation, City of Coatesville, Chester County, PA. *Project sponsor:* Pennsylvania Department of Transportation (PennDOT). *Project description:* The project proposes to relocate the Coatesville Train Station approximately 450 feet east of the current location. It entails construction of the station platforms and access, provision of surface parking for Amtrak patrons, and improvements to Fleetwood Street. *Final agency actions:* No use of Section 4(f) resources; Section 106 finding of no adverse effect; project-level air quality conformity; and Finding of No Significant Impact (FONSI), dated March 2012. *Supporting documentation:* Environmental Assessment, dated December 2011.

3. *Project name and location:* St. Louis Loop Trolley, City of St. Louis and University City, MO. *Project sponsor:* East-West Gateway Council of Governments. *Project description:* The project is an approximately two-mile long, fixed-guideway trolley system in St. Louis and University City, MO. It will be constructed on Delmar Boulevard and DeBaliviere Avenue, and run from the History Museum in Forest Park in St. Louis to Trinity Avenue in University City, MO. *Final agency actions:* Determination of *de minimis* impact to one Section 4(f) resource and Section 106 finding of no adverse effect. *Supporting documentation:* Environmental Assessment Re-evaluation, dated March 2012.

4. *Project name and location:* Fitchburg Commuter Rail Extension Project/Wachusett Station and Westminster Layover Facility, West Fitchburg, MA. *Project sponsor:* Montachusett Area Regional Transit Authority (MART) and Massachusetts Bay Transportation Authority (MBTA). *Project description:* The project extends commuter rail service 4.5 miles from downtown Fitchburg to a new rail station in West Fitchburg, to be called Wachusett Station. A new layover facility adjacent to the end of the line is also part of the project. *Final agency actions:* No use of Section 4(f) resources; Section 106 finding of no historic properties affected; and Finding of No Significant Impact (FONSI), dated October 2010. *Supporting documentation:* Environmental Assessment, dated September 2010.

Issued on: May 2, 2012.

**Lucy Garliauskas,**

*Associate Administrator for Planning and Environment, Washington, DC.*

[FR Doc. 2012–10941 Filed 5–4–12; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2012–0058]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel FREE SPIRIT; Invitation for Public Comments

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized

to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before June 6, 2012.

**ADDRESSES:** Comments should refer to docket number MARAD–2012–0058. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel FREE SPIRIT is: *Intended Commercial Use of Vessel:* ''Day/overnight passenger passage. Depart and return same port. No passenger exchange.'' *Geographic Region:* ''Ohio.''

The complete application is given in DOT docket MARAD–2012–0058 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: April 26, 2012.

**Julie P. Agarwal,**

*Secretary, Maritime Administration.*

[FR Doc. 2012–10857 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2012–0054]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel BLUE PLANET; Invitation for Public Comments

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before June 6, 2012.

**ADDRESSES:** Comments should refer to docket number MARAD–2012–0054. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel BLUE PLANET is: *Intended Commercial use of Vessel:* ''Charter to Boy Scouts of America Florida Sea Base. Operation as a sail training vessel.'' *Geographic Region:* ''Florida, Maryland, New York, New Jersey, Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut.''

The complete application is given in DOT docket MARAD–2012–0054 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: May 1, 2012.

**Julie P. Agarwal,**

*Secretary, Maritime Administration.*

[FR Doc. 2012–10861 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2012–0052]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel KEALIA; Invitation for Public Comments

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before June 6, 2012.

**ADDRESSES:** Comments should refer to docket number MARAD–2012–0052. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:**

As described by the applicant the intended service of the vessel KEALIA is: INTENDED COMMERCIAL USE OF VESSEL: ''Full Moon Charter, the company under which KEALIA will operate will appeal to an affluent, upscale market. It will offer: 1. Private, catered charters for 6 to 12 passengers. 2. Bed-and-Breakfast for up to 4 overnight guests. 3. A venue for private at-the-dock social functions. As a private, well-maintained yacht, KEALIA will do no more than 2 charters and 2 overnight stays per week. This represents 24 charter and 8 overnight guests per week.'' GEOGRAPHIC REGION: ''California.''

The complete application is given in DOT docket MARAD–2012–0052 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: April 26, 2012.

**Julie P. Agarwal,**

*Secretary, Maritime Administration.*

[FR Doc. 2012–10863 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2012–0055]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel THE BLUE MOON; Invitation for Public Comments

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before June 6, 2012.

**ADDRESSES:** Comments should refer to docket number MARAD–2012–0055. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel THE BLUE MOON is:

*Intended Commercial Use of Vessel:* ''6 pack UPV (short cruises).''

*Geographic Region:* ''California.''

The complete application is given in DOT docket MARAD–2012–0055 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**Privacy Act**

Anyone is able to search the electronic form of all comments

received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: April 26, 2012.

By Order of the Maritime Administrator.

**Julie P. Agarwal,**

*Secretary, Maritime Administration.*

[FR Doc. 2012–10865 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2012–0057]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel NORSK VIND; Invitation for Public Comments

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before June 6, 2012.

**ADDRESSES:** Comments should refer to docket number MARAD–2012–0057. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel NORSK VIND is: INTENDED COMMERCIAL USE OF VESSEL: ''1, 2, or 3 day trips in Puget Sound, Washington State.'' GEOGRAPHIC REGION: ''Washington State.''

The complete application is given in DOT docket MARAD–2012–0057 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: April 26, 2012.

**Julie P. Agarwal,**

*Secretary, Maritime Administration.*

[FR Doc. 2012–10862 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2012–0053]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel SUNCLIPPER II; Invitation for Public Comments

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before June 6, 2012.

**ADDRESSES:** Comments should refer to docket number MARAD–2012–0053. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov*.

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel SUNCLIPPER II is:

*Intended Commercial use of Vessel:* ''6 passenger charter vessel for hire.''

*Geographic Region:* ''Florida.''

The complete application is given in DOT docket MARAD–2012–0053 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver

criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: April 26, 2012.

**Julie P. Agarwal,**

*Secretary, Maritime Administration.*

[FR Doc. 2012–10864 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2012–0056]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel LONGWOOD BATEAU; Invitation for Public Comments

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before June 6, 2012.

**ADDRESSES:** Comments should refer to docket number MARAD–2012–0056. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel LONGWOOD BATEAU is: INTENDED COMMERCIAL USE OF VESSEL: ''Day outings, harbor cruises and sightseeing cruises for no more than six passengers with one licensed captain on a seasonal basis.'' GEOGRAPHIC REGION: ''Massachusetts, Rhode Island, Connecticut and New York.''

The complete application is given in DOT docket MARAD–2012–0056 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: April 26, 2012.

**Julie P. Agarwal,**

*Secretary, Maritime Administration.*

[FR Doc. 2012–10867 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

**[Docket No. PHMSA–2012–0068]**

### Pipeline Safety: Verification of Records

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice; Issuance of Advisory Bulletin.

**SUMMARY:** PHMSA is issuing an Advisory Bulletin to remind operators of gas and hazardous liquid pipeline facilities to verify their records relating to operating specifications for maximum allowable operating pressure (MAOP) required by 49 CFR 192.517 and maximum operating pressure (MOP) required by 49 CFR 195.310. This Advisory Bulletin informs gas operators of anticipated changes in annual reporting requirements to document the confirmation of MAOP, how they will be required to report total mileage and mileage with adequate records, when they must report, and what PHMSA considers an adequate record. In addition, this Advisory Bulletin informs hazardous liquid operators of adequate records for the confirmation of MOP.

**FOR FURTHER INFORMATION CONTACT:** John Gale by phone at 202–366–0434 or by email at *john.gale@dot.gov.* Information about PHMSA may be found at *http://phmsa.dot.gov.*

**SUPPLEMENTARY INFORMATION:**

**Background**

On January 10, 2011, PHMSA issued Advisory Bulletin 11–01. This Advisory Bulletin reminded operators that if they are relying on the review of design, construction, inspection, testing and other related data to establish MAOP and MOP, they must ensure that the records used are reliable, traceable, verifiable, and complete. If such a document and records search, review, and verification cannot be satisfactorily completed, the operator cannot rely on this method for calculating MAOP or MOP and must instead rely on another method as allowed in 49 CFR 192.619 or 49 CFR 195.406.

Section 192.619 currently contains four methods for establishing MAOP: (1) The design pressure of the weakest element in the segment; (2) pressure testing; (3) the highest actual operating pressure in the five years prior to the segment becoming subject to regulation under Part 192; and (4) the maximum safe pressure considering the history of the segment, particularly known corrosion and the actual operating

pressure. The third method, often referred to as the ''grandfather clause,'' allows pipelines that had safely operated prior to the pipeline safety MAOP regulations to continue to operate under similar conditions without retroactively applying recordkeeping requirements or requiring pressure tests.

Many of the pipelines being newly subjected to safety regulation in the 1970's were relatively new and had demonstrated a safe operating history. PHMSA is now considering whether these pipelines should be pressure tested to verify continued safe MAOP. In its August 20, 2011, accident investigation report on the September 9, 2010, Pacific Gas and Electric Company natural gas transmission pipeline rupture and fire, the National Transportation Safety Board (NTSB) recommended that PHMSA should:

> Amend Title 49 CFR 192.619 to delete the grandfather clause and require that all gas transmission pipelines constructed before 1970 be subjected to a hydrostatic pressure test that incorporates a spike test. (P–11–14)

PHMSA will be addressing this recommendation in a future rulemaking.

On January 3, 2012, President Obama signed the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Act), which requires PHMSA to direct each owner or operator of a gas transmission pipeline and associated facilities to provide verification that their records accurately reflect MAOP of their pipelines within Class 3 and Class 4 locations and in Class 1 and Class 2 locations in High Consequence Areas (HCAs). Beginning in 2013, PHMSA intends to require operators to submit data regarding verification of records in these class locations via the Gas Transmission and Gathering Systems Annual Report.

Operators of both gas and hazardous liquid pipelines should review their records to determine whether they are adequate to support operating parameters and conditions on their pipeline systems or if additional action is needed to confirm those parameters and assure safety. The Research and Special Programs Administration and the Materials Transportation Bureau, PHMSA's predecessor agencies, recognized the importance of verifying MAOP. Prior to 1996, there was a regulatory requirement titled: ''Initial Determination of Class Location and Confirmation or Establishment of Maximum Allowable Operating Pressure'' at 49 CFR 192.607. This regulation required operators to confirm the MAOP on their systems relative to class locations no later than January 1, 1973. The regulatory requirement was removed in 1996 because the compliance dates had long since passed. PHMSA believes documentation that was used to confirm MAOP in compliance with this requirement may be useful in the current verification effort.

**Advisory Bulletin (ADB–2012–06)**

*To:* Owners and Operators of Gas and Hazardous Liquid Pipeline Systems.

*Subject:* Verification of Records Establishing MAOP and MOP.

*Advisory:* As directed in the Act, PHMSA will require each owner or operator of a gas transmission pipeline and associated facilities to verify that their records confirm MAOP of their pipelines within Class 3 and Class 4 locations and in Class 1 and Class 2 locations in HCAs.

PHMSA intends to require gas pipeline operators to submit data regarding mileage of pipelines with verifiable records and mileage of pipelines without records in the annual reporting cycle for 2013. On April 13, 2012, (77 FR 22387) PHMSA published a **Federal Register** Notice titled: ''Information Collection Activities, Revision to Gas Transmission and Gathering Pipeline Systems Annual Report, Gas Transmission and Gathering Pipeline Systems Incident Report, and Hazardous Liquid Pipelines Systems Accident Report.'' PHMSA plans to use information from the 2013 Gas Transmission and Gathering Pipeline Systems Annual Report to develop potential rulemaking for cases in which the records of the owner or operator are insufficient to confirm the established MAOP of a pipeline segment within Class 3 and Class 4 locations and in Class 1 and Class 2 locations in HCAs. Owners and operators should consider the guidance in this advisory for all pipeline segments and take action as appropriate to assure that all MAOP and MOP are supported by records that are traceable, verifiable and complete.

Information needed to support establishment of MAOP and MOP is identified in § 192.619, § 192.620 and § 195.406. An owner or operator of a pipeline must meet the recordkeeping requirements of Part 192 and Part 195 in support of MAOP and MOP determination.

Traceable records are those which can be clearly linked to original information about a pipeline segment or facility. Traceable records might include pipe mill records, purchase requisition, or as-built documentation indicating minimum pipe yield strength, seam type, wall thickness and diameter. Careful attention should be given to records transcribed from original documents as they may contain errors. Information from a transcribed document, in many cases, should be verified with complementary or supporting documents.

Verifiable records are those in which information is confirmed by other complementary, but separate, documentation. Verifiable records might include contract specifications for a pressure test of a line segment complemented by pressure charts or field logs. Another example might include a purchase order to a pipe mill with pipe specifications verified by a metallurgical test of a coupon pulled from the same pipe segment. In general, the only acceptable use of an affidavit would be as a complementary document, prepared and signed at the time of the test or inspection by an individual who would have reason to be familiar with the test or inspection.

Complete records are those in which the record is finalized as evidenced by a signature, date or other appropriate marking. For example, a complete pressure testing record should identify a specific segment of pipe, who conducted the test, the duration of the test, the test medium, temperatures, accurate pressure readings, and elevation information as applicable. An incomplete record might reflect that the pressure test was initiated, failed and restarted without conclusive indication of a successful test. A record that cannot be specifically linked to an individual pipe segment is not a complete record for that segment. Incomplete or partial records are not an adequate basis for establishing MAOP or MOP. If records are unknown or unknowable, a more conservative approach is indicated.

PHMSA is aware that other types of records may be acceptable and that certain state programs may have additional requirements. Operators should ensure all records establish confidence in the validity of the records. If a document and records search, review, and verification cannot be satisfactorily completed to meet the need for traceable, verifiable, and complete records, the operator may need to conduct other activities such as in-situ examination, measuring yield and tensile strength, pressure testing, and nondestructive testing or otherwise verify the characteristics of the pipeline to support a MAOP or MOP determination.

PHMSA is supportive of the use of alternative technologies to verify pipe characteristics. Owners and operators seeking to use alternative or non-traditional technologies in the determination of MAOP or MOP, or to

meet other regulatory requirements, should first discuss the proposed approach with the appropriate state or Federal regulatory agencies to determine its acceptability under regulatory requirements.

PHMSA will issue more direction regarding how operators will be required to bring into compliance gas and hazardous liquid pipelines without verifiable records for the entire mileage of the pipeline. Further details will also be provided on the manner in which PHMSA intends to require operators to reestablish MAOP as discussed in Section 23(a) of the Act.

Finally, PHMSA notes that on September 26, 2011, NTSB issued Recommendation P–11–14: Eliminating Grandfather Clause. Section 192.619(a)(3) allows gas transmission operators to establish MAOP of pipe installed before July 1, 1970, by use of records noting the highest actual operating pressure to which the segment was subjected during the five years preceding July 1, 1970. NTSB Recommendation P–11–14 requests that PHMSA delete § 192.619(a)(3), also known as the ''grandfather clause,'' and require gas transmission pipeline operators to reestablish MAOP using hydrostatic pressure testing. PHMSA reminds operators that this recommendation will be acted upon following the collection of data, including information from the 2013 Gas Transmission and Gathering Pipeline Systems Annual Report, which will allow PHMSA to determine the impact of the requested change on the public and industry in conformance with our statutory obligations.

Issued in Washington, DC, on May 1, 2012.

**Alan K. Mayberry,**

*Deputy Associate Administrator for Field Operations.*

[FR Doc. 2012–10866 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF TRANSPORTATION

### Research & Innovative Technology Administration

**[Docket ID Number RITA 2008–0002]**

### Agency Information Collection; Activity Under OMB Review; Reporting Required for International Civil Aviation Organization (ICAO)

**AGENCY:** Research & Innovative Technology Administration (RITA), Bureau of Transportation Statistics (BTS), DOT.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for extension of currently approved collections. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on February 29, 2012 (77 FR 12364). No comments were received.

**DATES:** Written comments should be submitted by June 6, 2012.

**FOR FURTHER INFORMATION CONTACT:** Jeff Gorham, Office of Airline Information, RTS–42, Room E34, RITA, BTS, 1200 New Jersey Avenue SE., Washington, DC 20590–0001, Telephone Number (202) 366–4406, Fax Number (202) 366–3383 or Email *jeff.gorham@dot.gov*.

*Comments:* Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street NW., Washington, DC 20503, Attention: RITA/BTS Desk Officer.

**SUPPLEMENTARY INFORMATION:**

*OMB Approval No.:* 2138–0039.

*Title:* Reporting Required for International Civil Aviation Organization (ICAO).

*Form No.:* BTS Form EF.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Large certificated air carriers.

*Number of Respondents:* 40.

*Number of Responses:* 40.

*Total Annual Burden:* 26 hours.

*Needs and Uses:* As a party to the Convention on International Civil Aviation (Treaty), the United States is obligated to provide ICAO with financial and statistical data on operations of U.S. air carriers. Over 99% of the data filed with ICAO is extracted from the air carriers' Form 41 submissions to BTS. BTS Form EF is the means by which BTS supplies the remaining 1% of the air carrier data to ICAO.

The Confidential Information Protection and Statistical Efficiency Act of 2002 (44 U.S.C. 3501), requires a statistical agency to clearly identify information it collects for non-statistical purposes. BTS hereby notifies the respondents and the public that BTS uses the information it collects under this OMB approval for non-statistical purposes including, but not limited to, publication of both Respondent's identity and its data, submission of the information to agencies outside BTS for review, analysis and possible use in regulatory and other administrative matters.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department concerning consumer protection. Comments should address whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC on May 1, 2012.

**Pat Hu,**

*Director, Bureau of Transportation Statistics, Research and Innovative Technology Administration.*

[FR Doc. 2012–10909 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–HY–P**

## DEPARTMENT OF TRANSPORTATION

### Research & Innovative Technology Administration

**[Docket ID Number RITA 2008–0002]**

### Agency Information Collection; Activity Under OMB Review; Submission of Audit Reports—Part 248

**AGENCY:** Research & Innovative Technology Administration (RITA), Bureau of Transportation Statistics (BTS), DOT.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for extension of currently approved collections. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on February 29, 2012 (77 FR 12365). No comments were received.

**DATES:** Written comments should be submitted by June 6, 2012.

**FOR FURTHER INFORMATION CONTACT:** Jeff Gorham, Office of Airline Information, RTS–42, Room E34, RITA, BTS, 1200 New Jersey Avenue SE., Washington,

DC 20590–0001, Telephone Number (202) 366–4406, Fax Number (202) 366–3383 or Email *jeff.gorham@dot.gov.*

*Comments:* Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street NW., Washington, DC 20503, Attention: RITA/BTS Desk Officer.

**SUPPLEMENTARY INFORMATION:**

*OMB Approval No.* 2138–0004.

*Title:* Submission of Audit Reports—Part 248.

*Form No.:* None.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Large certificated air carriers.

*Number of Respondents:* 76.

*Number of Responses:* 76.

*Total Annual Burden:* 19 hours.

*Needs and Uses:* BTS collects independent audited financial reports from U.S. certificated air carriers. Carriers not having an annual audit must file a statement that no such audit has been performed. In lieu of the audit report, BTS will accept the annual report submitted to the stockholders. The audited reports are needed by the Department of Transportation as (1) a means to monitor an air carrier's continuing fitness to operate, (2) reference material used by analysts in examining foreign route cases (3) reference material used by analyst in examining proposed mergers, acquisitions and consolidations, (4) a means whereby BTS sends a copy of the report to the International Civil Aviation Organization (ICAO) in fulfillment of a United States treaty obligation, and (5) corroboration of a carrier's Form 41 filings.

The Confidential Information Protection and Statistical Efficiency Act of 2002 (44 U.S.C. 3501), requires a statistical agency to clearly identify information it collects for non-statistical purposes. BTS hereby notifies the respondents and the public that BTS uses the information it collects under this OMB approval for non-statistical purposes including, but not limited to, publication of both Respondent's identity and its data, submission of the information to agencies outside BTS for review, analysis and possible use in regulatory and other administrative matters.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department concerning consumer protection. Comments should address whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC on May 1, 2012.

**Pat Hu,**

*Director, Bureau of Transportation Statistics, Research and Innovative Technology Administration.*

[FR Doc. 2012–10910 Filed 5–4–12; 8:45 am]

**BILLING CODE 4910–HY–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. AB 1072X]**

### Iowa River Railroad, Inc.—Abandonment Exemption—in Marshall and Hardin Counties, IA

On April 17, 2012, Iowa River Railroad, Inc. (IRR) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to abandon an approximately 34.35-mile line of railroad between milepost 209.00 and milepost 243.35 at or near Marshalltown, in Marshall and Hardin Counties, Iowa (the Line). The Line traverses United States Postal Service Zip Codes 50005, 50158, 50627, 50258, and 50259, and includes the stations of Marshalltown (milepost 243.35), Bethel, Minerva Junction, Albion (milepost 236.9), Liscomb (milepost 232.6), Union (milepost 225.9), Eldora (milepost 216.58), and Steamboat Rock (milepost 212.30).[1]

IRR states that it does not have information in its possession to conclude that the Line contains federally granted rights-of-way. Any documentation in IRR's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, In Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by August 3, 2012.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,500 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the Line, the Line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than May 29, 2012. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to Docket No. AB 1072X and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; and (2) T. Scott Bannister, 111-SW 56th Street, Des Moines, IA 50312. Replies to the petition are due on or before May 29, 2012.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs and Compliance at (202) 245–0238 or refer to the full abandonment or discontinuance regulations at 49 CFR pt. 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any agencies or other persons who commented during its presentation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA generally will be within 30 days of its service.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: May 1, 2012.

[1] IRR states that four shippers have used IRR's services over the Line during the past four years: United Suppliers, Inc., Prairie Land Cooperative, Quality Products, and New Century Farm Service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Derrick A. Gardner,**

*Clearance Clerk.*

[FR Doc. 2012–10913 Filed 5–4–12; 8:45 am]

**BILLING CODE 4915–01–P**

## U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

### Notice of Open Public Hearing

**AGENCY:** U.S.-China Economic and Security Review Commission.

**ACTION:** Notice of open public hearing—May 10, 2012, Washington, DC.

**SUMMARY:** Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission.

*Name:* Dennis Shea, Chairman of the U.S.-China Economic and Security Review Commission. The Commission is mandated by Congress to investigate, assess, and report to Congress annually on ''the national security implications of the economic relationship between the United States and the People's Republic of China''. Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC on May 10, 2012, ''Assessing China's Efforts to Become an Innovation Society—A Progress Report''.

**Background**

This is the fifth public hearing the Commission will hold during its 2012 report cycle to collect input from academic, industry, and government experts on national security implications of the U.S. bilateral trade and economic relationship with China. The May 10 hearing will address China's innovation capabilities, with emphasis on the information technology and defense sectors. The hearing will be co-chaired by Commissioners Sen. Carte Goodwin and Hon. Dennis Shea. Any interested party may file a written statement by May 9, 2012, by mailing to the contact below. A portion of each panel will include a question and answer period between the Commissioners and the witnesses.

*Location, Date and Time:* 562 Dirksen Senate Office Building. Thursday May 10, 2012, 8:45 a.m.–3:40 p.m. Eastern Time. A detailed agenda for the hearing will be posted to the Commission's Web Site at *www.uscc.gov* as soon as available. Please check our Web site at *www.uscc.gov* for possible changes to the hearing schedule. *Reservations are not required to attend the hearing.*

**FOR FURTHER INFORMATION CONTACT:** Any member of the public seeking further information concerning the hearing should contact Gavin Williams, 444 North Capitol Street NW., Suite 602, Washington, DC 20001; phone: 202–624–1492, or via email at *gwilliams@uscc.gov*. *Reservations are not required to attend the hearing.*

**Authority:** Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005).

Dated: May 1, 2012.

**Michael Danis,**

*Executive Director, U.S.-China Economic and Security Review Commission.*

[FR Doc. 2012–10869 Filed 5–4–12; 8:45 am]

**BILLING CODE 1137–00–P**


# FEDERAL REGISTER

Vol. 77 Monday,
No. 88 May 7, 2012

Part II

## Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 441

Medicaid Program; Community First Choice Option; Final Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Part 441**

**[CMS–2337–F]**

**RIN 0938–AQ35**

## Medicaid Program; Community First Choice Option

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements section 2401 of the Affordable Care Act, which establishes a new State option to provide home and community-based attendant services and supports. These services and supports are known as Community First Choice (CFC). While this final rule sets forth the requirements for implementation of CFC, we are not finalizing the section concerning the CFC setting.

**DATES:** These regulations are effective July 6, 2012.

**FOR FURTHER INFORMATION CONTACT:** Kenya Cantwell, (410) 786–1025.

**SUPPLEMENTARY INFORMATION:**

### I. Executive Summary and Background

*A. Executive Summary*

1. Purpose

This final rule implements section 2401 of the Affordable Care Act of 2010, as amended by the Health Care and Education Reconciliation Act of 2010, which adds section 1915(k) to the Social Security Act (the Act). The Community First Choice Option established a new State plan option to provide home and community-based attendant services and supports at a 6 percentage point increase in Federal medical assistance percentage (FMAP). While this final rule sets forth the requirements for implementation of CFC, we are not finalizing § 441.530, ''Setting,'' at this time.

2. Summary of the Major Provisions

- This final rule sets out our interpretation of the statutory requirements for eligibility under the Community First Choice (CFC) Option. Specifically, this final rule clarifies that under the statute, individuals should be determined to need an institutional level of care to be eligible for CFC services. This rule also provides States with the option to permanently waive the annual recertification requirement for individuals if it is determined that there is no reasonable expectation of improvement or significant change in the participant's condition because of the severity of a chronic condition or the degree of impairment of functional capacity.
- This rule specifies the services that must be made available under the CFC State plan option. States electing this option must make available home and community-based attendant services and supports to assist in accomplishing activities of daily living, instrumental activities of daily living, and health-related tasks through hands-on assistance, supervision, and/or cueing. Additionally, the following services may be provided at the State's option: Transition costs such as rent and utility deposits, first month's rent and utilities, purchasing bedding, basic kitchen supplies, and other necessities required for transition from an institution; and the provision of services that increase independence or substitute for human assistance to the extent that expenditures would have been made for the human assistance, such as non-medical transportation services or purchasing a microwave.
- States are required to use a person-centered service plan that is based on an assessment of functional need and allows for the provision of services to be self-directed under either an agency-provider model, a self-directed model with service budget, or other service delivery model defined by the State and approved by the Secretary. States may offer more than one service delivery model.
- The final rule also implements the requirement that for the first full twelve month period in which a CFC State plan amendment is implemented, the State must maintain or exceed the level of expenditures for home and community-based attendant services provided under the State plan, waivers or demonstrations, for the preceding 12-month period.
- States will receive an additional 6 percentage point in Federal Medical Assistance Percentage (FMAP) for the provision of CFC services and supports.

3. Summary of Costs and Benefits

| Provision description | Total costs | Total benefits |
|---|---|---|
| Provision of home and community based attendant services and supports. | The Federal and State impacts for FY 2012 are estimated at $820 million and $480 million, respectively. | This final rule provides States with additional flexibility to finance home and community-based services attendant services and supports. We anticipate this provision will likely increase State and local accessibility to services that augment the quality of life for individuals through a person-centered plan of service and various quality assurances, all at a potentially lower per capita cost relative to institutional care settings. |

*B. Section 2401 of the Affordable Care Act*

The Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148, enacted on March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted March 30, 2010) (collectively referred to as the Affordable Care Act) established a new State plan option to provide home and community-based attendant services and supports. Section 2401 of the Affordable Care Act, entitled ''Community First Choice (CFC) Option,'' adds a new section 1915(k) of the Social Security Act (the Act) that allows States, at their option, to provide home and community-based attendant services and supports under their State plan. This option, available October 1, 2011, allows States to receive a 6 percentage point increase in Federal matching payments for medical assistance expenditures related to this option.

Under section 1915(k)(1) of the Act, States can provide home and community-based attendant services and supports for individuals who are eligible for medical assistance under the State plan whose income does not exceed 150 percent of the Federal Poverty Level (FPL) or, if greater, the income level applicable for an individual who has been determined to require an institutional level of care to be eligible for nursing facility services under the State plan and for whom there has been a determination that, but for the provision of such services, the individuals would require the level of care provided in a hospital, a nursing facility, an intermediate care facility for

the mentally retarded, or an institution for mental diseases, the cost of which could be reimbursed under the State plan. The individual must choose to receive such home and community-based attendant services and supports, and the State must meet certain requirements set forth in section 1915(k)(1) of the Act. Section 1915(k)(1)(A) of the Act requires States electing this option to make available home and community-based attendant services and supports to eligible individuals, under a person-centered service plan agreed to in writing by the individual, or his or her representative, that is based on a functional needs assessment. This assessment will determine if the individual requires assistance with activities of daily living (ADLs), instrumental activities of daily living (IADLs), or health-related tasks. The services and supports must be provided by a qualified provider in a home and community-based setting under an agency-provider model, or through other methods for the provision of consumer controlled services and supports as referenced in section 1915(k)(6)(C) of the Act. Section 1915(k)(1)(B) of the Act requires that States make available additional services and supports including the acquisition, maintenance, and enhancement of skills necessary for the individual to accomplish ADLs, IADLs, and health-related tasks, backup systems or mechanisms to ensure continuity of services and supports and voluntary training on how to select, manage, and dismiss attendants.

Section 1915(k)(1)(C) of the Act prohibits States from providing services and supports excluded from section 1915(k) of the Act, including room and board costs for the individual; special education and related services provided under the Individuals with Disabilities Education Act (Pub. L. 101–476, enacted on October 30, 1990) (IDEA) and vocational rehabilitation services provided under the Rehabilitation Act of 1973 (Pub. L. 93–112, enacted on September 26, 1973); assistive technology devices and services other than backup systems or mechanisms to ensure continuity of services and supports, medical supplies and equipment, or home modifications. However, some, although not all, of these services can be covered by Medicaid under other authorities. Section 1915(k)(1)(D) of the Act sets forth services and supports permissible under section 1915(k) of the Act that States can provide, including expenditures for transition costs such as rent and utility deposits, first month's rent and utilities, bedding, basic kitchen supplies, and other necessities required for an individual to make the transition from a nursing facility, institution for mental diseases, or intermediate care facility for the mentally retarded to a community-based home setting where the individual resides. States can also provide for expenditures relating to a need identified in an individual's person-centered plan of services that increase independence or substitute for human assistance, to the extent that expenditures would otherwise be made for the human assistance.

Section 1915(k)(2) of the Act provides that States offering this option to eligible individuals during a fiscal year quarter occurring on or after October 1, 2011 will be eligible for a 6 percentage point increase in the Federal medical assistance percentage (FMAP) applicable to the State for amounts expended to provide medical assistance under section 1915(k) of the Act.

Section 1915(k)(3) of the Act sets forth the requirements for a State plan amendment. States must develop and have in place a process to implement an amendment in collaboration with a Development and Implementation Council established by the State that includes a majority of members with disabilities, elderly individuals, and their representatives. States must also provide consumer controlled home and community-based attendant services and supports to individuals on a statewide basis, in a manner that provides such services and supports in the most integrated setting appropriate to the individual's needs, without regard to the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports the individual requires to lead an independent life.

In addition, for expenditures during the first full fiscal year of implementation, States must maintain or exceed the level of State expenditures for medical assistance attributable to the preceding fiscal year for medical assistance provided under sections 1905(a), 1915, or 1115 of the Act, or otherwise provided to individuals with disabilities or elderly individuals. States must also establish and maintain a quality assurance system for community-based attendant services and supports that includes standards for agency-based and other delivery models for training, appeals for denials and reconsideration procedures of an individual plan, and other factors as determined by the Secretary. The quality assurance system must incorporate feedback from individuals and their representatives, disability organizations, providers, families of disabled or elderly individuals, and members of the community, and maximize consumer independence and control. The quality assurance system must also monitor the health and well-being of each individual who receives section 1915(k) services and supports, including a process for the mandatory reporting, investigation, and resolution of allegations of neglect, abuse, or exploitation in connection with the provision of such services and supports. The State must also provide information about the provisions of the quality assurance required to each individual receiving such services.

States must collect and report information for the purposes of approving the State plan amendment, permitting Federal oversight, and conducting an evaluation, including data regarding how the State provides home and community-based attendant services and supports and other home and community-based services, the cost of such services and supports, and how the State provides individuals with disabilities who otherwise qualify for institutional care under the State plan or under a waiver the choice to receive home and community-based services in lieu of institutional care.

Section 1915(k)(4) of the Act requires that States ensure, regardless of the models used to provide CFC attendant services and supports, such services and supports are to be provided in accordance with the requirements of the Fair Labor Standards Act of 1938 and applicable Federal and State laws regarding the withholding and payment of Federal and State income and payroll taxes; the provision of unemployment and workers compensation insurance; maintenance of general liability insurance; and occupational health and safety.

Section 1915(k)(5) of the Act sets forth the requirements that States provide data to the Secretary for an evaluation and Report to Congress on the provision of CFC home and community-based attendant services and supports. States must provide information for each fiscal year for which CFC attendant services and supports are provided, on the number of individuals estimated to receive these services and supports during the fiscal year; the number of individuals that received such services and supports during the preceding fiscal year; the specific number of individuals served by type of disability, age, gender, education level, and employment status; and whether the specific individuals have been previously served under any other home and community-based

services program under the State plan or under a waiver. Section 1915(k)(5) also requires the Secretary to submit to Congress an interim report no later than December 31, 2013 and a final report no later than December 15, 2015. These reports must be available to the public.

Finally, section 1915(k) (6) of the Act sets forth the definitions of specific terms as they relate to CFC.

*C. Background of Home and Community-Based Attendant Services and Supports*

The CFC option expands States' and individual's Medicaid options for the provision of community-based long-term care services and supports. Consistent with the decision of the United States Supreme Court in *Olmstead* v. *L.C.,* 527 U.S. 581 (1999), this option will support States in their efforts to develop or enhance a comprehensive system of long-term care services and supports in the community that provide beneficiary choice and direction in the most integrated setting. Since the mid-1970s, States have had the option to offer personal care services under their Medicaid State plans. The option was originally provided at the Secretary's discretion, had a medical orientation and could only be provided in an individual's place of residence. Personal care services were mainly offered to assist individuals in activities of daily living, and, if incidental to the delivery of such services, could include other forms of assistance (for example, housekeeping or chores). In the 1980s, some States sought to broaden the scope of personal care services to include community settings for the provision of services to enable individuals to participate in normal day-to-day activities.

Through the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66, enacted on August 10, 1993) (OBRA 93), the Congress formally included personal care as a separate and specific optional service under the Federal Medicaid statute and gave States explicit authorization, under a new section 1905(a)(24) of the Act, to provide such services outside the individual's residence in addition to providing personal care to eligible individuals within their homes. This provision was implemented by a final rule published in the September 11, 1997 **Federal Register** (62 FR 47896) that added a new section at § 440.167 describing the option for States to provide a wide range of personal assistance both in an individual's residence and in the community. In 1999, we released additional guidance as an update to the State Medicaid Manual (SMM) to clarify that personal care services may include ADLs and IADLs that all qualified relatives, with the exception of ''legally responsible relatives'', could be paid to provide personal care services and that States were permitted to offer the option of consumer-directed personal care services.

Additionally, the Omnibus Reconciliation Act of 1989 (Pub. L. 101–239, enacted on December 19, 1989) (OBRA 89), revised the Early and Periodic Screening, Diagnosis and Treatment Benefit to include the requirement that all section 1905(a) services are mandatory for individuals under the age of 21 if determined to be medically necessary in accordance with section 1905(r) of the Act.

Furthermore, before 1981, the Medicaid program provided limited coverage for long-term care services in non-institutional, community-based settings. Medicaid's eligibility criteria and other factors made institutional care much more accessible than care in the community.

Medicaid home and community-based services (HCBS) were established in 1981 as an alternative to care provided in Medicaid institutions, by permitting States to waive certain Medicaid requirements upon approval by the Secretary. Section 1915(c) of the Act was added to title XIX by the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35, enacted on August 13, 1981) (OBRA 81). Programs of HCBS under section 1915(c) of the Act are known as ''waiver programs'', or simply ''waivers'' due to the authority to waive certain Medicaid requirements.

Since 1981, the section 1915(c) HCBS waiver program has afforded States considerable latitude in designing services to meet the needs of people who would otherwise require institutional care. In 2010, approximately 315 approved HCBS waivers under section 1915(c) of the Act served nearly 1 million elderly and disabled individuals in their homes or alternative residential community settings. States have used HCBS waiver programs to provide numerous services designed to foster independence; assist eligible individuals in integrating into their communities; and promote self-direction, personal choice, and control over services and providers. The Deficit Reduction Act of 2005 (Pub. L. 109–171, enacted on February 8, 2006) (DRA) added section 1915(i) of the Act which affords some of the same flexibility and service coverage through the State plan without a waiver.

The section 1915(k) benefit does not diminish the State's ability to provide any of the existing Medicaid home and community-based services. States opting to offer the CFC Option under section 1915(k) of the Act can continue to provide the full array of home and community-based services under section 1915(c) waivers, section 1115 demonstration programs, mandatory State plan home health benefits, and the State plan personal care services benefit. CFC provides States the option to offer a broad service package that includes assistance with ADLs, IADLs, and health-related tasks, while also incorporating transition costs and supports that increase independence or substitute for human assistance.

Additional important aspects of this background are the passage of the Americans with Disabilities Act of 1990 (Pub. L. 101–336, enacted July 26, 1990) (ADA), and the *Olmstead* v. *L.C.,* U.S. Supreme Court decision. In particular, Title II of the ADA prohibits discrimination on the basis of disability by State and local governments and requires these entities to administer their services and programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities. In applying the most integrated setting standard, the U.S. Supreme Court ruled in *Olmstead* that unnecessary institutionalization of individuals with disabilities constitutes discrimination under the ADA. Under *Olmstead,* States may not deny a qualified individual with a disability a community placement when: (1) Community placement is appropriate; (2) the community placement is not opposed by the individual with a disability; and (3) the community placement can be reasonably accommodated.

Finally, the self-direction service delivery model is another important aspect to the background of this provision and a key component of the CFC option. Two national pilot projects demonstrated the success of self-directed care. During the 1990's, the Robert Wood Johnson Foundation funded these projects which evolved into Medicaid funded programs under section 1915(c) of the Act and the ''Cash and Counseling'' national section 1115 demonstration programs. Evaluations were conducted in both of these national projects. Results in both projects were similar—persons directing their personal care experienced fewer unnecessary institutional placements, experienced higher levels of satisfaction, had fewer unmet needs, experienced higher continuity of care because of less attendant care provider turnover, and maximized the efficient use of community services and

supports. The DRA also established section 1915(j) of the Act which provided a State plan option for States to utilize this self-direction service delivery model without needing the authority of a section 1115 demonstration.

This rule finalizes many of the provisions set forth in the February 25, 2011 proposed rule, modifies some such provisions and allows that one provision, § 440.530 ''Setting'', will be subject to further comment.

**II. Analysis of and Responses to Public Comments on the Proposed Rule**

We received a total of 141 timely items of correspondence from home care provider representatives and other professional associations, State Medicaid directors, unions, beneficiaries, and other individuals. We received hundreds of individual comments within these items of correspondence, which ranged from general support or opposition to the proposed rule, to specific questions and detailed comments and recommendations regarding the proposed changes. A summary of our proposals, the public comments and our responses are set forth below.

*A. General*

*Comment:* Many commenters expressed support for the rule. Several commenters strongly believe that everything must be done to help keep individuals out of nursing homes and in the community. The commenters stated doing so will save taxpayer's money and increase the quality of life for individuals who receive services. The commenters believe individuals are valuable to communities and they deserve to have the ''cheaper'' option of staying home. Another commenter indicated that CFC could provide needed assistance to children with special health care needs and their families who wish to remain in their communities where they can direct their own service plan. Another commenter indicated that personal care is more humanely provided and more cost effective in the home rather than in an institution. The commenter believes infrastructure cost of running an institution and the need to protect the administration detracts from patient care efforts, and believes patient care becomes secondary to administrative function. Another commenter requests the CFC rule be implemented so that all disabled persons, such as the commenter's 31-year old son who is partially paralyzed by a stroke, have a choice of living their own life. Another commenter stated community-based reimbursed services provide access for the growing group of aging baby boomers. The commenter believes that CFC will support individuals in the setting appropriate to the individual's need and allow them to lead a more independent lifestyle. The commenters urged CMS to implement the final rule. One commenter was pleased the rule recognized the need for flexibility to ''meet States where they are'' with regard to the provision of home and community-based services with an eye toward expanding opportunities for consumers.

*Response:* We appreciate the commenters' perspectives.

*Comment:* A few commenters expressed opposition to the proposed rule. One commenter requested limiting excessive rules that would burden the States financially or would be time-consuming to implement. Another commenter believes CFC violates the 10th amendment of the United States Constitution by requiring States to perform services that the Federal Government is prohibited from doing by the Constitution. The commenter believes the regulation should be withdrawn.

*Response:* We disagree with the commenters' statement that the CFC program violates the 10th amendment of the United States Constitution. Section 1915(k) of the Act sets forth an option, not a mandate, for States to include such services in their Medicaid program.

We do not believe the regulation places excessive requirements on States, rather it provides States with the necessary guidance to implement section 1915(k) of the Act successfully. We also believe the regulation provides participant protections to ensure individuals exercise maximum control of home and community-based attendant services and supports.

*Comment:* One commenter expressed concern that section 1.B, Background of Home and Community-Based Attendant Services and Supports, omits the section 1930 Community Supported Living Arrangements program, which influenced the development of home and community-based services. The commenter believes this is an important cornerstone of the new program and should be included in the final rule.

*Response:* We agree that the section 1930 Community Supported Living Arrangement program has influenced the development of home and community-based services. However, we do not believe that its specific influence on the CFC option warrants inclusion in the final rule.

*Comment:* One commenter indicates that to implement CFC for the population eligible to receive home and community-based attendant services and supports, as well as to implement the array of services available to eligible individuals would be overly expansive. The commenter believes States would need additional staffing to assess the needs of the eligible CFC populations, develop and maintain the quality assurance systems, and report data. Another commenter expressed concern that the proposed rule creates some uncertainty about whether States can build upon existing State structures in delivering services under CFC.

*Response:* We recognize that States that do not currently have the infrastructure necessary to support implementation of CFC may experience higher initial administrative burdens and costs when designing their CFC program. We believe the enhanced FMAP provided under CFC will lessen the burden on States, allowing them to serve the population eligible for CFC. Additionally, States may use existing infrastructure, such as a current advisory council to act as the Development and Implementation Council, as long as the statutory requirements for the structure, composition, and collaborative and consultative role of the council are met.

*Comment:* One commenter wanted to know the impact CFC will have on the Early Periodic Screening Diagnosis and Treatment (EPSDT) benefit

*Response:* The EPSDT mandate under section 1905(r)(5) of the Act requires that any medically necessary health care service listed at section 1905(a) of the Act be provided to a Medicaid beneficiary under the age of 21 even if the service is not available under the State's Medicaid plan to the rest of the Medicaid population. CFC services are provided under section 1915(k) of the Act, which is outside the scope of section 1905(a) of the Act and therefore are not required under the EPSDT program. We note that this does not preclude a State from providing CFC services to any individual who meets the criteria to receive CFC services, regardless of age, and from receiving the added Federal support associated with providing CFC services. Furthermore, in addition to meeting EPSDT requirements through the provision of the section 1905(a) services, a State may also meet a particular child's needs under EPSDT through services that are also available through the section 1915(k) benefit.

*Comment:* One commenter expressed concern that the rule should include appeals for reductions in service based

on anything other than a documented change in need. The commenter indicated that his State allows requests for hearings, but stated that they are routinely denied. The commenter stated that the State's assurances with regard to due process are not reliable and recommended that there be a higher standard for the CFC option and other waivers with regard to appeals.

*Response:* We acknowledge the importance of a beneficiary's ability to appeal service reductions. States are required to adhere to the requirements specified in 42 CFR 431 subpart E for the Medicaid program in general, and for CFC specifically. It is important to note, however, that CFC is a State plan option and not an HCBS waiver.

*Comment:* One commenter explained that their State asserts they have no obligation to meet the client's needs in the community—only that the services authorized be indexed to actual needs. The commenter also stated that the risk of re-institutionalization is controlled by closing institutions, resulting in clients being placed into community placements without the same level of support provided in an institutional setting. The commenter believes that CMS ''turns a blind eye'' to these issues and that all waivers should respect the clients' rights to have their needs met in the community. Another commenter expressed concern that their State is intentionally limiting services and that the State has declared that they have no obligation to, or intention of, meeting the needs of vulnerable adults in the community. The commenter is concerned the choice guaranteed in the *Olmstead* decision is not upheld, and wonders why the Federal government goes through these pro-forma rulemaking processes when there is no intent to follow-up or enforce the ''reassuring words.''

*Response:* We want to clarify that the CFC is a State plan option, not a waiver. We respect the commenter's opinions, but do not agree with the commenter with regard to the Federal government not enforcing regulations or ignoring these important issues noted above. We also believe that the rulemaking process is a meaningful process that allows the public to have a voice in how laws passed by the Congress are implemented by CMS. We echo throughout the regulation that in implementing CFC, States must ensure that individuals are served in the most integrated settings appropriate to their needs. We have also worked closely with Medicaid beneficiaries, as well as States, over the years to assist in determining how the Medicaid program can support them in meeting their *Olmstead* obligations. This regulation will establish the parameters States must follow in implementing CFC. Additionally, the Data collection requirements described at § 441.580, and the Quality assurance system requirements described at § 441.585, require States to provide CMS with information regarding the provision of CFC services. We encourage all stakeholders to collaborate with States and CMS to ensure these parameters are met.

*Comment:* One commenter stated that to be consistent with *Olmstead,* personal choice is required to participate in the CFC option, and the proposed rule should be amended to expressly indicate this right and take care not to limit expressions of beneficiary choice to community options.

*Response:* We agree that personal choice is an important part of CFC and have taken steps throughout the regulation to illustrate its importance. Based on feedback received through the comment process, we have decided to amend language in the ''assessment of need'' and ''person-centered service plan'' sections, as described below, to strengthen this principle.

*Comment:* Another commenter stated that the current focus of their State's Home and Community-Based Services (HCBS) plans is on lowering costs, not meeting all the needs of individuals. The commenter is concerned that States have too much power and the CFC rule does not correct the imbalance between saving taxpayer money while still serving the needs of vulnerable adults.

*Response:* The Medicaid program is a State/Federal partnership. States have the flexibility to design and administer their Medicaid programs as long as they meet the Federal requirements set forth in the regulations. In addition, States have the choice of providing an array of optional services. The purpose of CFC is to afford States another option to provide home and community-based services as an alternative to institutional placement. This benefit is not like a waiver program in that it is not required to be cost neutral in terms of community versus nursing facility costs. While this program should not be viewed individually as the key to ensuring community access, it is an important tool for States to consider as they strive to meet their obligations under *Olmstead.*

*Comment:* We received many comments asking if CFC can be delivered through managed care under a section 1915(b) waiver authority, or a section 1915(b)/(c) waiver. One commenter expressed concern that the proposed rule does not reference the ability for States to deliver this rule's services through Medicaid health plans under a section 1915(b) waiver. The commenter believes that Medicaid health plans have demonstrated their ability to provide coordination across a range of services essential to facilitate the choice of community setting for individuals with disability. The commenter recommended CMS confirm in the preamble that States have the option of implementing the CFC option through Medicaid managed care programs. Another commenter requested States not be subject to additional limitations or restrictions if they elect to have a managed care organization administer their program.

*Response:* We are willing to consider the implementation of the CFC option through Medicaid managed care programs with a State interested in doing so; however, the State would need to ensure that the delivery system implemented through the (b) waiver would not impede the provision of services as specified in section 1915(k) of the Act. Therefore, we are not revising the regulation text.

*Comment:* One commenter requested clarification whether the additional 6 percentage point increase in Federal medical assistance percentage (FMAP) is for expenditures related to both direct services and administration.

*Response:* The 6 percentage point increase in FMAP is related to direct services only and does not apply to administrative costs.

*Comment:* One commenter expressed concern that regulatory requirements for CFC may be duplicative of, or in conflict with PACE regulations applicable to PACE organizations. The commenter requested clarification on the relationship of the PACE program and CFC for PACE participants who also meet the eligibility criteria for CFC. Specifically, the commenter questioned if home and community-based attendant services may be provided in a manner consistent with the PACE benefit under section 1934 of the Act. The commenter also questioned if PACE organizations may provide services under CFC under the agency-provider model or under another model established by a State.

*Response:* Section 1915(k) of the Act does not preclude PACE organizations, or any entity, from providing CFC services as a separate line of business, as long as provider qualifications established by the State are met. However, CFC is a separate and distinct program, with its own statutory and regulatory requirements, and may not be provided under the PACE authority.

*Comment:* One commenter requested CMS include a direct reference to a

State's obligation, in establishing processes for public notice and input, to comply with section 5006(e) of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5, enacted on February 17, 2009) (ARRA) prior to submission of a State plan amendment or other action under section 2401 of the Affordable Care Act that would have a direct effect on Indians or Indian health providers or urban Indian organizations.

*Response:* The consultation requirements of section 5006(e) of ARRA require solicitation of advice prior to submission of any State plan amendment, waiver request, or proposal for a demonstration project that is likely to have a direct effect on Indians, Indian Health Programs or Urban Indian Organizations, in any State in which one or more Indian Health Programs or Urban Indian Organizations furnishes health care services. These requirements apply to but are not unique to CFC. Therefore, we do not believe it is appropriate to include these requirements in this regulation specifically. CMS reviews State plan amendments, waiver requests, and demonstration proposals for compliance with the ARRA 5006(e) provisions.

*Comment:* One commenter requests Medicare expand options to allow individuals to stay at home.

*Response:* This rule implements section 2401 of the Affordable care Act, which is limited to the Medicaid program.

*Comment:* One commenter recommended CMS incorporate provisions within the CFC regulation to enable States to implement data systems to monitor the direct-care workforce.

*Response:* We believe the implementation of data systems to monitor the direct-care workforce would be an acceptable component of a State's Quality Assurance System. However, we do not believe there is a need to reference this specifically.

*Comment:* One commenter requests the term ''mentally retarded'' be replaced throughout the final document in its entirety with a term such as ''developmentally disabled'', ''individual with an intellectual disability'' or other more appropriate language.

*Response:* We appreciate the commenter's concern and note that the rule does not include the term ''mentally retarded'', but rather, includes the statutory term ''Intermediate Care Facility for the Mentally Retarded (ICF/MR).'' While CMS supports using the term ''individuals with intellectual disabilities,'' it would be beyond the scope of this regulation to change the statutory name of ICFs/MR. Since we are only using this term to refer to this specific setting, which has not been renamed in law, we do not believe we can make this change. However, in the October 24, 2011 **Federal Register**, we proposed in the Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction proposed rule to replace the term ''mentally retarded'' with ''intellectually disabled'' throughout our regulations.

*B. Basis and Scope (§ 441.500)*

We proposed to implement section 1915(k) of the Act, known as the CFC Option, to provide home and community-based attendant services and supports through the Medicaid State plan. We proposed the scope of the benefit include the provision of home and community-based attendant services and supports to eligible individuals, as needed, to assist in accomplishing ADLs, IADLs, and health-related tasks through hands-on assistance, supervision, or cueing.

*Comment:* One commenter indicated that CFC should be a mandatory benefit.

*Response:* Section 1915(k) of the Act amends the Medicaid statute to add CFC as an optional State Plan benefit, not a mandatory benefit. It is beyond the scope of a regulation to expand CFC to a mandatory benefit.

*Comment:* Many commenters stated that this section of the regulation should acknowledge that CFC is intended to make available home and community-based attendant services and supports to people with disabilities of all ages as an alternative to institutional placement. Another commenter stated the same, but also included individuals with serious mental illness.

*Response:* We agree with the commenters that the scope of CFC is to provide home and community-based services and supports as an alternative to institutional placement. Furthermore, we received comments supporting Congressional intent that all individuals receiving CFC services must meet an institutional level of care, consistent with the view that CFC is to provide services and supports as an alternative to institutional placement. We discuss this issue in further detail in the response to comments on Eligibility, § 441.510. We have revised the eligibility section to clarify that under the statute all individuals receiving CFC services must meet an institutional level of care; however, we do not believe it is necessary to revise the basis and scope section explicitly.

*Comment:* One commenter wanted to know if there is State flexibility to focus on a single modality (hands-on or supervision or cueing) or must all three modalities be covered.

*Response:* We believe the statutory language requires that all three modalities must be available to individuals.

*Comment:* One commenter stated that the regulation should allow for different ''benefit'' packages for people with different needs; for example, populations such as children versus adults, young adults versus older adults.

*Response:* Section 1915(k)(3)(B) of the Act requires that services must be provided without regard to the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports the individual requires to lead an independent life. Therefore, States may not differentiate the benefit package; however, services must be provided to individuals based on their needs.

*Comment:* A few commenters expressed concern with a State's ability to limit the amount, duration, and scope of CFC. One commenter believes States make arbitrary and capricious reductions in services due only to budget constraints. These reductions result in an individual's reliance on ''informal care contracts'' paid by the individual's small income to fill the gap of needed services. Another commenter expressed concern that States who take advantage of this new option may impose unnecessary restrictions on families (such as limiting in-home nursing supports to children who are on ventilators).

*Response:* CFC is a State plan optional service and States may set limits on the amount, duration and scope of services, as long as the amount, duration and scope are sufficient to reasonably achieve the purpose of the service. In addition, these limits must be applied without regard to the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life. We will be reviewing all State proposals to implement CFC under the State plan. Our review will include a review of any proposed limitations.

*Comment:* One commenter requested clarification of what is meant by ''severity of disability'' and asked if this definition would preclude limiting the CFC to the ''severely impaired'' population. In addition, this commenter raised the concern that if the definition does preclude limiting CFC population, States would lose the ability to ''effectively utilize CFC to serve unique populations.''

*Response:* As stated above, section 1915(k)(3)(B) of the Act indicates that the services must be provided on a statewide basis without regard to the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life as specified in § 441.515. Based on this requirement, the CFC population cannot be limited based on type or severity of disability, as long as the individual meets the eligibility requirement set forth in § 441.510. States cannot refuse access to CFC, or the ability to self-direct CFC services and supports, because of the severity of an individual's needs.

After consideration of the public comments, this section is being finalized without revision.

*C. Definitions (§ 441.505)*

We proposed several definitions specific to CFC.

*Comment:* Many commenters applauded CMS for prefacing the list of ADLs with ''including, but not limited to.'' The commenters believe this language recognizes that individuals may have additional needs for support.

*Response:* The intent of CFC is to assist individuals with receiving services necessary to have a lifestyle that is integrated into their community. Therefore, we do not believe it is appropriate to specify a prescriptive list that may not address each person's individualized needs.

*Comment:* One commenter wanted to know if States are allowed to define ADLs more expansively by adding activities since the definition of ADLs includes the phrase ''but not limited to.''

*Response:* Through the State Plan Amendment (SPA) process, States have the flexibility to propose additional factors to be included as components of ADLs.

*Comment:* A few commenters suggested removing the term ''self-directed'' from the definition of ''agency-provider model.'' The commenters believe the use of this term with the agency-provider model implies that services will be restricted to individuals who can fully manage services and supports, and will not allow individuals who are unable to fully manage them, or who do not wish to do so, from receiving services under the agency-provider model.

*Response:* We believe the commenter is applying a different definition of ''self-direction'' than what is specified within this rule. Section 1915(k)(6)(B) of the Act used the term ''consumer controlled'' to mean a method of selecting and providing services and supports that allow the individual, or where appropriate, the individual's representative, maximum control of the home and community-based attendant services and supports, regardless of who acts as the employer of record. In the preamble of the proposed regulation, we elected to use the term self-directed rather than consumer controlled to be consistent with terminology in other Medicaid provisions. We interpret this to mean that all CFC services are self-directed and it is up to the individual to determine the level of self-direction they want to have. Therefore we are not adopting the commenter's suggestions.

*Comment:* Several commenters requested more clarification around the ''agency-provider model.'' A few commenters wanted to know if the agency-provider model is the same as what is sometimes referred to as a ''co-employment'' model. One commenter disagreed with the proposed definition stating that an agency-provider model does not mean that an entity contracts for the provision of services and supports. The commenter states the agency-provider model has to do with who the employer is. The commenter also states that under an agency-provider model, the individual can still select, train, manage, and dismiss an attendant care provider. When the attendant care provider is dismissed, the attendant care provider is still employed by the agency and can be selected by someone else.

*Response:* The definition in the rule is from section 1915(k)(6)(C)(i) of the Act. In the preamble of the Service Model section of the proposed rule, we construed the ''agency-provider model'' to mean ''traditional agency model'' and an ''agency with choice'' model. Under the traditional agency model, the individual retains hiring and firing authority of personal care attendants, with regard to the receipt of services from a specific personal care attendant. In other words, the employment relationship between the personal care attendant and the agency does not change. The agency with choice model utilizes a co-employment relationship between the individual and an agency. We acknowledge that not all agency-provider models utilize a contractual relationship between the agency-provider entity and the State Medicaid agency for the provision of services. Rather, it is more common for a provider agreement to be used. Therefore, we are modifying the agency-provider definition to better reflect the various arrangements through which the provision of personal attendant services may occur. We will also modify the language at § 441.545(i) to reflect this change. Additionally, we acknowledge the confusion caused by our use of the terms ''hire'' and ''fire.'' We will replace such terms with ''select'' and ''dismiss'' throughout the regulation, as appropriate. We appreciate the commenter's description of an agency-provider model and believe it is one example of an agency-provider model that falls within the definition in the rule. We believe the definition in the rule is broad enough to encompass the various agency-provider types that exist.

*Comment:* We received a few comments requesting that we define the agency-provider model in a way that clearly includes States that provide long term care services and supports directly through public authority entities instead of private contractual arrangement.

*Response:* It is our understanding that the structure of the long-term care services and supports provided through public authority entities varies among States. It is possible that one State's public authority entities could meet the definition of an agency-provider type while another State's public authority entities meet the definition of ''other model.'' For this reason, we are requesting States to provide a description of such entities during the SPA process.

*Comment:* One commenter suggests we add ''as defined by the State and approved by the Secretary'' into the definition of ''backup systems or supports'' to ensure consistency with other home and community-based service programs.

*Response:* We do not agree the suggested language is necessary. All State plan amendments will require adherence to this regulation's service definitions and will be approved by CMS.

*Comment:* Some commenters suggested medication management be included to the definition of ''backup systems.'' Other commenters requested the definition be revised to ensure coverage of a broad variety of health support technologies, such as telehealth, independent living technologies, and remote patient monitoring. The commenter advised that currently 44 States reimburse for Personal Emergency Response Systems (PERS), 16 States reimburse for medication management technology, 1 State reimburses for home telecare/remote monitoring, and 7 States reimburse for home telehealth/telemonitoring under sections 1905(a), 1915, or section 1115 of the Act. The commenter states that it is important that all these technologies that ensure continuity of services and

supports are also available under CFC. One commenter requested that PERS, medication management technology, telecare/remote monitoring and telehealth/telemonitoring should be included in the definition of ''backup systems and supports.''

*Response:* Section 1915(k) of the Act indicates the purpose of backup systems or mechanisms is to ensure continuity of services and supports. We do not believe medication management complies with the intent of backup systems and supports; however, it could be a component of personal attendant services, or another Medicaid service. We agree with the commenters that telemedicine could be a useful method of providing backup systems or supports. We are available to discuss a State's interest in using such technology for this purpose, but do not believe the rule should be revised to specifically indicate this. Therefore, we are not revising the definition of backup systems to include explicit reference to medication management and telemedicine technologies.

*Comment:* We received many comments requesting that we expand the definition of ''backup systems and supports'' to include other approaches, such as written backup plans, action plans such as calling emergency agencies or personal emergency contacts, contacting other systems that support individuals in identifying backup attendant care providers when regularly scheduled attendants are unavailable, or other necessary planning to deal with a variety of possible situations which require additional services or supports. The commenters also added that backup systems should apply to all service models, stating that although backup systems are most often considered in the context of self-directed services they also apply to services and supports delivered through an agency-provider model.

*Response:* We agree with the commenters that backup systems and supports may include approaches in addition to electronic devices. This belief is supported by the inclusion in the definition described in the proposed rule of allowing people to be included as backup supports. Additionally, we agree that each individual, regardless of service delivery model, should have a backup plan to address how emergencies and unplanned events affecting the continuity of services will be handled. This belief is supported in the requirement of backup strategies as a measure of risk mitigation included in the person-centered service plan, which is required for all CFC participants regardless of service delivery model. We are modifying the requirements of the person-centered service plan to remove the ''as needed'' language, to indicate that all individuals should have an individualized backup plan.

*Comment:* One commenter noted that the rule requires backup systems be made available but excludes assistive technology devices and assistive technology services.

*Response:* Section 1915(k)(1)(C)(iii) of the Act indicates that assistive technology devices and assistive technology services are excluded, other than those under section 1915(k)(1)(B)(ii) of the Act. This authorizes the coverage of such devices and services when used as part of a backup system or mechanism to ensure continuity of services and supports.

*Comment:* One commenter asked that CMS clarify in both the preamble and regulatory text, whether cell phones, hand-held communication devices such as smartphones, and computers that allow participants to communicate with providers of home and community-based attendant services would be allowable expenditures. Another commenter recommended the definition include language explicitly stating that smartphones and more generally, any useful emerging applications or technologies which will become available, are allowable.

*Response:* We do not believe it is necessary to mention specific types of technology. To allow for the inclusion of future developments, we will replace the term ''pager'' with ''an array of available technologies.'' We believe the broad definition will support the inclusion of technological advances as they are developed.

*Comment:* One commenter requested clarification regarding the circumstances in which it would be appropriate for a State to reimburse expenditures for CFC services furnished by a person who is an identified backup support. The commenter also requested that CMS provide guidance on what back up support services a person can provide.

*Response:* The State may reimburse for any CFC service identified on the approved person-centered service plan, including those provided by a backup support person. However, the backup support person would need to be recognized by the State as an appropriate provider of CFC services and supports, for the State to reimburse those expenditures.

*Comment:* One commenter requested clarification regarding how the definition of ''health-related tasks'' as tasks that can be delegated or assigned by licensed professionals might interact with a State's statutory exemption from the Nurse Practice Act delegation requirements for health maintenance activities under a self-directed model. Specifically, the commenter questioned if the State is required to conform to the delegation expectation as defined. Another commenter suggested the definition for ''health-related tasks'' should include tasks that are exempted from State law and/or licensure requirements.

*Response:* The definition of ''health-related tasks'' specifies that tasks delegated or assigned by licensed professionals may be provided under CFC as long as the task being delegated is done in accordance with the State law governing the licensed professional delegating the task. Recognizing the variance among State laws governing the specific tasks licensed health-care professionals may delegate, we do not believe we should impose requirements that could cause a licensed professional to be out of compliance with the State law in which they provide services. We do acknowledge that this State variance will lead to a varied scope of activities meeting the definition of ''health-related tasks.''

*Comment:* One commenter questioned if a State can offer more than one self-directed option under different authorities of section 1915 of the Act where an item of specific difference is the delegation requirement.

*Response:* In addition to the section 1915(k) authority, self-directed services may be provided under other section 1915 authorities such as the section 1915(c) HCBS waiver authority, section 1915(j) Self-directed Personal Assistance Services Program State Plan Option, and section 1915(i) HCBS Plan Option. Each of these authorities has its own regulatory requirements that must be met, and each may be operated simultaneously with CFC as part of a State's Medicaid program. However, the 6 percent additional FMAP only pertains to services authorized under CFC.

*Comment:* One commenter requested clarification as to whether the definition of ''individual's representative'' would allow a State to select a self-direction model that limits direction by representatives, for example, to parents of minor children.

*Response:* Section 1915(k)(1)(A)(iv)(II) of the Act requires that services are controlled, to the maximum extent possible, by the individual or where appropriate, the individual's representative. It is an expectation that this control exists regardless of whether the individual is personally able and has chosen to make his or her own

decisions and direct his or her own services and supports, is represented by someone such as a guardian or parent who is authorized to make decisions for him or her under the laws of the State, or has selected or appointed a representative. This is true regardless of the service delivery model. The State may not place a limit on this statutory requirement.

*Comment:* Many commenters suggested the definition of ''individual's representative'' explicitly include spouse and partner. The commenters also suggested the definition specify that an authorized individual is someone who has been designated by the participant or family to represent the participant to the extent the participant wishes. One commenter requested the definition include paid and unpaid individuals chosen by the individual or family. One commenter requested the language be clear that the designation made by the individual does not require a formal process (such as guardianship). One commenter requested that we revise the definition of ''individual's representative'' to include a broad definition of ''family'' that recognizes a same-sex partner or a child of a partner as members of the individual's family. The commenter also requested the rule use the Office of Personnel Management's definition of ''family member.''

*Response:* In defining the term ''individual's representative'' we are aware that States have a variety of laws regarding selection, appointment, designation, or recognition of surrogate decision-makers with respect to personal, financial, and health care matters. We are not requiring a formal process for the appointment of an authorized representative for the purposes of CFC, but are aware that States may have procedures and requirements that may apply. We do not agree with the suggestions to amend the definition further to list specific relationships an individual may have, as we believe this could be inconsistent with the laws of the State, or overly prescriptive on an issue that is deeply personal and highly individualized. We believe the definition we proposed is broad enough to allow individuals the opportunity to exercise maximum choice with respect to the individual who will act as their representative. In some instances, the individual's representative under State law would have the authority to designate another individual as the representative for the purpose of participating in the planning and direction of services and supports under CFC. We expect the State to recognize the representative chosen by the individual if that choice is not inconsistent with State laws unless the State is aware of and can document through evidence that the representative is not acting in the best interest of the individual or is unable to perform the required functions. To reduce redundancy throughout the regulatory language, we are adding a definition for the term ''individual'' to mean the eligible individual and, if applicable, the individual's representative.

We are not requiring in this rule that an authorized representative be chosen using a formal process, such as a court-appointed guardian, or the execution of a Power of Attorney. The authorized representative may be any person an individual chooses to assist him or her in making decisions regarding his or her care unless that choice is prohibited by State law. We also note that § 435.908 provides that the single State Medicaid agency must allow an individual of the applicant's choice to accompany, assist and represent the application in the Medicaid eligibility application or renewal process. The individual assisting in the Medicaid application or renewal process need not be the same individual chosen in connection with the provision of services under section 1915(k) of the Act.

*Comment:* Many commenters requested the rule specify that the authorization of an individual's representative should be in writing or in some other verifiable manner. The commenters expressed concern that someone may say they are the authorized representative when they are not. The commenters believe a written authorization is necessary to assure a purposeful and clear authorization, as well as to eliminate confusion if several individuals state that they represent a person with a disability.

*Response:* We agree with the commenters that a written authorization is generally an appropriate safeguard to ensure individuals have an active role in electing a representative of their choice. Accordingly, we have revised the definition of individual representative as follows: ''a parent, family member, guardian, advocate, or other authorized representative of the individual with written authorization, when feasible, by the individual to serve as a representative.'' We note that a legal guardian would not need to obtain written authorization by the individual to serve as a representative. Likewise, it is not practical to require a minor child to provide written authorization for a parent to serve as a representative. States must have methods in place to ensure the individual was maximally involved in the choice of his or her representative, particularly in instances in which the individual is unable to provide written authorization.

*Comment:* One commenter questioned if an individual's representative assisting the individual to self-direct and manage their services can be paid as part of the service plan.

*Response:* Individuals acting as a representative are not paid to do so. Individuals acting as a representative also should not be a paid caregiver of an individual receiving CFC services and supports. This arrangement was prohibited in the section 1915(j) regulation, to avoid a conflict of interest. We are modifying the definition of ''Individual's representative'' to continue this prohibition.

*Comment:* One commenter indicated that the proposed language broadens the definition of IADLS from the definition in the SMM. The commenter recommends the rule use the SMM definition, and added that if we do not align the definition with the SMM, we clarify what is meant by ''traveling around and participating in the community.''

*Response:* We defined IADLs from the language used in section 1915(k)(6)(F) of the Act. We believe ''traveling around and participating in the community'' alludes to the premise that CFC services and supports should facilitate an individual's desire to be fully integrated into their community and not limit the provision of services to an individual's residence.

*Comment:* One commenter suggested the definition for IADLs include activities such as work life, parenting and basic home maintenance.

*Response:* We appreciate the commenter's suggestion, however, since the IADL definition includes the language, ''but is not limited to'' which allows for the inclusion of additional activities determined appropriate for the individual, we do not agree that a change to the definition is needed.

*Comment:* One commenter stated that the definition of IADLs includes the phrase ''but not limited to'' and asked if States be allowed to define these terms more expansively by adding activities to the definitions.

*Response:* Through the SPA process, States have the flexibility to propose additional services to be included as components of IADLs.

*Comment:* One commenter requested confirmation that since the definition of IADLs include managing finances, the financial management services defined at § 441.545(b)(1) can be included as an IADL. The commenter also adds that if these activities are permissible IADLs, then it is a required service under

§ 441.520(a)(1) and (2), meaning that States must provide them.

*Response:* Managing finances as an IADL activity pertains to assisting an individual with the management of personal finances. We believe such assistance is beyond the scope of the financial management activities defined at § 441.545(b)(1) which is for the exclusive purpose of assisting an individual to ensure CFC service budget compliance with regulatory requirements, and is only for those individuals in a ''self-directed model with service budget'' delivery system.

*Comment:* One commenter stated the definition for ''other models'' is not clear. The commenter asked for clarification as to whether States whose self-direction model recognizes the consumer as the employer, with the authority to hire and terminate employees, and makes available consumer and attendant care provider training opportunities, would meet the definition of ''other models.''

*Response:* Section 1915(k)(6)(C)(ii) of the Act defines other models as methods other than an agency-provider model, for the provision of consumer controlled services and supports. Such models may include the provision of vouchers, direct cash payments, or use of a fiscal agent to assist in obtaining services. Under the ''Service Models'' section of the preamble, we interpreted ''other models'' to mean ''self-directed model with service budget.'' We further described self-directed model with service budget in § 441.545(b)(1), (b)(2) and (b)(3). Based upon the commenter's information, it is difficult for us to determine if the model described would meet an agency-provider model or the self-directed model with service budget. We recognize that States utilize various models to provide individuals with different levels of self-direction to receive personal attendant services. It is possible for States to use existing models under either category, as long as the models meet the requirements of § 441.545.

To eliminate any confusion, we are adding a definition of ''Self-directed model with service budget'' to mean ''methods of providing self-directed services and supports using an individualized service budget. Such models may include the provision of vouchers, direct cash payments and/or the use of a fiscal agent to assist in obtaining services.''

To permit States to propose additional service delivery models not envisioned in this regulation, we will amend the definition of ''other models'' to mean ''methods other than an agency-provider model or the self-directed model with service budget, for the provision of self-directed services and supports, as approved by CMS.'' We will work with States through the SPA review process to review proposed models.

*Comment:* One commenter requested the regulation provide a definition for the term ''vouchers.''

*Response:* For the purpose of CFC, vouchers are given a specific monetary value to be used for a specific good or service. They are used in various forms, such as tokens, or tickets. We believe the use of vouchers is common among State programs and the form varies greatly. We believe the term ''voucher'' should be defined by the State if they elect to use this structure.

*Comment:* Several commenters shared their support of the ''self-directed'' definition included in the rule. One commenter recommended the definition of ''self-directed'' should specifically say that the individual or representative has control to hire, train, supervise, schedule, determine duties, and fire the attendant care provider.

*Response:* The definition reflects the language at section 1915(k)(6)(B) of the Act. However, we agree with the commenter the definition should include the specific tasks an individual should have authority to do when self-directing CFC services. Therefore, we have revised the definition to say: ''Self-directed means a consumer controlled method of selecting and providing services and supports that allow the individual maximum control of the home and community-based attendant services supports, with the individual acting as the employer of record with necessary supports to perform that function, or the individual having a significant and meaningful role in the management of a provider of service when the agency-provider model is utilized. Individuals exercise as much control as desired to select, train, supervise, schedule, determine duties, and dismiss the attendant care provider.''

Upon consideration of the public comments received, we are finalizing § 441.505 with revision to the definition of ''individual'' to incorporate the individual's representative as applicable, to add the definition of ''Self-directed model with service budget'' and to modify the definitions of ''agency-provider model'', ''backup systems and supports'', ''individual's representative'', ''other models'' and ''self-directed.''

*D. Eligibility (§ 441.510)*

Section 1915(k)(1) of the Act requires that to receive services under CFC, individuals must be eligible for Medicaid under an eligibility group covered by the State plan. This section does not create a new eligibility group but rather a new benefit option. Individuals who are not eligible for Medicaid under a group covered under the State Medicaid plan are not eligible for the CFC, even if they otherwise meet the requirements for the option. The proposed rule interpreted the statute as providing that individuals eligible under the State Medicaid plan whose income does not exceed 150 percent of the FPL are eligible for CFC without requiring a determination of institutional level of care. In determining whether the 150 percent of the FPL requirement is met, the regular rules for determining income eligibility for the individual's eligibility group under the State plan apply, including any income disregards used by the State for that group under section 1902(r)(2) of the Act. We proposed that individuals eligible under the State Medicaid plan whose income is greater than 150 percent of the FPL are eligible for CFC if it has been determined such individuals need the level of care required under the State Medicaid plan for coverage of institutional services. Specifically, we proposed that States must determine that, but for the provision of the home and community-based attendant services and supports, the individual would require the level of care provided in a hospital, a nursing facility, intermediate care facility for the mentally retarded or an institution for mental diseases, the cost of which would be reimbursed under the State plan. Additionally, we proposed that individuals who are eligible for Medicaid under the special home and community-based waiver eligibility group defined at section 1902(a)(10)(A)(ii)(VI) of the Act could be eligible to receive CFC services. We stated that these individuals would have to receive at least one section 1915(c) home and community-based waiver service per month. As we interpreted the statute in the proposed rule, the need for a level of care determination would be directly related to an individual's income level in section 1915(k)(1) of the Act. Thus we proposed to require an annual verification of income for all individuals receiving services under the section 1915(k) State plan option. We proposed to implement this requirement at § 441.510.

*Comment:* We received many comments both in support and opposition of the proposed language specifying the institutional level of care requirement. Two commenters supported the proposed eligibility

language because they believe it gives States the opportunity to prevent or delay institutional care, and that providing better integration and coordination of services in less costly settings creates the potential for significant cost savings. Some of the commenters believe that by not requiring all individuals to meet the standards for an institutional level of care, States would have the option of using CFC program funds for less needy individuals who cost less to serve. One commenter believes the eligibility language furthers the spirit of the *Olmstead* decision. Several commenters indicated that some States use nursing facility level of care assessments that do not consider the cognitive impairments of individuals, such as those with traumatic brain injury or Alzheimer's Disease and that these individuals may not be able to conduct ADLs without cuing or compensatory strategies. Several commenters supported the provision specifying that the institutional level of care standard should only be applied to individuals with incomes above 150 percent of the FPL, and such a limiting requirement should not be applied to individuals with incomes at or below 150 percent. One commenter indicated that this population is especially vulnerable, with the poorest health status and the least resources to pay for services and supports. Some commenters expressed concern with the requirement that the level of care determination only applies to individuals whose income is above 150 percent FPL. Commenters indicated that section 1915(k) of the Act is based upon the Community Choice Act [legislation introduced in the 110th (H.R. 1621/S. 799) and 111th (H.R. 1670/S. 683) Congress, but not enacted] which required all eligible individuals to have an institutional level of care. The commenters believe that requiring States to serve individuals with both institutional and non-institutional care needs could have the unintended effect of driving up the cost of implementing this program, and expressed concern that this will be a major deterrent for States to elect CFC.

While many of the commenters acknowledged the statutory language is confusing, these commenters believe the interpretation provided in the regulation does not reflect Congressional intent. They indicated that the intent of the provision was to make CFC available only to individuals requiring an institutional level of care with the goal of deterring institutionalization or encouraging transitions for institutionalized individuals back to the community. Some commenters provided legislative history to support this conclusion. The commenters indicated the income eligibility was intended to match the State's income eligibility for institutional placement, stating that 150 percent of the poverty line is established as a baseline for all States, but if a State allows a higher income level for nursing facility services then the higher income eligibility is what applies. The commenters indicated that the intent was to assure that if an individual could be income eligible for institutional placement then the individual would be income eligible for this benefit. The commenters believe this interpretation is underscored by the requirement in the statute that individuals be given a choice to receive the transitional services, described in section 1915(k)(1)(D)(i) of the Act, which only applies to the population who would be otherwise eligible for institutional placement.

One commenter requested we not apply an institutional level of care to anyone. Another commenter believes the requirement for individuals with incomes above 150 percent of the FPL to meet a nursing facility level of care is more restrictive than some State's existing financial criteria for some eligibility groups (for example, working disabled). Because of this, the commenter believes that many individuals eligible for State plan services would not be eligible for CFC. The commenter requested we reconsider requiring individuals to meet a nursing facility level of care so that those who are in need are not left out.

Some commenters recommended the rule be amended to require States to limit eligibility to individuals with income of up to 300 percent of the maximum Federal SSI benefit and an institutional level of care need. The commenters suggested that only after a State addresses this eligibility group, may a State opt to expand the eligibility to serve lower income persons who do not have an institutional level of care need. Furthermore, the commenters recommended amending the regulation to allow States the option to only cover individuals who have an institutional level of care need.

Several commenters requested clarification on the flexibility States have to limit who can receive CFC services. Several commenters expressed concern that States should not be allowed to establish a CFC program that only serves low income individuals who do not have to meet an institutional level of care.

One commenter indicated the eligibility language in § 441.510(b)(2) appears to be inconsistent with the eligibility language in the ''Background'' section. The commenter stated that being eligible for nursing facility services in Medicaid differs from requiring an institutional level of care. For example, an individual with a developmental disability may require an institutional level of care at an ICF/MR, but that individual would not be eligible for nursing facility services. The commenter recommended the regulation expressly state that an individual must be eligible for nursing facility services or require an institutional level of care. Another commenter requested clarification around the institutional level provided in an institution for mental diseases (IMD). The commenter stated that IMDs are a payment exclusion, not a facility type, service or level of intensity.

One commenter indicated that it appears that the first reference to eligibility for NF services may be redundant in § 441.510(b)(2), and requests we remove or provide clarification as to its purpose.

*Response:* The statute specifically sets forth the eligibility requirements for CFC. In our proposed rule, we interpreted the statute based on reading the clause ''* * * and with respect to whom there has been a determination that, but for the provision of such services, the individuals would require the level of care provided in a hospital, a nursing facility, an intermediate care facility for the mentally retarded, or an institution for mental diseases * * *'' to pertain only to the phrase immediately preceding it, which describes individuals with incomes greater than 150 percent of the poverty line. However, based on many comments, including those from the Congressional sponsors of CFC and from advocacy groups from the disability community, we have reconsidered the interpretation of the statute discussed in the proposed rule. We believe that the language, purpose, and history of the statute require a different interpretation. Commenters outlined the detailed historical efforts to have similar legislation passed since the 105th Congress and cited statements made during the 111th Congress' health reform debate, that the intent of section 1915(k) is to develop a program that improves access to community-based alternatives for individuals requiring services at an institutional level of care. Thus, the requirement in section 1915(k)(1) of the Act that the individual require an institutional level of care should be read as an independent requirement, and not as a requirement that modifies only the higher income

level. After careful review and consideration of the comments, we agree that section 1915(k)(1) of the Act should be read to require that an institutional level of care determination apply to all individuals who would be eligible for community-based attendant services and supports. Thus, we are issuing this interpretive rule to clarify that under the statute the institutional level of care requirement applies to those described earlier in the paragraph whose income does not exceed 150 percent of the poverty line, as well as to those with higher incomes. For individuals whose income is above 150 percent of the FPL, the individual must be part of an eligibility group that provides access to the nursing facility benefit.

We are revising § 441.510 to state that, regardless of income, for individuals to receive CFC services, it must be determined, on an annual basis, that but for the provision of CFC services, the individual would meet an institutional level of care. We are also revising § 441.510 to allow States, at their option, to waive the annual level of care requirement if the State, or designee, determines that there is no reasonable expectation of improvement or significant change in the participant's condition because of the severity of a chronic condition or the degree of impairment of functional capacity. Lastly, we acknowledge the confusion created by using the term ''level of care furnished in an IMD''. We are revising § 441.510 to specify that this means a level of care furnished in ''an institution providing psychiatric services for individuals under age 21'' and ''an institution for mental diseases for individuals 65 or over''. This clarification is now expressed at § 441.510(d).

*Comment:* One commenter questioned whether CFC is an entitlement program.

*Response:* The CFC program is an optional service available under the Medicaid program. States have the choice of whether to include this service in their Medicaid State plan. As an optional service, States also have the flexibility of offering this service to individuals qualifying for Medicaid under the categorically needy group only, or to both the categorically and the medically needy under the Medicaid State plan. Once the service is offered under a State plan, all eligible individuals who qualify for the service must be provided the care.

*Comment:* We received many comments requesting clarification on whether CFC established a new eligibility group. Several commenters specifically requested that we allow States, at their discretion, to make the CFC population a separate categorical population for the purposes of automatically qualifying for Medicaid. The commenters stated this would allow people in need of CFC services to qualify for Medicaid in the same way individuals qualify for nursing facility services, HCBS waiver services, and HCBS State plan (section 1915(i)) services. The commenters believe the proposed regulation's language for access to CFC is more limited. The commenters do not believe that the Congress intended the eligibility pathways to CFC to be inferior to the pathways of other similar services and programs. Additionally, commenters noted that a separate CFC eligibility category is needed to allow individuals who could qualify for Medicaid in the medically needy category to receive CFC services in States that do not provide State plan services to the medically needy eligibility category. Another commenter believes the statutory language authorizes eligibility for a special-income level categorical population. Specifically the commenter believes the following statutory language ''individuals who are eligible for medical assistance under the State plan whose income does not exceed 150 percent of the poverty line, or, if greater, the income level applicable for an individual who has been determined to require institutional care'' is a clear reference to the special income level categorical populations authorized by 42 U.S.C. § 1396a(a)(10)(A)(ii)(V) and (VI) (relating to institutionalized individuals and HCBS waiver recipients, respectively). The commenter believes this language demonstrated Congressional intent to allow States to make the CFC benefit available to individuals with incomes up to 300 percent of the Federal SSI benefit rate, the same way that States may make nursing facility services, HCBS waiver services, and HCBS State plan benefit services available to them. In addition to the CFC statutory language, the commenter believes that the statutory language in the Deficit Reduction Act and the Affordable Care Act show that the Congress intended to create a new, income-based categorical eligibility population for HCBS State plan and CFC beneficiaries. The commenter believes that failure to create a separate categorical eligibility for CFC would result in unfair outcomes for beneficiaries. The commenter believes CMS has discretion to authorize separate eligibility categories. Another commenter requests clarification of the meaning of ''eligible for medical assistance under the State plan'' with regard to States that have opted to use the special income standard at section 1902(a)(10)(A)(ii)(V) of the Act for institutionalized individuals. The commenter believes the CFC statute and the proposed regulation would prohibit access by those who would only be eligible for Medicaid by virtue of residing in a medical institution.

*Response:* Section 1915(k) of the Act did not amend section 1902(a)(10) of the Act to the establish a new eligibility group of individuals receiving 1915(k) services. Section 1915(k) of the Act created new pathways for Medicaid eligible individuals to receive home and community-based attendant services and supports. To receive services under 1915(k), individuals must be eligible for medical assistance under the State's Medicaid plan, must meet an institutional level of care, and be in an eligibility group under the State plan that includes nursing facility services. If the individual is in an eligibility group under the State plan that does not provide coverage of nursing facility services, the individual must have income that is at or below 150 percent of the federal poverty line.

*Comment:* One commenter believes that individuals must only be *eligible* for section 1915(c) HCBS waivers or section 1115 demonstrations, rather than be enrolled and receiving waiver services, to be eligible for CFC.

*Response:* Section 1915(k)(1) of the Act provides that individuals must be eligible for Medicaid under an eligibility group covered by the State plan. As noted above, to be eligible for Medicaid under the special HCBS waiver group, individuals must receive at least one section 1915(c) waiver service per month.

*Comment:* One commenter requested with regard to § 441.510(b)(3), we confirm that there is not an eligibility group specific to waiver programs, but that section 1902(a)(10)(A)(ii)(V) of the Act allows individuals in institutions to be eligible under the 300 percent Special Income Group and section 1902(a)(10)(A)(ii)(VI) of the Act allows for application of the 300 percent Special Income Group to those individuals receiving HCBS as an alternative to institutional care.

*Response:* We included the reference to the special income group in the CFC regulation to highlight that States may offer section 1915(k) services to individuals who qualify for Medical assistance under the special home and community-based waiver eligibility group defined at section 1902(a)(10)(A)(ii)(VI) of the Act and who receive at least one home and

community-based waiver service per month. The special income group is an example of an eligibility group States may cover under the special home and community-based waiver group. It is our intent to permit people in section 1915(c) home and community-based waiver programs to receive section 1915(k) services also. We are moving this language to § 441.510(e), removing paragraph (b)(3), and making a technical correction to replace the term ''Medicaid assistance'' with ''medical assistance.''

*Comment:* One commenter requested we clarify whether an individual qualifying for Medicaid under the Family and Children's and Medicare savings eligibility categories are eligible to receive CFC services.

*Response:* Individuals must be eligible for Medicaid under an eligibility group covered by the State plan. If these are eligibility groups the State covers under its Medicaid State plan, they could be eligible to receive services under CFC as long as the individuals meet all other eligibility criteria. However, we note that Medicare beneficiaries eligible for Medicaid only for Medicare cost-sharing, such as Qualified Medicare Beneficiaries, would not be eligible for CFC services unless they are eligible for full Medicaid benefits under another State plan group.

*Comment:* Some commenters requested we clarify whether a State is required to cover all of the income levels defined at § 441.510 or whether a State could limit eligibility to only one or two of the income levels. One commenter questioned if a State could exclude State plan individuals qualifying under the medically needy group from receiving CFC services.

*Response:* If an individual is eligible for medical assistance under the State plan, meets an institutional level of care; and is part of an eligibility group with access to the nursing facility benefit (or if part of an eligibility group without access to the nursing facility benefit with an income at or below 150 percent FPL) then the State must allow the provision of CFC services if the State elects to include the CFC state option as part of its State plan. Please note that CFC is an optional service, therefore, as with any other optional service available under the State plan, it is at the State's discretion to provide these services to the medically needy group in addition to the categorically eligible group.

*Comment:* Some commenters questioned if a State has the flexibility to limit CFC recipients to their current FPL or whether they would have to expand to 150 percent FPL. Another commenter questioned if a State could impose stricter eligibility than 150 percent of the FPL.

*Response:* Section 1915(k) of the Act does not permit States to increase income standards or to impose stricter income standards for covered eligibility groups. If the income standard for a covered group is less than 150 percent of the FPL, States may not increase it or decrease it for individuals who will receive CFC services.

*Comment:* One commenter requested clarification regarding eligibility groups that are automatically eligible for Medicaid without regard to income, and the application of the 150 percent limit above which institutional level of care is required. For example, some States provide eligibility without an income test to children eligible for foster care or adoption assistance, women receiving treatment for breast or cervical cancer, and individuals with section 1619(a) or (b) status. The commenter requests clarification as to whether States are required to identify income for these groups to determine eligibility for CFC services, or whether States should assume that all individuals in these ''automatic'' categories are eligible, regardless of level of care status.

*Response:* As indicated above, we have revised the regulation to require all individuals receiving CFC services to meet an institutional level of care. Individuals who meet the eligibility requirements for a Medicaid group for which the State provides full State plan services may receive CFC services if: (a) They satisfy the institutional level of care requirement; and (b) they are in an eligibility group that includes nursing facility services under the State plan, or, if their eligibility group does not include nursing facility services under the State plan, their income is at or below 150 percent of the FPL.

*Comment:* One commenter requested clarification on what is considered a ''special population.''

*Response:* We did not use the term ''special population'' in the preamble or regulatory text. If the commenter is referring to our reference to the ''special home and community-based waiver eligibility'' group defined at section 1902(a)(10)(A)(ii)(VI) of the Act and our use of the term ''special income level group'', we are referring to individuals eligible for Medicaid through meeting the eligibility for HCBS waivers services under institutional rules.

*Comment:* One commenter questioned how an individual's assets are considered in determining financial eligibility for the CFC option.

*Response:* An individual receiving services under the CFC option must be eligible for Medicaid under the State plan. Therefore, the State's usual Medicaid eligibility rules would determine whether and how the individual's assets are counted in determining eligibility for Medicaid. This may vary from group to group. There are no additional special CFC rules regarding assets.

*Comment:* Several commenters recommended the regulation allow individuals who would qualify for Medicaid under the medically needy eligibility group to qualify in the low-income category. The commenters believe individuals with income over 150 percent FPL in the medically needy group should be included in the low-income group because the medically needy group is required to spend down to 75 percent of FPL to qualify for Medicaid. The commenters believe it would be costly and administratively burdensome for States to implement two sets of eligibility criteria for CFC. Several commenters indicated that as written, the proposed rules potentially exclude individuals who would otherwise qualify for a Medicaid-funded nursing facility placement because their gross income would be too high. The commenters recommend the regulation be revised to have language clarifying that individuals who may spend down to Medicaid eligibility under the medically needy category would also be eligible for the CFC benefit.

*Response:* The rule does not preclude States from providing 1915(k) services to individuals who are Medicaid eligible as medically needy. If a State covers the medically needy eligibility group under its State plan, the State can elect to provide section 1915(k) services to the medically needy. In determining Medicaid eligibility for medically needy individuals receiving section 1915(k) services, the State must use the same income and resource methodologies approved under its State plan (for the medically needy), including spend down and any methodologies approved under section 1902(r)(2) of the Act.

*Comment:* One commenter recommends paragraph § 441.510(c) be amended to add language articulating that the regular rules for determining income eligibility for an individual's eligibility group under the State plan apply when determining whether the individual's income is below 150 percent of FPL.

*Response:* We agree with the recommendation made by the commenter and will revise this provision accordingly.

*Comment:* One commenter indicated that cash payments to purchase personal attendant services or used to purchase

services that substitute for human assistance should not be counted as income or resources when determining eligibility for public benefit programs or income tax purposes. The commenter indicated that problems could arise if the cash benefit is treated as income, that when added to the individual's actual income would disqualify the individual from the public benefit programs.

*Response:* Disbursement of cash to individuals in accordance with § 441.545(b)(2) is for the sole purpose of purchasing program approved services and supports identified in an individual's person centered service plan. Therefore, for the purpose of determining an individual's Medicaid eligibility, receipt of such monies should not be considered income, nor should it have any effect on an individual's eligibility for Medicaid. Determining the treatment of income for the income tax purposes is beyond the scope of this rule, as such, we do not have the authority to opine on tax related issues.

*Comment:* Many commenters recommended the regulation be modified to explicitly address the Affordable Care Act's modification to the spousal impoverishment statute that goes into effect January 1, 2014. The commenters expressed concern that if CFC is limited strictly to individuals who qualify under an eligibility group covered under the State plan before they may receive coverage for the benefit, the community spouse resource allowance will be meaningless for most CFC beneficiaries, because most CFC beneficiaries will have been screened against the more limited ''couple'' resource standard applicable to the category under which they originally qualified. Additionally, commenters requested the full spousal impoverishment protection be extended.

*Response:* The rule does not need to be modified to reflect section 2404 of the Affordable Care Act because eligibility for the CFC services hinges on independent eligibility under an eligibility group in the State's plan. Guidance on section 2404 of the Affordable Care Act is outside the scope of this regulation.

*Comment:* One commenter stated that the eligibility criteria included in the regulation does not include a needs assessment element. The commenter believes that CFC services and supports are not medical and as such it is not appropriate for a State to set ''medical necessity'' criteria to establish who can receive CFC services. The commenter recommends CMS consider adding a new eligibility element to specifically assess an individual's need for attendant services.

*Response:* We disagree with the commenter. Section 441.535 requires an assessment of functional need for each individual receiving CFC services. The information gathered in the assessment must support the determination that an individual requires CFC services.

*Comment:* One commenter requested the regulation clarify whether both non-institutional and institutional individuals must be served.

*Response:* Although the eligibility criteria require individuals to meet an institutional level of care, services are only available to individuals residing in a home and community-based setting. Recognizing the purpose of these services includes providing individuals living in institutions the opportunity to transition to a home and community-based setting, we understand that individuals may be residing in an institution during the assessment process of the program. However, CFC may not be provided until the individual is residing in the community, with the exception of transitional services.

*Comment:* A few commenters recommended revising the regulation to add a paragraph to § 441.510, clarifying that the CFC option is not mutually exclusive and can be provided to eligible Medicaid enrollees in the State who are receiving other non-CFC services and supports under another waiver program. Specifically, the commenters recommend that a paragraph (d) should be added to § 441.510 providing that ''Individuals receiving services through CFC will not be precluded from receiving other home and community-based long term care services through other waiver or State plan authorities.''

*Response:* We agree with the commenter and have included the recommended language in a new paragraph (e).

*Comment:* Several commenters requested we clarify whether States have the flexibility to establish medical or functional eligibility criteria. One commenter asked if a State can impose the same functional eligibility requirements that exist for a State's personal care State plan option. Several other commenters requested we allow States to establish medical eligibility criteria that would limit eligibility for the program to individuals who have an institutional level of care, regardless of their income. The commenters believe that without this clarification, States could perceive the option as too expensive to adopt if they have to serve both non-institutional and institutional level beneficiaries. Alternatively, one commenter recommended the regulations require that any medical or functional criteria States establish for CFC not be more restrictive than the State's nursing facility or other institutional level of care requirements.

*Response:* As indicated in an earlier response, we are interpreting the statute to include a requirement that States make determinations for all individuals receiving CFC services that an institutional level of care would be required but for the provision of home and community-based services.

*Comment:* One commenter supports the eligibility and statewideness requirements in the regulation, indicating that this will prevent States from limiting services to a numeric amount or to a geographic area, with the result being increased access to home and community-based services by those in need. The commenter stated that States still have flexibility to set medical necessity. The commenter requested CMS monitor State efforts to educate all beneficiaries of the program, expressing concern that States may tailor public relations activities, such as limiting outreach efforts, to certain geographic areas of the State.

*Response:* States must offer CFC services on a statewide basis. As indicated in an earlier response, all individuals must meet an institutional level of care to receive CFC services. Thus, there is no need for States to establish separate medical necessity criteria, for the purpose of determining who may receive CFC services.

*Comment:* Some commenters recommended the rule be amended to require States to limit eligibility to individuals with income of up to 300 percent of the maximum Federal SSI benefit and an institutional level of care need. The commenters suggested that only after a State addresses this eligibility group, may a State opt to expand the eligibility to serve lower income persons who do not have an institutional level of care need. Furthermore, the commenters recommended amending the regulation to allow States the option to only cover individuals who have an institutional level of care need.

*Response:* As we have stated, we are setting forth in this final rule our interpretation that under the statute all individuals must meet an institutional level of care to receive CFC services.

*Comment:* One commenter does not want the institutional level of care requirement applied to the special income group.

*Response:* The special income group is an institutional eligibility group.

Therefore, States must follow the rules pertaining to the eligibility requirements for the special income group defined at section 1902(a)(10)(A)(ii)(V) of the Act, which includes the requirement that individuals must meet an institutional level of care.

*Comment:* With regard to the special income group, commenters questioned if case management or monthly monitoring would satisfy the requirement that individuals must receive at least one home and community-based waiver service per month. Additionally, the commenters requested the language be revised to say ''is receiving at least one home and community-based waiver service per month or monthly monitoring.''

*Response:* The purpose of this language is to ensure that people in the special income group maintain their eligibility for Medicaid, thereby adhering to the CFC eligibility criteria that people must be eligible for the State plan. If monthly monitoring is an approved waiver service in the State, this would satisfy the requirement.

*Comment:* A few commenters requested clarification on whether States had to extend CFC services to individuals in the waiver program. The commenters recommended revising § 441.510(b)(3) to state ''eligible if the State elects to expand CFC service coverage to its waiver program.'' Another commenter expressed concern about the potential overutilization of services if individuals eligible for waivers are required to continue to receive one waiver service to maintain eligibility for CFC.

*Response:* Individuals enrolled in section 1915(c) waivers are eligible to receive any State plan service. Individuals in the special home and community-based waiver group are required to receive at least one waiver service per month. Section 1915(k) of the Act did not change this requirement. We expect States to implement policies and procedures to prevent overutilization and duplication of services when individuals receive services through a 1915(c) waiver and the CFC State plan option.

*Comment:* We received many comments both opposed to and in support of the annual income requirement set forth in § 441.510. Some commented on the methods for verification, such as recommending ''Passive redetermination'' and that income recertification for CFC should not be more burdensome, for individuals or for States, than the existing Medicaid programs.

*Response:* As explained above, in the final rule, we are modifying our regulations to make clear that the 150 percent of FPL income determination would only be necessary in cases where an individual is not in a Medicaid eligibility group under the State plan that already provides coverage for nursing facility services. In such cases, there would need to be an annual verification of income for the purpose of determining an individual's eligibility for CFC services.

States that employ passive eligibility re-determination methods for the purpose of Medicaid eligibility could continue to do so. Additionally, we believe it is appropriate for the State to align this CFC requirement with the annual recertification process for Medicaid.

Upon consideration of public comments received, we are modifying § 441.510, and are issuing an interpretive rule to clarify the statutory requirements for eligibility. We are revising the language in § 441.510(b) as originally proposed. We are clarifying the statutory requirement that individuals must be in an eligibility group under the State plan that includes nursing facility services. Individuals in an eligibility group that does not include such nursing facility services must have an income at or below 150 percent of the FPL. We added the language proposed at § 441.510(c) to § 441.510(2) with clarification that in determining whether 150 percent of the FPL requirement is met, State must apply the same methodologies as would apply under their Medicaid State plan, including the same income disregards in accordance with section 1902(r)(2) of the Act. We replaced the language proposed at § 441.510(c) with the provision that all individuals meet an institutional level of care, removing the term ''an institution for mental diseases'' and replacing it with ''an institution providing psychiatric services for individuals under age 21'' and ''an institution for mental diseases for individuals age 65 or over,'' and adding § 441.510(c)(1) and (2) to allow for State administering agencies to permanently waive the annual level of care recertification if certain conditions are met. We have relocated the language proposed at § 441.510(b)(3) to a new paragraph (d), and removed the term ''Medicaid assistance'' and replaced it with ''medical assistance.'' We are also adding a new paragraph (e) to indicate that receipt of CFC services does not impact receipt of other long-term care services provided through other Medicaid State Plan, waiver, or grant authorities.

*E. Statewideness (§ 441.515)*

To reflect the requirement at section 1915(k)(3)(B) of the Act, we proposed that States must provide CFC services and supports on a statewide basis, in a manner that provides such services and supports in the most integrated setting appropriate to the individual's needs, and without regard to the individual's age, type or nature of disability, or the form of home and community-based attendant services that the individual requires to have an independent life.

*Comment:* Many commenters supported the provisions under § 441.515. One commenter applauded CMS for recognizing that people should receive services and supports based on their need rather than a predetermined assumption based on characteristics, such as age or disability. Several commenters further emphasized the ability of this program to enhance State adherence to the *Olmstead* decision and providing services in the most integrated setting appropriate to the individual's needs.

*Response:* We appreciate the perspectives these commenters had in support of this provision of the rule.

*Comment:* One commenter asked CMS to clarify how we will define the ''most integrated setting appropriate to the individual's needs.''

*Response:* This requirement is not defined in the statute and we do not believe that is it appropriate to define this phrase in this regulation. Rather, we expect States implementing CFC to have meaningful interactions with each individual electing to receive CFC services and supports. Through the assessment of functional need and the development of the person-centered service plan, individuals should be made aware of all living arrangements available for their consideration. As indicated below at ''Person-centered service plan'' (§ 441.540), a requirement of the service plan is a description of these options and a reflection of the individual's choice. These protections represent significant advances in facilitating individuals' rights to live in the most integrated setting appropriate to their needs. We plan to publish a separate proposed rule to define home and community based settings and issue additional guidance which should further assist States in these efforts.

*Comment:* One commenter recommended that CMS clarify that it is within the State's discretion to limit the amount, duration, and scope of the required services within CFC.

*Response:* As indicated in the responses to questions received in the ''Basis and Scope'' (§ 441.500) section of

the regulation, CFC is an optional benefit and a State may set limits on the amount, duration and scope of the services provided under the option, consistent with the regulation at § 440.250. However, section 1915(k)(3)(B) of the Act indicates that the services must be provided on a statewide basis without regard to the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life. There requirements are reflected at § 441.515. A State cannot set limits on the amount, duration, and scope based on any elements listed above.

*Comment:* A few commenters indicated that the language in § 441.515(c), ''in a manner that provides the supports that the individual requires to lead an independent life'' is broad. One commenter suggested removing the language, but offered the suggestion of defining such supports in § 441.520, ''Required Services,'' if the language is not removed. Another commenter asked if a State could set reasonable parameters on the level of support commitment such as an annual service budget amount limit or a cap on the hours of paid care per day.

*Response:* As noted above, States maintain the flexibility to set limits on the amount, duration and scope, except based on the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life. While the majority of the language in § 441.515(c) was taken from the statute, we realize that making this language separate from the language in § 441.515(b) could create confusion, so we are taking this opportunity to remove § 441.515(c) and incorporate its language in § 441.515(b) to more directly align with the statute.

*Comment:* One commenter encouraged CMS to issue guidance or add language to the regulation to ensure that CFC is provided to all qualified applicants in the State regardless of sexual orientation, gender identity or expression, or marital status.

*Response:* Section 441.500(b) addresses this concern specifying that CFC is designed to make available services and supports to eligible individuals. It is not permissible for a State to deny the provision of medical assistance services to eligible individuals based on sexual orientation, gender identity or expression, or marital status. We do not agree that additional language needs to be added to the regulation to clarify.

*Comment:* A few commenters asked whether States would be afforded the flexibility to target specific populations.

*Response:* As noted above, States electing CFC must provide CFC services and supports on a statewide basis and without regard to the individual's age, type or nature of disability, severity of disability or the form of home and community-based services and supports that the individual requires to lead an independent life. This requirement does not allow States to target any specific population.

*Comment:* One commenter requested clarification regarding the statewide implementation of the CFC. Specifically, the commenter asked if CFC can be implemented throughout the State incrementally over time or if the option must be statewide upon implementation.

*Response:* If a State chooses to implement CFC, it must be implemented on a statewide basis, not phased-in incrementally throughout the State.

After consideration of the public comments, we are revising this section to remove § 441.515(c) and incorporate its language in § 441.515(b) to more directly align with the statute.

*F. Included Services (§ 441.520)*

We proposed to reflect the requirements at sections 1915(k)(1)(A) and (B) of the Act that States electing CFC must provide:

- Assistance with ADLs, IADLs, and health-related tasks through hands-on assistance, supervision, or cueing;
- The acquisition, maintenance and enhancement of skills necessary for the individual to accomplish ADLs, IADLs, and health-related tasks;
- Backup systems or mechanisms to ensure continuity of services and supports; and
- Voluntary training on how to select, manage, and dismiss attendants.

We also proposed to require that States choosing to provide for permissible services and supports as set forth at section 1915(k)(1)(D) of the Act, must offer at a minimum, expenditures for transition costs such as rent and utility deposits, first month's rent and utilities, bedding, basic kitchen supplies, and other necessities required for an individual to transition from a nursing facility, institution for mental disease, or ICF/MR to a community-based home setting where the individual resides. States choosing to provide for permissible services and supports set forth at section 1915(k)(1)(D) of the Act may also include expenditures that increase independence or substitute for human assistance, to the extent that expenditures would otherwise be made for human assistance.

*Comment:* One commenter indicated that the proposed rule is not clear regarding whether all services and supports listed at § 441.520(a) must be provided to all individuals served under CFC, and the commenter provided cost estimates if each potential participant were provided a pager (including device and monthly service charges). The commenters indicated that it would be cost prohibitive for their State to provide each participant all the services and recommended it be made clear that the services and supports listed in (i) through (iii) are to be made available based on parameters indicated in each State Medicaid plan. For example, backup systems that include electronic devices may only be needed by persons who have high level of care needs, while persons with greater functioning across ADLs or IADLs may simply require advance planning in case their attendant fails to show up for work.

*Response:* The ''Background'' and the ''Provision of the Proposed Rule'' sections both indicated that the services listed under *Required Services* must be made available by States electing CFC. This does not mean that each and every individual participating in CFC would receive each of these services. Each individual's needs must be assessed, and only those required services needed by the individual must be provided. As indicated above, States have the flexibility to decide what backup systems and supports will be offered in their CFC programs as long as these systems will sufficiently meet the needs of individuals served under CFC.

*Comment:* One commenter asked if States could design a CFC program where each participant may not receive all of the four required services in paragraph (a).

*Response:* All services listed in § 441.520(a) must be made available by any State that elects the CFC. The services authorized for individuals must be based upon their individualized assessment of functional need.

*Comment:* One commenter specifically asked if CFC could be used to support consumers' employment goals.

*Response:* As indicated at section 1915(k)(1)(C) of the Act, vocational rehabilitation services under the Rehabilitation Act of 1973 are specifically excluded by the statute; however, we affirm that attendant services and supports under the CFC

could be utilized by an individual while at their place of employment.

*Comment:* One commenter urged CMS to provide additional guidance regarding the frequency with which required services may be provided stating that individuals with mental illness may not require assistance with ADLs and IADLs 24 hours a day/7 days a week as these individuals are often able to accomplish these tasks independently, particularly when personal assistance is supplemented by skills training. The commenter suggested that CMS clarify at § 441.520(a)(1) that assistance need not be furnished on a constant, 24/7 basis.

*Response:* While we agree with the commenter that individuals may not require assistance with ADLs and IADLs 24 hours a day/7 days a week, we do not agree that this needs to be clarified in the regulation. The amount of supports and services provided under this option are determined based on an individualized assessment of functional need.

*Comment:* One commenter requested that CMS clarify ''health-related tasks'' and asked if these include medication administration and other paramedical tasks such as g-tube feeds, ostomy care, wound care, etc. and if so, for individuals self-directing their personal care, would these tasks be furnished by personal care attendant care providers who are employed by the individual (responsible for training and supervising the attendant care provider) where there is no nurse involvement. The commenter also inquired how assistance with medications is accounted for. Another commenter added that State Nurse Practice Acts vary greatly and have very specific requirements regarding what types of health-related tasks may be delegated and/or overseen by licensed medical professionals, such as registered nurses. In addition, the commenter requested that CMS add language acknowledging that the scope of the health-related tasks may vary by State and added that for health services that are not delegated under a State Nurse Practice Act or in States without nurse delegation, such services would have to be delivered under State plan home health or waiver skilled nursing benefits.

*Response:* The statute specifically defines ''health-related tasks'' as ''specific tasks related to the needs of an individual, which can be delegated or assigned by licensed health-care professionals under State law to be performed by an attendant.'' Given this definition, activities that are not able to be delegated or assigned by a licensed professional under State law are not ''health-related tasks.'' Recognizing the variance among State laws governing the specific tasks licensed health-care professionals may delegate, we recognize that the scope of ''health-related tasks'' will differ by State. This will be the case regardless of the service delivery model utilized by the State, including self-direction. We agree with the commenter that activities outside the scope of ''health-related tasks'' may continue to be claimed, as appropriate, through other Medicaid authorities such as home health, rehabilitative services, services provided by other licensed practitioners, etc.

*Comment:* One commenter indicated strong support for inclusion of the phrase ''hands on assistance, supervision, or cueing'' in § 441.520(a)(1), as persons with different disabilities require different types of assistance. Another commenter urged CMS to consider whether the use of ''and/or'' in ''hands on assistance, supervision, or cueing'' would make it clear that a combination of methods may be used for any particular individual, depending on what is needed. One commenter asked if there is State flexibility to focus on only a single modality (hands-on or supervision or cueing) or if all 3 modalities must be covered.

*Response:* We understand that what is needed to assist with ADLs, IADLs, and health-related tasks will vary from individual to individual and expect that any one, or a combination of, hands on assistance, supervision, or cueing could be necessary to accomplish these tasks. As such, all three modalities must be available, however, it is an individual's assessed needs and person centered plan that will determine which will be provided. We agree with the commenter and have revised the rule to include ''and/or'' to make our intent clear.

*Comment:* A few commenters asked if there was any additional guidance regarding what services constitute the ''acquisition, maintenance, and enhancement of skills necessary for the individual to accomplish ADLs, IADLs, and health-related tasks.'' Several commenters indicated that States should have the same discretion they already exercise in structuring their waiver programs and recommended that CMS make explicit that States will have the discretion to define the services that will be provided to assist consumers with the ''acquisition, maintenance and enhancement of skills necessary for the individual to accomplish ADLs, IADLs, and health-related tasks'' and suggested the following language be added to the rule: ''*as defined by the State and approved by the Secretary.''* Another commenter added that to assure consistency with other home and community-based services programs and to allow States to define services, CMS should revise paragraph (a) to add ''If a State elects to provide the Community First Choice Option, the State must provide all of the following services as defined by the State and approved by the Secretary.''

*Response:* The ''acquisition, maintenance, and enhancement of skills necessary for an individual to accomplish ADLs, IADLs, and health-related tasks'' is a direct provision of the statute and we agree with the commenters that States should have the same discretion they currently have to define their programs, particularly, since CFC is an optional benefit.

We have chosen not to specifically define this component of the CFC benefit to facilitate State flexibility. States will need to define how they will implement this component through their SPAs. States could choose several methods to meet their obligations for this component of the benefit, including, but not limited to, incorporating functional skills training and/or the use of permissible services and supports that facilitate the acquisition, maintenance, and enhancement of skills through the purchasing of services and/or supports that increase independence or substitute for human assistance. We are available to provide technical assistance to States in determining alternative ways to satisfy this requirement.

*Comment:* A commenter noted that for the acquisition, maintenance and enhancement of skills, such services may be unrealistic or unnecessary for elderly persons in extremely fragile health, or whose health is deteriorating (such as cancer patients), but appropriate for other persons with disabilities. The commenter believes that the statute gives States flexibility in these cases by identifying the acquisition, maintenance and enhancement of skills as an ''included service and support'' and recommends the CMS clarify in the regulations that States provide these services to individuals likely to benefit from them, based on the assessment of functional need and individual service plan, and consistent with the CFC philosophy of self-direction.

*Response:* We appreciate the perspective of this commenter. Ultimately, each individual's assessment of functional need should determine whether or not an individual needs the acquisition, maintenance, and enhancement of skills necessary for accomplishment of ADLs, IADLs, and

health-related tasks. If it is determined that an individual needs them, a State would be required to provide them, according to the parameters of the person-centered service plan discussed at § 441.540. However, we do reiterate a State's ability to put limits on the amount, duration and scope of CFC services, as long as these limits are not based on the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life, as prohibited in the statute.

*Comment:* A commenter stated strong support for both the inclusion of backup systems or mechanisms to ensure continuity of services and supports, and the training of how to select, manage and dismiss attendants referenced at § 441.520(a)(3) and (4), respectively. One commenter questioned if cell phones funded under Federal programs (for example, Safe Link) can be considered for use to meet backup system requirements. Another commenter recommended amending this rule to allow for plans of action in case of emergency, such as identifying a friend or relative who could be called upon if a provider does not show up, or calling for emergency backup through a local public registry. One commenter suggested that the plan for continuity of services (if existing services are disrupted) should be flexible and participant-driven, much like the plan for services.

*Response:* There are various options for backup systems. We agree with the commenters that backup systems and supports may include approaches in addition to electronic devices. This belief is supported by the inclusion in the definition described in the proposed rule of allowing people to be included as backup supports. We agree that a cell phone funded under another program (Federal or otherwise) could be used as part of a backup system, assuming doing so does not violate any terms of use required by the other program. However, it is important to note that items or services provided through another program or benefit are not eligible for Federal financial participation (FFP) under CFC.

*Comment:* One commenter voiced concern that States will develop a ''canned'' ''one size fits all'' voluntary training package or program specified in § 441.520(a)(4), and suggested that the voluntary training needs to be very flexible and individualized. Another commenter recommended that training be a required step in demonstrating that the individual has the tools to select, manage, and dismiss attendants. One commenter indicated that, consistent with the philosophy of self direction, this training must be voluntary and not a mandatory requirement for the individual to receive services under CFC, and requested that CMS allow States to provide established, existing consumer training programs already available to consumers/employers. Another commenter stated that, it is important that all training content and procedures be driven by the participants themselves, and while the proposed rule specifies that training be ''developed'' by States, the commenter pointed out that various training curricula already exist, and suggested that one method to control costs would be to modify and adopt existing training approaches, as long as such training is agreed upon by participants and the methods are sensitive to the training needs of the targeted groups (for example, accessible format, at no cost, web-based, etc.). Another commenter encouraged CMS to allow States to retain the authority to develop this training with a level of flexibility that would be appropriate to meet the needs of all potential CFC participants.

*Response:* As the commenters indicated, many States currently have existing consumer training programs available that could potentially be leveraged or modified to meet this requirement. These training programs should be able to meet the needs of individuals at varying levels of need with regard to selecting, managing, and dismissing attendants. As we stated in the proposed rule, consistent with the philosophy of self direction, and in keeping with the statute set forth at section 1915(k)(1)(B)(iii) of the Act, this training must be voluntary, and may not be a mandatory requirement for the individual to receive services under this option.

*Comment:* A few commenters suggested that CMS create a separate section for permissible purchases to reduce confusion. One commenter added that since § 441.520(b) begins a list of optional services, CMS should begin a new section here to clarify that these services are not required services. The commenter added that CMS should clarify at (b)(1) that ''the waiver'' would not cover rent as this is excluded.

*Response:* We are renaming § 441.520 as ''Included Services'' to reduce confusion and to highlight that permissible services and supports in paragraph (b) are at the State's option. We also reiterate that CFC is not a waiver program, but rather a new optional service authorized under the Medicaid State plan. With regard to the commenter's suggestion about the exclusion of rent, while ''room and board'' are excluded services, expenditures related to transition costs, including the first month's rent, are the exception. Therefore, we do not agree that revisions are necessary.

*Comment:* One commenter asked whether an individual receiving services through CFC and a section 1915(c) waiver could receive assistive devices if they are covered services in the waiver.

*Response:* Assistive devices and assistive technology services may be provided under CFC if the requirements under § 441.520(b) are met. It would be up to the State to choose whether to provide these items through a waiver, or through CFC, if an individual is participating in both programs.

*Comment:* One commenter asked that CMS clarify the minimum services that must be offered if a State chooses to provide permissible services.

*Response:* While we proposed to require that States offering permissible services and supports must at a minimum provide for transition costs, we realized that the statute does not provide a basis to require such services and supports. Therefore, the provision of permissible services and supports are at the State's option. We strongly encourage States to consider providing for the transition services and supports at paragraph (b)(1) under § 441.520.

*Comment:* One commenter indicated that States need to have the flexibility in permissible purchases to set limitations on these costs including the total amount, recurrence, etc.

*Response:* States have the flexibility to design their CFC benefit as long as all requirements are met. States maintain the flexibility to set reasonable limitations on the costs of permissible services and supports. We encourage States to consider the ability of beneficiaries to actually return to the community when establishing limits on these services and supports. We will work with States on an individual basis to ensure the intent of the legislation is met, while acknowledging the realities of State fiscal situations.

*Comment:* One commenter voiced concern that permissible purchases, including expenditures necessary for an individual to transition from institutional care and expenditures for items that could increase independence or substitute for human assistance, are considered optional for States electing to offer CFC. The commenter added that these optional services in many cases would make the difference between whether an individual can live successfully in the community or not

and suggested that CMS should more strongly encourage States to allow the purchase of these services, perhaps by providing some additional incentive for States to do so, financial or otherwise.

*Response:* We agree with the commenter that transition costs can be crucial for an individual as it relates to being able to transition from an institution to the community. We also agree that many items that increase independence or substitute for human assistance have the potential to make a significant difference in an individual's life while also being cost-effective. We hope that the enhanced match included in CFC, and the potential for cost savings, will be an incentive to States to include permissible services and supports in their CFC programs. We are also revising the language in paragraph (b)(1) under § 441.520 to reference a ''home and community-based setting'' rather than a ''community-based home setting.''

*Comment:* One commenter suggested that expenditures related to transition costs should include funding for basic home modifications to expand the supply of physically accessible housing options. Such modifications to entrances or bathrooms, for example, could make an otherwise inaccessible unit accessible at a reasonable cost. This commenter also indicated that while the proposed rule states that individuals are not required to save an amount in a budget to purchase items that increase independence or substitute for human assistance, it should be made clear that individuals should not be pressured to purchase items if it would unduly reduce the hours of personal assistance in a manner that negatively impacts overall service needs.

*Response:* At the State's option, and consistent with the statute, where a service is based on a need identified in the person-centered service plan, qualifying home modifications may be provided either as a transitional costs or as a way to increase an individual's independence or as a substitute for human assistance. We further address this in § 441.525(e). We also agree that individuals should not be pressured to purchase any items if such purchases would reduce the number of hours of assistance in a manner that would negatively impact them.

*Comment:* One commenter suggested that institutions other than nursing facilities, IMDs, or ICF–MRs should be included among the list of institutions from which individuals could transition, as often individuals with serious mental illness reside in smaller institutional settings such as adult homes or large group homes. The commenter indicates that these funds would be necessary for transitions from those settings. The commenter suggested that paragraph (b)(1) be amended to include ''adult homes for people with mental illness and group homes with over four residents.''

*Response:* Section 1915(k)(1)(D)(i) of the Act sets forth requirements that expenditures for transition costs are available ''for an individual to make the transition from a nursing facility, and institution for mental diseases, or intermediate care facility for the mentally retarded.'' Therefore, we are not revising the regulation as suggested.

*Comment:* One commenter asked if States can limit the CFC transition benefit to individuals not eligible for transition services under either section 1915(c) of the Act or Money Follows the Person (MFP) program. The commenter also asked whether the transition benefit can differ from what is already offered in the State through section 1915(c) of the Act.

*Response:* CFC services must be provided without regard to the individual's age, type, or nature of disability, severity of disability, or the form of home and community-based attendant services and supports the individual requires to lead an independent life. Thus, a State may not propose to provide a service to only to a subset of the population eligible for CFC services. We recognize there may be instances in which individuals are eligible for similar services under more than one Medicaid authority. As indicated in § 441.510(e) individuals receiving CFC services will not be precluded from receiving other home and community-based long-term care services and supports through other waiver, State plan or grant authorities. To prevent duplication of the provision of services to the same individual, steps must be taken when developing the person- centered service plan, to prevent the provision of unnecessary or inappropriate care, as required at § 441.540(b)(12).

*Comment:* One commenter asked if States will need to contemplate and detail in the State plan amendment, all potential supports/services that may be allowed (presumably under permissible services) and whether or not States can define specific exclusions. Another commenter asked that CMS clarify whether permissible purchases are only available under the self-directed service model or if it applies to the agency model as well.

*Response:* A State would not be required to detail each item they would allow under permissible services and supports. States will need to indicate in the State plan amendment electing CFC whether they will be offering such services and supports, and any limitations they propose to include. States will also be asked to identify whether they will include items that increase independence or substitute for human assistance as permissible services and supports. Permissible services and supports are available at the State's option regardless of service model.

*Comment:* Several commenters strongly supported the first component of section 1915(k)(1)(D)(ii) of the Act that permits States to make expenditures available for individuals to acquire items that increase independence or substitute for human assistance and also supported the inclusion of this flexibility in the CFC proposed rule, but stated that the second component of this statement (''to the extent that expenditures would otherwise be made for human assistance and are related to a need identified in an individual's person-centered plan'') may actually lead to more restrictions than necessary. The commenters stated that the purchase of innovative goods and services may not replace human assistance, but rather make such assistance more effective (for example, the use of devices to support transferring individuals from their bed to a wheelchair) and suggested that addressing independence or substituting for human assistance is more appropriate. The commenters also stated that it is also important to recognize that some people who require CFC will not have the benefit of increasing independence, but rather may be successful at sustaining current functional ability or minimizing the restriction of independence that is occurring due to changes in health status and suggested that the CFC rule should be reflective of this reality.

*Response:* We appreciate the points made in this comment and fundamentally agree with them. The language in the proposed regulation was taken directly from the authorizing legislation. However, we believe that ''increase independence or substitute for human assistance'' is sufficiently broad to encompass all the scenarios identified by the commenter. We do not interpret the term ''substitute'' to mean only the total replacement of human assistance; therefore, the regulation would allow the purchase of items that just decrease the need for human assistance. We also agree that independence may be viewed to be ''increased'' by purchases aimed at preventing its decline.

*Comment:* One commenter questioned including the same language at § 441.520(b)(3) as in § 441.525 regarding the potential for providing some otherwise excluded services if they are based on a need in the service plan, as the language in paragraph (b)(3) is broad when applied to all permissible services, and this language could put a difficult burden on consumers to identify all possible future support needs during the care assessment phase.

*Response:* We do not anticipate a burden being placed on individuals to determine possible future needs during the functional need assessment or development of the person-centered plan. Both the assessment and the plan must be revised, as indicated in § 441.535(c) and § 441.540(e), respectively, at least every 12 months, when the individual's circumstances or needs change significantly, and at the request of the individual or the individual's representative. These protections are sufficient to address any future needs.

*Comment:* One commenter asked specifically who coordinates the assessment and person-centered plan and whether there is a requirement that a separate Targeted Case Management service accomplish these tasks. The commenter also asked if these coordination services would be eligible for the enhanced match. Another commenter encouraged the addition of care coordination as a permissible service as this is essential for individuals with long-term care needs, and added that States may be more inclined to utilize CFC if this is a component that would also receive the enhanced FMAP.

*Response:* Targeted Case Management is a Medicaid service separate and distinct from CFC. There is no Targeted Case Management requirement in CFC. States may choose to use Targeted Case Management to assist with coordination and linkage functions for individuals participating in CFC, as long as all Targeted Case Management requirements are met. While we agree that care coordination is a beneficial service component for individuals with long-term care needs, care coordination was not a component that was included in the CFC statute, and therefore, would not be eligible for the enhanced FMAP.

*Comment:* One commenter indicated that States should be allowed to provide services in CFC that are currently allowable under section 1915(c) waivers, such as home delivered meals, adult day services, and non medical transportation if these services are an identified need in the service plan, as these services allow seniors and those with disabilities to live as independently as possible in their own homes and communities.

*Response:* States that choose to offer permissible services and supports have the option to provide for items that increase independence or substitute for human assistance, to the extent that expenditures would have been made for human assistance, as long as the item meets the requirements at § 441.520(b).

Upon consideration of public comments received, we are finalizing § 441.520 with revision, changing the title of this section to ''Included Services'', modifying paragraph (a)(1) to refer to ''* * * hands-on assistance, supervision, and/or cueing'', modifying paragraph (b) to indicate that items covered under transition costs must be linked to an assessed need and adding the phrase ''At the State's option'' to clarify that paragraphs (b)(1) and (2) that follow are both at the State's option, revising the language in paragraph (b)(1) to reference a ''home and community-based setting'' rather than a ''community-based home setting.'' and removing paragraph (b)(3) and relocating the language to 441.520(b).

*G. Excluded Services (§ 441.525)*

Consistent with section 1915(k)(1)(C) of the Act, we proposed to exclude the following services from CFC:

- Room and board costs for the individual, except for allowable transition services described in § 441.520(b)(1) of this subpart.
- Special education and related services provided under the Individuals with Disabilities Education Act that are related to education only, and vocational rehabilitation services provided under the Rehabilitation Act of 1973.
- Assistive devices and assistive technology services other than those defined in § 441.520(a)(3) of this subpart (incorrectly specified as § 441.520(a)(5) in the proposed rule, which does not exist) or those that are based on a specific need identified in the service plan when used in conjunction with other home and community-based attendant services.
- Medical supplies and equipment.
- Home modifications.

Consistent with section 1915(k)(1)(D) of the Act, we proposed to allow certain otherwise excluded items if they related to an identified need in an individual's service plan that increase an individual's independence or substitute for human assistance, to the extent that expenditures would otherwise be made for the human assistance.

*Comment:* One commenter noted that the rule required backup systems to be made available, but excluded assistive technology and assistive technology services.

*Response:* We appreciate this commenter's perspective. The statute provides that the excluded services and supports are ''subject to subparagraph (D)'' which defines permissible services and supports to include expenditures relating to a need identified in an individual's person-centered service plan that increases independence or substitutes for human assistance. From our experience with Cash and Counseling demonstrations, section 1915(j) and 1915(c) authorities, we know that assistive technology devices and services often fall under the category of items that increase independence or substitute for human assistance. Therefore, we proposed in the rule that some items or services that could be classified as assistive technology devices or services could be covered, but only when based on a specific need in the person-centered service plan. We are maintaining this flexibility in the final rule.

*Comment:* Several commenters recommended that CMS include in the final regulation that Medicaid reimbursement for room and board for a personal attendant is an allowable expenditure as this is consistent with the SMD letter included with the section 1915(c) waiver guidance and CFC should be consistent with current CMS policy.

*Response:* We appreciate the commenters' suggestion and acknowledge that section 1915(c)(1) of the Act indicates that excluded ''room and board'' costs shall not include amounts States may define as rent and food expenses for an unrelated personal caregiver residing in the same household with the individual. Such amounts are part of the cost of delivering the service; they are not room and board for the individual. No such clarification was included in the statute for section 1915(k) of the Act; it speaks only to excluded room and board costs ''for the individual.'' To continue efforts to align CMS policy across Medicaid authorities whenever appropriate, we agree with the commenter. Room and board costs attributable to an unrelated attendant residing in the same household would be considered appropriate for reimbursement as a CFC service, as these costs are part of service delivery for ''assistance in accomplishing ADLs, IADLs, and health-related tasks.''

*Comment:* Multiple commenters stated that it is appropriate to pay for assistive technology, medical equipment, and home modifications

when coverage is based on an identified need in a service plan and used in conjunction with other home and community-based attendant services. One commenter added that the proposed regulation was in keeping with the intent of CFC to be primarily an attendant services benefit and indicated that it made sense to allow States to balance the use of these items in relation to attendant services. Multiple commenters supported the proposal to only exclude coverage of assistive devices, medical equipment, and home modifications in circumstances where they would be the sole needed service in an individual's service plan. Another commenter added that coverage of other services and supports encourages increased independence which is a key goal of person-centered services and is cost effective. Multiple commenters commended the inclusion of the language referencing the exclusion of services ''that are related to education only'' in paragraph (b). One commenter indicated that they understood the reasoning behind allowing some items that increase independence or substitute for human assistance, but were unclear how the requirement that they be used in conjunction with another CFC service furthered that goal, as there are many forms of assistive technology that, independent of all other services, can reduce dependency and substitute for human assistance.

*Response:* We agree that it is appropriate to pay for items that increase independence and substitute for human assistance. However, after reviewing comments and further consideration of the statute, we do not believe it is necessary to require that such items must be used in conjunction with other home and community-based attendant services. Section 1915(k)(1)(C) of the Act indicates that excluded services are subject to subparagraph (D) which indicates that States may cover ''expenditures relating to a need identified in an individual's person-centered plan of services that increase independence or substitute for human assistance * * *'' There is no statutory requirement that these items be provided ''in conjunction with other home and community-based attendant services.'' We are concerned that maintaining this requirement could result in an individual not receiving needed services. Therefore, we are revising § 441.525(c) to remove the requirement that assistive devices and assistive technology services meeting the requirements of § 441.520(b)(2) have to be used in conjunction with other home and community-based attendant services.

*Comment:* Several commenters urged CMS to ensure that the actual text of the regulation reflect the intent expressed by CMS to allow assistive technology, medical equipment, and home modifications when coverage is based on an identified need in the service plan.

*Response:* We have revised § 441.525(d) and (e) to clarify the treatment of medical supplies, medical equipment, and home modifications. We believe this flexibility for assistive technology devices and assistive technology services is already clear.

*Comment:* Multiple commenters indicated that the preamble language on page 10740 of the proposed rule stating that CFC ''would not include services furnished through another benefit or section under the Act'' is overly broad and should be amended to read ''would not include certain specific types of services furnished through another benefit or section under the Act.''

*Response:* The language in the preamble excluding services from CFC when furnished through another benefit or section under the Act was not included in the actual regulation text. Since section 1915(k) of the Act specifies the services that are available under the CFC State plan option, and such a prohibition was not specified in statute, we have decided to not include such a prohibition in the CFC regulation. As indicated earlier, steps must be taken when developing the person-centered service plan to prevent the provision of unnecessary or inappropriate care, as required at § 441.540(b)(12). To meet this requirement, we expect States to implement policies and procedures to prevent the duplication of services that may be available under more than one Medicaid benefit.

*Comment:* One commenter indicated that the statute excludes assistive technology devices and services and acknowledged that the proposed rule noted that the statute does not define the terms, which could be read broadly to exclude devices or services allowed under sections 1915(k)(1)(D)(i) or (ii) of the Act. The commenter stated that because CMS only excludes devices and services that do not serve a specific need in the person-centered service plan, the implementation of this regulation may become too restrictive as advances in technology may be accommodated too slowly because individuals may have imperfect information on the devices and services that may suit their particular needs.

*Response:* The statute is clear at section 1915(k)(1)(D)(ii) of the Act that these expenditures must be related ''to a need identified in an individual's person-centered plan of services.'' If advances in technology result in an item that would meet an individual's identified need, it would potentially be allowable as a permissible service or supports. Both the assessment and the service plan must be revised, as indicated in § 441.535(c) and § 441.540(e), respectively, at least every 12 months, when the individual's circumstances or needs change significantly, and at the request of the individual or the individual's representative. These protections are sufficient to address any future needs. It is also important to note that States have the flexibility to choose whether or not to provide for permissible services and supports as they are not a required service.

*Comment:* One commenter asked CMS to clarify whether examples such as a walk-in shower to allow for a wheeled shower chair to be used for bathing, kitchen adjustments to permit someone with functional limitations to prepare his or her own meals, or moving a washer/dryer upstairs may qualify under such a definition. One commenter urged CMS to include additional examples of eligible assistive technology devices and services that could be included including medication management technology, home telecare/remote monitoring, and telehealth/telemonitoring, as these may assist personal attendant and health-related services under CFC in the future. Another commenter strongly supported inclusion of items such as environmental controls and telecare, stating that these could be very cost-effective and improve the independence of persons with disabilities as such technology or devices could reduce the need for human assistance. Other commenters provided additional examples of items that increase independence or substitute for human assistance such as adaptive utensils that allow a participant to eat meals and a voice activated system that allows a participant with quadriplegia to control various aspects of the home environment (lights, windows, door locks, etc.) and added that the exceptions to the excluded services as outlined in the proposed rule are of the utmost importance to glean the benefits of the Cash & Counseling model. Another commenter requested that CMS clarify the actual scope of services under this exception that could be provided.

*Response:* We appreciate the commenters' requests for clarification and suggestions regarding what items may be allowable under permissible services and supports. We do not believe it is appropriate for CMS to define a finite list of items that can be provided as a service or support. As we noted above, the statute set forth that ''expenditures relating to a need identified in an individual's person-centered plan of services that increase independence or substitute for human assistance, to the extent that expenditures would other-wise be made for the human assistance'' are allowable as permissible services and supports. States have the choice to provide any of the permissible services and supports that meet the requirements at § 441.520(b).

*Comment:* Another commenter noted that the prohibition on home modifications seems extreme as access to keyless entries and accessible bathrooms are important to increase both access to affordable and accessible housing and quality of life. The commenter added that ''Assistive Technology services'' seems too narrowly defined to address important supports such as bathroom modifications.

*Response:* The term ''assistive technology services'' is taken directly from statute as an excluded service. Section 1915(k)(1)(C) of the Act indicates that excluded services are subject to subparagraph (D) which indicates that States may cover ''expenditures relating to a need identified in an individual's person-centered plan of services that increase independence or substitute for human assistance * * *.'' Therefore, we believe some services that would otherwise be excluded may be covered when related to an identified need for items that increase independence or substitute for human assistance.

*Comment:* Several commenters supported CMS' proposal to provide for coverage of assistive devices in certain circumstances while at the same time promoting appropriate allocation of resources within the service plan and the program. The commenters noted that under the self-directed service delivery model proposed for CFC, the State must approve a service budget or cap that meets specified requirements, including specifying a dollar amount that an individual may use for services and supports under the program. The commenters added that States must also satisfy criteria for the budget methodology that it employs including a process for describing any limits the State places on CFC services and supports and the basis for the limits. The commenters believe that these provisions work in concert with § 441.525(c) to provide a framework for coverage that is compatible with implementation of the required exclusion and recommended that CMS point out this linkage in the preamble to the final rule.

*Response:* We appreciate comments but do not believe that it is necessary to point specifically to the linkage of these particular provisions in the final regulation.

*Comment:* One commenter voiced concern that explicitly indicating that States may determine at what point the amount of funds to purchase such devices and adaptations places them in the statutorily excluded categories will lead to an unreasonable limitation on this category with an over-emphasis on cost rather than need and relation to the other home and community-based attendant services. Another commenter added that the regulation does not contain any language related to the proposal to allow States to determine the point at which the funding amount would place items into the statutorily excluded categories and is concerned that regulatory language might confuse the cost of the service with the type or purpose of the service and that States should not have absolute discretion to target exclusions strictly based on cost. One commenter suggested that there should be some annual spending limits on the more costly and technologically advanced of the available assistive technologies such as an annual monetary limit per individual. Another commenter recommended that there be guidelines for the States to determine the cost threshold which would place the services and modifications into the excluded categories. The commenter asked if this was a onetime expenditure measured against the cost savings from reducing human assistance over the period of a month/year, or multiple years. The commenter noted concern that if the State sets a cap on the amount of funding that can be used to purchase devices and adaptations, this could prevent people from getting those supports even if it increases independence and saves money over the long term.

*Response:* As noted above, States have the choice to provide permissible services and supports. While we encourage States to allow for transition costs and for items that increase an individual's independence or substitute for human assistance, States have the flexibility to determine which, if any, permissible services and supports they will provide. All determinations regarding coverage of allowable items that meet the criteria in the final regulation, including the costs associated with the items, are the State's to make.

We acknowledge that the preamble language regarding the proposal to allow States to determine the point at which the funding amount would place items into the statutorily excluded category did not carry over into the regulation. We are not incorporating this language into the final regulation, but we are clarifying here that States retain the ability to establish amount, duration and scope limitations relative to the provision of these items, as long as such limits are not prohibited by the statute, which among other requirements, specifies that they must not be based on the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life.

With regard to the costs measures and timeframes for the determination of cost savings related to the substitution for human assistance, we do not intend to set forth the methodology for determining this threshold as this is also at the State's discretion.

*Comment:* One commenter interpreted the proposal to allow for coverage of assistive technology, equipment or home modifications when used in conjunction with other attendant services as integrated with the general principle that coverage under CFC is available only when there is no other coverage available under Medicaid or otherwise, and noted that at first impression, the proposal would seem to be inconsistent with section 1915(k)(1)(D) of the Act. The commenter stated that if this is not the case, it would be helpful if CMS could offer an estimate as to the potential cost of these services if included in the program.

*Response:* The correlation between the commenter's interpretation and the request for a potential cost estimate is not clear. We note that there is nothing included in the final regulation that would make coverage under CFC available only when there is no other coverage available under Medicaid or otherwise. As noted earlier, we have also removed the requirement that these items must be used in conjunction with other home and community-based services.

*Comment:* One commenter noted that medical equipment and home modifications are an essential component of any person-centered plan and that these items may assist a person in the transition from institutionalized

care to community care. The commenter questioned why they were listed as excluded services in the first place and recommended that they be added to the list of included services at § 441.520.

*Response:* These items were listed as excluded services in the statute at section 1915(k)(1)(C) of the Act, subject to section 1915(k)(1)(D). We agree that these items may assist an individual in the transition from an institution into the community and we also believe that these items may also assist an individual choosing to remain in their own homes. As such, and consistent with section 1915(k)(1)(D) of the Act, we proposed to allow States to cover such items as permissible services and supports long as the criteria described in § 441.520(b)(1) or (b)(2) are met.

*Comment:* Several commenters noted that while the exclusion of vocational rehabilitation services provided under the Rehabilitation Act of 1973 is well understood given its existence in other Medicaid programs, CMS and States should be reminded of the importance of allowing CFC participants to utilize their CFC services and supports within employment settings.

*Response:* We agree that individuals requiring attendant services and supports should be allowed to receive those services as needed/required in any home and community-based setting in which normal life activities take the individual, including the workplace.

*Comment:* One commenter indicated that access to State vocational rehabilitation services is extremely limited for individuals with serious mental illness and recommended that services excluded from CFC should be limited to those services that vocational rehabilitation agencies are, in fact, paying for and not services for which they might pay, but are not providing to the specific individual. The commenter added that the regulation as written creates a ''catch-22'' for people with severe disabilities whom vocational rehabilitation agencies reject, and encouraged CMS to amend paragraph (b) to clarify that the intent is to prevent Medicaid paying for services already covered and paid for under vocational rehabilitation.

*Response:* The statute specifically excludes vocational rehabilitation services (direct services to individuals with disabilities which teach specific skills required by an individual to perform tasks associated with performing a job to help them to become qualified for employment) from being provided under CFC. Therefore, we disagree with the suggestion to amend paragraph (b) as these services are not related to the services provided under CFC and should not impact vocational rehabilitation services being provided to an individual.

*Comment:* A few commenters noted that the proposed rule indicates at § 441.525 (c) that assistive technology devices and assistive technology services are excluded, other than those defined in § 441.520(a)(5), but pointed out that the proposed regulation does not include a § 441.520(a)(5).

*Response:* We have revised the regulation to reference § 441.520(a)(3).

Upon consideration of public comments received, we are finalizing § 441.525 with revision, modifying paragraph (c) to correct a reference to paragraph (a)(3) and to remove the requirement that assistive devices and assistive technology services meeting the requirements of § 441.520(b)(2) have to be provided in conjunction with other home and community-based attendant services, and modifying paragraphs (d) and (e) to allow medical supplies, medical equipment and home modifications when coverage is based on an identified need in the service plan.

*H. Setting (§ 441.530)*

We proposed that States must make available attendant services and supports in a home and community setting and specified that such settings did not include the following:

- A nursing facility;
- An institution for mental diseases;
- An intermediate care facility for the mentally retarded;
- Any settings located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment or custodial care; or
- A building on the grounds of or immediately adjacent to, a public institution or disability-specific housing complex, designed expressly around an individual's diagnosis that is geographically segregated from the larger community, as determined by the Secretary.

We received multiple thoughtful comments related to this section of the proposed regulation. These comments provided a rich and varied array of perspectives for our consideration. Several commenters were supportive of CMS' efforts to add parameters regarding home and community-based settings and some were supportive of the proposed language. Several commenters were strongly supportive of the proposed setting exclusions specifically. Multiple commenters expressed their concerns related to the proposed regulation and offered suggestions for revision of the criteria. These comments are reflected as follows:

- One commenter indicated the need for a more specific definition of setting adding that facilitating residents' engagement with and participation in the community is an essential component of services provided in a home and community-based setting.
- One commenter noted that the ambiguity surrounding the definition of home and community-based desperately needed to be remedied.
- One commenter noted that CMS proposed to adopt the statutory definition at section 1915(k)(1)(A)(ii) of the Act and recommended that CMS rely on this definition for purposes of CFC.
- One commenter recommended that CMS continue exploring how to clarify that certain settings are ''outside of what would be considered home and community-based because they are not integrated into the community.'' The commenter suggested that CMS consider that such clarification could be process-based and service-based and explore which processes and services characterize integration. The commenter recommended that CMS ensure that any clarification of the definition does not eliminate important community-based options for Medicaid beneficiaries, including assisted living communities, group homes, and settings that happen to be located near institutional settings. The commenter also suggested that when a clarification is developed, CMS should initially limit the use to one HCBS program until it is determined that there are no unintended or unanticipated problems caused by the clarification. Another commenter requested we clarify if CFC services may be provided in other residential community-based settings such as Assisted Living Facilities. The commenter believes the criteria should ensure participant independence and choice in residential settings that meet the unique needs and preferences of each individual.
- Several commenters requested that CMS convene meetings of stakeholders to address the definition of home and community-based.
- Other commenters encouraged CMS to ensure that the regulation recognizes that some populations need and choose to reside in settings that are similar to assisted living, so that they can maximize their independent living while still being able to access support services to keep them healthy and safe, and that some people with disabilities with very particular functional limitations need to receive support

services in more structured environments.

• Another commenter added that any criteria for setting should allow individuals to access services that aim to integrate individuals into community life and that organizations that are accredited by a national accreditation group that meet standards for person-centered planning and community integration as established by the accrediting body for programs serving people with disabilities should be eligible providers.

• One commenter indicated that ''community'' is defined as a unified body of individuals; people with common interests living in a particular area; a fellowship; a social state or condition, and pointed out that a community is more than a place or a location, and is defined not just by where people live but how they interact. The commenter added that in many States the word ''inclusion'' means that adults with special needs live in isolated settings like group homes, separated by a radius of 1000 feet where there is little or no contact with neighbors but is nevertheless considered being in the community and thus ''included.'' The commenter stated that individuals and their families are the primary decision makers regarding where and with whom to live and that they should be able to choose where they want to be rather than where they are forced to be included. The commenter pointed out that the stated values of CMS include ''promoting initiative and choice in daily living,'' yet HCBS waiver funding would be denied to those who would benefit from the choice of residential options, and recommended that Medicaid waiver funding should be person-centered, choice based, consumer driven and the money should follow the person, not ''idealist ideology.'' Finally, the commenter stated that ''inclusion'' must not exclude individuals with developmental disabilities from the rights afforded to all other citizens, including the right to live next to peers in a setting of choice.

• Another commenter indicated that as proposed, these exclusions, which they believe to be based on artificial considerations, might actually lead to greater isolation of individuals. The commenter indicated that despite the locations where some individuals reside, the sense of community there is much greater than the individual might have if they were living by themselves in an apartment with limited social opportunities, access to assistance and amenities, and vulnerable to exploitation. The commenter added that as written, this apartment would be considered ''integrated'' while a planned residential retirement community where individuals and their friends live alongside one another with access to services would not be considered a community setting.

• One commenter recommended a more robust set of standards to evaluate the ''quasi-institutional'' setting to determine whether they are to be excluded and suggested that these standards include whether the setting is segregated from the community at large, whether the residents are limited in terms of meal times, meal sources, and visitors, whether the setting limits the choice of caregivers, whether the setting controls or limits the resident's abode in terms of normal actions as furniture, food storage, paint colors, and use of TVs etc., and whether the facility has any contractual or other obligation to provide personal care to residents.

• One commenter indicated that there is a limited supply of affordable, handicap accessible housing that is available for low income individuals and that establishing a strict definition of settings could have a negative impact on access to CFC.

• Several commenters voiced concern regarding whether services will still be authorized in settings if these proposed criteria are adopted broadly across Medicaid. One commenter indicated that their organization serves frail elderly individuals, most of whom are Medicaid beneficiaries, on a campus that includes 6 buildings (1 with 20 nursing care beds, 1 with 16 memory care beds, 3 assisted living buildings, and one building of independent living with 12 apartments). The commenter added that the nursing care beds are the only nursing beds in the entire county and they were moved to this location when the rural critical access hospital closed down due to funding issues. The commenter voiced concern as they have been involved with the waiver program since its inception and as written, these exclusions would have a negative impact on the lives of many elderly individuals currently being served.

• One commenter requested that CMS regulations and State Plan Amendments assure that a State's decision to access CFC does not adversely impact assisted living settings for American Indians and Alaska Natives (AI/AN) individuals who reside in/near Indian communities where living settings may differ according to the cultural norms of those communities. The commenter indicated that certain assisted living settings, even though they may be large congregate settings, should be considered appropriate home and community-based settings under certain conditions. The commenter recommended that the regulation affirmatively state that those culturally appropriate settings in/near Indian communities, including assisted living settings for persons of retirement age, without regard to disability, where the individual is to be served is an Indian or resides in/near an Indian community where group living arrangements are culturally acceptable, are not excluded from home and community-based settings.

• One commenter suggested that CMS had not gone far enough to assure that settings are truly community-based, stating that the language only lists three types of institutions, and proposed language, similar to that used in the Money Follows the Person (MFP) program, that provides an exclusion that they felt would capture an institutional setting regardless of its licensure category. Other commenters suggested using the definition of ''community housing'' developed for the MFP program to clarify whether and what type of Assisted Living Facility will or will not be allowed as a setting under CFC. Several other commenters suggested using the 2011 MFP application definition of ''qualified residence'' and one commenter added that this would prevent HCBS dollars from being used to house people on congregate campuses. Another commenter suggested further clarifying the community nature of the setting where services may be provided to ensure that States are not using this option to further entrench institutional placements in the State and suggested defining ''community setting'' in the definition section using guidelines similar to those used in MFP: A home owned or leased by the recipient or that individual's family; a residence in a community-based residential setting in which no more than four unrelated individuals reside; or assisted living facilities or settings that offer a lease, as long as those residences include living, sleeping, bathing and cooking areas, offer residents lockable access and egress and cannot require that services be provided as a condition of tenancy or from a specific company. One commenter indicated that ''inpatient institutional treatment'', ''custodial care'' and ''provides'' were not defined in the proposed regulations and added that it is important that CMS clarify the meaning of these terms, as how they are defined could have a significant impact on the settings where individuals may receive CFC services. The commenter also pointed out the definition of custodial care in the Medicare Benefit

Policy Manual and added that some of the services offered under CFC are these same services. Another commenter asked if individuals who live in any building that provides custodial care by the Federal definition would be precluded from receiving services under CFC.

• One commenter asked what was meant by using the phrase ''publicly or privately operated facility that provides custodial care'' while several commenters voiced concern that the reference in subparagraph (d) to ''custodial care'', depending on how it is defined, could preclude individuals who live in any building that provides assistance with activities of daily living from receiving CFC. Another commenter indicated that depending how terms in both paragraphs (d) and (e) are defined and interpreted, the current proposed language could prevent the provision of CFC services in any residential setting where personal care is provided other than an individual's own private home. One commenter added that States have innovative housing with services models of care that promote consumer choice for home and community-based services and that at times, HUD funded section 202 and 811 housing are located on the same campus as a nursing home. The commenter stated that many times these programs provide ''custodial care'' to help older individuals and persons with disabilities age in place. The commenter also stated that as part of their rebalancing efforts, some States are encouraging nursing homes to decertify beds and establish independent living for older individuals and persons with disabilities and because this independent living is located in a nursing home, the consumers would not be eligible for CFC, even though their residences are currently considered independent living. The commenter indicated that the definition of setting in the proposed rule for CFC could be a barrier in many States where older frail individuals with chronic diseases and persons with disabilities choose to live in the least restrictive setting in their community that offer the services that they need to remain independent.

• Another commenter added that if efforts are made to dismantle settings that would now be excluded, that people with disabilities in congregate housing complexes ''in the community'' be provided with ample phasing-in time or consider grandfathering- in settings for people who do not wish to move to continue receiving their services as people should not have to choose between housing and supports.

• One commenter indicated that individuals receiving self-directed services generally must live in a setting that is not provider owned and operated and asked if such settings are excluded under the CFC program as it is not clear.

• One commenter indicated that denying access to CFC funds for an individual who resides ''in a building on the grounds of, or immediately adjacent to, a public institution or disability-specific housing complex'' does not reflect the purpose of section 1915(k) of the Act, which is to improve access to personal attendant services, and other services required under § 441.520 for individuals in the community. The commenter added that there was no statement in the *Olmstead* ruling that required that the setting for care delivery cannot be located in a building on the grounds of, or immediately adjacent to, a public institution or disability-specific housing complex. One commenter suggested that terms in paragraph (e) like ''disability specific housing complex'' be clarified while another suggested that it be removed altogether as individuals living in these settings are currently eligible to receive home and community-based services and supports. One commenter requested that community-based settings not be excluded based on proximity to congregate care or the fact that they only serve individuals with disabilities as community integration is a large part of their programs.

• Several commenters voiced concern about the definition excluding those settings that are geographically segregated from the community and urged that size alone not become part of the definition. The commenter indicated that small campus settings can provide rich staffing and supervision and a continuum of care model needed for individuals with traumatic brain injuries etc. Another commenter expressed concern that the proposed definition of home and community-based setting might exclude important options for services that assist people with disabilities, especially cognitive disabilities related to severe brain injuries, to live in and be part of the community. Specifically, the commenter is concerned that services could be denied to individuals currently receiving Medicaid benefits from post-acute brain injury rehabilitation service programs that are enrolled in Medicaid and other State programs serving people with brain injury. Another commenter with a family member in a facility for individuals with traumatic brain injury stated that this setting was much better for her daughter than a nursing home and that she is part of community there.

• Other commenters indicated that some companies have various settings ranging from a campus to group homes and apartments and individuals as well as families and guardians choose these settings. Another commenter suggested that rather than including geographical segregation when setting a standard, CMS should impose a standard for community integration that is applied to service plans, including access and involvement in the community and the level of social interaction in the residence of the individual.

• One commenter voiced concern about the tension between the need for affordable, accessible housing for people with developmental disabilities (including HUD's section 811 and 202 housing programs) and the need for that housing to be provided in integrated settings rather than clustered or segregated housing that primarily or exclusively serves people with disabilities. Other commenters shared concerns that housing used by the elderly and individuals with disabilities as allowed by the Senior Housing Exemption to the Fair Housing Act and under HUD's subsidized apartments (811 and 202 housing programs) would be restricted by the phrase ''disability specific housing segregated from the larger community'' and recommended that these settings be allowed. Another commenter questioned what type of setting this language intended to address and voiced concern that individuals in these 811 and 202 housing programs might be affected or lose services. Several commenters expressed concern that the proposed definitions would exclude the delivery of attendant services in many settings that are the most appropriate setting to an individual's needs, especially those residing in HUD funded section 811 and 202 housing designated specifically for targeted populations with disabilities.

• Another commenter added that to exclude certain settings goes beyond the Congressional intent of the CFC option as the Congress only excluded CFC in particular settings and urged CMS to remove the reference to disability-specific housing in this section.

• One commenter indicated that some individuals need and choose to receive services in ICFs/MR and the provision of a range of service options is supported by Federal law including Medicaid and the U.S. Supreme Court (*Olmstead*).

• One commenter requested that in addition to excluding settings that are co-located with current institutions that CMS also exclude settings created on the grounds of former institutions as it should be clear that the reorganization and reclassification of an institution

would not meet the criteria of a community-based setting.

• Another commenter added that CMS should clarify instances where paragraph (e) would not apply. One commenter referred to this proposed rule as providing clarifications of setting at § 441.530 with the purpose of disallowing HCBS Waiver funding for living arrangements in ''alternative or subsidiary residential settings on the ground of or located adjacent to such institutional facilities'' and recommended language revisions. The commenter appreciates explicit clarification that would prevent the practice of reconfiguring institutions to access funds not intended for institutional settings.

• One commenter indicated that community-based care settings like adult foster care, assisted living and residential care should qualify as a permitted setting under CFC.

• One commenter indicated that the preamble of the Home and Community-Based Services Waivers proposed rule published in the April 15, 2011 **Federal Register** (76 FR 21311), listed 8 conditions for an assisted living home to be included as a community setting. The commenter stated that, with the exception of aging in place, the conditions are common to, and actually regulated for the licensing of assisted living homes in their State. The commenter stated that the view that assisted living is not part of the larger community is due to lack of experience with it and recommended that the emphasis be on the character of a building inside the walls rather than the location or foundation within the larger community or sharing grounds or walls with a nursing facility.

• Many commenters expressed concern that the definitions of setting would exclude assisted living facilities and other specific settings that they felt should be settings in which individuals could receive CFC services. Many commenters noted that individuals often choose to reside in these settings and continue to be part of the community rather than moving into a nursing facility.

• Several commenters indicated that any definition of home and community-based service settings applied across the Medicaid program should include assisted living facilities as well as group homes, disability-specific and non-institutional settings providing services to individuals and encouraged CMS to recognize the need for some populations to reside in settings that are similar to assisted living to maximize independence while at the same accessing support services to keep them healthy and safe.

• Several commenters recommended the following criteria be added to the section for a setting to be considered community-based:

++ The Unit/room must be a specific place that can be owned or rented and include the same protections from eviction under the State's landlord/tenant law;

++ The individual must have privacy in the unit (lockable entrance doors, freedom to furnish and share the unit only by choice, the inclusion of individual bathroom), unless partners/spouses share a room);

++ There is freedom/support to control one's own schedules and activities including access to food at any time; and

++ The individual may have visitors of their choosing at any time.

• One commenter proposed adding the following language to the list of excluded characteristics:

++ Any residence that requires that services must be provided as a condition of tenancy;

++ Any setting that requires notification of absence from the facility;

++ Any setting that does not have lockable access and egress controlled by the individual; and

++ Any residence where the lease reserves the right to assign apartments or change apartment assignments.

• One commenter indicated that the new proposed rule seems vague and seems to give the Secretary great latitude in describing what kind of setting is ''geographically segregated'' from the larger community (and therefore ineligible for waiver reimbursement for brain injury services). The commenter indicated that they support the freedom of consumers' choice and the option to live in a setting where community integration is maximized. The commenter does not support any definition that uses size of a home or the adjacency of homes on a small ''campus'' as the criteria for defining ''geographic segregation.'' The commenter added that in terms of small campus settings for individuals who are catastrophically injured and severely limited cognitively and physically and who require a good deal of medical oversight, this kind of living arrangement may provide the necessary richness of staffing to facilitate, rather than inhibit community integration to the highest degree possible for particular individuals. The commenter stated that while home size can matter, one size does not fit all, especially where the results from brain injury are profound for the consumer. Finally, this commenter urged the inclusion of the following specific criteria, other than simply size of the home, in the definition of settings:

++ The facility provides post-acute residential care to individuals with an acquired brain injury.

++ The facility is accredited by the Commission on Accreditation of Rehabilitation Facilities(CARF) as a community integrated brain injury rehabilitation facility.

++ There is handicap access to the community. (One example would be an accessible wheelchair path).

++ There is evidence of a robust level of community participation on the part of individuals living in the homes. (The commenter noted that one significant measure of the levels of community participation can be highlighted by applying the Maya-Portland inventory; the internationally recognized, standardized assessment in brain injury populations). Other evidence of such community participation may be access to jobs in the community, recreational outings, participation in community programs and prolific voting in local and national elections etc.

++ There is consideration given to the functional level of the people living in that home. For some individuals with profound limitations due to brain injury, a small campus in close proximity to a town or urban center is frequently the most effective way to provide the intensity of staffing, medical oversight, and richness of rehabilitation services that will enable people living in the home to access the social capital of community life.

++ There is a continuum of care available at the facility, so that as individuals gain functionally and can negotiate the community more safely, they can move from small campus settings in the community to even smaller group homes and independent apartments.

++ There is evidence of consumer choice in selection of the residential setting.

++ The home is not on the grounds of a hospital, nursing home or ICF.

• Several commenters strongly disagree with CMS' proposed clarifications and stated that proximity of a community setting to an institutional setting or disability-specific housing complex has little, if any, bearing on the degree of community integration experienced by residents. The commenters added that geographic separation should not matter if a residence is well integrated with the larger community. They believe that a better way to clarify community integration would be to look at the

services available and provided by the setting and to ensure that processes, such as care planning, promote beneficiary choice. The commenters stated that because all States license or certify assisted living providers, Medicaid beneficiaries living in these communities receive services with greater government oversight than those receiving services in freestanding homes. The commenters also added that in recent years, as residents' levels of disability and the proportion of residents with Alzheimer's and other related diseases have increased, States have responded by increasing regulatory standards applying to assisted living communities and that due in part to the fact that Medicaid cannot pay for room and board in community-based settings, the extent of Medicaid coverage in assisted living already is much more limited than Medicaid coverage for nursing homes and other long term care options. The commenters urged CMS to reconsider its clarification of ''home and community-based'' and recommended that CMS utilize the definition in law and explore a clarification that relies on services available and provided by the setting, and ensure that processes, such as care planning, promote choice.

• One commenter suggested that consideration be given to including the list of factors characterizing settings included in the recently proposed rule revising section 1915(c) HCBS waiver provisions published in the April 15, 2011 **Federal Register**. The commenter shared language from § 441.301(b)(1)(iv) that states that attendant services may be provided ''only in settings that are home and community-based, integrated in the community, provide meaningful access to the community and community activities, and choice about providers, individuals with whom to interact, and daily life activities.''

*Response:* We appreciate these thoughtful comments. Several commenters referenced waivers in their comments and we would like to clarify that this regulation pertains to the CFC State plan option, not the HCBS waiver program.

In consideration of the comments received, we are not finalizing the setting provisions of proposed § 441.530 at this time. The comments received indicated to us that the proposed provisions caused more confusion and disagreement than clarity and we believe further discussion and consideration on this issue is necessary. In addition, similar language proposed in the notice of proposed rulemaking for revisions to the 1915(c) waiver program garnered significant public comment. Therefore, we intend to issue a new proposed regulation that will provide setting criteria for CFC that we developed in light of the comments received and to invite additional public comment on our proposal. We plan to propose home and community-based settings shall have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan:

• The setting is integrated in, and facilitates the individual's full access to, the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, in the same manner as individuals without disabilities;

• The setting is selected by the individual from among all available alternatives and is identified in the person-centered service plan;

• An individual's essential personal rights of privacy, dignity and respect, and freedom from coercion and restraint are protected;

• Individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact are optimized and not regimented;

• Individual choice regarding services and supports, and who provides them, is facilitated;

• In a provider-owned or controlled residential setting, the following additional conditions must be met. Any modification of the conditions, for example, to address the safety needs of an individual with dementia, must be supported by a specific assessed need and documented in the person-centered service plan:

++ The unit or room is a specific physical place that can be owned, rented or occupied under another legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord tenant law of the State, county, city or other designated entity;

++ Each individual has privacy in their sleeping or living unit:

—Units have lockable entrance doors, with appropriate staff having keys to doors;

—Individuals share units only at the individual's choice; and

—Individuals have the freedom to furnish and decorate their sleeping or living units;

++ Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time;

++ Individuals are able to have visitors of their choosing at any time; and

++ The setting is physically accessible to the individual.

We also plan to propose that home and community-based settings do not include the following:

(1) A nursing facility;

(2) An institution for mental diseases;

(3) An intermediate care facility for the mentally retarded;

(4) A hospital providing long-term care services; or

(5) Any other locations that have qualities of an institutional setting, as determined by the Secretary. The Secretary will apply a rebuttable presumption that a setting is not a home and community-based setting, and engage in heightened scrutiny, for any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment in a building on the grounds of, or immediately adjacent to, a public institution or disability-specific housing complex. CMS will engage States in discussion and review any pertinent information submitted during the SPA review process to determine if these facilities meet the HCBS qualities set forth in the proposed rule.

While we are proposing the aforementioned setting requirements in a new proposed rule, the CFC option is in full effect. CMS will rely on the proposed setting provision as we review new 1915(k) State plan options and we will fully expect States to comply with the setting requirements and design and implement the benefit accordingly. To the extent there are changes when this language is finalized, we are committed to permitting States with an approved section 1915(k) State plan amendment a reasonable transition period, at a minimum of one year, to make any needed program changes to come into compliance with the final setting requirements. We are committed to minimizing disruption to State systems that have been established based upon compliance with these proposed regulations.

It is our intent to and to apply this criteria to sections 1915(c) and 1915(i) of the Act authorities.

As expressed earlier, we believe further discussion is necessary and we believe this can be accomplished by soliciting public comments on the modified criteria. Therefore, we are not finalizing the setting provision at this time.

*I. Assessment of Need (§ 441.535)*

We proposed that States must conduct a face-to-face assessment of the individual's needs, strengths and preferences that supports the determination that an individual requires attendant services and supports available under CFC, as well as the development of a person-centered service plan and, if applicable, a service budget. We also proposed that this assessment must be conducted at least every 12 months, as needed when the individual's support needs or circumstances change significantly, necessitating revisions to the service plan, or at the request of the individual, or the individual's representative, as applicable.

*Comment:* One commenter indicated support for this section and appreciated the emphasis on understanding and honoring an individual's personal goals and preferences for the provision of services.

*Response:* We believe that an individual's preferences and goals for the provision of services is an important aspect of both an assessment and the person-centered service plan.

*Comment:* Several commenters indicated that it is unclear whether the term ''may'' in § 441.535(a) makes the entire subpart optional and suggested that CMS clarify that States must gather information on all the items listed in the proposed rule at paragraphs (a)(1) through (8). The commenters also indicated that it is unclear what role the consumer has in selecting (or prohibiting) the use of specific processes and techniques used to obtain information about an individual, and pointed out that the list of items included in paragraph (a) does not clearly correspond to ''processes and techniques.'' The commenters suggested that CMS change ''processes and techniques'' to ''criteria'' and recommended that certain criteria be mandatory to assure that the assessment is based on a comprehensive information set. The commenters recommended that the other criteria should be optional, but in all cases should not exceed the scope of the conversation with the individual, adding that collateral contacts should not be allowed unless requested by the individual. Finally, the commenters recommended that ''health condition'' at § 441.535(a)(1) be expanded to read ''health condition and treatments'', and that ''household'' at § 441.535(a)(7) be edited to read, ''household and physical living arrangements, including the safety of those arrangements'' as ''household'' may be relevant to understanding the individual's functional limitation, but should not be a basis for lowering a needs determination based on availability of other people. One commenter requested that CMS amend § 441.535(a)(1) to read ''health and mental health condition.''

*Response:* With regard to the ''processes and techniques'' to gather information for the assessment, the intent of this language was to indicate that States have the flexibility to utilize multiple methods to gather this information. Therefore, we do not agree with the commenters' suggestion to modify this language. With regard to the individual's role in the processes or techniques the State chooses to utilize, an individual should have the opportunity to discuss any gathered or related information during the assessment, and the individual must approve the person-centered service plan which is based on the assessment of need.

In the absence of other statutory requirements, we proposed language in the assessment section for CFC that was consistent with the section 1915(j) Self-Directed Personal Attendant Services final rule, in an effort to streamline State requirements where possible across the programs. In addition, we indicated in the preamble that we are currently working to determine universal core elements to include in an assessment for consistency across programs. This initiative is directly related to the work being done regarding the Balancing Incentives Payment Program (Balancing Incentive Program) created under section 10202 of the Affordable Care Act.

Based on multiple comments and the acknowledgement that additional policy work is necessary to maximize the extent to which consistency can exist across the Medicaid programs as it relates to assessments for HCBS programs, we are revising the language, as some commenters suggested, to reflect the broad assessment requirements in statute. As such, we are reflecting this assessment throughout the final rule as the ''assessment of functional need.'' We are also taking more time to consider all of the thoughtful comments from this rule and the forthcoming comments from the proposed rule that will be published to implement changes to the section 1915(i) HCBS State Plan option required by the Affordable Care Act, and to have additional policy discussions both internally and with stakeholders. Our intent is to share any finalized universal core elements that are developed under the Balancing Incentive Program with States to use as examples of elements to be incorporated into the assessment of functional need for CFC and other HCBS assessments as determined by CMS. As such we are revising the language to add that the assessment must include other requirements as determined by the Secretary. Finally, we are clarifying the scope of the assessment to indicate that it is the individual's need for the services and supports provided under CFC that must be assessed. This is in no way meant to limit a State from implementing a comprehensive assessment that would determine an individual's need for a broader scope of services. We are simply clarifying in this rule that the assessment described at § 441.535 is only required to assess the need for CFC services and supports.

*Comment:* One commenter stated that the proposed regulation does not recognize that there may be other services and programs that can meet the needs of those applying for CFC and indicated that a comprehensive assessment should include a determination as to whether the individual is appropriate for this and other State plan and/or home and community-based services so that the consumer can be offered a choice of programs and not be limited to one model of care. The commenter added that such an assessment tool is recognized as a vital component of other Federal programs including the State Balancing Incentive Program and is used by some States.

*Response:* We agree with the commenter that it would be ideal for a State to have one comprehensive streamlined assessment for an individual that would serve to inform a person-centered service plan, and that the entity that coordinates and/or conducts these functions be able to present an array of possible services and supports to meet the individual's needs to provide a choice among these services to the individual. States have the flexibility to offer this kind of assessment and service plan and as the commenter pointed out, some States have implemented their programs in this manner.

*Comment:* One commenter appreciated that CMS decided not to prescribe a specific assessment tool to determine an individual's functional needs. Another commenter pointed out that the preamble clearly states that CMS will not dictate the assessment tool and asked that CMS clarify in the rule that States may design and/or select the assessment tool to determine functional eligibility, as well as identify needed services as long as such tools contain the required CMS elements. Another commenter asked CMS to clarify

expectations about the face-to-face assessment process and instrument proposed for use in CFC, the more universal level of care assessment and service planning process, and instruments used in a State's section HCBS 1915(c) waiver programs. The commenter asked if there is flexibility for a State to use the same fundamental processes and instruments but with different threshold levels for program participation or if a State may choose different processes and instruments. The commenter also asked if States may set an assessment standard to operationalize the determination that an individual requires CFC. One commenter asked if States were expected to develop new assessment tools or if they can use existing assessment tools that establish level of care and service planning if the current tools conform to the requirements in the CFC regulation. The commenter added that States should be permitted to use assessment processes and person-centered service planning to allow individualized determinations of the most integrated setting appropriate to the individual's needs and preferences, as well as eligibility for this option. Other commenters asked if States will have flexibility in selecting an assessment instrument and if the instrument could focus on specific types of disabilities (physical, intellectual, developmental, etc.).

*Response:* We have not specified the instruments or techniques that should be used to secure the information necessary to determine an individual's functional need for the attendant services and supports offered under CFC or to develop the service plan and/or service budget. States continue to have the flexibility to develop their own assessment tools or to utilize existing tools to the extent possible to meet the requirements under CFC. While this regulation does not specifically address the assessment process or tool States utilize in their section 1915(c) programs for assessments or level of care determinations, States have the flexibility to use any existing assessment tools if the CFC requirements are met. As States are not permitted to target attendant services and supports provided under CFC to any particular population or disability, we do not anticipate States will tailor an assessment of need to focus on any such population or disability.

*Comment:* One commenter indicated that the most important aspect of legislative intent that is not captured in the proposed rule is a clear statement of a State obligation to provide services and supports to meet the individuals' assessed needs. The commenter suggested that language be added to paragraph (a) to say ''so as to meet the individual's assessed needs'' and recommended that this language be included elsewhere in the regulation as needed to ensure that a State has to meet the assessed needs of the individuals to receive funding.

*Response:* An individual's person-centered service plan must be based on that individual's assessment of functional need. We expect that as needs for the required attendant services and supports available under CFC are identified and incorporated into the person-centered service plan, these services would be made available to the individual to meet those needs. Therefore, we disagree with the suggestion to add this proposed language as we believe this expectation is clear. In fact, we do reiterate the ability of a State to establish limits on the amount, duration and scope of CFC services, as long as those limits are not based on the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life, as prohibited in the statute.

*Comment:* One commenter voiced concern that States might ''poorly integrate'' the CFC assessment into their current assessment processes for HCBS and suggested, along with another commenter, that States be required to have a publicly available written plan explaining how the CFC assessment will work, interact with existing assessments for HCBS, and ensure that the regulatory requirements are met.

*Response:* States have the flexibility to design a new assessment tool, or utilize current assessment tools as long as the requirements in the CFC regulation are met. We do not agree with the commenter's recommendation to require States to have a written plan regarding their assessment, as we do not require a CFC-specific assessment. States electing CFC must submit a State plan amendment that shows how they propose to implement CFC and how the program requirements will be met. Once approved, this will become part of a State's Medicaid plan, which is a public document.

*Comment:* One commenter recommended that CMS consider adding the concept of an independent assessment found in section 1915(i) of the Act and suggested that CMS add an independent assessment descriptor to § 441.535. The commenter indicated that in paragraph (b), an independent assessment would also address concern about recipients needing the service, as an objective assessment would establish medical necessity for the services.

*Response:* We agree that consideration should be given to the proposed requirements of the assessment for the section 1915(i) State plan option. As noted above, in addition to the comments received for this proposed rule, we will be considering the forthcoming section 1915(i) proposed rule public comments related to assessments as we move forward with the development of the universal core assessment elements and methods to streamline requirements across the Medicaid program.

*Comment:* One commenter pointed out that CMS states in the preamble that ''the assessment should include a determination of whether there are any persons available to support the individual, including family members. These persons may be able to provide unpaid personal assistance * * *'' and added that inclusion of such language in the preamble implies that CFC includes a waiver of comparability as found at section 1915(j)(3) of the Act. The commenter indicated that they have not identified a corresponding provision in section 2401 of the Affordable Care Act or in the proposed section 1915(k) rule and requested that CMS clarify whether such a waiver of comparability is intended and add language authorizing such a waiver.

*Response:* We can confirm that no waiver of comparability was included in the authorizing legislation, or in the implementing regulation for CFC. However, we do not believe that comparability of services is violated based on an individualized determination of the impact of available unpaid personal assistance on the CFC services and supports required.

*Comment:* One commenter indicated that the preamble mentions the identification of natural supports but the proposed rule related to assessment does not. The commenter recommended that if CMS mentions natural supports in the rule that we specify that the assessment and service plan take into account, but do not compel, natural supports, as case managers or other entities conducting the assessment and/or planning process should not automatically make judgments about what families ought to provide and reduce needed services accordingly.

*Response:* We mention the identification of natural supports in the assessment preamble section as understanding an individual's natural supports is an important aspect in determining an individual's needs. It is a requirement in the person-centered

service plan that these supports be reflected in the person-centered service plan. We expect that identification of these natural, unpaid supports be taken into consideration with the purpose of understanding the level of support an individual has, and should not be used to reduce the level of services provided to an individual unless these unpaid supports are provided voluntarily to the individual. We have incorporated this philosophy into the ''Person-Centered Service Plan'' section, as discussed below.

*Comment:* A few commenters indicated that they did not understand the purpose of paragraph (b) which states that ''assessment information supports the determination that an individual requires CFC * * *'' and suggested clarification or deletion. One commenter requested that in paragraph (b) CMS substitute the word ''requires'' with the words ''would benefit from'' CFC services.

*Response:* Information gathered in the assessment should support the determination that an individual requires the services and supports available under CFC. If an individual does not meet the State's medical necessity criteria for the receipt of attendant services and supports, the individual would not participate in the option. Therefore, we do not agree with the suggested language change.

*Comment:* One commenter voiced concern that the proposed rule does not address the gap between the actual support needs of individuals and the needs typically assessed in current assessment tools which are generally limited to ADLs and IADLs.

*Response:* While we appreciate the commenter's concern, CFC is a benefit to provide attendant services and supports to individuals to assist in accomplishing ADLs and IADLs. While States are not limited to assessing an individual's needs based solely on ADLs and IADLs, CFC as a benefit is centered around these services and supports.

*Comment:* Several commenters referenced and supported the requirement at § 441.535(c) that the assessment must be conducted at least every 12 months, as needed when the individual's support needs or circumstances change significantly, necessitating revisions to the service plan, or at the request of the individual. One commenter appreciated these caveats and noted that without them, 12 months could be too long a period considering how quickly an individual's needs may change. A few commenters indicated that § 441.535(c) uses the word ''or'' to link the clauses whereas § 441.540(e) uses the word ''and'' and suggested that CMS be consistent and use ''and' in both sections. One of the commenters added that the policy should guarantee that a service plan would always be reviewed at the request of the individual and suggested that this meaning is best implemented by using the word ''and.'' Some commenters added that assessments often need to be conducted more often than every 12 months for some populations due to frequent changes in needs due to behavior, improved cognitive skills, and other emerging health issues. Several commenters suggested that CMS clarify either in the regulation or in future guidance that an individual's circumstances or needs change significantly when a participant's support network changes, including friends and family that the participant relies on for physical or emotional support and these protections should explicitly include Lesbian, Gay, Bisexual and Transgender individuals and their families. Other commenters recommended that CMS provide specific timeframes for conducting these assessments including both a standard timeframe and an emergency timeframe to address situations where a consumer's health or safety may be in jeopardy. One commenter asked if it was possible for the State to require more frequent assessments but not exceed an annual authorization as this would assure consistency across other home and community-based services and the potential for moving between service modalities.

*Response:* We believe that an assessment of functional need should be conducted at least every 12 months, at a minimum, to ensure that an individual's needs are commensurate to the services authorized in the service plan, as we understand that an individual's needs can change significantly over time and as a result of various circumstances. Regarding the comment that mentioned changes in a participant's support network, we expect this paragraph and all parts of this rule to apply to all individuals equally regardless of disability, age, sexual orientation, or any other factor. We include several provisions related to the reassessments that we believe capture various circumstances necessitating a reassessment and updates to the service plan. Therefore, we do not agree that we need to change the language. In addition, States have the option to choose how many reassessments they offer as long as the requirements in the final rule are met. We appreciate the commenters pointing out the discrepancy between the use of ''and'' and ''or'' in different sections of the regulation. We are modifying § 441.535(c) to incorporate the word ''and'' to ensure appropriate reassessments as necessary.

*Comment:* Several commenters voiced support for the face-to-face assessment. Other commenters added that in-person assessment meetings allow for the building of rapport to improve information sharing. Two commenters added that CMS should specify that CFC applicants should have the right, though not the requirement, to have the face-to-face assessment conducted in their own home as this would decrease undue burden on the individual who may have mobility issues and would have the added benefit of providing the State with increased information about the individual's living situation and support system. Another commenter asked that CMS clarify the statement that the assessment be conducted at the site where the services are to be provided to assure a comprehensive assessment of need. Another commenter suggested that it be clarified in the regulations that the annual reassessment should be conducted face-to-face. One commenter suggested that the initial assessment be conducted face-to-face but CMS should allow subsequent assessments to be conducted via a variety of other health technologies and tools as appropriate for an individual's needs, accessibility and preference.

*Response:* We agree that ideally, the assessment of functional need would be conducted face-to-face in order for the entity conducting the assessment to get a better overall understanding of an individual's needs. However, we recognize that many States are developing infrastructure and policies to support the use of telemedicine and other ways to provide distance-care to individuals to increase access to services in rural areas or other locations with a shortage of providers. To support these activities, we are indicating here that the ''face-to-face'' assessment can include any session(s) performed through telemedicine or other information technology medium if the following conditions apply:

(1) The health care professional(s) performing the assessment meet the provider qualifications defined by the State, including any additional qualifications or training requirements for the operation of required information technology;

(2) The individual receives appropriate support during the assessment, including the use of any necessary on-site support-staff; and

(3) The individual is provided the opportunity for an in-person assessment

in lieu of one performed via telemedicine.

We have modified the regulation to allow for use of these technologies to meet this requirement. With regard to the location of the assessment, we continue to encourage that these assessments be conducted in the individual's place of residence, as this would provide the best picture of the individual's needs, allow the State to monitor the health and welfare of the individual, and allow the State to get a sense of how well the services and supports in the service plan are meeting the individual's needs. But we note that the CFC proposed rule did not require the assessment to be conducted at the site where the services are to provided. In addition, as the assessment of functional need and the person-centered planning process may take place at the same visit, the service planning process section at § 441.540 indicates that this process take place at times and locations of convenience to the individual.

*Comment:* Several commenters indicated that assessments, when overdone, can be draining and somewhat de-humanizing for participants and requested that CMS and States be sensitive to this as they design tools and policies for the frequency of assessments. The commenters added that recognizing that some people may not experience a change in functional status over time, trigger questions that allow the assessor to shorten the assessment and minimize intrusiveness, when possible, can be beneficial to all. One commenter disagreed with the proposed requirement that an assessment be conducted at a minimum of every twelve months and indicated, along with another commenter, that States should have the discretion to both allow for exceptions where an individual's living situation is stable, medical condition is non-degenerative, and abuse risk factors are low, and to conduct telephone or paper reassessments in similar situations. The commenter indicated that less frequent assessments promote efficient use of governmental resources and are less burdensome on the recipient, but did support the allowance for more frequent reassessments if necessary or at the individual's request. Similarly, multiple commenters recommended that CMS identify certain circumstances in which it would not be necessary to conduct a face-to-face assessment of need every 12 months such as when an individual can document that their needs are unlikely to change from year to year.

*Response:* We agree that the assessment process should not be overdone or burdensome for individuals participating in CFC. States may want to design their assessments to accommodate the needs of individuals whose needs are not likely to change significantly from year to year. This could save both the individual and the State time, but the requirements in the final rule would still apply to these circumstances. Assessments must be conducted at least every 12 months. We appreciate the commenter's suggestions to identify circumstances in which it would not be necessary to conduct reassessments face-to-face. While we believe that a face-to-face visit is ideal for the reasons previously indicated, we have revised the regulation to allow for the use of telemedicine or other information technology medium if certain conditions apply. We strongly advise States to consider a face-to-face meeting to allow for the closer monitoring of health and welfare and appropriate services and supports.

*Comment:* One commenter recommended additional guidance for States regarding the reauthorization periods for services, stating that frequent reauthorizations can be burdensome for individuals with long-term care needs and often serve as an opportunity to reduce services despite no decrease in need.

*Response:* We believe that the regulation is clear that the service plan is based on the assessment of functional need. If an individual requires a particular level or amount of attendant services to meet these needs, the services should not be decreased at any time unless an individual no longer requires that level of support. An individual must agree to and sign any service plan, and therefore, we do not believe that we need to issue any further guidance to States regarding the reduction of services absent a decrease in need. We do reiterate the ability of a State to implement limits on the amount, duration and scope of CFC services, as long as these limits are not based on an individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life, as prohibited in the statute.

*Comment:* One commenter suggested that the assessments not be limited to only 1 hour as such planning and discussion requires more time and only allowing for 1 hour of payment for the assessment creates barriers to preparing an effective plan.

*Response:* We do not require that an assessment be limited to 1 hour. While the Regulatory Impact Analysis section of the proposed rule included an estimate of 1 hour to conduct an assessment, this estimate was based on an average amount of time, and we did not limit the assessment to 1 hour in the regulation.

*Comment:* Multiple commenters recommended that the regulations require the assessment to be conducted in a linguistically and culturally appropriate manner for the individual (and/or their appointed representative) as determined by the individual in a fully accessible way.

*Response:* We agree with the commenter. We expect that States will conduct assessments of functional need and the subsequent person-centered planning process in a linguistically and culturally appropriate manner for the individual and as appropriate, their representative in a fully accessible way. Such a requirement already exists for the development of the person-centered service plan, as identified at § 441.540(a)(4).

*Comment:* Several commenters indicated that participants should be treated with dignity in the needs assessment, regardless of their sexual orientation or gender identity.

*Response:* We expect that all individuals will be treated with dignity in the assessment process and all other aspects of CFC.

*Comment:* Two commenters pointed out that the statutory language includes a requirement that the assessment be agreed to in writing in section 1915(k)(1)(A)(i) of the Act and suggested that the regulation explicitly include this language in § 441.535.

*Response:* Section 1915(k)(1)(A)(i) of the Act indicates that the ''person-centered plan of services and supports that is based on an assessment of functional need'' be agreed to in writing by the individual or, as appropriate, the individual's representative. We reflect this statutory requirement at § 441.540(d).

*Comment:* One commenter asked if CMS intends for an individual to have a right to appeal the assessment.

*Response:* Rather than appealing the assessment, individuals have the right to appeal their person-centered service plan. The person-centered service plan must be based on the assessment of functional need and agreed to in writing by the individual. If the individual does not agree with the findings of the assessment or the proposed service plan based on these findings, an individual does not have to agree to or sign the service plan. The individual would have the right to disagree with the assessment and service plan at any time during the process. States electing the CFC Option

are required as specified in § 441.585, to have procedures for appeals of denials and reconsideration of an individual service plan in place as part of their quality assurance system for the CFC. The fair hearing requirements of 42 CFR part 431, Subpart E apply to CFC in the same manner as they apply to other Medicaid State plan services.

*Comment:* One commenter asked if the requirement that States conduct the assessments allows for the State to contract with a private entity and if so, urged CMS to require that States demonstrate that the private entity is complying with the law and regulations.

*Response:* States are required to comply with all requirements related to CFC regardless of whether they contract with private entities to fulfill any function of CFC. Contracting with an entity does not absolve the State of making sure that all requirements are met in accordance with the final regulation.

*Comment:* One commenter requested that States be granted the discretion to determine the qualifications of persons who may conduct functional assessments. Another commenter recommended that the assessment of need standards include the qualifications of the person conducting the assessment. Another commenter asked who coordinates the responsibilities of the assessment and person-centered plan.

*Response:* States are responsible for determining the provider qualifications of the entities who will conduct the assessments and the person-centered planning process. With regard to who coordinates the responsibilities of the assessment and the person-centered service plan, that is also up to the State. Many States choose to utilize service coordinators to fulfill this role.

*Comment:* One commenter suggested that the designated representative participate fully in the assessment of need and that any representative also be evaluated regarding competency to undertake the role of representative.

*Response:* We agree with the commenter that if an individual has a representative, that representative should have an active role in the assessment and person-centered planning process to the extent that the individual chooses to include that representative. However, we are not revising the regulation to make this a requirement. With regard to evaluating the competency of an individual to undertake the role of representative, we do not believe it is necessary to require such a step, although States would have the ability to do so.

*Comment:* One commenter indicated that assessments and service plans should include an assessment of the consumer's interest and ability to self-direct. Another commenter recommended that the assessment include an evaluation of the individual's ability to receive care in the delivery model available under the State's program, particularly if the program is limited to self-directed care, as it would be harmful to an individual or his or her representative to permit placement in a self-directed care model when the individual, or his or her representative was not able and/or willing to take on the responsibilities under the self-directed model. While these elements are included to an extent in the support system section, they should be integrated in the assessment process.

*Response:* States may include as part of their assessments and service plans a determination of an individual's interest and ability to self-direct. If the State is only offering CFC via a self-directed model with service budget, and the individual or individual's representative is not able or willing to assume responsibilities inherent in this model, the entity conducting the assessment or development of the service plan should identify other programs for which the individual would be eligible.

*Comment:* Several commenters suggested that CMS should be more prescriptive regarding the specific elements incorporated into assessments, as they have the capacity to inform quality assurance monitoring and measurement of quality outcomes, and suggested that CMS require States to develop an assessment of need that includes these ''standardized elements, key system functionality, and workflow that will be sufficiently comprehensive.''

*Response:* We appreciate the commenters' suggestions. As indicated above, and in the preamble of the proposed rule, a set of universal core assessment elements is being developed. As these elements are developed, we will work with States to determine the extent to which these elements, if not already part of a State's assessment for CFC, could be incorporated. States have the flexibility to design a quality assurance system that integrates current and future assessment elements. We also set forth our expectation in the preamble to the proposed rule that States will include a standardized set of data elements, key system functionality, and workflow that will be sufficiently comprehensive to support the determination that an individual would require attendant care services and supports under CFC and the development of the individual's subsequent service plan and budget. For these reasons, we do not believe it is necessary to add an additional requirement for this purpose.

*Comment:* Multiple commenters provided feedback specifically regarding the statement in the preamble that CMS is currently working to determine the universal core elements to include in a standard assessment for consistency across programs. Several commenters supported our effort in seeking consistency across authorities, including the attempt to create commonalities within assessment processes. Several commenters expressed various concerns regarding standardized assessments. Multiple commenters offered suggestions regarding what should be included in a universal assessment. Other commenters added that ensuring participants are involved in the prioritization of core elements may help to identify elements that have a clear link to the planning process, and a few commenters expressed interest in commenting on any proposed list. The specific comments as summarized above are as follows:

- One commenter suggested that the core elements should include an assessment of an individual's ability to perform ADLs and IADLs without assistance, assess the ability to self-direct his or her services, and should reflect and be consistent with the State's functional eligibility criteria for the service.
- One commenter indicated that functional assessments should consider that a person's disability can change over time.
- One commenter indicated that functional assessments should address the complexities of independent living and active daily living outside the home, such as what supports are needed to go to a community bathroom.
- Several commenters recommended that universal core elements include discussion of unique needs of families, such as whether there are needs of children and partners that should be addressed in the home. The commenters added that these assessments are important for all families because assessing the needs of others in the home will help identify the unique needs of the individual requiring assistance.
- Another commenter voiced concern about the development of universal assessment tools and requested that CMS recognize during its universal core elements development process that core elements likely will vary by population

and recommended, along with other commenters, that rather than specific assessment elements, CMS develop universal domains that cut across programs and populations, and added that program and/or population specific elements could be developed. The commenter urged CMS to convene a meeting of stakeholders to discuss our vision and the viability of universal core domains with elements that might vary by population and program.

- One commenter requested that if changes are necessary after implementation of CFC has begun, that CMS provide States sufficient time to incorporate any new core elements into their assessment process.
- One commenter cautioned against requiring additional elements to be included in the assessment beyond the statutory requirements, as they believed it would increase the assessment time for social attendant care providers.
- One commenter urged CMS to proceed with caution with regard to standardized assessments for States, as research on HCBS is in need of development and codification of assessment elements at this stage may be premature. The commenter added that some States have broader eligibility standards than others and indicated that they would want CMS to adopt a broad view of assessment at this stage to facilitate future expansion and experimentation. The commenter also suggested that to the extent CMS requires States to use a standardized set of data elements, we should consider additional individualized assessments of need that may not fit the standardized data elements.
- One commenter asked whether CMS will be including the determined universal core elements in the core standardized assessment in the State Balancing Incentive Payments Program.

*Response:* We appreciate the various points, concerns and recommendations made by these commenters. We will take these perspectives and recommendations into consideration during the development of universal core assessment elements as part of the Balancing Incentives Payment Program created under section 10202 of the Affordable Care Act, as well as future HCBS guidance. As noted above, we intend to share any finalized universal core elements that are developed with States as examples of elements that can be incorporated into the assessment of functional need for CFC and other HCBS assessments as determined by CMS. Future guidance will provide additional detail regarding the finalized set of universal core assessment elements.

After consideration of the public comments received, we are finalizing § 441.535 with revision, to refer to an ''assessment for functional need'', to indicate that the scope of the assessment is limited to CFC services and supports, to change ''or'' to ''and'' in paragraph (c), to add the ability for States to meet the face-to-face requirement through the use of telemedicine or other information technology medium if certain conditions are met, and to add a new paragraph (d) to indicate ''Other requirements as determined by the Secretary.''

*J. Person-Centered Service Plan (§ 441.540)*

We proposed to require a minimum set of criteria for a person-centered planning process, and proposed that the resulting person-centered service plan must reflect the services that are important for the individual to meet individual services and support needs as assessed through a person-centered functional assessment, as well as what is important to the person with regard to preferences for the delivery of such supports. We also proposed to require a minimum set of criteria for the person-centered service plan. Finally, we proposed additional requirements of the plan, including the timeframes for its review and revision.

*Comment:* Several commenters applauded CMS for recognizing the importance of person-centered planning and for seeking consistency in person-centered planning expectations across Medicaid authorities. The commenters noted that the person-centered planning process should be implemented in a customized fashion according to the unique needs and preferences of the individual. Two commenters agreed with our proposed language and one commenter added that the person-centered planning process should be comprehensive.

*Response:* We believe that our proposed approach will allow for the process to be incorporated with States' current approaches to maximize the strengths and preferences of the individual. As indicated earlier in the final rule, in an effort to streamline State requirements where possible across the programs, we proposed language in the CFC proposed rule that in some instances was consistent with other HCBS final rules, such as section 1915(j) of the Act, and in some instances was consistent with proposed language in a recently proposed rule for the section 1915(c) waiver program, which published in the April 15, 2011 **Federal Register**. Based on multiple comments and the acknowledgement that additional policy work is necessary to maximize the extent to which consistency can exist across Medicaid HCBS programs, we are revising the language in this section to clarify the requirements of this process and resulting service plan as it pertains to CFC. We are taking more time to consider all of the thoughtful comments from this rule, the comments received from the section 1915(c) proposed rule, and comments forthcoming from the section 1915(i) proposed rule to have additional policy discussions both internally and with stakeholders. We will be issuing subregulatory guidance to provide additional details and expectations as it pertains to the person-centered planning process and the elements that should be included in a person-centered service plan.

*Comment:* A few commenters stated that it is extremely important that the person-centered planning process not interfere with, or delay access to, services. One commenter added that at times extensive person-centered assessment and planning processes are so time consuming that individuals trying to avoid placement in a facility cannot access services in a timely manner and are forced into an unwanted institutional placement. A few commenters suggested that the regulation require States to include an expedited enrollment process for such situations so that individuals may receive basic attendant services and supports and avoid institutional placement while the complete person-centered service plan is being developed. One commenter suggested that CMS require States to complete the assessment and service plan within 30 days of application.

*Response:* We agree that the process should not interfere with or delay access to services. States currently conduct assessment processes and create service plans for HCBS programs. We do not believe that the proposed person-centered principles and service plan components for CFC should be overly burdensome or time consuming. In the Collection of Information Requirements for implementing CFC, we estimated that a total of 3.5 hours on average would be necessary per individual, including the assessment, the person-centered planning process, service plan development and providing an individual a copy of the service plan. In addition, as we indicated in the preamble of the proposed rule, States will need to have a minimum set of policies and procedures associated with the assessment and service plan. These policies and procedures should ensure that the process is timely. We expect

States to establish guidelines that support a timeframe that responds to the needs of the individual, thus allowing access to needed services as quickly as possible. We encourage States to implement policies and procedures that provide services as expeditiously as possible. In addition, we are incorporating language originally proposed at paragraph (c)(2) to indicate that the person-centered planning process must be timely, in addition to occurring at times and locations of convenience to the individual.

*Comment:* Another commenter suggested that while the statute uses the term person-centered, CMS should encourage States to use a consumer-directed process as consumer-directed planning puts the individual in charge of the planning process whereas the term person-centered has been used to allow others on a planning team to make all important decisions ''in their best interests.''

*Response:* We appreciate the commenter's perspective and the term consumer-directed, but do not agree that the language should be changed for this rule. To be consistent with other Medicaid programs, we will maintain the phrase ''person-centered'' in referring to this process. That said, CFC has a strong focus on individual choice and direction that is evidenced throughout the regulation. For the person-centered service plan, much effort was put into ensuring that an individual maintains a central role in both the planning process and finalizing the service plan. In addition, we are adding at § 441.540(a) that the person-centered planning process must be driven by the individual.

*Comment:* One commenter suggested that more guidelines be provided to States for the person-centered planning process as the proposed rule does not include qualifications for the entities responsible for the planning process and the entities States utilize may not have adequate training in self-determination/direction or any true person-centered planning training. The commenter suggested that § 441.540(c) include requirements for the States' policies and procedures including the qualifications, training and quality assurance of those conducting the person-centered plans. Another commenter indicated that it would be beneficial, particularly for individuals with mental illness, if the person-centered service planning process included a requirement for a facilitator who had more experience and information than family or other outside individuals chosen by the individual. The commenter noted that in mental health service planning, individuals need some support to fully understand their choices and explore their preferences, and to learn how to assess what support they may need to carry out the plan. The commenter indicated that peers trained to perform this facilitator role might be the best option and suggested that States could be encouraged to consider that option.

*Response:* States are responsible for determining the provider qualifications of the entities who will conduct the assessments and the person-centered planning process as long as the requirements in the final regulations have been met. It is expected that these entities would have adequate training to perform this function. We agree additional guidance should be provided to States and we intend to issue future guidance, as indicated above, regarding our vision of the person-centered process and how we intend to apply that philosophy across Medicaid HCBS programs.

*Comment:* One commenter asked if States can leverage existing single entry point entities currently under contract for section HCBS 1915(c) waiver assessments and planning processes to conduct the person-centered planning process outlined in § 441.540. Another commenter asked CMS to clarify whether the State can delegate its responsibilities to other entities, such as a managed long-term care plan, to develop service plans, budgets, etc.

*Response:* States have the flexibility to leverage existing entities to conduct various functions required in CFC, provided all requirements of the final regulation are met.

*Comment:* One commenter stated that the proposed rule implies that two separate meetings will be held, one to complete the assessment and one to develop the service plan through the person-centered planning process, and recommended, along with another commenter, that the rule reflect the ability to combine these meetings.

*Response:* We did not intend to require two separate and distinct meetings. While individuals and States may choose to conduct separate meetings, particularly depending on the length of the assessment and the availability of all parties involved, we believe that it is appropriate that the assessment of need and the person-centered planning process could be combined into one meeting. We have not revised the regulation, to maintain flexibility, based on individual circumstances.

*Comment:* Two commenters supported the identification of all of a person's needs (not just what is offered under CFC). One of the commenters also supported the identification of the individual's desired outcomes from services and suggested that the assessment cover the individual's broad life goals and desires as well. The other commenter added that CMS should require that all needs identified during the assessment be addressed in the service plan, ensuring that the needed service is actually being addressed either informally and/or by applying to other programs and benefits.

*Response:* While this comment references the assessment, the specifics of the comment relate to this section so we will address this comment here. It is our expectation that during the assessment process, and the subsequent person-centered service plan process, an individual's CFC service and supports needs, as well as what is important to the person with regard to preferences for the delivery of such services and supports, be identified and addressed. In States conducting a more comprehensive assessment that exceeds the scope of CFC services and supports, a determination would then need to be made as to which services and supports could be delivered under CFC and which are more appropriately delivered through another benefit or informal support. For the purposes of CFC, States would only be required to provide the services and supports required under CFC as indicated by the final rule. However, we encourage States to coordinate among all the services an individual is eligible for to determine how to best meet an individual's needs as identified during this assessment. As indicated above, we will issue additional guidance regarding our vision of the person-centered process and how we intend to apply that philosophy across Medicaid HCBS programs.

*Comment:* One commenter suggested that CMS add language that requires coordination with other government-funded health services that may also be providing personal care to consumers, stating that the absence of such clarity can threaten the continuity of care and risk care duplication.

*Response:* It is our expectation that during the assessment of functional need and the subsequent person-centered service planning process, all attendant/personal care needs and currently received services and supports in place to meet those needs would be identified. A determination would then need to be made as to which services and supports could be delivered under the CFC Option and which are more appropriately delivered through another benefit. States are familiar with this process and we do not agree that

additional regulatory language is necessary. States are expected to take every step to ensure that services are not being duplicated and individuals currently receiving attendant services and supports experience continuity of care during a transition to CFC.

*Comment:* One commenter noted that the criteria described including consumer direction, convenience to time and place, cultural considerations, conflict resolution, the ability to alter the plan and real choice are all good markers for a good process but indicated that these should be regarded as a minimum level of responsiveness and not a maximum. The commenter added that respecting a person's gender identification is also important.

*Response:* We appreciate the commenter's perspective regarding the criteria being regarded as a minimum level of responsiveness and not a maximum. We agree that respecting an individual's gender identification is important. We expect that all individuals will be treated with respect.

*Comment:* One commenter suggested that CMS offer guidance on how to provide necessary support to ensure the person with a disability has meaningful input in the planning process.

*Response:* We will consider this suggestion as we work on additional guidance regarding our vision of the person-centered process and how we intend to apply that philosophy across Medicaid HCBS programs. In the meantime, we will look to States to implement a person-centered planning process that ensures meaningful input from all individuals in the CFC program.

*Comment:* One commenter voiced concern over the requirement that the person-centered planning process must occur at ''times and locations of convenience to the individual'' as referenced in paragraph (a)(3), as they believed that this is overly restrictive and beyond the statutory requirement. The commenter stated that the process should be scheduled when it is mutually convenient for both the agency staff and individuals and added that it may be necessary to have the assessment conducted at the individual's home so that the staff can more accurately assess the client's needs in the context of their home environment and community. Another commenter urged CMS to include language that will allow States flexibility to put reasonable limits on the optional locations for these assessments/plans. One commenter indicated that to adequately assess for environmental as well as health and safety needs, States must be allowed to require the face-to-face meeting be held in the participant's place of residence and recommended deleting the words ''and locations'' from paragraph (a)(3).

*Response:* We appreciate the commenters' concerns and suggestions. The commenters appear to be talking about both the assessment of functional need, which was required in the proposed rule to be conducted face-to-face with the individual, and the person-centered service plan development, which is to occur at times and locations of convenience to the individual. While we do not prescribe the setting in which the assessment of functional need takes place, we encourage the assessment to be conducted in an individual's home in order for the entity conducting the assessment to get a more informed perspective of the individual's supports and needs in their residence. However, we are not mandating this as some individuals will use CFC to transition from an institutional setting, and therefore, would be assessed while still residing in the institution. With regard to the person-centered planning process, if this process takes place separate and apart from the assessment of functional need, we expect that this meeting be scheduled at a time and place that is convenient to all parties taking part in the process, but particularly to the individual. We recognize that there will be practical constraints for the professionals involved in the person-centered planning process and the assessment of functional need, such as availability being limited to certain business hours; however, we do not believe it is necessary to revise the regulation as suggested.

*Comment:* One commenter asked what the expectations/requirements are for States in terms of supports that address the needs identified by the assessment of expanded areas such as employment, school, income and savings, and social goals as referenced in paragraph (b)(3). The commenter indicated that providing this expanded assessment will result in additional costs to States and it is unclear what States would be required to address. The commenter asked if these requirements would be limited in scope to ''the provision of services'' as stated in § 441.535(a)(2) and the qualification at § 441.515 that States provide CFC ''in a manner that provides the supports that the individual requires to lead an independent life.'' The commenter asked CMS to confirm that a State would not be required to provide money-management support, and it would not have to have an outcome measured in the quality assurance system, if an individual had the goal to save money for their grandchild's college fund in their assessment/plan. The commenter wanted to know how this expands a State's responsibilities or liability.

*Response:* While this comment references aspects also covered in the assessment section, the main issue expressed in this comment relates to this section so we will address this comment here. As indicated above, we have revised the regulation to indicate that it is only the need for services and supports within the scope of CFC services that must be assessed. It is our expectation that during the assessment process, and the subsequent person-centered service plan process, an individual's CFC service and supports needs as well as what is important to the person with regard to preferences for the delivery of such services and supports be identified and addressed. In States conducting a more comprehensive assessment that exceeds the scope of CFC services and supports, a determination would then need to be made as to which services and supports could be delivered under the CFC and which are more appropriately delivered through another benefit or informal support. We believe that many States already have such a system in place. For the purposes of CFC, States would only be required to provide the services and supports required under CFC as indicated by the final rule. However, we encourage States to coordinate among all the services an individual is eligible for to determine how to best meet an individual's needs as identified during this assessment.

After considering the feedback received and the acknowledgement that additional policy work is necessary to maximize the extent to which consistency can exist across Medicaid HCBS programs, we are revising the language in this section to clarify what must be included in the plan as it pertains to CFC. As indicated above, we are taking more time to consider all of the thoughtful comments from the CFC proposed rule, the section 1915(c) proposed rule and the comments we will receive in response to the forthcoming section 1915(i) proposed rule to have additional policy discussions both internally and with stakeholders. We plan to issue additional guidance regarding our vision of the person-centered process and how we intend to apply that philosophy across Medicaid HCBS programs.

*Comment:* One commenter indicated that in § 441.540(a)(5), CMS describes the requirements for service plans

including a requirement that States have ''strategies for solving conflict or disagreement within the process, including clear conflict of interest guidelines for all planning participants'' and in § 441.555(b)(2)(xiv), CMS requires that participants be provided ''information about an advocate or advocacy systems * * * and how [they] can access [such] systems.'' The commenter then pointed out that CMS does not discuss CFC appeals processes in the proposed rule and recommended that CMS clarify the appeals processes and the relation to the provisions noted above. Another commenter asked if CMS plans to intend for an individual to have the right to appeal the service plan. A commenter suggested that CMS require that both the final written assessment and the service plan include information on the individual's right to appeal if she/he disagrees with the assessment or any parts of the service plan.

*Response:* An individual has the right to appeal the service plan. The person-centered service plan, which is based on the assessment of functional need, must be finalized and agreed to in writing by the individual. If the individual does not agree with the findings of the assessment or the proposed service plan based on these findings, an individual does not have to agree to or sign the service plan. The individual would have the right to disagree with the assessment and service plan at any time during the process. As such, States electing the CFC option are also required to have appeals for denials and reconsideration procedures of an individual service plan in place as part of their quality assurance system for the CFC.

*Comment:* Several commenters noted that it is not clear what components of the service plan proposed by CMS are ''required'' versus ''recommended'' and pointed out that there is also inconsistency in the use of terms (for example, Support Plan, Service Plan, and Plan of Care). The commenters recommended that, regardless of the term chosen, the term reflect the person-centered approach and participant-directed nature of CFC.

*Response:* As indicated in the proposed rule, the elements in § 441.540(b) are all required. This is evidenced by the use of the term ''must'' in the last sentence prior to the numbered list of elements. We are revising the regulation to ensure that all ''plan'' references throughout the rule indicate that it is the ''person-centered service plan.'' In addition, based on multiple comments regarding the requirements of the plan at § 441.540(c), we have removed the duplicative requirements that were already captured in § 441.540(b) and have moved the remaining requirements to the more appropriate Support System section at § 441.555.

*Comment:* One commenter stated that the person-centered service plan should reflect that the place where the individual resides is the least restrictive setting available based on the individual's need for a handicap accessible place of residence and affordability, as well as the consumer's freedom of choice to live in that particular place of residence. The commenter added that the person-centered service plan should determine the appropriate setting for an individual covered under CFC.

*Response:* While we agree that the service plan could reflect that an individual resides in the least restrictive setting of their choice, we do not agree that the service plan should determine the appropriate setting for an individual. We have revised the service plan process to add paragraph (a)(8) requiring States to record the alternative home and community-based settings that were considered by the individual. We also amended the person-centered service plan to require an assurance that the setting in which the individual resides is chosen by the individual. This will be reflected as a new paragraph (b)(1), and all existing text will be renumbered accordingly.

*Comment:* One commenter suggested that to protect the integrity of the program and to ensure adherence to service plans, that CMS allow for fiscal or other program intermediaries to validate service plans, issue rules for the training of attendants, and develop a process to ensure that services and supports are assessed for appropriateness.

*Response:* States may decide to have a mechanism by which a service plan is compared to the services provided to protect the integrity of the program, but we are not clear how allowing a fiscal or other program intermediary to issue rules for the training of attendants would protect program integrity. States have the discretion to determine provider training and qualifications as long as the requirements in the final rule are met. We believe the assessment of functional need, person-centered service planning process and finalizing of the service plan should result in appropriate services and supports being provided to the individual to meet their assessed needs.

*Comment:* One commenter asked CMS to clarify whether a State may use a prior authorization process to ensure services rendered and paid for match the service needs indentified through the service planning process.

*Response:* States have the flexibility to use various methods to ensure that services provided match the needs identified through the assessment and service plan. States will need to describe in their State plan amendment how they propose to utilize the prior authorization process.

*Comment:* Two commenters suggested that the development of the person-centered service plan, as spelled out in the proposed rule, should include health promotion and wellness components designed to mitigate health risks and maintain and support healthful behaviors.

*Response:* As indicated above, additional policy work is necessary to maximize the extent to which consistency can exist across Medicaid HCBS programs and we are taking more time to consider all of the thoughtful comments from this rule, comments received from the section 1915(c) proposed rule, and forthcoming comments from the section 1915(i) proposed rule to have additional policy discussions both internally and with stakeholders. We plan to issue additional guidance regarding how we intend to apply the person-centered philosophy across Medicaid HCBS programs. We will continue to consider this comment during that process. In the meantime, there is no prohibition against a State incorporating these elements into the development of the person-centered service plan. In addition, we are taking this opportunity to add an additional requirement that will allow for the incorporation of future person-centered planning requirements published by CMS.

*Comment:* A commenter noted that paragraph (b)(2) refers to the ''person-centered functional assessment'' and recommended that CMS change the language to: ''reflect clinical and support needs as identified through a functional assessment'' as they believe that § 441.540 needs to more clearly reflect the distinction between the assessment of functional need and the person-centered service plan.

*Response:* We are revising the regulation to say ''reflect clinical and support needs as identified through the assessment of functional need.'' This is now paragraph (b)(3).

*Comment:* Several commenters suggested that in paragraph (b)(3) CMS change the phrase ''individually identified goals'' to ''participant identified goals.''

*Response:* We do not agree with the commenters' suggestion. While an individual receiving services and

supports under CFC will be a ''participant'', we choose to maintain the term ''individual.'' This term is used throughout the regulation and we prefer to be consistent so as to not create any unnecessary confusion.

*Comment:* A commenter encouraged CMS to require in paragraph (b) that the standard assessment of need include the individual's assessment of their strengths and their goals regarding housing, services, education, transportation, employment, recreation and socialization, wellness and the supports needed to enable them to live independently in the community setting of their choice, in addition to a person's preferences.

*Response:* The proposed rule at § 441.540(b)(1) indicates that the person-centered service plan must reflect the individual's strengths and preferences. Section 441.540(b)(3) proposed language to address an individual's goals and desires and included the term ''may'' to suggest aspects that could be included in the person-centered service plan. Based on comments and further consideration we have decided not to specify particular aspects of an individual's strengths, preferences and goals that could be assessed or included in the person-centered plan as we do not want to create an unintended limit on the aspects that could be included in the service plan. Therefore, we are revising the regulation to read ''Include individually identified goals and desired outcomes'' at paragraph (b)(4).

*Comment:* Several commenters indicated that the proposed rule appropriately sets forth multiple factors to be considered in determining the need for and authorization/provision of services, but they, and multiple other commenters, voiced concern regarding the identification of informal supports. Other commenters supported the consideration of natural and informal supports but did not want it to be construed that the existence of family, natural and other informal supports could be used as a reason to reduce the level of services an individual would receive. Multiple commenters indicated that these supports can be considered as appropriate in determining the individual's needs, strengths, and preferences, but eligibility and supports covered for an individual by CFC should be based upon functional need, independent of the existence of family or other informal caregivers. Several commenters believed that reliance on family and other informal supports who may not be skilled/trained to care for certain conditions and may have limitations of their own could lead to additional strain on families and could put the consumer at risk. One commenter voiced concern that the regulation does not include the CMS Handbook definition of informal care (that which is capable, available and freely given) and that without emphasis on ''freely given'' States may assign the responsibility of this care to family members and other informal supports. Another commenter suggested that at a minimum, if family members or other informal supports are identified in the assessment/plan, the participant must indicate acceptance of the unpaid supports in lieu of provided services and the family members or other informal supports must indicate they are willing and able to perform the roles/tasks. The commenter added that the participant and family/informal supports must also have the ability to no longer accept or to withdraw their support without harming the beneficiary and the plan should be adjusted to reflect the lost support. Another commenter added that if the State includes family or other informal caregivers in the service plan, it should be a requirement that the needs of the family or other informal caregiver also be assessed and addressed, especially if crucial aspects of the service plan depend on these caregivers. The commenter added that such an assessment would identify the family caregiver's needs, strengths and preferences and connect such caregivers to critical supports such as respite, training or other assistance, as helping the caregiver to continue in their caregiving role could delay or prevent institutionalization of the care recipient. Another commenter indicated that the consideration of unpaid assistance needs to take into account the sometimes oppressive influence this has on family and personal relationships adding that these relationships should not be forced to become strictly defined as a caregiver/care-receiver relationships at their core level and that the provision of unpaid but necessary services can affect the ability of the consumer to control how his/her services are provided. Other commenters urged CMS to remove the language from the preamble.

*Response:* While these comments reference aspects also referenced in the preamble for assessment of need, the requirement referenced is included in § 441.540 so we will address this comment here. We appreciate the concerns regarding the potential that the identification of natural supports could result in the decrease of services provided under CFC, or these natural supports might be weakened as a result of the expectation that they be provided. We expect that the identification of these natural, unpaid supports be taken into consideration for the purpose of understanding the level of support an individual has, and should not be used to reduce the level of services provided to an individual unless the individual chooses to receive, and the identified person providing the support agrees to provide, these unpaid supports to the individual in lieu of a paid attendant. We have modified the regulation to incorporate this intention. We also expect that if an individual is receiving services and supports, either paid or unpaid, that if circumstances change, an individual has the right to request a reassessment of need and/or revision to the person-centered plan. For the concern regarding individuals providing supports having the skills or training to care for certain conditions or having their own limitations, having a full picture of the individual's paid and unpaid supports will assist the State and the individual in determining what level of support the individual requires and what services need to be accessed to meet the individual's needs and ensure their health and safety. With regard to the recommended requirement that the needs of the family or other informal caregiver also be assessed and addressed, we agree that it is important to consider these needs to encourage and preserve support for the individual, but we do not agree that this should be an additional requirement in the CFC final regulation. As noted above the order of the paragraphs has shifted and this requirement is now reflected at paragraph (b)(5).

*Comment:* One commenter indicated that the risk assessment portion of the planning process is a challenge, as many consumers are competent adults and need to be allowed the same level of freedom and personal control as a non-disabled person, and allowed to assume risk at the same levels as non-disabled persons. The commenter voiced concern that this section could potentially be used to impede a consumer's goals and desires and recommended that if there are disability-related conditions that impact the ability of the individual to assess risk, their plan should only impinge on their freedom commensurate with the need for reasonable safety. The commenters added that strategies for risk abatement should include voluntary participation in skills training and peer support to improve their ability to access and assume risk, and that the consumer's use of additional training for the

personal assistant related to risk avoidance may be another strategy. Another commenter asked that CMS clarify that a contingency plan should be part of the service plan, to ensure that individuals are prepared and have a backup attendant care provider if the regular attendant care provider is not able to provide services.

*Response:* We agree that individuals should have personal control and the opportunity to assume risk. We proposed at § 441.540(b)(5) that the person-centered service plan reflect risk factors and measures in place to minimize them, including backup strategies when needed. Service plans will need to reflect risk factors and measures in place to minimize them for each individual regardless of disability or level of need. Nothing in this section should be used to impede an individual's goals and desire outcomes or to impinge on an individual's freedom. As noted in response to comments received in the Definitions section, we are modifying the requirements of the person-centered service plan to remove the ''as needed'' language, to indicate that all individuals should have an individualized backup plan as specified in paragraph (b)(6). We would like to point out that for the purposes of CFC, this backup plan could include formal or informal backup supports as part of the plan.

*Comment:* A commenter voiced concern regarding the requirement that the individual sign the service plan as this may not always be possible due to disability or inability to write, and suggested that the regulation be amended by adding ''if possible.'' Another commenter suggested language in paragraph (b)(6) that would allow an individual's representative to sign the service plan when appropriate, and suggested the removal of a similar requirement in paragraph (d), as they felt the emphasis should be related to the individual and persons responsible for implementation. Another commenter indicated that the requirement for all individuals and providers to sign the plan may be onerous and logistically complicated as consumers can change providers frequently for a variety of reasons, and consumers should be able to obtain agreement from providers through formats other than the service plan. Other commenters added for clarification that the signature expectation is only for those involved with the actual assessment/planning process and not for the providers and others not present who are responsible for the implementation of the plan. Another commenter recommended that the language in paragraph (b)(6) be changed to: ''be distributed to all individuals and providers responsible for its implementation and signed by all parties within 30 days of the development date'' as they felt that requiring all provider signatures at the point of development would delay services.

*Response:* After consideration of these comments, we have revised the final regulation to indicate that the plan be finalized and agreed to in writing by the individual and signed by all individuals and providers responsible for its implementation. While we understand that some individuals may not be able to provide an actual signature, we believe that it is important to capture that the individual agrees to the service plan as finalized. Should an individual not be able to make any indication that they agree with the plan in writing or the individual does not have a representative who can do so on the individual's behalf, States will need to explain the methods they propose to use to indicate that the individual agrees with the service plan. While we do not specify the timeframe by which States must obtain the signature of the providers responsible for implementation of the plan, we expect that any provider that is responsible for implementing services or supports authorized in the service plan should receive and sign the individual's service plan, as this would be necessary to not only understand the level of CFC services and supports needed by an individual, but also the individual's strengths, preferences, goals and desired outcomes related to the provision of the services and supports. We are reflecting this change at a revised paragraph (b)(9) under § 441.540, and have removed this language from paragraph (b)(6) and paragraph (d).

*Comment:* One commenter suggested that CMS should clarify explicitly at paragraph (b)(7) that the plan must also be understandable to the individual's representative. A few commenters recommended that the regulations require the development of the service plan be conducted in a linguistically and culturally appropriate manner for the individual (and/or their appointed representative) as determined by the individual in a fully accessible way.

*Response:* We appreciate the commenters' suggestions. However, we do not agree that paragraph (b)(7) under § 441.540 needs to clarify explicitly that the plan must be understandable to the individual's representative as the language at paragraph (b)(7) encompasses a representative. We also believe that the requirement at § 441.540(a)(2), that the planning process provides necessary support to ensure the individual directs the process to the maximum extent possible, and the requirement at paragraph (a)(4), that the process and plan reflects cultural considerations of the individual, encompass the other commenters' suggestions.

*Comment:* With regard to the requirement to include a timeline for review, a commenter suggested that CMS add a requirement at paragraph (b)(8) that reviews of the service plan occur at least every 18 months to assure that not too much time will pass between reviews and does not place undue burden on the participant or service providers. Another commenter suggested that the person-centered plan of care be revised as needed to reflect the goal of providing the least restrictive setting. Another commenter strongly supported the periodic reassessment and revision of the care plan at least every 12 months. Another commenter suggested that CMS require timely review (within 1 week) when the individual believes that the plan needs to be revised. Multiple commenters recommended that paragraph (b)(8) be expanded to read ''include a timeline for review and implementation of changes.''

*Response:* While we proposed at paragraph (b)(8) that the person-centered service plan include a ''timeline for review'', we also proposed requirements at § 441.540(e) for reviewing the service plan. To clarify our expectation regarding review of the service plan, we are removing the language at paragraph (b)(8), as it is encompassed later in this section and have moved the language proposed at paragraph (e) to (c) with the exception of ''or the individual's representative, as applicable'' which we have removed.

*Comment:* One commenter stated that the ''agreement'' portion of the service plan, as required in paragraph (d), needs to be strengthened. The commenter indicated that ''agreement'' needs to be elevated to the level of a ''contract'' to avoid what they perceive to be the ''pitfalls'' of current HCBS waivers. The commenter indicated that in their State, the waiver service plan can be unilaterally altered by the State without the ability of clients to challenge the State's decision. The commenter believes this is a fundamental denial of a civil right, must not be extended into the new rule, and must be corrected within current HCBS waivers.

*Response:* We disagree with the commenter's suggestion that CMS change the service plan agreement language to a contract. We believe that the requirement proposed at

§ 441.540(d), now reflected in paragraph (b)(9), that the service plan must be agreed to in writing by the individual or their representative, as applicable, will ensure that the service plan is approved by the individual. States may not alter an individual's service plan without the individual's knowledge or approval. In addition, an individual has the right to appeal any State decision to decrease services. With regard to other HCBS programs including waivers, changes to their processes are not within the scope of this regulation.

*Comment:* With regard to distribution of the plan at § 441.540(b)(10), one commenter recommended that CMS should require that a copy of the service plan be placed in the hands of the consumer. Another commenter suggested that the phrase ''including the participant'' makes it look like providing the plan to the individual is an afterthought and that the consumer should be able to decide who else received a copy of the plan, as there may be services or goals identified in the plan that do not need to be shared with every provider.

*Response:* It is expected that each individual receiving services under CFC would receive a copy of the finalized service plan. We interpret the commenter's recommendation to mean that we should require States to hand-deliver the service plan to the individual. While we do not discourage a State from doing so, we do not require that the service plan be hand-delivered to each individual. The intent of the language ''including the participant'' was to emphasize that the individual must receive a copy of the plan. We have revised paragraph (b)(10) to make this clear. We appreciate the commenter's indication that individuals should determine with whom to share their person-centered service plan. While we do not believe it is necessary to include this requirement in the regulation, we expect an individual's preferences for the level of information in the plan that is shared with other providers to be respected.

*Comment:* One commenter indicated that the service plan should be composed to fully meet the needs of the individual regardless of the service delivery model and any shortcomings of a plan within the limitations of the Medicaid program or the delivery model should be referenced to the individual. The commenter added a person needs to be informed of their options, the risks of choosing particular options, the alternatives available, and the anticipated consequences of any alternatives. The commenter added that if a limitation in the State program puts an individual at risk of adverse consequences that could be mitigated in an alternative approach available under the State program, the service planning process should provide the individual with that information before the plan is finalized.

*Response:* It is our expectation that during the person-centered planning process and development of the service plan, the issues indicated above and options available will be articulated and discussed with the individual, regardless of the service delivery model. In addition, we are taking this opportunity to make clear that the service plan requirements for the self-directed model with service budget must be incorporated into the person-centered service plan when applicable.

*Comment:* Several commenters requested that CMS explain the rationale for service plan criteria related to the ''provision of unnecessary or inappropriate care.''

*Response:* This requirement was included to emphasize that the service plan should reflect and authorize only the services and supports necessary to meet the assessed needs of the individual.

*Comment:* One commenter asked who has final approval of the service plan. Several commenters stated that the preamble explains that the entire plan must be in writing and agreed to by the individual, but the regulation only requires ''signing off'' on the plan in writing. The commenters recommended that specific requirements be put in the plan itself, in writing, for the consumer to have adequate time to review the plan themselves or with others.

*Response:* The regulation does not indicate that an individual only needs to ''sign off'' on the service plan, but requires the service plan be ''finalized and agreed to by the individual.'' As the individual, and as appropriate the individual's representative, are included in the planning process and the development of the service plan, we believe that the individual should know what the plan includes throughout the process. Additionally, the service plan, as a whole, must be finalized and agreed to, in writing, by the individual. Therefore, we do not agree that revisions to the regulation are necessary.

*Comment:* One commenter indicated that the main conflict of interest in the care planning process emanates from the pressure on State agencies and their contractors to keep spending to certain levels, to promote or discourage the use of certain services based on cost and availability, or to enforce unwritten rules about levels of services which results in consumers previously determined eligible for services experiencing terminations either of particular services or of their HCBC eligibility all together. The commenter recommended that the conflict of interest provision at § 441.540(c)(4) address these conflicts as they are very real and limit consumer access to the services they need.

*Response:* The person-centered service plan is based on an assessment of functional need. If an individual requires a particular level or amount of attendant services to meet these needs, the services should not be decreased at any time unless an individual no longer requires that level of support. An individual must agree to and sign any service plan, and therefore, we do not believe that we need to issue any further guidance to States regarding the reduction of services absent a decrease in need. We do reiterate the ability of a State to implement limits on the amount, duration and scope of CFC services, as long as these limits are not based on an individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life, as prohibited in the statute.

The conflict of interest provisions proposed at § 441.540(c)(4) were intended to protect the individual and relate to similar protections at § 441.555. We are moving these protections to the more appropriate Support System (§ 441.555).

*Comment:* Two commenters indicated that there is potential for a significant conflict of interest resulting in public and private entities that authorize or pay for services and the individuals affiliated with them participating in the development of the person-centered service plan and suggested CMS include these entities at § 441.540(c)(4).

*Response:* We believe that this is already addressed in this section as paragraph (c)(4) indicates ''that apply to all individuals and entities, public or private.'' As indicated above, this section is being moved to the more appropriate Support System.

*Comment:* One commenter recommended that the conflict of interest provisions be clarified, as they may exclude a provider who conducts an assessment from providing one or more services to individuals under CFC, which the commenter believes would undermine their State's current delivery system. The commenter indicated that its State pioneered and predicated its core models of long term care and home care on the consolidation of the assessment, care management and

service delivery functions within, and at the provider level, which has been very successful in terms of cost efficiency, timely integration, and provision of services in accordance with the individuals needs. The commenter noted that the prohibition of this coordinated approach should not be part of CFC and stated that it was not required by the statute.

*Response:* As noted earlier, the conflict of interest provisions have been relocated to the more appropriate Support System, § 441.555. While we do not believe it is generally appropriate for an entity that would benefit financially from the assessed needs of the individual to also be the entity to perform the assessment of functional need or the person-centered planning process for the individual, we acknowledge that in some geographic areas there may be circumstances in which the only willing and qualified entity to perform the assessment of functional need and/or the development of the person-centered service plan also provides the HCBS services and supports in that area. Therefore, we are adding additional language to address this circumstance.

*Comment:* Multiple commenters expressed concern regarding the proposed conflict of interest standards included in § 441.540(c)(4). One commenter indicated that the proposed rule is contradictory with regard to the assessment of need in that section § 441.535 indicates that family members can support the individual, serve as representatives and be paid providers whereas paragraph (c)(4) excludes the family member from conducting the assessment/service plan. Another commenter suggested that there was a contradiction in the conflict provisions between the mandate that the individual be permitted to designate who may assist them with service plan development and who may provide the actual services. Multiple commenters indicated that the total prohibition of family members is too broad and may inappropriately undermine the preference of individuals to choose persons they wish to involve. Another commenter added that while the commenters agree that the assessment and planning process needs to be done by a neutral party, the regulation seems to include and exclude family/other participation. Several commenters urged CMS to develop a specific process by which the individual or authorized representative can make a written informed decision to waive the prohibition on family member involvement in development of the service plan that includes safeguards to facilitate an independent informed choice to waive the prohibition. Multiple commenters suggested that ''involved in'' at paragraph (c)(4) be changed to ''conducting'' as this conflict of interest provision should apply only to the team conducting that assessment and creating the plan, as a relative may be ''involved in'' the process to help the individual with any one of a number of functional limitations, assist with communication, or distribute and collect materials. Another commenter recommended that the words ''and service plan development process'' be removed from paragraph (c)(4) and that CMS change the language in the same paragraph to: ''at a minimum, these standards must ensure that the individuals or entities conducting that assessment of need are not.'' Multiple commenters objected to the conflict of interest provisions in paragraph (c)(4) altogether and suggested that CMS remove them, stating that service plan development should often include family members and service providers and that it is counterproductive, and potentially undermines a person's preference, to exclude them. Other commenters asked that CMS provide clarifying language to explain the intent of the provision. Other commenters asked CMS to provide guidance reconciling an individual's ability to choose participants with the requirement that certain individuals are not to be included in the planning process.

*Response:* These comments illustrate the need to clarify the intent of this provision. We acknowledge the confusion caused by use of the term ''involved in'' when describing the conflict of interest protections. To clarify our intent, we are revising this paragraph to state ''At a minimum, these standards must ensure that the individuals or entities conducting the assessment of functional need and person-centered service plan development are not * * *.'' As noted above, this new language will now be reflected in § 441.555, Support System.

*Comment:* A commenter suggested that at § 441.540(c)(4)(i), CMS change the language to ''family members, as defined by this section'' indicating that as written the language does not provide conflict of interest protections to Lesbian, Gay, Bisexual and Transgender individuals as there are different types of families that may not fall under the definition of ''related by blood and marriage.'' Another commenter asked for additional guidance on the exclusion of blood relatives, financially responsible relatives, paid caregivers and those with a financial interest in provided services from the assessment and service plan development processes.

*Response:* We do not believe that such revision is necessary, given the revision to the regulation text described above.

*Comment:* One commenter stated that physician input is necessary and indicated that it is not clear whether the proposed rules intend to exclude primary care providers (physicians, physician's assistants, etc) from the assessment and planning process.

*Response:* Nothing in this regulation excludes primary care providers from participating in the assessment of functional need or the development of the person-centered service plan, as long as the requirements of this section are met.

*Comment:* Multiple commenters recommended that subpart (e) be expanded to read ''the review and revision of the service plan must be conducted according to an established timeframe that is explained to the consumer.''

*Response:* We believe that a person-centered service plan, based on a reassessment of functional need, should be conducted at least every 12 months, at a minimum, to ensure that an individual's needs are commensurate to the services authorized in the service plan, as we understand that an individual's needs can change significantly over time and as a result of various circumstances. We include several provisions related to the reassessments and reviews to the service plan that we believe capture various circumstances necessitating a reassessment and updates to the service plan. Therefore, we do not agree that we need to revise the language. While we do not specify in regulation a particular timeframe for the review of the service plan based on each of the provisions, we expect States to respond to the requests for review in a timely manner as specified in paragraph (c).

Upon consideration of the public comments received, we are finalizing § 441.540 with the following revisions:

- We are adding a requirement that the person-centered planning process be driven by the individual;
- We are indicating that the scope of the person-centered service plan is only required to address the services and supports provided under CFC;
- We are consistently using the term ''person-centered service plan'' throughout the document;
- We are adding a requirement in paragraph (a) that the person-centered planning process must record the alternative home and community-based

settings that were considered by the individual;

• We are adding a requirement in paragraph (b) that the person-centered service plan must indicate that the setting in which the individual resides was chosen by the individual;

• Paragraph (b)(3) will now say ''reflect clinical and support needs as identified through the assessment of functional need;''

• We are modifying what is now paragraph (b)(4) to modify ''desires'' to ''desired outcomes'', to remove the specific examples of goals that could be addressed in the person-centered service plan;

• We are modifying what is now paragraph (b)(5) to indicate that natural supports should not supplant services and supports provided under CFC.

• We are modifying what is now paragraph (b)(6) to require all individuals to have an individualized backup plan specified in the person-centered service plan;

• We are removing the proposed language at paragraph (b)(8);

• We are modifying what is now paragraph (b)(9) to require that the person-centered service plan be finalized and agreed to in writing by the individual, and signed by all individuals and providers responsible for its implementation;

• We are modifying paragraph (b)(10) to indicate that the person-centered service plan must be distributed to the individual and others involved in the plan;

• We are revising § 441.540(b)(11) to incorporate the service plan requirements for the self-directed model with service budget at § 441.550, when applicable;

• We are adding § 441.540(b)(13) to state ''Other requirements as determined by the Secretary;''

• We have relocated the language from (c)(1) to the more appropriate Support System § 441.555, relocated ''is timely'' from proposed (c)(2) to the beginning of paragraph (a)(3), removed the duplicative requirements from the proposed paragraph (c)(3) that were already captured in § 441.540 (b), revised the language proposed at paragraph (c)(4) to state ''At a minimum, these standards must ensure that the individuals or entities conducting the assessment of functional need and person-centered service plan development are not'', and have moved this paragraph to the more appropriate Support System § 441.555.

• We have removed paragraph (d) as the requirements in the proposed (d) were incorporated in the revised paragraphs (b)(9) and (10).

• We have removed paragraph (e) as these requirements are now reflected at paragraph (c) with the exception of ''or the individual's representative, as applicable'' as this has been removed.

*K. Service Models (§ 441.545)*

We proposed that a State may choose one or more of the service delivery models defined in the statute. We categorized these models into two main groups, the Agency Model and the Self-directed Model with Service Budget. We proposed to further define the categories within the Self-directed Model with Service Budget to include the models specified in the statute, including financial management entity, direct cash, and vouchers.

*Comment:* Many commenters expressed support of the efforts to align CFC with Medicaid HCBS programs like section 1915(j) of the Act. Many other commenters offered support for the service models described in the proposed rule, including allowing States to use multiple service models. Many commenters strongly supported the direct cash option and the inclusion of financial management activities.

*Response:* We appreciate the commenters' support.

*Comment:* One commenter noted that in the definition section, § 441.505, the rule uses the term ''Agency-provider model'' and in § 441.545 the term ''Agency model'' is used.

*Response:* We have revised the rule at § 441.545(a) to make this technical correction.

*Comment:* One commenter recommended we include the statutory language regarding maximized consumer control found at section 1915(k)(1)(A)(iv)(II) of the Act in the opening language of this subpart. The commenter recognizes that it has been incorporated by definition into the term ''self-directed'' but considers it important here for clarity.

*Response:* We appreciate the commenter's perspective, but we do not believe such a revision is necessary, as the ''consumer controlled'' philosophy is inherent throughout this regulation.

*Comment:* One commenter requested that the regulation allow States to differentiate service models among populations serviced under CFC.

*Response:* Section 1915(k)(3)(B) of the Act requires that services must be provided without regard to the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports the individual requires to lead an independent life. When a State specifies what service delivery models will be provided under CFC, the model must be available to all individuals meeting the medical necessity for CFC services. Therefore, States may not target certain service delivery models to sub-populations of individuals eligible for CFC. However, States could give all individuals participating in CFC the ability to choose among more than one service model.

*Comment:* Many commenters expressed concern and disagreed with the fact that the regulation gives States a choice to provide one or more service models. Many commenters believe the proposed rules did not carry out the statutory intent that States must offer people with disabilities a full range of options (including choice of service model) for receiving home and community-based services. The commenters believe States should be required to offer both an agency with choice as well as a self-directed model with service budget. The commenters indicate that a ''choice'' does not exist if the State only offers one model. One commenter recommended the regulation require assurances that individuals, rather than the State, would have the ability to select the service model that is best suited for their specific needs. Additionally, the commenters expressed concern that States could choose to only provide services under a self-directed model with service budget, which would potentially prevent individuals without the capacity to self-direct from accessing these services. Similarly, States could choose to only select the agency model, which would potentially prevent individuals from stating control over the budget and prevent them from having control to the maximum extent possible. The commenters indicated that either of these alternatives alone is inconsistent with the statutory language. The commenters requested the regulation be revised to assure that individuals have the opportunity to select the service model that best meets their needs. Another commenter believed States should not be allowed to have one model of care because one model will not fit all participants. The commenter stated that limiting the service delivery model is counter to the purpose of section 1915(k) of the Act and would only serve to perpetuate discrimination against individuals who can safely live in their own homes.

*Response:* The commenters provided compelling arguments as to why a State should provide more than one service delivery model. However, section 1915(k)(A)(iii) of the Act requires that the State shall make available home and community-based attendant services and supports ''under an agency-provider

model or other model * * *.'' The use of the word ''or'' instead of ''and'' led us to interpret the requirement that States are given a choice of service model to offer. We agree that individuals should be given a choice of service model that best meets their needs and we encourage States to elect to provide more than one. However, based upon the statutory language, we do not believe we have the authority to mandate a State to offer both service models.

*Comment:* A few commenters indicated that it is not clear what models would be included in the agency-provider model. In addition to requiring States to offer more than one service delivery model, a few commenters also requested the regulation specify the additional delivery models to be provided, such as traditional agency model, agency with choice model and self-direction with a service budget.

*Response:* We would like to clarify that, for the purposes of CFC, the agency-provider model could include both the traditional model and the agency with choice model. States using the agency-provider model for CFC may choose one or both of these agency options. As noted in the response to comments received in the Definition section, we have modified the definition of agency-provider model. Therefore, we have also revised the language at § 441.545 to align this section with the revised definition.

*Comment:* One commenter believed that mandating all models would not only allow a wider range of eligible individuals the opportunity to access services, but could potentially be of benefit to the growing personal care workforce. The commenter acknowledged the value of self-directed models, but also expressed the belief that it can isolate attendant care providers and offer them little opportunity for advancement. If the person they care for passes away or is hospitalized, the attendant care providers have no assurance of continued work. Payment for travel costs and holidays, which is standard in agencies, is almost non-existent for attendant care providers participating in self-directed models. Working for an agency may guarantee continued work, ongoing professional training or support, and recourse for addressing employment problems.

*Response:* We appreciate the commenter's perspective, and as stated earlier, encourage States to offer more than one service delivery model. However, we do not believe the statute mandates the provision of more than one service delivery model. Additionally, the scope of this regulation does not extend to address advancement opportunities and the examples of employees benefits the commenter provided.

*Comment:* One commenter stated that attendant services and supports should be available to individuals whether or not the individual fully manages them. The commenter requested that we use the term ''consumer controlled'' instead of ''self-directed'' when talking about the agency-provider model.

*Response:* We agree that individuals should exercise the level of control they want to, and we believe the self-direction philosophy supports this flexibility. As indicated above, we have modified the definition of ''agency-provider model'' to remove the term ''self-directed'', to avoid confusion.

*Comment:* One commenter requested that we clarify how an agency-provider model can legally provide participants with ''hiring and firing authority'' of personal care attendants, if attendant care providers are employees of the agency. Another commenter requested we clarify the definition of agency model within the context of consumer direction.

*Response:* We would like to clarify that the hiring and firing authority in the agency-provider model grants individuals the choice of who will provide services to them. When an individual chooses to not continue to use a attendant care provider (that is, ''fire'' the attendant care provider), the attendant care provider is still employed by the agency and is available to provide services to someone else. As indicated in an earlier response we have replaced references to ''hire'' and ''fire'' with ''select'' and ''dismiss''.

*Comment:* One commenter wanted to know if an individual's representative assisting the individual to self-direct and manage their services can be paid as part of the service plan.

*Response:* The assistance provided to a participant by an authorized representative is not considered a CFC service, and therefore, there is no reimbursement available through CFC.

*Comment:* One commenter indicated that the services available through the CFC program are provided in most States as adult day, home care and PACE, under different authorities such as sections 1915(c), 1915(b), 1115, 1915(i), and 1905(a) of the Act. The commenter recommended the regulation be amended to allow these providers to participate in the CFC program. One commenter suggested that the final regulation indicate that voluntary participation by PACE programs as a provider under CFC is allowed under the agency model or under another model established by the State.

*Response:* We do not agree the regulation should specify the various provider types that may be allowed to provide CFC services. The State determines the provider qualifications for providers to provide CFC services under the agency provider model. If the provider types listed meet the State's qualifications, and the providers are willing to provide the service, they may do so.

*Comment:* We received many comments requesting clarification on the level of control individuals have under the agency service model. One commenter indicated the regulatory language pertaining to the agency service delivery model is ambiguous. Section 441.545(a)(2) provided that under the agency model for CFC, individuals maintain the ability to hire and fire the providers of their choice. The commenter indicated that this can be read to mean individuals under this model only have the ability to hire and fire providers and do not have maximum control over service delivery, as required by the statute in section 1915(k)(6)(B) of the Act. The commenter recommended that this regulation be amended to make the language in § 441.550, relating to the authority of the individual to control service delivery, compliant with their interpretation of the statute.

*Response:* We do not agree with the commenter. When services are provided under the agency-provider model, individuals have maximum control within that service delivery model to select and dismiss attendant care providers, provide input as to the provision of services, and the type of assistance the attendant care provider provides. The individual also retains the right to train attendant care providers to perform the needed assistance in a manner that comports with the individual's personal, cultural, or religious preferences.

*Comment:* A few commenters requested that the regulation require that under the agency model, the individual maintain the ability to do the following: Select providers of their choice for services identified in their person-centered service plan, train, supervise, schedule, determine duties, fire their attendants, manage their providers and control, to the maximum extent possible, the services identified in their person-centered service plan.

*Response:* We believe the regulations include these requirements.

*Comment:* One commenter indicated that it is not clear if ''provider'' means agent, attendant or something else.

*Response:* For purposes of CFC, provider means any individual or entity providing a CFC service and/or support.

*Comment:* One commenter indicated that the statute calls for ''consumer-controlled'' services, regardless of the model utilized. The methods for adhering to this philosophy are clear with the self-directed model, but less clear within the agency-provider model.

*Response:* We would like to clarify that the agency-provider model (which States could choose to implement through a traditional agency model and/or an agency-with-choice model) also adheres to the philosophy of ''consumer-controlled.'' Under this model, individuals retain the ability to select, dismiss, and manage their attendant care provider.

*Comment:* A few commenters recommended that the rule ensure that the scope and authority it provides for the consumer's ''hiring and firing'' of the attendant care provider are complementary, appropriate and in sync with the agency's business and employment model, all applicable agency regulations, and basic employee protections. The regulation should include a clear delineation of the roles and responsibilities of the consumer and the agency under this model.

*Response:* We do not believe it is necessary to include such specificity in the regulation, as it will vary by service delivery model and should be developed by the State. We believe there are sufficient requirements in the regulation to ensure all parties understand their basic roles and responsibilities. We also reaffirm that the individual's ability to ''fire'' their attendant care provider in no way affects the attendant care provider's employment status with the agency. We reiterate that we have replaced references to ''hire'' and ''fire'' with ''select'' and ''dismiss.''

*Comment:* One commenter indicated that the agency service model can ''muddy the water'' for self-direction. The commenter recommends a consulting system, where an individual can receive any assistance needed to perform employer duties, such as hiring, training, and paperwork.

*Response:* We agree with the commenter's suggestion that individuals receive assistance needed to perform employer duties and believe these protections are included in the Support System section. Therefore, we have revised the Support System requirements at § 441.555 to apply to all individuals receiving CFC regardless of the service delivery model. We describe these revisions further in § 441.555.

*Comment:* Many commenters supported the provision in the Person-Centered Service Plan section of CFC that required that the Plan ''be directly integrated into self-direction where individual budgets are used'', but noted that it was unclear why the use of service budgets across all models is not assumed, given the language proposed in the section, ''Service Budget Requirements'' (§ 441.560). The commenters supported the use of service budgets in all models (since such a process ensures transparency and allows participants to have meaningful control over their services). The commenters requested that CMS reconsider the proposal for a separate section, ''Service Plan Requirements for Self-Directed Model with Service Budget'' (§ 441.550), as the Person-Centered Service Plan section should address the requirements for assuring true participant direction, regardless of the model chosen. The commenters pointed out that this is consistent with the expectation set forth by the CFC statute requiring CFC be ''consumer-controlled,'' regardless of the models chosen. The commenters added that while they recognize that basic elements of the person-centered service plan may be implemented differently based on the model, there should be core expectations for assuring participant direction across the models, and that models should be chosen based on appropriateness for the State, not based on presumptions relative to cost associated with fewer or less requirements.

*Response:* Every individual participating in CFC is expected to have a person-centered service plan that is based on an assessment of functional need regardless of the service delivery model available in the State. The service plan requirements for the self-directed model with service budget include the additional requirements that must be met when an individual is directing services through this model. We do not agree that service budgets should be a component of every service delivery model, as service budgets are not used in the agency-provider model.

*Comment:* We received many comments requesting that the regulation specify the various types of service delivery models that may be included under the ''other'' category. One commenter requested the regulations not restrict the statute's open-ended ''other'' category to only those models that feature a service budget component. A few commenters requested the regulation clarify that a collective bargaining model, which provides consumers the ability to select, direct and dismiss their own caregiver, while giving States the ability establish work-force wide compensation standards is an acceptable ''other model.'' Many commenters requested the CFC rules be designed so that all States with public authorities can fully participate in all aspects of CFC without undermining their successful policy approaches for expanding and stabilizing the workforce available to these consumers. In particular, the commenters requested that the regulation clarify that compensation setting and other workforce-related activities by the State be consistent with all allowable service models under CFC. The commenters indicated that difficulties finding and retaining quality home care attendant care providers are among the significant impediments to the expansion of attendant care programs, and CMS should ensure that the CFC regulation does not undermine these State activities but encourages such activities.

*Response:* We do not believe it is necessary to specify in regulation every type of service delivery model that exists, as we do not believe we would be able to capture them all. States wishing to utilize ''other models'', as defined in § 441.505, would need to include a description of the proposed service delivery model in their CFC SPA. We will discuss these models with the State, and a determination will be made as to whether it is an appropriate service delivery model for CFC.

We are taking this opportunity to add a new paragraph (c), to indicate that States have the ability to propose an alternative service delivery model not envisioned in this regulation. Such a model would be described in the State's CFC SPA, and approved by CMS.

*Comment:* One commenter requested the regulation be amended to add a provision that enables States to take on responsibility for building a self-directed workforce sufficient to meet the goals of the program by ensuring adequate compensation for direct care attendant care providers, establishing a consumer workforce for direct care attendant care providers, and implementing data systems to monitor the direct care attendant care providers.

*Response:* We do not believe it is within the scope of this regulation to mandate such activities. We believe that States have the ability to implement such requirements and should discuss them with the Development and Implementation Council.

*Comment:* One commenter is very appreciative of the broad language allowing individuals to choose their

attendant, establish additional cultural competency requirements, and train attendants to their specific cultural competency requirements. The commenter expressed that this flexibility is particularly important to ensuring service provision to Lesbian, Gay, Bisexual and Transgender (LGBT) individuals, especially older LGBT adults and people of color.

*Response:* We appreciate the commenter's support.

*Comment:* One commenter requested we clarify whether CMS perceives self-direction delivery models approved under different Federal authorities to be vulnerable to allegations of inequitable access under provisions of the Americans with Disabilities Act.

*Response:* The Americans with Disabilities Act requires that individuals with disabilities be given the ability to receive their long-term care services and supports in the most integrated setting appropriate to their needs. We believe that Medicaid authorities allowing for self-direction of services and supports do not conflict with this mandate, as self-direction is a service delivery model, and does not prevent the provision of additional services, through Medicaid or other authorities, that may be necessary for a State to comply with the Americans with Disabilities Act.

*Comment:* One commenter requested that the regulation clarify whether a State may select a self-direction model under the authority of section 1915(k) of the Act that differs from the State's existing self-direction delivery models under HCBS 1915(c) waivers.

*Response:* While there are many similarities between the section 1915(k) authority and the self-direction delivery models under the section 1915(c) authority, these are separate authorities with different requirements. States may implement different self-direction models under sections 1915(c) and 1915(k) of the Act, as long as all program requirements are met.

*Comment:* One commenter indicated that it is unclear if the direct cash model is intended to be a stand-alone model or an option within the financial management entity.

*Response:* Section 441.545(b)(1) requires a State to make financial management services available to all individuals with a service budget. States can separately choose to allow cash disbursement to individuals self-directing CFC services. Individuals using the direct cash option have the choice of using the financial management entity for some or all of the relevant functions.

*Comment:* One commenter recommended the regulation specify when FFP is drawn down under the direct cash option and how unexpended portions of a cash disbursement should be treated.

*Response:* Cash disbursement is given prospectively. States would report expenditures for CFC services on the CMS 64 form based on this prospective disbursement. States may determine how to account for unexpended portions of cash disbursements. Based on past experience, we know that some States recoup unexpended funds; others allow beneficiaries to carry over unexpended funds into subsequent months.

*Comment:* One commenter requested clarification on the requirement to comply with Internal Revenue Service rules contained under each service model. The commenter also requested clarification on how these paragraphs relate to the requirements in the State assurance provisions in § 441.570. The commenter suggested the regulations be clarified to ensure that the requirements of § 441.570 apply to each of the service models listed in § 441.545, as required by the statute.

*Response:* While the language pertaining to meeting IRS requirements may seem duplicative, the entity responsible for ensuring the requirement is met differs depending on the service delivery model used, and whether an individual is utilizing financial management activities. We believe the regulation is clear that requirements under the State Assurance sections apply to all service delivery models.

*Comment:* We received several comments supporting the inclusion of a financial management entity and the specific requirements for the service.

*Response:* We appreciate the commenters' support.

*Comment:* One commenter indicated that given the participant direction requirement of CFC, it may be important for CMS to consider whether or not a financial management entity could also be used within an Agency with Choice and other agency-provider models. The commenter added that the regulation does not provide specificity as to whether the financial management entity would operate on behalf of an individual who would be the employer of his or her attendants, or if a financial management entity could be an Agency with Choice, wherein the agency is the official employer of attendant care providers who provide service to participants.

*Response:* It is unclear how a financial management entity would be utilized in an agency-provider model. However, we would be willing to discuss such a proposal with States.

*Comment:* Two commenters suggested the regulation require States to offer more than one choice of financial management entity, and recommended the term ''entity'' be changed to ''entities.''

*Response:* Section 1915(k) of the Act does not provide the authority to require States to provide more than one choice of financial management entity, as this is an administrative function that may be completed by the State or a vendor organization. However, the statute does not prohibit States from having more than one financial management entity if they choose to. We believe offering more than one entity is congruent with the philosophy of consumer choice and encourage States to consider allowing more than one financial management entity.

*Comment:* One commenter recommended that § 441.545(b)(1)(iii) be amended to say ''separately track budget funds and expenditures for each individual.'' The commenter believes this revision is necessary because States may interpret ''separate account'' to mean ''separate bank account'' which is an overly complex, costly and unnecessary approach to managing an individual budget.

*Response:* The intent of this provision is to eliminate the possibility of commingling of individuals' budget funds. We have revised the rule to incorporate the suggested language and also added the requirement for the financial management entity (FME) to separately maintain budget funds. Additionally, we have revised paragraph (b)(vi) to clarify that the FME is required to provide periodic reports of expenditures to the individual and State.

*Comment:* One commenter suggested revising § 441.545(b)(2)(I) to also require filing and reporting FICA, FUTA and State unemployment taxes.

*Response:* We believe the regulation already specifies these functions, as we interpret ''compliance with'' to encompass filing and reporting. However, we are taking this opportunity to add ''and State employment and taxation authorities'' after requiring compliance with all applicable requirements of the IRS.

*Comment:* One commenter recommended that communications between the FME and the individual occur at least monthly.

*Response:* We believe the frequency of communication between the FME and the individual should be established by the State and should be based upon the level of assistance needed and provided.

*Comment:* One commenter wanted clarification as to whether the cost of the FME is considered a service cost rather than an administrative cost. The commenter also wanted to know if this service may be included in an individual's service budget.

*Response:* Consistent with other authorities including services provided by a financial management entity, this is considered an administrative function and may not be included in the individual service budget.

*Comment:* One commenter suggested the regulation should recognize fiscal intermediaries and include language that those entities that have been approved to serve a similar role under a State program should be automatically approved or allowed a streamlined approval process to provide similar services under CFC.

*Response:* Section 441.545 sets forth the minimum mandatory functions that must be performed by the FME. We recognize that States may interpret ''fiscal intermediaries'' differently. Additionally, we do not believe that fiscal intermediaries are synonymous with fiscal management activities. Therefore, we do not believe it is appropriate to list fiscal intermediaries in the regulation; however, we note they could provide the functions set forth in § 441.545, as determined by the State.

*Comment:* One commenter recommended the regulation clarify whether FME activities must be provided if a State does not elect to offer direct cash, vouchers, or permissible purchases.

*Response:* Section 441.545(b)(1) requires a State to make financial management activities available to all individuals with a service budget, including when the direct cash option is used. We are modifying paragraph (b)(3) to clarify that the requirements at § 441.545(b)(2)(i) through (iv) also apply to vouchers. Accordingly, we are removing ''If the cash option is the only model offered by the State for Community First Choice'' and ''services under the cash option'' from paragraph (b)(2)(iv) as we want to be clear that this provision applies to both direct cash and vouchers. States only implementing CFC through an agency-provider model would not need to provide FME activities.

*Comment:* One commenter recommended that a financial management entity be available for all self-directed model options. In such cases, the role of the financial management entity within each of the models would need to be clarified.

*Response:* Section 441.545(b)(1) requires a State to make financial management activities available to all individuals with a service budget. States can separately choose to allow cash disbursement or vouchers to individuals self-directing CFC services. Individuals using the direct cash option have the choice of using the financial management entity for some or all of the relevant functions. We believe these requirements ensure sufficient access to financial management entities.

*Comment:* One commenter stated that education on the responsibilities of managing cash when an FME is not used is key. Specifically, States and individuals should be educated on the risks associated with not using a financial management entity and the consequences of mismanaging the duties required.

*Response:* We agree with the commenter and believe the requirements under § 441.555, Support System, will provide individuals with the necessary education.

*Comment:* One commenter recommended the regulatory citations for service models be reorganized so that all the information pertinent to the agency model is together and the self-direction requirements are all together.

*Response:* As indicated earlier, we have revised the Support System language at § 441.555 to indicate that it applies to all service delivery models. We believe this addresses this commenter's suggestion.

Upon consideration of public comments received, we are finalizing § 441.545 with revision, revising paragraph (a) to refer to the ''agency-provider model'', amending paragraph (a)(1) to align with the revised agency-provider model definition, amending paragraph (b)(1)(iii) to say ''separately track budget funds and expenditures for each individual'', amending paragraph (b)(1)(vi) to require the FME to provide periodic reports of expenditures to the individual and to the State, amending paragraph (b)(2)(i) to specify compliance with State employment and taxation authorities, removing ''If cash option is the only model offered by the State for Community First Choice'' and ''services under the cash option'' from (b)(2)(iv), modifying paragraph (b)(3) to make the requirements at § 441.545(b)(2)(i) through (iv) apply to vouchers, and adding a new paragraph (c) to permit States to propose other service delivery models.

*L. Service Plan Requirements for Self-Directed Model With Service Budget (§ 441.550)*

We proposed that the self-directed service plan requirements convey authority to the individual to recruit, hire (including specifying attendant care provider qualifications), fire, supervise, and manage attendant care providers in the provision of CFC services and supports. In addition, we proposed that the service plan describe the ability of the individual to determine the amount paid for a service, support, or item, as well as the ability to review and approve provider invoices.

*Comment:* Many commenters offered general support of the self-direction model with service budget. The commenters believe the intent of this section is to give people maximum control over their services, recognizing that giving individuals the authority to manage their service provider is integral for self direction.

*Response:* We appreciate the commenters' support.

*Comment:* One commenter requested more specificity regarding the requirement for individuals to evaluate an attendant care provider's performance found at § 441.550(d)(4). Specifically, the commenter suggests that we explain the purpose of the evaluation, who will deliver and receive the evaluations, and what actions are to be taken in response to the evaluations. This commenter also questioned whether evaluations are required if the recipient is the spouse of the provider, or a minor with a parent provider. Alternatively, one commenter offered support of the evaluation requirement, but requested the rule not allow States to impose formal or standard evaluation processes. The commenter believes that the method for evaluation should be the decision of the employer.

*Response:* Individuals receiving services under the self-directed model with service budget have the ability to supervise and manage attendant care providers providing services to them. We expect individuals to evaluate the quality and adequacy of services the attendant care provider provides as part of their supervision responsibilities. We do not expect that the evaluation has to be a formal process, nor is it the responsibility of the State to impose a standard evaluation process. The purpose of the evaluation is to provide the individual with the opportunity to provide feedback to the attendant care provider with regard to the provision of services. When the individual has a representative, the representative would be expected to conduct the evaluation.

*Comment:* Many commenters expressed support of the self-directed service plan requirements. The commenters believe the requirements are essential to meaningful self-directed models of care and encourage their inclusion in the final regulation.

*Response:* We appreciate the commenters' support.

*Comment:* One commenter requested we clarify whether the State is allowed to set parameters or limits on any of the following: Annual service budget amount, the number of paid attendant care hours received from any single family member within a time period (per week, month, etc), or minimum wages.

*Response:* CFC is an optional State plan service. As such, States may set limits on the amount duration and scope of CFC benefits, as long these limits comply with the CFC specific requirements set forth in statute and regulation. We will be reviewing all State proposals to implement CFC under the State plan. Our review includes a review of any proposed limitations.

*Comment:* Many commenters expressed concern with individuals determining the amount to pay for a service, support, or item. Many commenters indicated that States should be allowed to establish reimbursement rates and methodologies including the use of collective bargaining as a way to establish consistent reimbursement rates for services and supports, while still allowing the individual to determine the amount, duration, and scope of the services provided. One commenter recommended the regulation be amended to specify that when an individual is determining the amount to pay for a service, support or item, the individual's decision should be consistent with existing State laws and regulations governing compensation standards. Another commenter indicated that while individuals should appropriately review invoices, requiring that individuals determine payment for attendant services (hourly rate or wages) is not a necessary component of self-direction and could undermine States' efforts to build their long-term services attendant workforce through regulating compensation standards for attendants/direct care attendant care providers. Another commenter requests the elimination of the requirement that individuals in a self-directed model with service budget determine the amount paid for a service, support, or item.

*Response:* We understand the concern expressed by these commenters. The intent of CFC is to provide individuals with the opportunity to maximize their independence and control of the home and community-based attendant services and supports. An integral component of the self-directed model with service budget is the ability of the individual to determine the amount paid for services. However, this flexibility should not conflict with responsibilities for setting compensation according to State and Federal requirements. Therefore, we are modifying § 440.550(e) to specify that determining the amount to pay for services should be ''in accordance with State and Federal compensation requirements''.

*Comment:* One commenter expressed concern related to the requirement that ''the budget methodology include calculations of the expected costs of CFC services and supports if those services and supports were not self-directed.'' The commenter believes States will find this provision challenging since it asks them to compare two separate models that are not necessarily directly comparable.

*Response:* We do not agree with the commenter. We expect the State to obtain this information based on an analysis of historical costs and utilization and other factors that are likely to affect costs.

*Comment:* One commenter requested that we provide clarification around budgeting requirements, specifically whether individual budgeting is required.

*Response:* The service budgeting requirements are used when individuals are receiving services under the self-directed model with a service budget. The budget is developed based on an individual's assessment of functional need and the services specified in the person-centered service plan.

*Comment:* The commenter indicated that the proposed rule gives the appearance that the self-directed model is more costly and onerous to implement than agency-provider models.

*Response:* CMS encourages States to avail themselves of a variety of service models to implement CFC. We acknowledge that agency-provider models are more straightforward to implement, and likely are already in existence in most States. However, we fully recognize the merits of self-directed service models, and will work with any State interested in adopting a self-directed service model for CFC.

*Comment:* One commenter recommended that the rule be revised to add language stating that the attendant care provider's duties are identified in the approved self-directed service plan and within the scope of CFC services.

*Response:* It is the person-centered service plan, required for each individual receiving CFC services and supports, regardless of service delivery model, that would convey the duties of the attendant care provider in accordance with the scope of CFC. We do not believe that it is necessary to amend this section of the rule to additionally make these points.

*Comment:* One commenter stated that with regard to ''reviewing and approving provider invoices or timesheets'' attendant care providers must utilize timesheets per the Fair Labor Standards Act (rather than invoices). The commenter recommended revising the rule to say ''Reviewing and approving provider payment requests.''

*Response:* We agree with the commenter and have revised the rule at § 441.550(f) to say ''reviewing and approving provider payment requests.''

Upon consideration of the public comments received, we are finalizing § 441.550 with revision, modifying paragraph (e) to specify that determining the amount paid for services should be ''in accordance with State and Federal compensation requirements'', modifying paragraph (f) to specify ''reviewing and approving provider payment requests.'' As noted in the response to comments received in the Definitions section, we modified paragraphs (a) and (b) to use the terms ''dismiss'' and ''select.''

*M. Support System (§ 441.555)*

Based on our experience with self-direction programs, we are aware that the support system provided by the State is a critical element of the service delivery model. Therefore, to maintain consistency and to reflect our policy relating to self-direction, in § 441.555 we proposed the requirement that the State have in place a support system to facilitate successful self-direction by the individual. While we did not prescribe the way States are to design their support system, to allow flexibility, based on our experience, we included a minimum list of activities for which individuals may need information, counseling, training, or assistance, but States may offer additional activities. Generally, the activities requiring support include participant rights information and how the self-directed model of service delivery operates.

*Comment:* We received several comments providing overall support for the requirements set forth at § 451.555. One commenter strongly endorsed this section as a critical component to ensuring consumers achieve maximum independence.

*Response:* We appreciate the commenters' support.

*Comment:* A few commenters suggested that we extend paragraph (b)(1) to require communication in a linguistically and culturally appropriate

manner, with accommodations for all functional limitations, including the need for alternative formats.

*Response:* For a State to comply with this requirement, it is an expectation that the State will assure that information is provided to individuals in a manner that is culturally sensitive and at a level most appropriate for the individual to understand the information. This includes translator services as needed for non-English speaking participants and interpreter services and accommodations for individuals with sight or hearing impairments. We agree with the commenter's recommendation and have revised paragraph (b)(1) to include the following language: ''To ensure that the information is communicated in an accessible manner, information should be communicated in plain language and needed auxiliary aids and services should be provided.''

*Comment:* One commenter requested that we provide guidance on all conditions that are required for person-centered planning with a service budget to better determine the cost of participating.

*Response:* The requirements for person-centered planning are the same regardless of the service delivery model and are described at § 441.540. Additionally, the requirements set forth at § 441.560 must be met for individuals receiving services through the self-directed model with a service budget.

*Comment:* One commenter indicated that, with regard to risk management agreements required under paragraph § 441.555(b)(2)(xi), the regulation does not address whether criminal history record checks are permitted to help mitigate risk. The commenter questioned whether record or background checks would be allowed if the participant recruits, hires, trains and fires attendant care providers. The commenter requested CMS to clarify whether States are required to allow participants to hire someone who presents a risk of harm.

*Response:* Following the practice of other programs offering self-direction, we believe that criminal background checks of attendants should be left to the discretion of the States. However, we agree that this expectation was not clear in the proposed regulation.

While we will not prescribe the tools or instruments States should use when developing risk management agreements, we are revising § 441.555 to require States to specify any tools or instrument it uses to mitigate identified risks. In this section, we further add that if States make criminal or background checks a requirement, States would bear the expense of the background checks it performs on behalf of individuals participating in CFC.

Additionally, we believe that the individual must retain the authority to decide who to hire to provide personal attendant services, as this decision is inherent in self-direction, as long as the choice adheres to section 1903(i) of the Act that Medicaid payment shall not be made for items or services furnished by individuals or entities excluded from participating in the Medicaid Program.

*Comment:* One commenter requested that we consider giving States the option to make self-directed training mandatory to ensure that individuals have mastered the skills needed to manage the service budget.

*Response:* We do not agree with the commenter. Section 441.555(b) requires States to provide or arrange for the provision of appropriate information, counseling, training and assistance to ensure that an individual is able to manage the services and budget. These supports are to be available to the individual on a continuous basis until such time as it has been demonstrated that after additional counseling, information, training or assistance the individual cannot effectively manage self-direction responsibilities.

Furthermore, § 451.555(b)(2)(v) requires there to be a discussion about the risks and responsibilities of self-direction. We believe these protections are sufficient to facilitate successful provision of services and supports via a self-directed model with service budget.

*Comment:* One commenter asked if the entity providing the support system could also be the financial management entity.

*Response:* Such an arrangement would be appropriate, as long as the conflict of interest protections originally proposed in § 441.540(c)(4)(iv), and now relocated to this section, are met.

*Comment:* One commenter requested clarification as to whether the State's obligation is limited to providing information about existing advocacy systems or if there is an expectation that States actively invest in fostering development of advocacy systems for the CFC option.

*Response:* It is an expectation that States would provide information about existing advocacy systems. We are not mandating the establishment of additional systems specific to the CFC program.

*Comment:* One commenter recommends that paragraph (b)(2)(vii) be revised as ''Individual rights, including appeal rights.''

*Response:* We agree with the commenter and have revised the rule at § 441.555(b)(2)(vii) to say ''individual rights, including appeal rights.''

*Comment:* One commenter expressed concern that the regulatory language requiring States to provide assistance to define goals, needs and preferences in paragraph (b)(2)(ix) exceeds current program limits and could overpower existing systems. The commenter recommends States have the ability to define this within current program abilities and limits.

*Response:* We do not agree with the commenter that States be given the ability to define support activities within the States' current program abilities. While similar to existing authorities, CFC is not the same. We are clarifying that this requirement relates to the provision of CFC. Therefore we have revised the rule at § 441.555(b)(2)(ix) to say ''Defining goals, needs and preferences of Community First Choice services and supports.''

*Comment:* Several commenters expressed concern that the regulation only applies supports to the self-directed model population. The commenters indicated that some of these supports may also be relevant and important to individuals participating in the agency model. The commenter recommends extending the relevant support requirements to that population.

*Response:* We recognize that although participants may not control an individualized budget in the agency-provider model, participants may manage their services to the maximum extent possible. We agree with the commenters that the supports provided under this section apply to all service delivery models, not just the self-direction model with a service budget. Therefore, we have revised the rule to include language that applies this requirement to all service delivery models.

*Comment:* We received many comments suggesting States be encouraged to develop attendant care provider registries as part of the additional activities they undertake to support a self-directed model of service delivery. A few commenters expressed concern that individuals who do not choose to receive services through an agency may have difficulty locating direct-care attendant care providers outside of their immediate network of family members and contacts. The commenters indicated that a ''matching service registry'' is a labor market intermediary that creates a dynamic platform for matching supply and demand by allowing individuals to tap into an up-to-date bank of available

attendant care providers. The commenters also indicated that the attendant care providers can also alert participants of their availability for employment. These commenters recommended the regulatory language be revised to require States to establish a labor market intermediary such as a matching service registry to assist participants with identifying and accessing independent providers.

*Response:* We believe States should have the flexibility to design a system that would best address workforce issues and ensure access to providers in their States. We support State activity to implement systems that will improve an individual's access to attendants. However we believe it is beyond the scope of the regulation to mandate that States implement attendant care provider registries.

*Comment:* A few commenters suggest we add ''peer supports'' to the list of included support activities. Another commenter suggested that the regulation promote the use of local, peer-based and consumer controlled providers so beneficiaries have maximum access to their fiscal agent.

*Response:* We do not agree with the commenters that ''peer support'' services should be added to the list of support activities. For purposes of Medicaid, peer support services are an evidence-based mental health model of care that assists individuals with their recovery from mental illness and substance use disorders. We recognize that peer support is provided by specially trained individuals who are in recovery from mental illness and/or substance use services. As such, we believe it would create confusion to include ''peer supports'' as a CFC service.

Recognizing that individuals with experience in utilizing personal attendant services and supports could provide valuable assistance to individuals who desire to do the same, States could utilize individuals who were or are receiving such services in the implementation of the activities required under the Support System.

*Comment:* One commenter recommends deleting paragraph (b)(2)(xi), pertaining to risk management agreements. The commenter compares such agreements to managed risk agreements in assisted living facilities that are inappropriate and illegal to the extent that they purport to release a service provider from liability. The commenter indicated consumer law invalidates any agreement that would absolve a personal care provider from responsibility for his or her actions.

*Response:* We disagree with the commenter, as we do not believe the risk management agreement requirement absolves personal care providers from responsibility for his or her actions. We believe the purpose of the risk management agreement is to identify the risks that an individual is willing and able to assume, and the plan for how identified risks will be mitigated. The State must ensure that the risk management agreement is the result of discussion and negotiation among persons providing the support system functions, the individual, and others from whom the individual may seek guidance. This is a requirement under the person-centered service plan.

*Comment:* One commenter suggested that the regulation be revised at § 441.555(b)(2)(vi) to state ''The ability to freely choose from available home and community-based attendant providers, service delivery models and (if applicable) financial management entities.''

*Response:* We agree with the commenter, but must acknowledge that States have the choice of how many service delivery models to provide. Therefore we have revised § 441.555(b)(2)(vi) to state ''the ability to freely choose from available home and community-based attendant providers, available service delivery models and if applicable, financial management entities.''

*Comment:* One commenter requested that we clarify the vision for ensuring development of a conflict free support system, as alluded to in the preamble, in the service plan discussion. The commenter indicated the proposed rule contains no such language or guidance.

*Response:* The conflict free support system discussed in the preamble is operationalized by a State's adherence to the language proposed in § 441.540(c)(4), which has now been relocated to this section.

*Comment:* One commenter indicated that to avoid conflict with standard language referring to contracts, the word ''plan'' should be substituted for the word ''agreement'' in paragraph (b)(2)(xi): development of risk plans.

*Response:* We do not agree with the commenter's suggestion. We believe the use of the term ''agreement'' most accurately reflects that these strategies are the result of discussion and negotiation required under the person-centered plan development.

*Comment:* One commenter requested that the regulation include support system workforce competencies.

*Response:* We disagree with this suggestion, as we believe States should have the flexibility to determine the qualifications of the entities conducting the assessment of functional need and developing the person-centered service plan, provided all requirements of this regulation are met.

*Comment:* One commenter indicated that individuals may need ongoing education and guidance from the self-direction support system.

*Response:* We agree with the commenter, and believe that this ongoing support is provided for.

Upon consideration of the public comments received, we are finalizing § 441.555 with the following revisions:

- We are revising paragraph (b)(1) to include the following language: ''To ensure that the information is communicated in an accessible manner, information should be communicated in plain language and needed auxiliary aids and services should be provided.''
- We are adding a requirement at paragraph (b)(2)(xi) that States specify any tools or instruments it uses to mitigate identified risks, and adding that if States make criminal or background checks a requirement, States would bear the expense of the background checks it performs on behalf of individuals participating in CFC;
- We are revising paragraph (b)(2)(vii) to include ''individual rights, including appeal rights'';
- We are revising paragraph (b)(2)(ix) to state ''Defining goals, needs and preferences of CFC services'';
- We are revising the introduction to include language that applies this requirement to all service delivery models;
- We are revising paragraph (b)(2)(vi) to state ''the ability to freely choose from available home and community-based attendant providers, available service delivery models and if applicable, financial management entities.''
- We are adding a paragraph (c) to incorporate conflict of interest language proposed in § 441.540(c)(4).

*N. Service Budget Requirements (§ 441.560)*

We proposed to require that a service budget be developed and approved by the State and include specific items such as the specific dollar amount, how the individual is informed of the amount, and the procedures for how the individual may adjust the budget. We proposed that the budget methodology set forth by the State meet certain criteria, such as being objective and evidence based, be applied consistently to individuals in the program, and be included in the State plan. In addition, we proposed the budget methodology include calculations of the expected

costs of CFC services and supports if those services and supports were not self-directed. We proposed that States could place monetary or budgetary limits on self-directed CFC services and that if a State chose to do so, we proposed to require that the State have a process in place that describes the limits and the basis for the limits, any adjustments that will be allowed, and the basis for the adjustments, such as an individual's health and welfare. We proposed to require certain beneficiary safeguards in light of these possible limitations.

*Comment:* Many commenters offered their support for this requirement.

*Response:* We appreciate the commenters' support.

*Comment:* One commenter requested clarification around CMS' intent for anticipated safeguards, and whether it is limited to circumstances in which an individual's needs change.

*Response:* Our experience with self-direction indicated that at a minimum, a certain level of oversight by the State is necessary to help flag potential issues with the provision of services. We believe it is important that States have a system to oversee the expenditures being made by individuals self-directing their care. Premature depletion of the funds in a service budget could signal a health crisis which would require the State to immediately determine the health status of an individual and construct a new assessment. It could also signal misuse of funds, for which the State would need to take corrective action. Although there are general safeguard requirements outlined in the Support System section, the safeguard requirements in § 441.560 pertain specifically to resolving issues when the budgeted service amount is insufficient to meet the individual's needs.

*Comment:* One commenter requested more guidance in the regulation on the procedures the State must have in place to provide safeguards when the budgeted service amount is insufficient to meet the individual's needs.

*Response:* We appreciate the commenters' suggestions; however the specific safeguards are determined by the State. We will review the State's proposed safeguards during the review of their State plan amendment submitted to implement CFC.

*Comment:* One commenter suggested that the rule should require the State to explain and provide in writing the criteria used for determining an individual's service budget amount when the individual receives the final written service plan.

*Response:* Section 441.560(a)(2) requires the State to specify procedures for informing an individual of the amount of the service budget before the service plan is finalized. Additionally, paragraph (d) requires the State to have a method of notifying individuals of the amount of any limit that applies to CFC services and supports. To ensure individuals receive information in a manner in which they understand, we have revised § 441.560(d) to include the following language: ''Notice must be communicated in an accessible format, communicated in plain language, and needed auxiliary aids and services should be provided.''

*Comment:* One commenter wanted to know if a State must adhere to the required elements at § 441.560(a)(1), (a)(2), (a)(3)(i) and (a)(5) if the State does not elect to provide transition costs, direct cash, vouchers or permissible purchases.

*Response:* Any State allowing self-direction with a service budget must adhere to all requirements of the final regulation. To clarify the requirements as they relate to permissible services and supports, we are taking this opportunity to revise paragraph (a)(5) inserting ''other permissible services and supports as defined at § 441.520(b)'' after ''transition costs'' and removing the remaining language.

*Comment:* We received several comments requesting clarification with regard to a State's flexibility to establish service limits on the service budget. One commenter believes strongly that States should be allowed the flexibility to institute caps on hours of services in this section, especially in times of fiscal crisis or uncertainty. The commenter also believes States should not be required to provide all services relating to all needs identified through the needs assessment process as there are limited [financial] resources. Another commenter requested the regulation explicitly say if a State may set a per person service budget limit for the self-directed model.

*Response:* CFC is an optional State plan service and States have the flexibility to determine the amount, duration, and scope of the program, within the confines of statutory requirements. We provide clarification under the assessment of functional need section that although the assessment will identify all needs an individual has, the CFC program will only be responsible for the provision of services available under CFC. We believe it is necessary and appropriate for the individual to be referred to other Medicaid and non-Medicaid programs the individual may be eligible for, that will address the needs identified that are not available under CFC.

*Comment:* One commenter requested the provision of guidance to States on ensuring that when a budget is capped, there are methods to modify the budget allotment, especially in emergency situations.

*Response:* Section 441.560(b)(5) and (c) require States to have procedures to adjust limitations placed on CFC services and procedures to provide safeguards to individuals when the budgeted amount is insufficient to meet the individual's needs. These provisions allow States to modify the budget allotments in emergency situations.

*Comment:* One commenter recommends the regulation include appropriate safeguards to ensure that budgets are not arbitrarily reduced for an individual's self-directed services. Another commenter indicated it is not clear what ''safeguards'' are considered acceptable when the budgeted services amount is insufficient to meet the individual's needs. The service budget requirements should explicitly address what adjustments may be made, for example when the individual is at risk of an institutional placement because of budget limits. Another commenter indicated that individuals should be well-informed of the appeal process if they believe that a service budget cannot adequately meet their needs.

*Response:* Section 441.560(c) requires the State to have procedures in place that will provide safeguards to individuals when the budgeted service amount is insufficient to meet the individual's needs. The Support System set forth in § 441.555 requires individuals be informed of the process for changing the person-centered service plan. An individual is supposed to sign their plan only if they agree with it. If the individual does not agree with the service budget, it should be addressed at this time. Additionally, there are requirements for individuals to file an appeal, and as always, the standard Medicaid fair hearing appeal rights exist for individuals receiving CFC services.

*Comment:* One commenter indicated that the regulation should require that appeals be handled by entities not responsible for conducting the assessment or providing case management services.

*Response:* We agree appeals should be handled by an independent entity. Reconsiderations may be handled by the individuals responsible for conducting an assessment and facilitating the person-centered plan of care. However, if an individual is not satisfied with the service plan developed, including the amount of hours identified on the plan, an individual has the right to file an appeal. The individuals should file an

appeal following the State's appeal process.

*Comment:* One commenter requested the rule clarify the applicability of ''evidence based'' to a service budget allocation methodology, as referenced in paragraph (b)(1). Additionally, the commenter requests clarification as to whether the ''cost data'' invokes a relationship to historical Medicaid rates and corresponding expenditure costs, or if it CMS' expectation that ''cost'' is related to audited costs for providing services unrelated to historical reimbursement rates.

*Response:* By this, we mean that the method used by the State is based on an analysis of historical costs and utilization and other factors that are likely to affect costs.

*Comment:* One commenter requested that CMS clarify the test against which we will measure service budget allocation methodology to determine approval. This commenter asked if there is an expectation of actuarial soundness or some other rate setting standard against which the methodology will be judged.

*Response:* Verification of actuarial soundness will not be required. States are expected to provide a description of the methodology used to determine the individual's service budget amount. The methodology must take into account the cost of services if they were not self-directed. We would like to further clarify that we use the term ''cost'' to mean what it will cost the beneficiary to purchase the services, at either the fee-for-service rate or a beneficiary negotiated rate. We recognize the confusion the use of the terms ''allocation'' and ''cost'' in § 441.560(b)(1) have created, and therefore, we have revised the rule to remove the terms. Additionally, we have revised this section to remove redundant language.

*Comment:* One commenter requested clarification as to whether a State may set participation parameters, such that individuals may be prohibited from participating if the individual's choices around wage limits result in the service budget being insufficient to cover the assessed needs.

*Response:* Section 441.545(b)(2)(iii) requires that States make available a financial management entity to an individual who has demonstrated, after additional counseling information, training or assistance, that the individual cannot effectively manage the responsibilities of receiving a cash payment.

*Comment:* A few commenters noted an incorrect regulatory citation for the Medicaid fair hearing process.

*Response:* We have revised the rule to make this technical correction.

*Comment:* A few commenters suggested the regulation be revised at paragraph (b)(1) to require individuals to follow a compensation standard developed by the State under § 441.570. The commenters believe the States should include labor market data in their methodology for developing a participant service budget as a basis for setting adequate compensation standards for direct care services to support recruiting and retaining qualified providers.

*Response:* We do not agree with the commenter's suggestion because it would not support the requirement at § 441.550(e) granting individuals the authority to determine the amount paid for a service, support, or item.

*Comment:* Several commenters expressed support for the requirement § 441.560(e) that the service budget not restrict access to other medically necessary care and services furnished under the State plan.

*Response:* We appreciate the commenter's support.

*Comment:* One commenter requested that the service budget criterion be clear regarding what is permitted and prohibited. With regard to what is permitted, flexibility due to changing needs, priorities, or goals needs to be recognized.

*Response:* States must ensure the method of determining the budget allocation is objective and evidence based utilizing valid and reliable cost data. Additionally, the regulation requires that States have a process for adjusting any limits placed on the provision of CFC services.

*Comment:* One commenter indicated that safeguards for individuals to address budgeted amounts insufficient to meet consumer needs must be robust and timely.

*Response:* We agree with the commenter and will review the description of the State's safeguards through the State plan amendment process.

*Comment:* One commenter requests the regulation clarify if a State may set self-directed budgets at a level which assures that those using the self-directed service option will not exceed the amount of funding which would be spent under an agency-directed mode. The commenter indicated the necessity for fiscal neutrality, indicating that self-directed services in the State has led to budgets being reduced by a specific percentage to account for the fact that flexibility is likely to mean a person uses more of the funding allowed to care for them during the year. The commenter urges that any reductions or discounts be based on data and a transparent methodology.

*Response:* States determine the methodology through which the service budgets are developed. As required in paragraph (b)(1), this methodology must be objective and evidence-based, using valid, reliable cost data.

*Comment:* One commenter recommends revising paragraph (a)(3)(i) to indicate that ''the procedure for an individual to freely adjust amounts allocated to specific services and supports within the approved service budget.''

*Response:* We acknowledge the clarity this revision brings, and are revising the regulation to incorporate it.

*Comment:* One commenter recommends health and safety be added to paragraph (c).

*Response:* We do not believe that such a clarification is necessary, as the term ''safeguards'' is sufficiently broad to encompass health and safety protections.

Upon consideration of public comments received, we are finalizing § 441.560 with revision to paragraph (a)(5) inserting ''other permissible services and supports as defined at § 441.520(b)'' after ''transition costs'' and removing the remaining language, correcting the citation of the fair hearings process in paragraph (a)(6), incorporating the commenter's suggested revision to paragraph (a)(3)(i), removing the terms ''allocation'' and ''cost'' from paragraph (b)(1), revising paragraph (d) to inserting ''Notice must be communicated in an accessible format, communicated in plain language, and needed auxiliary aids and services should be provided'' and removing redundant language.

*O. Provider Qualifications (§ 441.565)*

We proposed to require that States provide assurances that necessary safeguards have been taken to protect the health and welfare of CFC recipients. States must define qualifications for providers of attendant services and supports under the agency-provider model. We proposed that an individual has the option to permit family members, or any other individuals to provide CFC services and supports identified in service plan as long as they meet the qualifications to provide such services and supports. We also proposed that individuals retain the right to train their attendant care providers in the specific areas of attendant services and supports needed by the individual, and that individuals also retain the right to establish

additional staff qualifications based on their needs and preferences.

*Comment:* One commenter supported the requirement that States take necessary safeguards to protect the ''health and welfare'' of enrollees.

*Response:* We recognize that the protection of health and safety requires program-wide consideration and oversight; we are therefore taking this opportunity to move this assurance from the Provider Qualifications section to the State Assurances section. Additionally, we are adding language to the State Assurance section to make it clear that this includes assuring the State's adherence to section 1903(i)(2) of the Act that Medicaid payment shall not be made for items or services furnished by individuals or entities excluded from participating in the Medicaid Program.

*Comment:* One commenter expressed concern that the regulatory language at § 441.565(c) does not state the statutory requirement that services be provided by an individual who is qualified. The commenter recommended the regulatory language be revised to explicitly state this.

*Response:* The requirements at § 441.565(b) requiring the development of provider qualifications includes the requirement that providers must be qualified. Therefore, we are not revising the regulatory language to explicitly state this.

*Comment:* One commenter requested that we define the term ''qualified.'' A few commenters requested that the regulation go beyond requiring States to define provider qualifications, by also establishing core qualifications for States to build around. The commenters believe the core qualifications should be applied uniformly to home care agencies, as well as the self-directed model with service budget. The commenters indicated that at a minimum, attendant care providers should be subject to criminal background checks, a minimum set of basic caregiver training standards, and training on mandated ''abuse and neglect'' reporting. Several commenters requested that the regulation require States to adopt national credentialing standards for personal assistance attendant care providers. One commenter requested that we confirm that the individual's right to establish additional staff qualifications does not interfere with a State's ability to set provider qualifications including those necessary to ensure the individual's health and welfare. A few commenters expressed concern that the State would not define the qualifications of providers who are not part of an agency, such as family members and friends. These commenters believed that there should be minimum safeguards that States must meet in establishing provider qualifications for services provided under both an agency model and self-directed model. These standards should include caregiver training and competencies, health assessments, quality assurance systems and others.

*Response:* Consistent with other Medicaid authorities providing personal assistant services, States have the flexibility to establish the minimum provider qualifications for providers of services provided under the agency-provider model. A description of provider qualifications will be reviewed with each State's proposal to implement CFC. Additionally, individuals receiving services under the agency-provider model retain the right to establish additional staff qualifications based on the individual's needs and preferences. We agree that these additional qualifications should not interfere with the State's ability to protect the health and welfare of individuals receiving CFC services and supports.

We appreciate the commenters' suggestions for possible safeguards States could employ to protect the health and welfare of participants receiving CFC services. While we agree with the suggestions, we believe that mandating specific safeguards will not allow States the flexibility to utilize procedures that have proven successful. In addition, we do not believe it is necessary or appropriate to establish at the Federal or State level provider qualifications for individuals delivering services via the self-directed model with service budget. A hallmark of self-directed models is the ability of the individual receiving services to define the qualifications of those furnishing services. The only exceptions in CFC is the need to adhere to requirements of State Practice Acts when determining the ability of ''health-related tasks'' to be delegated by licensed healthcare professionals and adherence to section 1903(i) of the Act prohibiting payment for items or services furnished by individuals or entities excluded from participating in the Medicaid Program.

We believe requiring State assurance of the provision of necessary safeguards is sufficient; however, as indicated above, we are moving this required assurance and adding language requiring adherence to section 1903(i) of the Act to § 441.570, State Assurances.

*Comment:* One commenter expressed concern that providers with a history of defrauding government programs need to be avoided in the selection process.

*Response:* We agree with the commenters' concerns and expect States to implement safeguards to prevent such individuals or entities from providing CFC services.

*Comment:* Several commenters requested the regulation require that all employers comply with basic attendant care providers rights such as minimum wage, tax withholding and provision of attendant care providers compensation.

*Response:* Except for the mandatory flexibility within the self-directed model with service budget for individuals to retain the authority to determine the amount to be paid for a service, we believe the commenters' suggestions are addressed in the requirements set forth in §§ 441.545 and 441.570. Additionally, we have modified § 441.570 State Assurances to add a paragraph (d)(5) to say ''any other employment or tax related requirements.''

*Comment:* One commenter asked if the personal care attendant is considered to be the provider. If the personal care attendants are considered to be providers, the commenter wanted to know if the providers are subject to the screening requirements under § 455.000.

*Response:* Based on the commenter's statement we are unable to determine if the commenter is referencing the program integrity requirements found at 42 CFR Part 455 or if this is an error as the proposed rule for CFC did not contain a § 455.000. However, we note that § 400.203(1) defines provider as either of the following: (1) For the fee-for-service program, any individual or entity furnishing Medicaid services under an agreement with the Medicaid agency; or (2) For the managed care program, any individual or entity that is engaged in the delivery of health care services and is legally authorized to do so by the State in which it delivers the services. To the extent personal care attendants meet one of the above definitions, they would be considered Medicaid providers and subject the program integrity requirements found at 42 CFR part 455. We acknowledge that the inherent flexibility of who can provide services under a self-directed service model, may result in a personal care attendant not meeting the definition of providers found in § 400.203. We believe the program safeguards included throughout this regulation, such as the activities required under the support system, provider qualifications, State assurances, and establishing a quality assurance system that evaluates quality of care and develops and implements mechanisms for discovery and

remediation and quality improvement activities, will ensure individuals receiving services under this benefit are afforded protections of health, safety and program integrity in circumstances in which the personal care attendant does not fall within the regulatory definition of a provider. Additionally, a State must adhere to the provisions of section 1902(a)(27) of the Act, and Federal regulations § 431.107, governing provider agreements.

*Comment:* We received many comments supporting the requirement that individuals have the option to permit family members or other individuals of their choosing to provide attendant services and supports. We also received many comments supporting the requirement that individuals set their own qualifications for family members or individuals they recruit.

*Response:* We appreciate the commenter's support.

*Comment:* One commenter believes services are best provided by public or not-for-profit entities. The commenter believes that if for-profit driven entities are used, the contracts should specify the profit and make sure the rest is spent for the consumers' benefit. The commenter also expressed concern that services may be cut to boost profits.

*Response:* The statute does not include language to exclude for-profit entities from providing CFC services if they are qualified to do so. We believe the regulation provides sufficient safeguards to thwart inappropriate behavior that could occur with any provider.

*Comment:* One commenter stated consumer voices need to be heard regarding the selection for providers.

*Response:* We believe that self-direction and consumer choice are supported throughout the rule. Regardless of the service delivery model, the individuals have control over who is providing services to them. As specified in the statute, and implemented in provisions of the rule, individuals have control to select and manage services. The Development and Implementation Council, which requires its membership composition include a majority of elderly individuals, individuals with disabilities, and their representatives, is an excellent forum to discuss important issues such as service delivery options and provider types to be included in the State's CFC program.

*Comment:* We received many comments requesting clarification regarding whether individuals are allowed to hire family members to provide CFC services. The commenters requested that participants be allowed maximum flexibility to hire any individual capable of providing services and supports, including legally responsible relatives. Many commenters requested that the regulatory language at § 441.565(b) state that individuals have the option to have family members provide services and supports whether the State allows family members to be a attendant care provider or not.

*Response:* Section 1915(k)(1)(A)(iv)(III) of the Act requires that services are provided by any individual who is qualified to provide such services, including family members. We interpret this to mean that under the self-directed model with service budget, States must allow individuals to hire family members qualified to provide any service identified on the person-centered service plan. Recognizing States have the option of only offering the agency-provider model, we expect that this model would allow an individual to exercise maximum control over who provides services to them. While we cannot mandate agencies to employ individuals' family members for the purpose of providing CFC services, we strongly encourage agencies to consider employing such individuals if they meet the established qualifications.

*Comment:* Many commenters requested the regulatory language at § 441.565(c) be revised to state that individuals or their representatives have the right to train attendant care providers to perform any tasks within an approved service plan without regard to State licensure or certification requirements.

*Response:* We interpret this provision to allow individuals to train providers to perform non-skilled activities tailored to the specific needs of the individual; therefore, we are not revising the regulatory language. However, for reimbursement to be made for services that meet the definition of a health-related task, those services must be delegated within the State's Practice Act for the practitioner delegating the service.

*Comment:* One commenter asked for confirmation on the applicability of 42 CFR 440.167 that prohibits FFP for payments to legally responsible individuals for the provision of State plan personal care services, unless those services meet the criteria as being ''extraordinary'' care.

*Response:* The regulatory requirements for State Plan personal care services do not apply to CFC, which has its own statutory and regulatory requirements. We acknowledge the confusion created by including in the same section State flexibilities in determining provider qualifications under agency-provider models and individual flexibilities in determining provider qualifications under self-directed models with service budgets. Such confusion was evident in many comments received. To that end, we are revising this section to indicate that paragraph (a) applies to all service delivery models, and paragraph (b) applies only to agency models and paragraph (c) applies only to self-directed models with a service budget. Paragraph (d) applies to ''other'' models defined by the State.

*Comment:* Many commenters expressed concern that the provider qualifications established by the State could threaten the ability of individuals to staff their support needs. The commenters suggested there be an exception process if there is no satisfactory attendant care provider available and the consumer makes a voluntary affirmative choice to waive the provider qualifications requirement. The commenters suggested that the regulation define ''voluntary affirmative choice'' in a way that will allow informed and sophisticated consumers to have the default requirement for a provider qualifications waiver, while not allowing this authority to be abused. For example, an agency should not be able to offer an unsuspecting consumer a waiver to ''get a faster attendant placement.'' Lastly, the commenter recommended that the administrative burdens of ascertaining and evaluating provider qualifications should not fall so heavily on an individual as to prevent hiring.

*Response:* As noted above, we have restructured this paragraph to clarify the requirements that apply under the various service delivery models. We believe this should alleviate any confusion. However, we disagree with the commenters' recommendation to add an exception process for individuals if there is no satisfactory attendant care provider available. For the purposes of ensuring health and welfare of individuals receiving CFC services, we believe that providers must meet either the qualification standards established by the State when services are delivered through the agency-provider model, or by the individual, when services are delivered through the self-directed model with service budget.

*Comment:* One commenter requested clarification as to whether a State, in accordance with State law, may prohibit family members from serving as the client's representative while also providing paid attendant services.

*Response:* We are clarifying here that an individual's representative may not

also serve as the individual's paid attendant. This arrangement was prohibited in the section 1915(j) program, and we are modifying the definition of ''individual's representative'' to continue that prohibition for CFC.

*Comment:* One commenter requested that the regulation give States the authority to determine which family members may act as providers of care.

*Response:* We do not believe it is appropriate for the regulation to authorize States to determine which family members may act as providers of care under the self-directed model with service budget. Consistent with the philosophy of self-direction, we believe individuals receiving CFC services must have the opportunity to exercise maximum control in deciding who can provide services.

*Comment:* One commenter indicated that when services are provided in a traditional agency model, the regulation should mandate that States establish a qualification standard that includes establishing a specific set of patient rights, including the right to immediate access to a supervisor to request a change in attendant, or hours, or duties.

*Response:* We do not agree that the regulation should mandate that States establish qualifications above and beyond what is already required for CFC. We believe that these important individual rights are included as requirements under the person-centered planning requirements at § 441.540 and the support system requirements at § 441.555.

*Comment:* One commenter suggested that the regulation should set the expectation that fraud, waste and abuse will not be tolerated and should be prevented, punished and prosecuted.

*Response:* A major tenet of the Medicaid program is maintaining program integrity. This requirement applies not only the section 1915(k) authority, but to all Medicaid authorities. In addition, the CFC regulation specifically requires services furnished to be based on the assessment of functional need, and indicates that the person-centered service plan should prevent the provision of unnecessary or inappropriate care. To promote the integrity of the Medicaid program, we have modified § 441.570(a), State assurances, to explicitly require a State's adherence to section 1903(i) of the Act, which stipulates that Medicaid payment shall not be made for items or services furnished by individuals or entities excluded from participating in the Medicaid Program, when implementing the CFC State plan option.

*Comment:* One commenter believes mandatory attendant training should be required. Another commenter believes the State should make available training programs or individualized coaching for those participants who prefer their attendant care provider receive such training. Alternatively, many commenters support the right of individuals to train attendant care providers in the specific areas of attendant care needed. The commenters suggested CMS clarify the interaction of this individual right with State laws mandating training requirements governing all attendant care providers.

*Response:* We disagree with the commenters' suggestion to require States to have mandatory trainings for providers of attendant services, as this would remove the authority vested in the individuals to train their providers. However, to support the requirement at § 441.565 that individuals retain the right to train attendant care providers in specific areas, and to be consistent with related requirements under section 1915(j) of the Act, we expect States to allow individuals to have access to additional attendant care provider training if needed or desired by the individual and related to needs identified in the person-centered plan. We have revised the rule at § 441.565 (a)(1) to reflect this change.

*Comment:* One commenter requests that cultural competency provisions explicitly include lesbian, gay, bisexual, and transgender populations.

*Response:* We do not believe that language specific to lesbian, gay, bisexual, and transgender populations is necessary, as the requirement applies for all individuals receiving CFC services.

*Comment:* A few commenters believe that there should be certain safeguards and oversight to ensure that services have been provided appropriately and at the level that is authorized.

*Response:* We believe that the regulation provides sufficient individual protections to detect whether needed services are provided appropriately. It is our expectation that an individual's services will be monitored by the entity providing support system services, and any irregularities in the provision of services will be detected and addressed. Additionally, the State Medicaid agency will exercise ongoing oversight and monitoring of the provision of services through review of the person-centered service plans, and through the Quality Assurance and Improvement Plan.

*Comment:* One commenter requested clarification regarding whether a State may set limits on the number of hours an individual may receive from any single family member, such as 40 hours per week.

*Response:* We do not believe it is appropriate for States to apply limitations to a certain classification of providers.

Upon consideration of public comments received, we are finalizing § 441.565 with revision, moving the requirement in paragraph (a) that requires States to assure the necessary safeguards that will be taken to protect the health and welfare of enrollees in CFC to § 441.570. ''State Assurances'' and modifying paragraph (c) to include the phrase ''including through the use of training programs offered by the State.'' We are also modifying this section to specify which requirements apply in various service delivery models.

*P. State Assurances (§ 441.570)*

We proposed to reflect the requirements at section 1915(k)(3)(C) of the Act that, for the first full fiscal year in which the State plan amendment is implemented, the State must maintain or exceed the level of expenditures for services provided under sections 1905(a), 1915, or 1115 of the Act, or otherwise, to individuals with disabilities or elderly individuals attributable to the preceding fiscal year. We also proposed to interpret this requirement to be limited to personal care attendant services. In addition we proposed to reflect requirements at section 1915(k)(4) of the Act that States electing this option must comply with certain laws in the provision of CFC regardless of which service delivery model the State elects to provide. Specifically, the statute requires that services and supports are provided in accordance with the Fair Labor Standards Act of 1938 and applicable Federal and State laws regarding withholding and payment of Federal and State income and payroll taxes; provision of unemployment and workers compensation insurance for attendant care workers; maintenance of general liability insurance; and occupational health and safety. We proposed to include these assurances as specified in the statute at § 441.570(b).

*Comment:* Multiple commenters supported limiting the application of the State maintenance of expenditure requirement to a defined set of services rather than to all Medicaid expenditures for older people and individuals with disabilities. Multiple commenters agreed that there is a need to develop a standard which more accurately reflects the legislative intent of CFC, as applying the maintenance of expenditure to all services is overly broad and would render the provision ''nearly pointless'',

but indicated that limiting it only to personal care services is overly narrow. Multiple commenters added that the maintenance of expenditure requirement should include all home and community-based services, not just personal care and indicated that this would be consistent with the intent of the law. Other commenters asked CMS to clarify in the regulation that CMS interpreted this requirement to only apply to personal care attendant services under sections 1905(a), 1915, and 1115 of the Act for the first year.

*Response:* We interpreted section 1915(k)(3)(C) of the Act to mean that, for the first full calendar year in which the State chooses to offer CFC in the State plan, the State's share of Medicaid personal care attendant expenditures for individuals with disabilities or elderly individuals must remain at the same level or be greater than State expenditures from the previous 12 month period year. As CFC is an attendant services and supports benefit, we believe it is appropriate to apply this maintenance of expenditure requirement only to comparable expenditures authorized under sections 1905(a), 1915, 1115 or other sections of the Act. We articulated this interpretation in the preamble of the proposed rule. To increase the clarity of this requirement, we are modifying the regulatory provision to specify the scope of services required under the requirement, to indicate that the clause ''or otherwise'' also applies to home and community-based attendant services authorized under other provisions of the Social Security Act, clarify that this requirement applied to State expenditures and to clarify we interpret the fiscal year to be a 12 month period. The new language will say ''For the first full 12 month period in which the State plan amendment is implemented, the State must maintain or exceed the level of State expenditures for home and community-based attendant services and supports provided under sections 1115, 1905(a), 1915, or otherwise, under the Act, to individuals with disabilities or elderly individuals attributable to the preceding 12 month period.''

*Comment:* A commenter indicated a 1-year maintenance of expenditure requirement is not sufficient, given that demographics will drive an increasing need and suggested that the requirement should be at a baseline for the first full fiscal year and then increase based on factors such as population demographics or indicators of need or demand such as waiting lists, applications for services, etc. Another commenter recommended that the requirement include gradual increases each year in access to personal care services.

*Response:* We believe that section 1915(k)(3)(C) of the Act was clear in terms of the timeframe for which States are required to maintain or exceed the level of expenditures.

*Comment:* Multiple commenters indicated that while States should have the flexibility to move beneficiaries from other programs into CFC, they recommended that safeguards be in place to ensure that beneficiaries do not experience any disruptions or loss of benefits, and that they are able to retain their providers from the initial program if they previously directed their own supports. Multiple commenters added that the shift should be seamless for consumers. Another commenter added that if States substitute personal care services under CFC for otherwise available personal care services, the qualifications and availability of the services should be maintained so that no currently eligible person or group loses care, and pointed out that the level of expenditures could be maintained in several ways including the expansion of eligibility for personal care services under section 1915(c) programs or State plan personal care.

*Response:* We believe the maintenance of expenditures provision will serve as a safeguard in that these expenditures cannot decrease for the first year of implementation; however, we acknowledge the commenters' concerns and expect States to ensure that services will not be disrupted, decreased, or lost as a result of a State choosing to elect CFC. We do not foresee there being an issue with individuals retaining their current providers if they choose to receive their attendant services and supports through CFC.

*Comment:* Multiple commenters stated that it was their belief that the legislative intent of the maintenance of expenditure provision was to ensure that States implemented the CFC to expand access to services, and not as a way to constrict existing services while securing higher matching funds. The commenters suggested that there be extra scrutiny of State reductions in services that are related to taking up CFC, in particular, where the State makes no effort to grandfather in existing services for affected consumers. The commenters explained that if a State were to take up the CFC option and apply an institutional level of care eligibility requirement, the State might be tempted to eliminate its personal care option to get higher match for those services through CFC. The commenter added that the large majority of States do not have an institutional level of care requirement for the personal care option and thus many individuals who were in the personal care option would not be able to transition to CFC. While the commenter noted that the State would likely not be in technical violation of the maintenance of expenditure requirement, based on the broader CFC spending obligations, it might violate the spirit of the CFC for thousands of consumers to find themselves without personal care services. The commenter cautioned that HHS should be careful to avoid helping States evade the purpose of the requirement.

*Response:* We do not believe that this regulation promotes the constriction of existing services to secure higher matching funds. We appreciate the suggestions regarding the potential reduction of services. The CFC State plan option provides individuals requiring an institutional level of care the opportunity to receive personal attendant services and supports (PAS) in the community instead of in an institution. We anticipate States will use this State plan option to improve access to non-institutional long term care services and supports. Additionally, § 441.570 requires States, for the first 12 months of implementing this State plan option, to maintain or exceed the level of State expenditures for similar services provided under other benefit authorities under the Act.

*Comment:* One commenter advised that if the maintenance of expenditure requirements for CFC pertain only to personal care attendant services, it should be clarified in the regulatory language in paragraph (a) to include HCBS waiver services as well. The commenter also expressed concern regarding the interaction between the Affordable Care Act Maintenance of Effort (MOE) for home and community-based waiver services and the maintenance of expenditure requirement for CFC purposes, as the commenter anticipated that persons may move from a waiver to CFC, and indicated that States should not risk noncompliance with the MOE under the Affordable Care Act if persons move from HCBS to CFC. Another commenter indicated that States need clarification as to whether they are required to maintain the same number of waiver slots, as would be required by the Affordable Care Act MOE if a State takes up CFC, as States may be unwilling to take up the option if they cannot realize savings from directing people away from waivers and towards less expensive State plan services.

*Response:* This set of comments addressed two aspects of the

maintenance of expenditure requirement of CFC. First, the spending covered by the maintenance of expenditure requirements are for home and community-based attendant care services in the State as authorized under sections 1905(a), 1915, 1115, or otherwise, under the Act. The final rule reflects that this requirement pertains to these services and these provisions of statute.

Secondly, the comments raised questions regarding the relationship of the maintenance of expenditure requirements as set forth in section 1915(k) of the Act to the MOE requirements established through Affordable Care Act as such requirements apply to long term services and supports, including HCBS waiver programs. The Affordable Care Act MOE pertains to Medicaid eligibility standards, methodologies, and procedures. Because institutional care and HCBS waivers can serve as a doorway to eligibility for certain individuals, changes impacting access to those benefits may raise MOE questions.

While changes to the section 1915(c) waiver eligibility and capacity may have implications for the Affordable Care Act requirements regarding MOE, a State currently has great flexibility to modify benefits to manage waiver costs. As a result, a State may elect to provide attendant care services and supports through CFC that are currently provided through other Medicaid authorities. States seeking to reduce waiver capacity (''slots'') or otherwise adjust the eligibility requirements for HCBS waivers should consult with CMS to ensure continued compliance with the MOE requirements, and to receive guidance on alternatives available to them in this regard. For additional information on the MOE requirements of the Affordable Care Act and its relationship to HCBS waivers, please see the State Medicaid Director letter issued on this matter at *http://www.cms.gov/SMDL/SMD/list.asp#TopOfPage.*

However, we do encourage States to evaluate what it offers under existing programs and consider the opportunities offered through CFC and the corresponding reporting and quality requirements to determine what is best for each State and its beneficiaries. We note that the additional 6 percentage point increase in FMAP would apply only to CFC, and would not apply to any currently approved program authorizing personal attendant services and supports.

*Comment:* A commenter recommended that CMS require States to formulate a plan to reduce existing waiver waiting lists for personal attendant care services.

*Response:* While we appreciate the commenter's suggestion, we do not plan to add a requirement to CFC for States to formulate such a plan as it is outside the scope of this benefit.

*Comment:* Another commenter requested further clarification on the section 1915(k)(4) requirement that waiver services meet FLSA and payroll tax requirements. Currently the State in which this commenter resides does not pay payroll taxes. The State shifts its payroll obligations to Medicaid recipients and also imposes unpaid care on the providers forcing them to ''volunteer'' for their employers. The commenter would like clarification as to whether or not CMS is attempting to remedy these abuses for CFC Option, as well as existing waivers.

*Response:* We reiterate that CFC is not a waiver program, but is a new, optional State plan benefit. Any State implementing CFC must adhere to the requirements in the authorizing legislation. By submitting a SPA to implement this program, the State will be assuring adherence to these requirements. States have the ability to contract with entities for the provision of activities such as the withholding of payroll taxes, etc., but retain ultimate responsibility for ensuring they are done appropriately.

*Comment:* A commenter asked for details regarding the applicable Federal laws regarding the requirement to maintain ''general liability insurance'' as their State's current personal care services program does not require this insurance for any party, and their current program is in compliance with all other provisions of this section. The commenter requested that this language be removed. Another commenter asked that CMS clarify which entity is expected to maintain general liability insurance as it is unclear whether it is the individual self directing care, the attendant providing services, or the financial management entity. The commenter also asked CMS to clarify whether the attendant's employer must provide attendant care providers with health insurance coverage.

*Response:* These details are best left to State Medicaid Agencies as they implement the program, so as to allow for State flexibility.

*Comment:* Another commenter suggested that CMS require States to set forth in detail how they intend to comply with/meet the various employment-related laws.

*Response:* States electing CFC must submit a State plan amendment that assures their adherence to this requirement. The specifics of how this happens are left to the States to determine.

*Comment:* A commenter stated that at paragraph (c)(4), CMS indicates that a State must assure that all applicable provisions of Federal and State law are met including those related to ''occupational health and safety'' and added that since the majority of CFC services will be delivered under person-centered plans and primarily in persons' residences, CMS should clarify how they envision States ensuring compliance with OSHA requirements, if that is the intent. The commenter stated that if compliance with OSHA requirements is not the intent, CMS needs to clarify what is meant by ''occupational health and safety.''

*Response:* These assurances were set forth in statute at section 1915(k)(4) of the Act. We will look to the State Medicaid Agencies to implement any policies they believe are necessary to ensure compliance.

*Comment:* Two commenters proposed an additional assurance at a new paragraph (c)(5) that States ensure that fiscal agents who will be cutting checks to attendant care providers on behalf of beneficiaries have sufficient cash reserves to be able to pay attendant care providers timely, notwithstanding delays in reimbursement due to bank holidays, etc.

*Response:* It is the responsibility of a State to ensure that the fiscal agents with whom the State chooses to work are capable of compensating providers of services and supports.

*Comment:* Several commenters recommended the following language: ''A State must assure that fair hearing processes for individuals are met in accordance with 42 CFR Part 431 Subpart E.''

*Response:* State Medicaid programs must adhere to the fair hearing requirements at 42 CFR part 431 Subpart E for all Medicaid programs. Therefore, we do not agree with the commenters that it is necessary to add an additional State assurance to the regulations for CFC.

*Comment:* A commenter suggested that the regulation promote the use of local, peer-based and consumer-controlled providers so beneficiaries have maximum access to their fiscal agent.

*Response:* This regulation includes extensive flexibility for States to establish provider qualifications in a way that encompasses a broad pool of experience. Individuals participating in a self-directed model will have ultimate

flexibility for selecting providers of services.

Upon consideration of public comments received, we are finalizing § 441.570 with revision, to clarify the intent of the maintenance of expenditures requirements proposed in paragraph (a), now paragraph (b). In addition, as indicated above, we are adding a new paragraph to reflect the movement of the requirement that States assure the provision of necessary safeguards to protect the health and welfare of CFC enrollees including adherence to section 1903(i) of the Act which stipulates that Medicaid payment shall not be made for items or services furnished by individuals or entities excluded from participating in the Medicaid Program. This will be a new paragraph (a), with the existing language being adjusted accordingly. As indicated in § 441.565, Provider Qualifications, we are adding a new paragraph (d)(5) to state ''any other employment or tax related requirements.''

*Q. Development and Implementation Council (§ 441.575)*

We proposed that States must establish a Development and Implementation Council that is primarily comprised of individuals with disabilities, elderly individuals and their representatives. We also proposed to require that States must consult and collaborate with this Council during the development and implementation of a State plan amendment to provide home and community-based attendant services and supports under CFC.

*Comment:* Many commenters had positive comments regarding the Development and Implementation Council. Many commenters stated the Development and Implementation Council is an excellent idea and a positive step forward for States, as well as a mechanism to ensure consumer input and implementation monitoring. Many of the commenters were pleased that CMS is soliciting comments on ways to design the Implementation Council, as it provides for robust stakeholder collaboration.

*Response:* We agree that the Council will provide additional opportunities for stakeholder input and collaboration.

*Comment:* Many commenters weighed in on the makeup of the Development and Implementation Council. Many commenters requested that a diverse population from advocacy organizations, disability rights groups, private agency representatives, stakeholders, direct support professionals, and direct service attendant care providers or their representatives be included in the Council's membership.

Many commenters requested that the final rule ensure that a majority of the Council is made up of individuals with disabilities, elderly individuals, and their representatives. The commenters further recommended that the Council should be comprised of members that reflect the diverse populations who use or could use CFC services and supports. One commenter requested that the following sentence be added to the end of § 441.575(a): ''This Council must also include home and community-based attendants or their selected representatives.'' Another commenter requested that the rule should require that 51 percent of the Council be made up of elderly or disabled individuals.

*Response:* Section 1915(k)(3)(A) of the Act requires that this Council include a majority of members with disabilities, elderly individuals and their representatives. This was reflected in the proposed rule at § 441.575 and is a requirement of the program. We believe that this membership will reflect the populations who will participate in CFC. We acknowledge that various advocacy organizations, disability rights groups, private agency representatives, stakeholders, direct support professionals and direct service attendant care providers and representatives could have a voice on the Council as long as the Council meets the requirements set forth in the final regulation. We do not agree that the regulation should add an additional requirement that attendants or their selected representatives be included in the membership of the Council or that the Council be broken down into a specific percentage of individuals. The statute specifically requires a ''majority'' of members with disabilities, elderly individuals and their representatives and this language will be maintained in our final rule. However, we acknowledge that the regulatory language proposed in the proposed rule used the phrase ''primarily comprised'' rather than a ''majority.'' We are revising the regulation to more closely align with the statute.

*Comment:* One commenter requested that consumers with the highest needs have a significant presence on the Development and Implementation Council.

*Response:* We believe that a having an array of individuals with varying needs on the Council will provide a broad representation of the individuals for whom CFC was created.

*Comment:* One commenter requested further definition of an ''aging or disability'' consumer. The commenter requested clarification on whether an older adult, who is not Medicaid eligible or low income, could hold a position on the Council under the current definition.

*Response:* Section 1915(k)(3)(A) of the Act requires that the Development and Implementation Council include a majority of members with disabilities, elderly individuals and their representatives. The statute did not set forth any additional qualifier or specifications these individuals must meet to participate on the Council. Therefore, we do not believe an older adult who is not on Medicaid or is not low-income would be prohibited from participating on the Council.

*Comment:* One commenter requested that the regulation suggest agencies and advocacy groups from which the Council could recruit.

*Response:* We disagree with providing specific agencies and advocacy groups from which to recruit, as this would unfairly advantage certain groups. States have the flexibility to determine how to best meet this requirement.

*Comment:* Many commenters requested that the Council's meetings and other functions be accessible and that supports be provided to individuals, as needed, to facilitate their full participation. The commenters indicated that these supports could include the use of modern technological devices. Several commenters requested that the Development and Implementation Council should hold their meetings publically and provide opportunities for public input, which would allow for transparency.

*Response:* We agree that the Council's meetings and other functions should be accessible to individuals to facilitate their full participation. With regard to the commenters' suggestion to require that these meetings be held publicly to allow for transparency, while we appreciate the suggestion, States have the flexibility to decide how to meet these requirements. A State's proposal for operating the Council will need to be described in their State plan amendment and approved by CMS for implementation. We do encourage these meetings to be held in a way that facilitates participation by a broad range of individuals.

*Comment:* Several commenters requested clarification of what ''transparency in the selection process'' means, as mentioned in the preamble to this section, and suggested using rules for implementing section 10201(i) of the Affordable Care Act as a means of providing transparency.

*Response:* In the proposed rule, we invited comments regarding how States

could achieve robust stakeholder input including transparency in the selection process and activities of the Council. The intent of this request was to gather ideas regarding what processes States might use to select members of the Council. States have the flexibility to determine how to meet the requirements of the final rule and we encourage States to be transparent in their selection processes.

*Comment:* One commenter requested that States be required to provide public notice on how they will establish the Development and Implementation Council.

*Response:* While we encourage States to provide public notice regarding how they will establish the Council, as this is a matter of interest to individuals and may be a direct way to solicit members, we do not agree that this should be an additional requirement that is added to this regulation. States maintain the flexibility to determine how to best meet the requirements to implement CFC.

*Comment:* Many commenters provided input related to how the Development and Implementation Council should be structured and the duties associated with it. Many commenters requested that baseline definitions and minimum participation standards for the Council be included in the final rule.

*Response:* We disagree with further defining the role of the Council or with setting minimum participation standards for the Council in this regulation.

*Comment:* One commenter provided models and examples of committees and councils formed to address issues related to home health care.

*Response:* We appreciate the commenter's efforts and contribution, but again emphasize that, outside of the specific mandates of the regulation, States will have the discretion to design their councils.

*Comment:* One commenter requested that the regulation require the Council to be in place, and to provide recommendations on CFC prior to October 2011, or whenever the State implements the program.

*Response:* We agree with the commenter that the Council will need to be in place prior to implementation, as the State is required to consult and collaborate with the Council to develop a State plan amendment for CFC, as set forth in section 1915(k)(3)(A) of the Act and reflected at § 441.575. We do not agree that revisions to the regulation are necessary.

*Comment:* One commenter requested that Council members be trained on what it means to be a Council member, including what the expectations are with regard to their role representing a larger constituency group. Council members should be supported in the acquisition of knowledge necessary to be active members and provided support to ensure meeting attendance.

*Response:* We agree that members of the Council should understand their role in the Council and the responsibilities that the Council has with regard to CFC. States may want to take this into consideration when determining how to best meet the requirements of this Council. It is important for the Council membership to understand their role and the purpose of the Council as a whole. Training requirements for the Council are beyond the scope of this regulation and we do not agree with the commenter that these should be added to the regulation. With regard to the commenter's point about support for meeting attendance, as we indicated above, States should make every effort to ensure that the meetings are held at times and locations that are accessible to the members of the Council.

*Comment:* One commenter requested that financial and personnel resources be dedicated solely to the work of the Council. The commenter added that States should recognize that the frequency of meetings will impact the success of the Council and suggested that they occur at least quarterly.

*Response:* States have the flexibility to implement the Council, and to determine the frequency at which meetings of the Council will occur, as long as all the requirements in the final regulation are met. Therefore, we do not agree that the regulation should add specific requirements pertaining to these issues.

*Comment:* Many commenters weighed in on the level of influence that the Development and Implementation Council has on the State. One commenter requested that the recommendations made by the Development and Implementation Council be incorporated into the State plan. One commenter expressed concern regarding the role of Council as it relates to the independent decision making authority of the State in developing and implementing a State plan amendment for CFC. The commenter would like clarification that the Council should in no way be empowered to impede a State's authority.

*Response:* As noted above, section 1915(k)(3)(A) of the Act sets forth the requirement that a State establish the Development and Implementation Council. This provision also requires a State to consult and collaborate with this Council to develop and implement the State plan amendment for CFC. While States must describe in their State plan amendment how this collaboration and consultation occurred, this does not mean that the State's ability to make decisions is compromised. States need to consider the Council's input and should make every effort to incorporate the feedback of the Council in these decisions. However, we are not interpreting ''collaboration'' as total concurrence.

*Comment:* Another commenter requested that the life of the Development and Implementation Council be extended beyond implementation to include a role in the ongoing improvement of the State's CFC program.

*Response:* Section 1915(k)(3) of the Act requires consultation and collaboration with the Council ''in order for a State plan amendment to be approved under this paragraph.'' We encourage States to continue operations of the Council even after implementation of CFC. A strict interpretation of the statute would require consultation and collaboration with the Council prior to submitting any type of CFC SPA to CMS, which would encompass amendments to an already approved CFC SPA. We recognize that requiring such consultation and collaboration prior to submitting a SPA to implement a minor or administrative change would be overly burdensome to both the State and Council members. But we are taking this opportunity to specify that any substantive changes to the operation of an approved CFC program would require the prior consultation and collaboration of the Council. We would define a substantive change to include revisions to the amount, duration, and scope of services provided under CFC, revisions to the service delivery model, revisions to payment methodologies, etc.

*Comment:* Another commenter requested that the Development and Implementation Council identify specific data to help better advise the State on the program and recommended that the proposed rules should also assure that States are responsive to the Council's request for such data.

*Response:* Section 441.575 reflects the requirements in the statute for this Council and we do not agree that additional requirements are necessary in regulation.

*Comment:* Many commenters requested further guidance from CMS regarding the Development and Implementation Council. A number of commenters requested confirmation that

a State may use an existing self directed care advisory committee or whether the requirement is for a dedicated advisory Council limited to self direction pursued under the section 1915(k) authority. Many commenters believe States should ensure that the Council coordinates with other stakeholder bodies that have related missions such as *Olmstead* implementation councils and long-term service and support commissions.

*Response:* States may utilize existing advisory bodies in the implementation of CFC, as long as the statutory requirements for the Development and Implementation Council are met. We acknowledge the benefits of the Council coordinating with related stakeholder councils and commissions and strongly encourage States to do so. States may also choose to leverage these councils and/or incorporate members from these councils to meet the requirements for CFC.

*Comment:* Many commenters requested amending the current proposed language to include more specific Development and Implementation Council criteria regarding what groups should be included in the Council membership and additional roles that the Council should assume. Several commenters requested adding a reference to ''direct-care attendant care providers'' after ''elderly individuals.'' The rationale behind the commenters' request is that direct care attendant care providers' contributions will enhance the work of the Council by providing regular, direct communication with the State on core service delivery issues. Furthermore the commenters recommend the following language be included, ''(c) The Council should develop a plan that ensures the adequacy of provider rates and compensation; makes attendant care provider training available; establishes a central mechanism to help program participants find providers; and develops an approach to collecting essential workforce data elements.''

*Response:* As indicated above, the statute was very specific in both the requirements for the membership and the functions and responsibilities of the Council. The final regulations reflect the statutory requirement and we do not agree with creating additional requirements that States must meet in addition to what is clear in the statute.

*Comment:* One commenter requested clarification regarding whether the activities of the Development and Implementation Council will be eligible for Federal funds because the Council is mandated both by statute and regulation.

*Response:* Activities required by CFC that are done for the operation of the program, such as implementation of the Development and Implementation Council will not receive an additional 6 percentage point FMAP increase, as they are administrative activities and are only eligible for the standard Federal administrative matching rate of 50 percent available at § 433.15(b)(7).

*Comment:* Several commenters requested a timeline for the creation of this Council.

*Response:* We believe that the Council should be in place prior to the submittal of a SPA requesting CFC, as States are required to consult and collaborate with the Council regarding the development and implementation of a SPA for CFC.

*Comment:* One commenter requested changing the rule to state: ''(a) States must establish a Development and Implementation Council comprised primarily of individuals with disabilities, elderly individuals, their representatives, and disability rights advocates. The Development and Implementation Council must be cross-disability and cross-age and must include representation of all categories identified in this paragraph; (b) The Council must include individuals who are eligible for and, when applicable, in receipt of CFC services; (c) States must consult and collaborate with the Council when developing and implementing a State plan amendment to provide home and community-based attendant services and supports or when contemplating any changes; and (d) To maintain quality assurance, States must continue to regularly consult with the Council and incorporate their recommendations into the operation of the Community First Choice Option.''

*Response:* We appreciate these suggestions, but do not agree that these additional requirements need to be incorporated into the regulation.

*Comment:* Another commenter requested changing the Development and Implementation Council language as follows: ''(a) States must establish a Development and Implementation Council which includes providers and individuals with disabilities including elderly individuals, and their representatives; and (b) States must consult the Council when developing and implementing a State plan amendment to provide home and community-based attendant services and supports.''

*Response:* We disagree with adding ''providers'' to § 441.575(a). The statute only directs that the majority of the Council must consist of elderly or disabled individuals, and their representatives. We do not believe it is appropriate to require other representation. We believe that § 441.575(b) closely mirrors the commenter's change in language and does not require change.

*Comment:* One commenter requested clarification of the term ''representative'' in reference to individuals who are elderly, have disabilities, or are the representatives of individuals with disabilities. Another commenter requested clarification of the term ''consumer representative'' as it is ambiguous and could be interpreted as an individual representing a consumer or an employee of an advocacy organization.

*Response:* We are interpreting ''representative'' broadly in the context of the Council, including both the individual's representative, as defined in § 441.505, and other representatives of elderly individuals or individuals with disabilities in general. The phrase ''consumer representative'' is not used in this regulation.

*Comment:* One commenter recommended that the proposed rule expressly state that section 1915(k)(3) of the Act, pertaining to State collaboration with a Development and Implementation Council, does not negate the State responsibility to solicit advice from Indian health programs and urban Indian organizations as required by section 5006(e) of the ARRA.

*Response:* We acknowledge the commenter's concern. Nothing in the CFC regulation should be construed as superseding current requirements for States in regard to Indian health organizations and programs.

Upon consideration of public comments received, we are finalizing § 441.575 with revision, to align with the statutory requirement that a majority of the Council be comprised of individuals with disabilities, elderly individuals, and their representatives.

*R. Data Collection (§ 441.580)*

We proposed to require that States must provide information regarding the provision of home and community-based attendant services and supports under CFC for each fiscal year for which the services and supports are provided. We also proposed a number of specific data elements that must be collected and reported.

*Comment:* One commenter commended the inclusion of subpart (c) regarding the collecting of information about individuals served under CFC and indicated that this data will be an essential tool to identify deficiencies in the provision of the benefit.

*Response:* We appreciate the commenter's support.

*Comment:* A few commenters asked what is meant by ''type of disability'', as indicated in paragraph (c).

*Response:* We interpret ''type of disability'' as set forth in section 1915(k)(5)(B)(iii) to include developmental disability, physical disability, traumatic brain injury, etc.

*Comment:* One commenter stated that in section § 441.535(a)(5) States are required to obtain information about an individual's ''school.'' This commenter asked if ''school'' is synonymous with ''education level'' as specified in § 441.580(c).

*Response:* Based on comments, we revised the text at § 441.535(a) and school is no longer a specified element of the assessment of functional need for the implementation of CFC. Therefore, there is no need to clarify further as the data collection requirement at § 441.580(c) is clear regarding ''education level.''

*Comment:* One commenter asked for a clarification of ''previous fiscal year'' with regard to data collection timeframes.

*Response:* We interpret ''fiscal year'' to mean ''Federal fiscal year.'' We plan to issue additional guidance to States regarding maintenance of expenditure requirements.

*Comment:* Several commenters asked for clarification regarding the data collection requirements at § 441.580(e) in terms of what CMS meant by ''data regarding how the State provides CFC and other home and community-based services.''

*Response:* We interpret this requirement to mean the methods in which the State delivers home and community-based services under CFC, through other State Plan authorities, through section 1915(c) waivers, or through section 1115 demonstrations. For CFC, this could include which service models are offered in the State, the permissible services and supports that a State has chosen to make available, any limits the State has set on services and supports, and a number of other factors as determined by the State. We anticipate being able to collect much of the information related to this requirement from the State Plan as the State Plan must describe how the State is providing CFC. We anticipate releasing additional guidance in the future, providing more detail on data collection and how it relates to the CFC evaluation required in the legislation.

*Comment:* One commenter stated that the language in paragraph (g) appears to be a request for a description and not data collection activity.

*Response:* We do not understand the commenter's concerns based on this comment, but while the requirement at § 441.580(g) could include a description of how the State provides individuals the choice to receive home and community-based services in lieu of institutional care, it could also include information regarding the methods used to offer this choice, the strategies involved in making this choice available, and the number of individuals that have made that choice.

*Comment:* One commenter asked CMS to clarify any expectations to reconcile estimated number of individuals anticipated to receive services against actual utilization. This commenter asked if there will be an expected accuracy standard and further stated that since this is a new option there is potential for significant discrepancy.

*Response:* We are clarifying that States may report on the actual number of individuals that received CFC services and supports in the prior fiscal year, when reporting on the estimate of individuals expected to receive them in the upcoming fiscal year. We understand that there will be discrepancies in the number of individuals estimated vs. actually served.

*Comment:* One commenter sought clarification on the respective roles the State and Federal government will play in regard to the evaluation.

*Response:* Section 1915(k)(5) of the Act sets forth the requirements that States provide data to the Secretary for an evaluation and reports to Congress. The States and the Federal government will partner to accomplish an evaluation of CFC. The States can evaluate their individual programs based on data collected throughout the fiscal year. The Federal government will be evaluating CFC on a nationwide basis based on each State's data. We anticipate releasing additional guidance in the future, providing more detail on data collection and how it relates to the CFC evaluation required in the legislation.

*Comment:* One commenter asked whether a self-report is an acceptable standard for type of disability, education level and employment status. Additionally, this commenter asked that CMS clarify the acceptability of retaining the original data with updates if there are changes rather than collecting it each year. This commenter also asked for clarification of the expectations for linking the data collected and asked whether a State could begin with data unlinked and phase in those capabilities over time.

*Response:* We are deferring answering this question until such time as we release additional guidance in the future, providing more detail on data collection and how it relates to the CFC evaluation required in the legislation.

*Comment:* One commenter asked what the Department hopes to collect.

*Response:* Through the data collection process, the Department hopes to determine the effectiveness of the provision of CFC services and supports in allowing the individuals receiving such services and supports to lead an independent life to the maximum extent possible; the impact on the physical and emotional health of the individuals who receive such services; and an comparative analysis of the costs of services provided under the State plan amendment under this paragraph and those provided under institutional care in a nursing facility, institution for mental diseases, or an intermediate care facility for the mentally retarded. As such, we are modifying the regulation to include a data collection requirement for States to capture data on the impact of CFC services and supports on the physical and emotional health of individuals, and other data as determined by the Secretary.

*Comment:* One commenter requested specificity of the exact data comparison expected for CFC and other home and community-based services.

*Response:* We are deferring answering this question until such time as we release additional guidance in the future, providing more detail on data collection and how it relates to the CFC evaluation required in the legislation.

*Comment:* One commenter suggested that the data collection section should begin with what questions CMS wants answered, some of which are in the preamble. This commenter further asked what the data at § 441.580 are supposed to illuminate. In conclusion, this commenter suggested considering convening an expert group to help draw up data points.

*Response:* The data collected from States will be used to complete the statutorily required evaluation of the effectiveness of CFC services and supports. We anticipate releasing additional guidance in the future, providing more detail on data collection and how it relates to the CFC evaluation required in the legislation.

*Comment:* One commenter asked for clarification regarding reporting the number of individuals that received services and supports during the preceding fiscal year. This commenter asked if after CFC has been in place the second and following years, if States report the number of persons in CFC from the preceding year(s).

*Response:* In accordance with section 1915(k)(5)(B) of the Act, States should

report the number of individuals that have received CFC services and supports during the preceding fiscal year. This means that after CFC has been in place the second and following years, States should report the number of persons in CFC for the preceding year (that is, reporting the number of individuals served under CFC in year one after the program has been in place for 2 years).

*Comment:* Two commenters asked for clarification pertaining to the requirement to report the specific number of individuals who were previously served under other authorities or State Plan options.

*Response:* To clarify, with regard to individuals receiving CFC services and supports, the State should report the number of these individuals who were previously receiving supports under sections 1115, 1915(c) and (i) of the Act, or the personal care State plan option.

*Comment:* One commenter asked whether a State may limit the number of individuals reported to those who received attendant support services under the specified authorities rather than all individuals served under the waivers, with regard to the requirement in paragraph (d).

*Response:* A State may not limit the number of individuals reported in this way. As stated in § 441.580(d), States are required to report the specific number of CFC individuals who were previously served under another authority regardless of what services and supports were received under that authority.

*Comment:* One commenter asked whether the requirement to report the specific number of individuals who have been previously served under sections 1115, 1915(c) and (i) of the Act is intended to include those individuals who are served concurrently or just those who are no longer accessing personal care services under those authorities and are now accessing only CFC services.

*Response:* States are required to report the number of individuals who were previously served under the authorities stated above, meaning that these individuals are now accessing attendant care services and supports through the CFC Option. It is possible that individuals receiving attendant services and supports through CFC could also be receiving other services, particularly via a section 1115 demonstration or section 1915(c) waiver.

*Comment:* One commenter stated that it is imperative that data collection is not a barrier to the provision of timely, high quality services.

*Response:* We agree that data collection should not be a barrier to the provision of services. Our intention is to place as little burden as possible on States and individuals in terms of data collection while ensuring that data is available to comply with the statutory requirements for evaluation and reporting.

*Comment:* Many commenters provided suggestions for additional data collection options. One commenter recommended the regulation require recording the number of individuals served, both in terms of the number of individuals eligible to receive CFC, and in terms of individuals receiving all of the various CFC services. Another commenter stated that it would be helpful if the data could show whether individuals who transferred to CFC from another home and community-based option experienced any loss of service subsequent to the transfer. This same commenter recommended that the regulation provide for the collection of data in such a way as to tell whether individuals receiving CFC services and supports were previously receiving home and community-based services through waivers or other options, or if individuals receiving CFC services are newly eligible for home and community-based services. Two commenters suggested collecting data specific to the service models utilized. One of these commenters further suggested including what services and items are used by those choosing the agency model versus those who choose the self-directed model with a service budget. Several commenters suggested including data pertaining to the number of people who were previously receiving services in institutions or nursing facilities. One of these commenters suggested collecting data on Medicaid costs of this option vs. Medicaid costs in institutional settings. Two commenters suggested that data should be made available to the public. One of these commenters also suggested that CMS should collect the data quarterly. Several commenters also suggested including data with additional demographic break-down of individuals. Two commenters suggested collecting data pertaining to race. One of these commenters suggested also including ethnicity, limited English proficiency, and type of residence. One commenter suggested that States include optional sexual orientation and gender identity questions to break down utilization rates. One commenter suggested requiring States to provide data on an individual's veteran status. Many commenters recommended that States be urged to provide data on the staff providing services including: attendant care provider availability, turnover and retention rates, and compensation. One commenter suggested also collecting data pertaining to training and credentialing of staff. Additionally, many commenters stated that in a self-directed delivery system, program participants will be the most likely source of data pertaining to staff, and urged for identification of collection methods that will be feasible for participants. One commenter suggested adding an ''other as determined by the Secretary'' element to this section.

*Response:* We appreciate the ideas and suggestions that commenters proposed. States continue to have the flexibility to design their data collection requirements as long as all of the requirements included in the regulation for CFC are met. States may adopt additional data collection requirements for their own purposes. As indicated above, we are adding data collection requirements for States to capture data on the impact of CFC services and supports on the physical and emotional health of individuals, and other data as determined by the Secretary.

*Comment:* One commenter stated that data collection requirements are excessive in comparison to reporting on section 1915(c) waivers and the section 1915(j) State Plan option. The commenter also stated that some of the requirements do not appear to provide CMS or the States with any additional information that is useful in the operation of multiple home and community-based services programs, quality assurance, or customer satisfaction. This commenter also stated that the requirements at paragraphs (a), (b), (d), and (f) are similar to existing reporting.

*Response:* We have implemented data collection requirements as they were specified in the statute. We do not agree that the data collection requirements are excessive. We believe that these requirements are an essential tool needed to evaluate CFC.

*Comment:* One commenter asked for CMS to clarify anticipated mechanisms to report annual estimates, and asked whether CMS will make changes to existing reporting mechanisms. Another commenter suggested that CMS provide States with flexibility in data reporting until existing State automated systems can be updated to accommodate new reporting requirements. Another commenter stated that mechanisms chosen need to include consumer input and consumer satisfaction surveys as well as outcome measures.

*Response:* As we noted, we will provide future guidance on the format of this reporting requirement. We will consider the commenters' perspectives as we develop our guidance and will try to impose as little burden on the States and individuals as possible. However, with regard to State flexibility in reporting, States must provide the information specified in § 441.580 in a timely manner regardless of the State's systems and potential system modifications needed. States may leverage existing data collection and reporting vehicles to meet the requirements of CFC.

Upon consideration of the public comments received, we are finalizing § 441.580 with revision, adding data collection requirements for States to capture data on the impact of CFC services and supports on the physical and emotional health of individuals, and other data as determined by the Secretary.

*S. Quality Assurance System (§ 441.585)*

We proposed to require that States must establish and maintain a comprehensive, continuous quality assurance system, detailed in the State plan amendment, that includes a quality improvement strategy and employs measures for program performance and quality of care, standards for delivery models, mechanisms for discovery and remediation, and quality improvements proportionate to the benefit and number of individuals served. We proposed that the quality assurance system must include program performance measures, quality of care measures, standards for delivery models and methods that maximize consumer choice and control. We also required that States elicit and incorporate feedback from key stakeholders to improve the quality of the CFC benefit and that States must collect and report on monitoring, remediation, and quality improvements related to information defined in the State's quality improvement strategy.

*Comment:* Several commenters commended the requirement that the quality assurance system be detailed in the CFC SPA.

*Response:* We appreciate the support of this requirement.

*Comment:* Several commenters noted that it is crucial that the quality management system utilized for CFC reflect the participant direction philosophy and recommended that the quality system resemble what is seen in sections 1915(i) and 1915(j) of the Act. The commenter indicated that special attention and/or assistance may be needed to ensure agencies administering CFC implement quality assurance and measurement techniques that build upon the participant direction paradigm.

*Response:* We appreciate the commenters' views and agree that the perspective of the individuals receiving CFC attendant services and supports is an important aspect to consider. We believe the requirement to incorporate stakeholder feedback will complement the other elements of the participant direction philosophy included in CFC. While certain aspects of the CFC quality assurance system were set forth in the statute, similar measures are required for other Medicaid programs including sections 1915(c), 1915(i) and 1915(j) of the Act, and we anticipate that States will leverage their current systems to meet the requirements for CFC where possible.

*Comment:* Multiple commenters suggested additional requirements for the quality assurance system including the following:

- Modification of the program performance measures to capture achievement of individuals' outcomes and goals identified in the service plan;
- Indication of the choice of location where the services are provided such as home, school, work or other;
- Collection of type of living situation such as group home, family home, individual's home or other in § 441.585(a)(1)(iii);
- Specification of the choice of institution or community;
- Collection of a core set of functional indicators which are representative of the full range of functional limitations for the CFC population;
- Implementation of measures of consumer satisfaction and consumer experience;
- Measurement and reporting of barriers to achievement of individual outcomes and goals and how the State intends to address and remove any identified barriers;
- Collection and monitoring of the difference between the number of personal attendant care hours scheduled or authorized in each qualified individual's service plan and the hours of the scheduled type of service that are actually delivered to the qualified individual;
- Implementation of a program performance measure called ''gaps in service'' which they believe would allow States to document, gauge and address service gaps;
- Implementation of standards for services and supports;
- Measurement of the numbers individuals served both in terms of the number of individuals eligible to receive CFC, and in terms of the individuals receiving all of the various CFC services;
- Measurement of the numbers of shifts that went unstaffed;
- Measurement of the general availability, turnover and retention of attendant staffing;
- Measurement of access to services on the basis of fields identified in § 441.580(c);
- Measurement of race, ethnicity, limited English proficiency, and type of residence;
- Evaluation of whether the payment methodologies for attendant services and supports are sufficient for developing and sustaining an adequate workforce;
- Measurement of the impact direct care workforce wages have on the access consumers have to a wide range of reliable, timely home and community-based services;
- Analysis of workforce quality and stability; and
- Development and implementation of program integrity measures to evaluate the validity of individual eligibility, appropriateness of the care plan, and propriety of payments to caregivers.

*Response:* We appreciate the commenters' suggestions regarding additional requirements to be included in States' quality assurance systems for CFC. As noted in previous sections, we are working to streamline the various HCBS requirements and expectations where possible across Medicaid HCBS programs. We are presently working with stakeholders to better understand the most effective and efficient method to assure the health and welfare of individuals with long term services and support needs, and to maximize quality across Medicaid HCBS authorities. We are considering the feedback from stakeholders, including the feedback received regarding the proposed language for CFC and forthcoming section 1915(i) comments, and analyzing current statutory and regulatory guidance across applicable Medicaid authorities. Additional guidance will be provided to States regarding any streamlined approaches that are developed for utilization across Medicaid HCBS. For the purposes of this regulation and the implementation of CFC, we have revised the quality assurance system requirements to more closely align with requirements included in statute. We will consider these commenters' suggestions as the work continues to better understand the most effective and efficient method to assure the health and welfare of individuals with long term services and

support needs, and to maximize quality across Medicaid HCBS authorities.

*Comment:* One commenter indicated that it is critical in a quality improvement framework to examine participant outcomes and suggested that CMS be more prescriptive in the assessment elements which will result in comparable data on which to monitor quality and compare outcomes across States over time. The commenter suggested that CMS consider identifying a standard set of measures that would be implemented across States as they believed that this would allow CMS to identify exemplary States that could serve as best practice examples, as well as identify those States that may require support to improve the provision of services to CFC participants. Another commenter recommended that CMS include a set of minimum measures in the regulation, stating that this will both ensure States are collecting core meaningful quality measures and also allow for comparison of different programs to help identify best practices. Several commenters indicated that States' continuous quality assurance systems must be designed to measure and report on achievement of individual outcomes and goals expressed by beneficiaries in their person-centered services and supports plans.

*Response:* We agree with the commenters that individual outcomes are an important component to consider in terms of quality improvement and quality assurance, particularly as they relate to specific services. We expect that States' quality assurance systems will utilize the information present in service plans to inform how needs are being met across the program and to see where improvements need to be made. As noted earlier, we have modified the Person-Centered Service Plan section to include individually identified goals and desired outcomes. States have the flexibility to incorporate additional measures above what is required through this regulation. Also, as mentioned in the assessment section, we are currently working to determine universal core elements to include in an assessment for consistency across Medicaid HCBS programs. Based on multiple comments and the acknowledgement that additional policy work is necessary to maximize the extent to which consistency can exist across the Medicaid programs as it relates to assessments for HCBS programs, we revised the assessment requirements to reflect the broad requirements in statute. Our intent is to require any finalized universal core elements that are developed to be incorporated into the assessment of functional need for CFC and other HCBS assessments as determined by CMS.

We also appreciate the commenters' suggestions regarding standard sets of quality measures. As noted, we are presently working with stakeholders to better understand the most effective and efficient method to assure the health and welfare of individuals with long term services and support needs, and to maximize quality across Medicaid HCBS authorities. For the purposes of this regulation and the implementation of CFC, we have revised the quality assurance system requirements to more closely reflect the requirements included in statute.

*Comment:* One commenter asked what the expectation is for measuring individuals' outcomes associated with the receipt of community-based attendant services and supports, particularly for the health and welfare of recipients of the service as stated at § 441.585(a)(2). The commenter asked if this is a major evaluation element or if it could be satisfied with a survey. The commenter voiced concern that a broad-based assessment of need that includes elements over and above what is offered in the personal care program's purview may negatively impact the ability of States to develop and measure individual outcomes.

*Response:* As noted above, individual outcomes are an important component to consider in terms of quality improvement and quality assurance, particularly as they relate to the services and supports provided under CFC. For these outcome measures being tied to assessment elements or the achievement of individual outcomes and goals expressed in the service plan, we expect that States' quality assurance systems will utilize the information present in service plans to inform how needs are being met across the program and to see where improvements need to be made. This information will also be a major component in the evaluation of CFC. States will need to describe how they plan to capture these outcomes in their quality assurance system. With regard to the commenter's concern regarding the assessment of need including elements over and above what is offered under CFC, as mentioned earlier, the assessment portion of the regulation has also been revised, as has the person-centered planning section, to remove the specified elements that went beyond the services and supports available under CFC. However, it is important to reiterate that our intent is to require any finalized universal core assessment elements that are developed to be incorporated into the assessment of functional need for CFC and other HCBS assessments as determined by CMS.

*Comment:* One commenter indicated that the proposed rule deferred too much to States, was too vague to provide adequate protection for Medicaid beneficiaries, and did not incorporate the monitoring function that section 2401 of the Affordable Care Act included as a requirement for a State's quality assurance system. The commenter recommended more prescriptive requirements for this function.

*Response:* We believe that the monitoring function was incorporated. Several protections for individuals are required under the quality assurance system, and the system as a whole must continuously monitor the quality of the program and incorporate feedback from key stakeholders. However, as mentioned above, we are continuing the work to determine quality approaches for utilization across Medicaid HCBS authorities. Therefore, for the purposes of this regulation and the implementation of CFC, we have revised the quality assurance system requirements to more closely reflect the requirements included in statute. Section 441.585(a)(2) now indicates that the quality assurance system must monitor the health and welfare of each individual who received CFC home and community-based attendant services and supports, including a process for the mandatory reporting, investigation, and resolution of allegations of neglect, abuse, or exploitation in connection with the provision of community-based attendant services and supports.

*Comment:* One commenter noted that the data collection and quality assurance system should not be burdensome on consumers and they should not be surveyed every month with a lot of questions that get into unnecessary detail or invade the person's privacy.

*Response:* We agree with the commenter.

*Comment:* Several commenters commended the inclusion of the examples of measures in the preamble, including functional indicators and individual satisfaction. One commenter added that the perspective of service recipients and advocates will be critically important in making determinations as to ''quality,'' particularly as it pertains to personal goal and outcome achievement.

*Response:* We believe that individual outcomes are an important component to consider in terms of quality improvement and quality assurance, particularly as they relate to the services and supports provided under CFC. With

regard to the perspective of individuals and advocates as referenced in the comment, States' quality assurance systems must also incorporate stakeholder feedback to improve the quality of the services offered under CFC. These aspects of CFC, along with the Development and Implementation Council, demonstrates the importance of the individual's perspective as it relates to services and supports provided under the program.

*Comment:* One commenter asked CMS to clarify whether a State can delegate its quality assurance responsibilities to an outside entity while retaining ultimate responsibility, or if the State is required to facilitate these functions.

*Response:* States continue to have the flexibility to design their quality assurance programs as long as all of the requirements included in the regulation for CFC are met. A State will need to determine whether they want an entity outside the State to be responsible for meeting this requirement.

*Comment:* A few commenters voiced concern about the complexity of the proposed quality assurance system, pointed out that it is very similar to that for the section HCBS 1915(c) waiver programs, and referenced a previous letter they had sent to CMS that stated: ''The growing demands on States to implement increasingly complex quality management systems and improvement strategies are problematic because they: (a) Deviate significantly from the original intent of the quality initiative, that is, that CMS would review State systems of quality rather than monitor activities at the level of the individual beneficiary, (b) extend beyond the expectation specific in the HCBS Waiver Application Version 3.5 and related guidance, and (c) are being placed on States at a time when their fiscal and human resources are diminishing.'' Another commenter referenced this letter and asked that CMS clarify expectations regarding how section 1915(k) quality assurance is similar or dissimilar to section 1915(c) quality improvement, with specific attention paid to individual outcome measures and remediation activity level of detail.

*Response:* As noted earlier, based on the feedback received during this process and the direction of ongoing work at CMS to develop a quality strategy that can be utilized to the extent possible across the Medicaid programs, we are revising this portion of the regulation to more closely align with the quality assurance system requirements included in statute.

*Comment:* One commenter indicated that the proposed language is similar to quality assurance in HCBS waivers, which they believe is unsatisfactory because it has few, if any, quality of care standards, and is based on quality indicators that may or may not be meaningful and do not give guidance to consumers when there is a dispute about how services are to be provided. The commenter added that the quality assurance process seems to be hidden from consumers and that the data seems to be almost exclusively viewed by the State and CMS, with little or no involvement from consumers. The commenter recommended that information from the quality assurance process be shared with stakeholders, including but not limited to consumers and their representatives.

*Response:* As mentioned above, we have revised the quality assurance system requirements to more closely align with the quality assurance system requirements included in statute. We have maintained the language that requires outcome measures associated with the receipt of community-based attendant services and supports, particularly for the health and welfare of recipients of this service. States may use a number of quality of care measures to meet that requirement. We also point the commenter to the final rule at § 441.585(b), which requires that the quality assurance system employ methods that maximize consumer independence and control and will provide information about the provisions of quality improvement and assurance to each individual receiving such services and supports, and § 441.585(c), which requires that the State elicit and incorporate feedback from individuals and their representatives, disability organizations, providers, families of disabled or elderly individuals, members of the community, and others to improve the quality of CFC.

*Comment:* One commenter indicated that the quality improvement strategy needs to involve consumer and stakeholder input, and that measurements and remediation needs to consider the convenience to the consumer and their ability to understand the process, and not impinge unduly on consumer direction while improving service delivery. The commenter added that the Development and Implementation Council needs to be directly involved in monitoring and making program changes to implement quality improvement strategies. Several other commenters indicated that in addition to stakeholder feedback received through the Council, feedback from consumer satisfaction surveys and other means should be included in the quality assurance system and should be included in the rule. Another commenter urged CMS to clarify that feedback from aging organizations should also be incorporated in the quality assurance system.

*Response:* We point the commenter to the final rule at § 441.585(b), which requires that the quality assurance system employ methods that maximize consumer independence and control, and will provide information about the provisions of quality improvement and assurance to each individual receiving such services and supports, and § 441.585(c), which requires that the State elicit and incorporate feedback from individuals and their representatives, disability organizations, providers, families of disabled or elderly individuals, members of the community, and others to improve the quality of CFC. We expect that States will include the feedback of the Development and Implementation Council as part of this requirement as the membership of the Council will include many of the individuals specified at § 441.585(c). We agree with the commenter that consideration should be given to the methods that involve individuals' feedback. We agree that surveys may be a useful component with which to gain feedback, but caution that this process not be overly complicated or burdensome for individuals.

*Comment:* One commenter asked that CMS clarify expectations for incorporating stakeholder feedback that may conflict with Federal regulations or State policy direction as defined in State statute, or drive increased expenditures for which a State lacks funding appropriation.

*Response:* The requirement at section 1915(k)(3)(D)(ii) of the Act, which we proposed to implement at § 441.585(b), requires that the quality assurance system incorporate feedback from consumers and their representatives, disability organizations, providers, families of disabled or elderly individuals, members of the community, and others. We are interpreting the use of the word ''incorporate'' to mean that feedback from these key stakeholders must be considered, but we do not expect that States must make changes based on each and every suggestion received. Should feedback received be in conflict with Federal regulations, States would not be expected to incorporate that feedback, in terms of making changes to the program, as Federal regulations must be adhered to for a State to be in compliance with such regulations. If feedback received was in conflict with

State policy direction, as defined in State statute, or would drive increased expenditures for which a State lacks funding appropriation, the State would need to make a choice as to whether to consider it.

*Comment:* One commenter asked to what extent a State must ''maximize consumer independence and control'' as described at § 441.585(a)(4), asked for an example of what this means and what CMS' intent is with this language. The commenter asked for confirmation that this is all within the confines of the individual's health needs and requested that if this is the case that CMS include additional language to make this clear.

*Response:* The statute and this regulation facilitate the ability for States to maximize individual independence and control throughout the CFC benefit, as illustrated by the inclusion of the language related to self-direction and person-centered planning, the Development and Implementation Council, and the stakeholder feedback requirements for the quality assurance system. While we do not set a minimum or maximum threshold that States must meet in terms of maximizing consumer independence and control, we expect that States make every effort to meet these requirements.

*Comment:* Multiple commenters recommended that the language at section 1915(k)(3)(D)(ii) of the Act be used at paragraph (b) Stakeholder feedback, instead of the term ''key stakeholders.''

*Response:* We appreciate the commenters' suggestion and have revised the language to include each entity specified in the statute.

*Comment:* Several commenters stated that at paragraph (a)(2), the regulation applies the statutory requirement regarding reporting and investigation of abuse and neglect. The commenters commended the connection of abuse and neglect reporting to quality of care measures, but believed that the statute (at section 1915(k)(3)(D)(iii) of the Act) applies the requirement more broadly than to the more limited subpart of ''Quality of care measures'' specified in paragraph (a)(2). The commenters recommended that it be more broadly set forth as an independent requirement under the quality assurance system.

*Response:* As mentioned above, we have revised the quality assurance system requirements to more closely align with the quality assurance system requirements included in statute. As such, § 441.585 of the final rule is clear that this function applies more broadly than to the proposed limited subpart of ''quality of care measures.''

Upon consideration of the public comments received, we are finalizing § 441.585 with revision, to more closely mirror the quality assurance requirements specified in statute.

*T. Increased Federal Financial Participation (§ 441.590)*

We proposed that beginning October 1, 2011, the FMAP applicable to the State will be increased by 6 percentage points for the provision of CFC home and community-based attendant services, under an approved State plan amendment.

*Comment:* One commenter expressed concern that since States will receive 6 percentage point increase in FMAP for costs associated to the program, it would seem shortsighted for a State not to take advantage of this opportunity to expand community-based services which will decrease the amount of money needed for institutional care.

*Response:* We appreciate the commenter's perspective.

*Comment:* Many commenters indicated that States should be permitted to receive the enhanced FMAP provided in CFC concurrently with receiving other HCBS enhanced match rates such as those authorized by the Money Follows the Person Rebalancing Demonstration and the Balancing Incentive Payments Program.

*Response:* We acknowledge the potential for States to receive enhanced FMAP under more than one program, and are willing to provide technical assistance to States interested in doing so.

*Comment:* One commenter requested clarification regarding how CFC services would work in conjunction with similar efforts already under way to transition individuals from skilled nursing facilities to a home and community-based setting, such as section 1915(c) waivers and MFP. The commenter asked if waiver participants would be able to access CFC services and if so, whether the additional FMAP would apply to MFP or waiver services.

*Response:* The enhanced FMAP applies to services authorized under the CFC program, but there is no prohibition on individuals receiving services through a section 1915(c) waiver or MFP program also receiving services through CFC.

*Comment:* One commenter stated that this provision needs to be strong enough to encourage State participation and should be seen as an incentive for States to comply with the Olmstead Integration Mandate. The commenter indicated that it should not preclude other forms of enforcement of the law.

*Response:* We agree with the commenter, and believe that the 6 percentage point increase in Federal match provides incentives to the States to provide CFC to eligible individuals. This provision does not preclude other forms of enforcement of the *Olmstead* decision.

*Comment:* Several commenters asked for clarification pertaining to what services and expenditures would be eligible for increased FMAP. One of these commenters requested that CMS clarify whether increased FFP is available for activities that support the delivery of ''home and community-based attendant services'' in context of CFC requirements. Two commenters requested that the enhanced reimbursement rate also be applied to assessments. One of these commenters further requested that CMS cover the coordination of the person-centered plan at the enhanced FMAP rate. Another commenter stated that their understanding is that attendant care would be eligible for the enhanced FMAP, and inquired whether additional services such as necessary case management or support brokerage services, administrative costs related to implementation of a fiscal agent structure, voluntary training for service participants, and the implementation of quality improvement mechanisms would be covered. One commenter requested clarification of the range of services eligible for the enhanced FMAP rate other than attendant services, such as case management, training, or personal agents. One commenter requested that CMS clarify that the additional 6 percent FMAP would be applied to all services qualifying under CFC. This same commenter encouraged CMS to clarify that the 6 percent additional FMAP applies to the entire package of services to anyone qualified to receive them, not just those who are newly in receipt of attendant care services and supports provided under CFC. This commenter also asked whether a Personal Emergency Response System (PERS) would also qualify for enhanced reimbursement.

*Response:* The authorizing legislation indicates that the additional 6 percentage points in FMAP applies to CFC services and supports. We are interpreting ''services and supports'' broadly in this context, to include not only the services referenced at § 441.520 (''Included services''), but also some of the activities referenced in the comments described above. Specifically, activities required by CFC that are performed for specific individuals, such as assessments, person-centered planning, support system and Financial

Management Services will receive an additional 6 percentage points to the State's service match rate. Activities required by CFC that are done for the operation of the program in general, such as quality management, data collection, implementation of the Development and Implementation Council, and administrative costs related to implementation of a fiscal agent structure will not receive an additional 6 percentage points as they are administrative activities and are only eligible for the standard federal administrative matching rate of 50 percent available at § 433.15(b)(7).

*Comment:* One commenter stated that CMS should ensure that the ''and supports'' is added to the end of ''home and community-based attendant services'' to be consistent with the terminology in the statute.

*Response:* We agree with this commenter and will add ''and supports'' to the end of ''home and community-based attendant care services'' in § 441.590.

*Comment:* One commenter requested that CMS clarify its expectations on how these services and expenditures are to be tracked to appropriately draw the higher FMAP. The commenter asked whether CMS will revise the CMS–64 form to reflect this State plan option.

*Response:* The CMS–64 form has been modified to include a new CFC line item.

*Comment:* Two commenters supported the 6 percent increase in FMAP, hoping that this will encourage States to select this option.

*Response:* We appreciate the perspectives these commenters had in support of this provision of the rule.

*Comment:* Two commenters requested confirmation of the duration of the 6 percent FMAP increase.

*Response:* There is no time limit attached to the FMAP increase. The 6 percentage point increase in FMAP is available to States for as long as States choose to provide services and supports under CFC.

*Comment:* One commenter asked if the enhanced Federal match is available if a State decides to implement later than October, 2011 to coordinate implementation efforts with other efforts connected to Affordable Care Act.

*Response:* The enhanced FMAP becomes available to a State upon the effective implementation date of their approved SPA for CFC, regardless of whether this date occurs after October 1, 2011.

*Comment:* One commenter suggested that a portion of the increased Federal financial assistance that States receive be invested in workforce compensation, and investment that has been shown to improve recruitment and retention and thus quality of care.

*Response:* States will continue to have flexibility with determining how they utilize the increased Federal funds that they will receive with the 6 percentage point enhanced match.

Upon consideration of the public comments received, we are finalizing § 441.590 with revision, to reflect that the enhanced match is available for CFC ''home and community-based attendant services and supports.''

## III. Provisions of the Final Regulations

Generally, this final regulation incorporates the February 25, 2011 provisions of the proposed rule. We have outlined in section II of this preamble the revisions in response to the public comments. The provisions of this final regulation that differ from the proposed rule are as follows:

- At § 441.505 we have revised the following definitions: Agency-provider model, backup systems and supports, individual representative, other models, Self-directed. This section has also been revised to add two new definitions: Individual, Self-directed model with service budget.
- We have revised § 441.510 to set forth the requirement that all individuals that meet an institutional level of care, allow for State administering agencies to permanently waive the annual level of care recertification if certain conditions are met and clarify income requirements
- We have revised § 441.515 to combine (b) and (c) to more directly align with the statute.
- We have revised § 441.520 to rename it ''Included services'' to align with the statute. We have revised § 441.520(b) to clarify that (b)(1) and (2) that follow are both at the State's option, and to add the language from proposed 441.520(b)(3) ''linked to an assessed need or goal identified in the individual's person-centered service plan'' into the introductory section so that it is clear it applies to both (b)(1) and (2).
- We have revised § 441.530 to remove the proposed home and community-based settings criteria. This section is now reserved for future use.
- We have revised § 441.535 to add the ability for States to meet the face-to-face requirement through the use of telemedicine or other information technology medium if the certain conditions are met. We also added a new requirement at § 441.535(d) indicating ''Other requirements as determined by the Secretary.''
- We have revised § 441.540 to add a new requirement that the service plan require an assurance that the setting in which the individual resides is chosen by the individual, and to require a description of the setting alternatives available to the individual from which to choose. The proposed text at § 441.540(b)(1) through (5) all shifted down by one number. We added requirements for administering the person-centered service plan. We also relocated some of the proposed rule language to the Support System section at § 441.555.
- We have revised § 441.545 to expand the types of arrangements that may exist under the Agency provider model, to clarify the authority individuals have in the selection and dismissal of their service providers, to clarify the responsibilities of the Financial management entity and to add ''Other service delivery model'' as an additional service delivery model to allow States the option of proposing alternate delivery models for consideration.
- We have revised § 441.550(e) to specify that determining the amount paid for services should be ''in accordance with State and Federal compensation requirements''.
- We have revised § 441.555 to specify that support system activities must be available to all individuals regardless of the service delivery model; We also revised the requirements under this section to add additional beneficiary protections.
- We have revised § 441.560(a)(3)(i), replacing the phrase ''change the budget'' with ''adjust amounts allocated to specific services and supports within the approved service budget.''
- We have revised § 441.560 to make technical corrections.
- We have revised § 441.565 to clarify which requirements apply to which service delivery model.
- We have revised § 441.570 to clarify that this includes assuring the State's adherence to section 1903(i) of the Act that Medicaid payment shall not be made for items or services furnished by individuals or entities excluded from participating in the Medicaid Program. We also clarified that the Maintenance of Existing Expenditures requirements described at § 441.570(b) pertains to the first full 12 months in which the CFC State plan amendment is implemented, and is limited to the expenditures for home and community-based attendant services and supports provided under sections 1115, 1905(a), 1915, or otherwise, under the Act, to individuals with disabilities or elderly individuals

attributable to the preceding 12-month period.

- We have revised § 441.575 to align with the statutory requirement that a majority of the Council be comprised of individuals with disabilities, elderly individuals, and their representatives.
- We have revised § 441.580 adding additional requirements for States to capture data on the impact of CFC services and supports on the physical and emotional health of individuals and other data as determined by the Secretary.
- We have revised § 441.585 to more closely align with requirements set forth in statute.

## V. Collection of Information Requirements

We solicited public comment on each of the issues for the following sections of this document that contain information collection requirements (ICRs). We received several public comments on specific sections contained in the ICRs. The comments and our responses follow:

### *A. Assessment of Functional Need (§ 441.535)*

Section 441.535 requires States to conduct a face-to-face assessment of the individual's needs, strengths, preferences, and goals for the services and supports under CFC. States may use one or more processes and techniques to obtain this information about an individual. In § 441.535(a)(1), the State must define the provider qualifications for health care professionals to use telemedicine or other information technology mediums for the assessment. In § 441.535(a)(3), the State must obtain informed consent from the individual to use telemedicine or other information technology mediums for the assessment. In addition to the initial assessment, States are required to conduct reassessments at least every 12 months (§ 441.535(c)).

The burden associated with the requirements under § 441.535 is the time and effort it would take to conduct a face-to-face assessment of each individual's needs, strengths, preferences and goals for the services and supports under CFC. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

The one-time burden associated with the requirements under § 441.535(a)(1) is the time and effort it would take the respondents to define the provider qualifications for health care professionals. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

The burden associated with the requirements under § 441.535(a)(3) is the time and effort it would take the respondents to obtain informed consent from the individual to use telemedicine or other information technology mediums for the assessment. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

The burden associated with the requirements under § 441.535(c) is the time and effort it would take the respondents to conduct reassessments at least every 12 months. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

*Comment:* Several commenters recommended that CMS revisit the time estimates for the assessment of functional need and reassessment of need. The commenters had concerns regarding the one hour estimate provided in the proposed rule stating that an assessment could take up to three hours. The commenters added that this estimate also does not include travel time or the time necessary to analyze the information. It was also noted that while a reassessment may take less time than an initial assessment, it still would take up to two hours to perform.

*Response:* Our estimates are based on the average time it may take for States to complete the assessment. This average would take into account the fact that some assessments may take less than one hour while some may take more than 1 hour. We do not believe the estimate of 1 hour to complete a face-to-face interview to be unreasonable and did not receive overwhelming public comment to indicate otherwise. Therefore, we have not revised the collection of information estimate.

### *B. Person-Centered Service Plan (§ 441.540)*

Section 441.540 requires the State to conduct a person-centered planning process resulting in a person-centered service plan (§ 441.540(b)), based on the assessment of functional need (§ 441.535), in collaboration with the individual and the individual's authorized representative, if applicable. This service plan must be agreed to in writing by the individual and signed by all individuals and providers responsible for its implementation. In addition, States must provide a copy of the plan to the individual and anyone else responsible for the plan. In addition to the initial plan, States are required to review the plan at least every 12 months (§ 441.540(c)).

The burden associated with the requirements under § 441.540(b) is the time and effort it would take to develop and finalize a written person-centered service plan for each individual, and to provide each individual and anyone else responsible for the plan a copy of that plan. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

The burden associated with the requirements under § 441.540(c) is the time and effort it would take respondents to review each person-centered service plan at least every 12 months and revise, when necessary. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

*Comment:* Several commenters recommended that CMS revisit the time estimates for development of the service plan. Several commenters stated that the CMS estimate of 2 hours to develop and finalize a service plan was too short. The commenters indicated that 2 hours is needed to develop the plan with an additional 2 hours, at minimum, to finish the plan. They added that the overall development of a person-centered plan, including administrative tasks, could take up to 5 hours.

*Response:* Our estimates are based on the average time it may take for States to complete the requirements related to § 441.540—Person-centered Service plan. This average would take into account the fact that some of these components may take less than the estimated time while some may take more than we estimated. We estimated a total of 3.5 hours on average. We do not believe that this estimate is unreasonable and did not receive overwhelming public comment to indicate otherwise. Therefore, we have not revised the collection of information estimate.

*C. Service Models (§ 441.545)*

Section 441.545 requires the State to choose one or more service delivery models for providing home and community-based attendant services and supports.

Under the agency-provider model for CFC, in § 441.545(a)(1), the State Medicaid agency or delegated entity, must enter into a contract or provider agreement with the entity providing the services and supports.

Under the self-directed model with service budget, in § 441.545(b), the individual must be provided with a service budget based on the assessment of functional need.

States must provide additional counseling, information, training, or assistance to individuals who have demonstrated that they cannot effectively manage the cash option described in § 441.545(b)(2)(iii). They must also provide the individual with the conditions under which the State would require an individual to use a financial management entity (§ 441.545(b)(2)(iv)).

In § 441.545(c), States have the option of proposing other service delivery models which must be defined by the State and approved by CMS.

The burden associated with the requirements under § 441.545(a)(1) is the time and effort it would take to enter into a contract or provider agreement with the entity providing the services and supports. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

The burden associated with the requirements under § 441.545(b) is the time and effort it would take the respondents to develop person-centered service plans and service budgets. While this requirement is subject to the PRA, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

The burden associated with the requirements under § 441.545(b)(2) is the time and effort it would take the respondents to provide additional counseling, information, training, or assistance to individuals who have demonstrated that they cannot effectively manage the cash option and provide that individual with the conditions under which the State would require an individual to use a financial management entity. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

*Comment:* One commenter was concerned that the State burden will vary depending on the service model. The commenter indicated that implementing the ''self directed model with service budget'' would create additional burden for the State and that a State would view the complexity of managing self-directed service budgets with new service features such as direct cash, vouchers, and training to support consumers with the full employer responsibility, as a significant additional burden.

*Response:* We appreciate the commenter's perspective. It is difficult to accurately estimate the total burden associated with any one of these models, as it would depend on the number of models a State chose to offer. While we acknowledge the additional burden that a State may have if they do not already offer such a model that could be leveraged to meet the requirements of CFC, we did not receive any estimates or additional comments that provide any compelling information to modify this section. Therefore, we will not be revising this collection of information estimate.

*D. Support System (§ 441.555)*

For each service delivery model described under § 441.545, States must provide or arrange for the provision of a support system to: Appropriately assess and counsel an individual or the individual's representative, if applicable, before enrollment (§ 441.535); provide appropriate information, counseling, training and assistance to ensure that an individual is able to manage the services and budgets (if applicable) (§ 441.545); establish conflict of interest standards for the assessments of functional need and the person-centered service plan development process that apply to all individuals and entities, public or private (§ 441.540); and ensure that the responsibilities for assessment of functional need and person-centered service plan development are identified (§§ 441.535 and 441.540).

In § 441.555(b), States must specify in their State plan any tools or instruments used to mitigate identified risks. The one-time burden associated with the requirements under § 441.555(b) is the time and effort it would take to amend their State plan by specifying any tools or instruments used to mitigate any identified risks. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

*Comment:* One commenter indicated that designing and implementing a support system that appropriately assesses and counsels an individual before an assessment, as well as providing information counseling, training, and assistance to the individual will require significant effort.

*Response:* We appreciate the commenter's perspective and agree that the requirements will require State effort. We did not receive any estimates or additional comments that provide any compelling information to modify this section. Therefore, we will not be revising this collection of information estimate.

*E. Service Budget Requirements (§ 441.560)*

For the self-directed model with a service budget, the State is required to develop and approve a service budget that is based on the assessment of functional need and person-centered service plan and must include all of the requirements in § 441.560(a)(1) through (a)(6). In addition to developing a service budget, the methodology used to determine an individual's service budget amount must meet the requirements in § 441.560(b) and must be included in the State plan (§ 441.560(b)(3)).

In § 441.560(c), the State must have procedures in place that will provide safeguards to individuals when the budgeted service amount is insufficient to meet the individual's needs. In § 441.560(d), the State must have a

method of notifying individuals of the amount of any limit that applies to an individual's CFC services and supports. In § 441.560(f), the State must have a procedure to adjust a budget when a reassessment indicates a change in an individual's medical condition, functional status, or living situation.

The burden associated with the requirements under § 441.560(a) is the time and effort it would take to develop and approve each service budget. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

The one-time burden associated with the requirements under § 441.560(b) is the time and effort it would take the respondents to develop a methodology used to determine an individual's service budget amount and include that methodology in the State plan. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

The one-time burden associated with the requirements under § 441.560(c), (d), and (f) is the time and effort it would take the respondents to develop: Procedures that will provide safeguards to individuals when the budgeted service amount is insufficient to meet the individual's needs, a method for notifying individuals of the amount of any limit that applies to an individual's CFC services and supports, and a procedure to adjust a budget when a reassessment indicates a change in an individual's medical condition, functional status, or living situation. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

An additional burden associated with the requirements under § 441.560(d) is the time and effort it would take the respondents to develop and distribute each notice that specifies the amount of any limit for the individual's CFC services and supports. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

*Comment:* One commenter believed that is would take far more than 16 hours to develop communicate, test, and finalize budget procedures with input from interested parties and intradepartmental reviews.

*Response:* We acknowledge the commenter's concern, however, the development requirement imposed is a onetime burden that will vary by State. We believe that the 16-hour estimate is an accurate reflection of the average time a State would take to develop their procedures. We did not receive any estimates or additional comments that provide any compelling information to modify this section. Therefore, we will not be revising this collection of information estimate.

*F. Provider Qualifications (§ 441.565)*

For the agency provider model of CFC services and supports, States must develop system safeguards that include written adequacy qualifications for providers. In certain circumstances, this requirement may apply to other models.

The one-time burden associated with the requirements under § 441.565(b) is the time and effort it would take to develop written adequacy qualifications for providers. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

*Comment:* One commenter believed that 16 hours to develop system safeguards, including written adequacy qualifications for providers, was significantly insufficient. The commenter noted that the identification, analysis, and development of provider qualifications together with executing regulator or contractual mechanisms to control and/or oversee the risk in the individual's environment will require more than 16 hours to complete.

*Response:* We disagree that 16 hours to develop system safeguards is insufficient. Our estimates are based on the average time it may take for States to fulfill these requirements. This would include States who may only have to slightly modify qualifications that are already in place and States who would have to create new qualifications. We did not receive any estimates or additional comments that provide any compelling information to modify this section. Therefore, we will not be revising this collection of information estimate.

*G. Development and Implementation Council (§ 441.575(b))*

States are required to establish a Development and Implementation Council, and must consult and collaborate with the Council when developing and implementing a State plan amendment to provide home and community-based attendant services and supports.

The burden associated with the requirements under § 441.575(b) is the time and effort it would take to consult and collaborate with the Council when developing and implementing a State plan amendment to provide home and community-based attendant services and supports. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

*H. Data Collection (§ 441.580)*

Section 441.580 requires States to provide specified information regarding the provision of home and community-based attendant services and supports under CFC for each Federal fiscal year for which such services and supports are provided.

The burden associated with the requirements under § 441.580 is the time and effort it would take to provide specified information regarding the provision of home and community-based attendant services and supports for each fiscal year for which such services are provided. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

*Comment:* Many commenters expressed concerns pertaining to the estimated annual burden associated with the data collection requirement.

*Response:* We have implemented data collection requirements as they were specified in the statute. We disagree that the annual burden will be significantly

more than estimated. While some States may need to revise their data collection systems, we do not believe that this will affect all States. Additionally, since much of this data collection is also a requirement under other authorities, we believe that States have the mechanisms in place to gather the requested information for reporting without excessive additional burden.

*Comment:* One commenter believed that the data collection requirements set forth in the proposed regulations are reasonable. However, the commenter believed that the burden of the requirement to estimate the number of individuals served by type of disability, education level, and employment status in their State prior to the first fiscal year will be significant because it will likely require a manual effort from disparate sources. The commenter stated that once other major projects involving automation are implemented, the requirement for reporting in future years will become far less burdensome.

*Response:* We appreciate this comment and the time that it may initially take States to set up systems to capture the required information. We agree that the initial data collection effort could be significant; however, as systems are put in place to capture this data we are confident that the time associated with data collection will be significantly reduced.

*Comment:* One commenter believed that the requirement to report whether specific individuals were previously served in other programs or waivers is significant because it requires the development of ad-hoc reporting and report validation system which is not currently produced. The commenter stated that the estimated annual burden associated with this requirement will be significantly more than 24 hours or $576 per State for the initial year.

*Response:* We appreciate this commenter's perspective. Our estimates are based on the average time it may take for States to fulfill these requirements. This would include States who may only have to slightly modify or determine how to leverage current data collection methods and States that would have to create new methods or systems. We also believe that some of the data required could be retrieved by a State's MMIS. We did not receive any estimates or additional comments that provide any compelling information to modify this section. Therefore we will not be revising this collection of information estimate.

*I. Quality Assurance System (§ 441.585)*

Section 441.585(a) requires each State to establish and maintain a comprehensive, continuous quality assurance system, detailed in the State plan amendment. In § 441.585(b), States must provide information about the provisions of quality improvement and assurance to each individual receiving such services and supports. In § 441.585(c), States must elicit and incorporate feedback from individuals and their representatives, disability organizations, providers, families of disabled or elderly individuals, members of the community and others to improve the quality of the community-based attendant services and supports benefit.

The burden associated with the requirements under § 441.585(a) is the time and effort it would take to establish and maintain a comprehensive, continuous quality assurance system, detailed in the State plan amendment. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

The burden associated with the requirements under § 441.585(b) is the time and effort it would take the respondents to provide information about the provisions of quality improvement and assurance to each individual receiving such services and supports. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

The burden associated with the requirements under § 441.585(c) is the time and effort it would take the respondents to elicit and incorporate feedback from individuals and their representatives, disability organizations, providers, families of disabled or elderly individuals, members of the community and others to improve the quality of the community-based attendant services and supports benefit. While this requirement is subject to the PRA, only a few States have expressed potential interest. Therefore, based on our informal discussions with States after the publication of the proposed rule, we believe that it would affect less than 10 entities on an annual basis; therefore, it is exempt from the PRA in accordance with 5 CFR 1320.3(c).

*Comment:* One commenter believed that establishing and maintaining a comprehensive quality assurance system that includes a continuous quality assurance system, quality improvement strategy, and measures for program performance will exceed 100 hours for development. The cost will also be more than $2,400 annually.

*Response:* We appreciate this commenter's perspective. Our estimates are based on the average time it may take for States to fulfill these requirements. This would include States who may only have to slightly modify or determine how to leverage current quality assurance systems and States that would have to create new systems. We did not receive any estimates or additional comments that provide any compelling information to modify this section. Therefore, we will not be revising this collection of information estimate.

This document imposed information collection and recordkeeping requirements. Consequently, it was reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

## VI. Regulatory Impact Analysis

*A. Statement of Need*

This final rule implements section 2401 of the Affordable Care Act. The Secretary is to establish a new State plan option to provide home and community-based attendant services and supports at a 6 percentage point increase in Federal matching payments for expenditures related to the provision of services under this option. Section 2401 of the Affordable Care Act, entitled ''Community First Choice Option,'' adds a new section 1915(k) of the Act that allows States, at their option, to provide home and community-based attendant services and supports under their State plan beginning October 1, 2011.

*B. Overall Impact*

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated an ''economically'' significant rule, under section 3(f)(1) of Executive Order 12866 and a major rule under the Congressional Review Act. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2012, that threshold is approximately $139 million. Because this rule does not mandate State participation in section 1915(k) of the Act, there is no obligation for the State to make any change to their Medicaid program. Therefore, we estimate this final rule will not mandate expenditures in the threshold amount of $139 million in any 1 year.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. As stated above, this final rule does not have a substantial effect on State and local governments.

This final rule is estimated to have an economic impact of $1.3 billion in fiscal year 2012, with the Federal and State shares reflecting $820 million and $480 million, respectively. The economic impact estimates presented in this final rule differ from those originally presented in the proposed rule, primarily due to the final rule revising § 441.510 to require, that in order to receive CFC services, all individuals, regardless of income, must be determined annually to meet an institutional level of care.

TABLE 1—MEDICAID COSTS FOR THE COMMUNITY FIRST CHOICE OPTION

[In $ millions] [1]

| | FY 2012 | FY 2013 | FY 2014 | FY 2015 | FY 2016 [2] |
|---|---|---|---|---|---|
| Federal Medicaid | $820 | $1,060 | $1,815 | $2,585 | $3,520 |
| State Medicaid | 480 | 620 | 1,061 | 1,511 | 2,058 |

[1] Figures are rounded to the nearest $1 million and assume increased State participation per fiscal year.
[2] The proposed rule included cost estimates for FY 2012 through FY 2015. The cost estimates in this final rule are for FY 2012 through FY 2016.

This final rule provides States with additional flexibility to finance home and community-based services by establishing a new CFC Option at an increased FMAP for attendant services and supports. Because of this enhanced flexibility, and the fact that a majority of States may already provide attendant services and supports through optional medical assistance services in its Medicaid State plan, HCBS waiver programs or both, we anticipate that each State will likely compare and decide which vehicle provides greater benefits and stability to their overall Medicaid program. As such, at this time it is very difficult to accurately predict how many States will choose to adopt the CFC Option, and how a State's election to exercise this option will influence other parts of its Medicaid program. However, for purposes of this RIA, we assume a gradual growth in the number of States adopting this option, so that, by FY 2016, 30 percent of eligible persons who would want this coverage would reside in States that offer it.

*C. Anticipated Effects*

1. Effects on Medicaid Recipients

We anticipate that a large number of Medicaid recipients will be affected. We believe the additional option to provide attendant care services and supports at the increased FMAP will likely have significant positive effects on Medicaid recipients, particularly on their demand for these services. We anticipate that the provisions of the final rule will likely increase State and local accessibility to services that augment the quality of life for individuals through a person-centered plan of service and various quality assurances, all at a potentially lower per capita cost relative to alternative care-settings.

2. Effects on Other Providers

We anticipate that this final rule will increase the demand for attendant care services and supports. We believe this effect will be beneficial to providers, particularly providers of attendant care services and supports. Additionally, if the increase in demand for such services is sufficient, the number of providers of such services may increase.

3. Impact on Small Entities

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the SBA definition of a small business and having revenues of less than $7 million to $34.5 million in any 1 year. (For details, see the Small Business Administration's Table of Size Standards at *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf*.) Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because the Secretary has determined that this final rule does not have a significant impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

4. Effects on the Medicaid Program Expenditures

Varying State definitions of personal care services and rules concerning who may furnish them make it difficult to estimate accurately the potential increases in expenditures for States that choose to adopt CFC under section 1915(k) of the Act. While we specifically solicited comments on the number of States that were likely to participate in CFC, we received none.

Table 1 above provides estimates of the anticipated Medicaid program expenditures associated with furnishing attendant care services and supports. The estimates were made using various assumptions about increases in service utilization and costs, as well as assumptions about the induced utilization that may result from the CFC option. We have allowed for possible State incentives due to the increased FMAP rate, as well as for the possibility of savings due to beneficiaries being diverted from nursing facility use.

*D. Alternatives Considered*

In finalizing the policies set forth in this rule, we reviewed all public comments submitted within the allowed time.

We received a large number of comments on the proposed definition of home and community-based settings. We met with Federal partners to discuss the concerns raised by public commenters. We also reviewed several documents and policy papers prepared by advocacy groups, independent policy groups, and other stakeholders for information on the types of settings personal attendant services are provided in. Additionally, we looked to the *Olmstead* Decision and the ADA as the framework onto which we built our definition.

After much discussion and consideration of the impact of each option discussed, we concluded that further discussion and consideration on this issue is necessary. Therefore, we are not finalizing the language proposed at § 441.530. Rather, we will issue a new proposed regulation that will establish setting criteria for CFC developed as a result of the comments received.

*E. Accounting Statement*

As required by OMB Circular A–4 (available at: *http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf*), we have prepared an accounting statement showing the classification of estimated transfers, benefits and costs associated with section 1915(k) services offered by qualified providers in the Medicaid program, as a result of this final rule.

TABLE 2—ACCOUNTING STATEMENT: ESTIMATED TRANSFERS, BENEFITS, AND COSTS

[FYs 2012 to 2016] [3]

| Category | | Transfers | | |
|---|---|---|---|---|
| Annualized monetized transfers | Year dollar | Discount rate | | Period covered |
| | 2012 | 7% | 3% | |
| | Primary Estimate | $1.87 Billion | $1.92 Billion | FYs 2012–2016 |
| From/To | Federal Government to Medicaid Qualified Providers. | | | |
| Category | Transfers | | | |
| Annualized monetized transfers | Year dollar | Discount rate | | Period covered |
| | 2012 | 7% | 3% | |
| | Primary Estimate | $1.09 Billion | $1.12 Billion | FYs 2012–2016 |
| From/To | State Governments to Medicaid Qualified Providers. | | | |
| Category | Benefits | | | |
| Qualitative Benefits | The CFC option will increase State and local accessibility to services which in turn improves, through a person-centered plan of service with various quality assurances, the quality of life for individuals, and reduces the financial strain on States and Medicaid participants. | | | |
| Category | Costs | | | |
| Administrative Burden Costs | The administrative burden costs are presented in the Paperwork Reduction Act section of this final rule. | | | |

[3] The proposed rule included cost estimates for FY 2012 through FY 2015. The cost estimates in this final rule are for FY 2012 through FY 2016.

**List of Subjects in 42 CFR Part 441**

Aged, Family planning, Grant programs—health, Infants and children, Medicaid, Penalties, Reporting and recordkeeping requirements.

The Centers for Medicare & Medicaid Services amends 42 CFR Chapter IV as follows:

## PART 441—SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES

■ 1. The authority citation for part 441 continues to read as follows:

**Authority:** Sec 1102 of the Social Security Act (42.U.S.C. 1302)

■ 2. Part 441 is amended by adding subpart K to read as follows:

**Subpart K—Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice)**

Sec.

## Subpart K—Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice)

### § 441.500 Basis and scope.

(a) *Basis.* This subpart implements section 1915(k) of the Act, referred to as the Community First Choice option (hereafter Community First Choice), to provide home and community-based attendant services and supports through a State plan.

(b) *Scope.* Community First Choice is designed to make available home and community-based attendant services and supports to eligible individuals, as needed, to assist in accomplishing activities of daily living (ADLs), instrumental activities of daily living (IADLs), and health-related tasks through hands-on assistance, supervision, or cueing.

### § 441.505 Definitions.

As used in this subpart:

*Activities of daily living* (ADLs) means basic personal everyday activities including, but not limited to, tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

*Agency-provider model* means a method of providing Community First Choice services and supports under which entities contract for or provide through their own employees, the provision of such services and supports, or act as the employer of record for attendant care providers selected by the individual enrolled in Community First Choice.

*Backup systems and supports* means electronic devices used to ensure continuity of services and supports. These items may include an array of available technology, personal emergency response systems, and other mobile communication devices. Persons identified by an individual can also be included as backup supports.

*Health-related tasks* means specific tasks related to the needs of an individual, which can be delegated or assigned by licensed health-care professionals under State law to be performed by an attendant.

*Individual* means the eligible individual and, if applicable, the individual's representative.

*Individual's representative* means a parent, family member, guardian, advocate, or other person authorized by the individual to serve as a representative in connection with the provision of CFC services and supports. This authorization should be in writing, when feasible, or by another method that clearly indicates the individual's free choice. An individual's representative may not also be a paid caregiver of an individual receiving services and supports under this subpart.

*Instrumental activities of daily living* (IADLs) means activities related to living independently in the community, including but not limited to, meal planning and preparation, managing finances, shopping for food, clothing, and other essential items, performing essential household chores, communicating by phone or other media, and traveling around and participating in the community.

*Other models* means methods, other than an agency-provider model or the self-directed model with service budget, for the provision of self-directed services and supports, as approved by CMS.

*Self-directed* means a consumer controlled method of selecting and providing services and supports that allows the individual maximum control of the home and community–based attendant services and supports, with the individual acting as the employer of record with necessary supports to perform that function, or the individual having a significant and meaningful role in the management of a provider of service when the agency-provider model is utilized. Individuals exercise as much control as desired to select, train, supervise, schedule, determine duties, and dismiss the attendant care provider.

*Self-directed model with service budget* means methods of providing self-directed services and supports using an individualized service budget. These methods may include the provision of vouchers, direct cash payments, and/or use of a fiscal agent to assist in obtaining services.

### § 441.510 Eligibility.

To receive Community First Choice services and supports under this section, an individual must meet the following requirements:

(a) Be eligible for medical assistance under the State plan;

(b) As determined annually—

(1) Be in an eligibility group under the State plan that includes nursing facility services; or

(2) If in an eligibility group under the State plan that does not include such nursing facility services, have an income that is at or below 150 percent of the Federal poverty level (FPL). In determining whether the 150 percent of the FPL requirement is met, States must apply the same methodologies as would apply under their Medicaid State plan, including the same income disregards in accordance with section 1902(r)(2) of the Act; and,

(c) Receive a determination, at least annually, that in the absence of the home and community-based attendant services and supports provided under this subpart, the individual would otherwise require the level of care furnished in a hospital, a nursing facility, an intermediate care facility for the mentally retarded, an institution providing psychiatric services for individuals under age 21, or an institution for mental diseases for individuals age 65 or over, if the cost could be reimbursed under the State plan. The State administering agency may permanently waive the annual recertification requirement for an individual if:

(1) It is determined that there is no reasonable expectation of improvement or significant change in the individual's condition because of the severity of a chronic condition or the degree of impairment of functional capacity; and

(2) The State administering agency, or designee, retains documentation of the reason for waiving the annual recertification requirement.

(d) For purposes of meeting the criterion under paragraph (b) of this section, individuals who qualify for medical assistance under the special home and community-based waiver eligibility group defined at section 1902(a)(10)(A)(ii)(VI) of the Act must meet all section 1915(c) requirements and receive at least one home and community-based waiver service per month.

(e) Individuals receiving services through Community First Choice will not be precluded from receiving other home and community-based long-term care services and supports through other Medicaid State plan, waiver, grant or demonstration authorities.

### § 441.515 Statewideness.

States must provide Community First Choice to individuals:

(a) On a statewide basis.

(b) In a manner that provides such services and supports in the most integrated setting appropriate to the

individual's needs, and without regard to the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life.

**§ 441.520 Included services.**

(a) If a State elects to provide Community First Choice, the State must provide all of the following services:

(1) Assistance with ADLs, IADLs, and health-related tasks through hands-on assistance, supervision, and/or cueing.

(2) Acquisition, maintenance, and enhancement of skills necessary for the individual to accomplish ADLs, IADLs, and health-related tasks.

(3) Backup systems or mechanisms to ensure continuity of services and supports, as defined in § 441.505 of this subpart.

(4) Voluntary training on how to select, manage and dismiss attendants.

(b) At the State's option, the State may provide permissible services and supports that are linked to an assessed need or goal in the individual's person-centered service plan. Permissible services and supports may include, but are not limited to, the following:

(1) Expenditures for transition costs such as rent and utility deposits, first month's rent and utilities, bedding, basic kitchen supplies, and other necessities linked to an assessed need for an individual to transition from a nursing facility, institution for mental diseases, or intermediate care facility for the mentally retarded to a home and community-based setting where the individual resides;

(2) Expenditures relating to a need identified in an individual's person-centered service plan that increases an individual's independence or substitutes for human assistance, to the extent that expenditures would otherwise be made for the human assistance.

**§ 441.525 Excluded services.**

Community First Choice may not include the following:

(a) Room and board costs for the individual, except for allowable transition services described in § 441.520(b)(1) of this subpart.

(b) Special education and related services provided under the Individuals with Disabilities Education Act that are related to education only, and vocational rehabilitation services provided under the Rehabilitation Act of 1973.

(c) Assistive devices and assistive technology services, other than those defined in § 441.520(a)(3) of this subpart, or those that meet the requirements at § 441.520(b)(2) of this subpart.

(d) Medical supplies and medical equipment, other than those that meet the requirements at § 441.520(b)(2) of this subpart.

(e) Home modifications, other than those that meet the requirements at § 441.520(b) of this subpart.

**§ 441.530 [Reserved]**

**§ 441.535 Assessment of functional need.**

States must conduct a face-to-face assessment of the individual's needs, strengths, preferences, and goals for the services and supports provided under Community First Choice in accordance with the following:

(a) States may use one or more processes and techniques to obtain information, including telemedicine, or other information technology medium, in lieu of a face-to-face assessment if the following conditions apply:

(1) The health care professional(s) performing the assessment meet the provider qualifications defined by the State, including any additional qualifications or training requirements for the operation of required information technology;

(2) The individual receives appropriate support during the assessment, including the use of any necessary on-site support-staff; and

(3) The individual is provided the opportunity for an in-person assessment in lieu of one performed via telemedicine.

(b) Assessment information supports the determination that an individual requires Community First Choice and also supports the development of the person-centered service plan and, if applicable, service budget.

(c) The assessment of functional need must be conducted at least every 12 months, as needed when the individual's support needs or circumstances change significantly necessitating revisions to the person-centered service plan, and at the request of the individual.

(d) Other requirements as determined by the Secretary.

**§ 441.540 Person-centered service plan.**

(a) *Person-centered planning process.* The person-centered planning process is driven by the individual. The process—

(1) Includes people chosen by the individual.

(2) Provides necessary information and support to ensure that the individual directs the process to the maximum extent possible, and is enabled to make informed choices and decisions.

(3) Is timely and occurs at times and locations of convenience to the individual.

(4) Reflects cultural considerations of the individual.

(5) Includes strategies for solving conflict or disagreement within the process, including clear conflict-of-interest guidelines for all planning participants.

(6) Offers choices to the individual regarding the services and supports they receive and from whom.

(7) Includes a method for the individual to request updates to the plan.

(8) Records the alternative home and community-based settings that were considered by the individual.

(b) *The person-centered service plan.* The person-centered service plan must reflect the services and supports that are important for the individual to meet the needs identified through an assessment of functional need, as well as what is important to the individual with regard to preferences for the delivery of such services and supports. Commensurate with the level of need of the individual, and the scope of services and supports available under Community First Choice, the plan must:

(1) Reflect that the setting in which the individual resides is chosen by the individual.

(2) Reflect the individual's strengths and preferences.

(3) Reflect clinical and support needs as identified through an assessment of functional need.

(4) Include individually identified goals and desired outcomes.

(5) Reflect the services and supports (paid and unpaid) that will assist the individual to achieve identified goals, and the providers of those services and supports, including natural supports. Natural supports cannot supplant needed paid services unless the natural supports are unpaid supports that are provided voluntarily to the individual in lieu of an attendant.

(6) Reflect risk factors and measures in place to minimize them, including individualized backup plans.

(7) Be understandable to the individual receiving services and supports, and the individuals important in supporting him or her.

(8) Identify the individual and/or entity responsible for monitoring the plan.

(9) Be finalized and agreed to in writing by the individual and signed by all individuals and providers responsible for its implementation.

(10) Be distributed to the individual and other people involved in the plan.

(11) Incorporate the service plan requirements for the self-directed model

with service budget at § 441.550, when applicable.

(12) Prevent the provision of unnecessary or inappropriate care.

(13) Other requirements as determined by the Secretary.

(c) *Reviewing the person-centered service plan.* The person-centered service plan must be reviewed, and revised upon reassessment of functional need, at least every 12 months, when the individual's circumstances or needs change significantly, and at the request of the individual.

**§ 441.545 Service models.**

A State may choose one or more of the following as the service delivery model to provide self-directed home and community-based attendant services and supports:

(a) *Agency-provider model.* (1) The agency-provider model is a delivery method in which the services and supports are provided by entities, under a contract or provider agreement with the State Medicaid agency or delegated entity to provide services. Under this model, the entity either provides the services directly through their employees or arranges for the provision of services under the direction of the individual receiving services.

(2) Under the agency-provider model for Community First Choice, individuals maintain the ability to have a significant role in the selection and dismissal of the providers of their choice, for the delivery of their specific care, and for the services and supports identified in their person-centered service plan.

(b) *Self-directed model with service budget.* A self-directed model with a service budget is one in which the individual has both a person-centered service plan and a service budget based on the assessment of functional need.

(1) *Financial management entity.* States must make available financial management activities to all individuals with a service budget. The financial management entity performs functions including, but not limited to, the following activities:

(i) Collect and process timesheets of the individual's attendant care providers.

(ii) Process payroll, withholding, filing, and payment of applicable Federal, State, and local employment related taxes and insurance.

(iii) Separately track budget funds and expenditures for each individual.

(iv) Track and report disbursements and balances of each individual's funds.

(v) Process and pay invoices for services in the person-centered service plan.

(vi) Provide individual periodic reports of expenditures and the status of the approved service budget to the individual and to the State.

(vii) States may perform the functions of a financial management entity internally or use a vendor organization that has the capabilities to perform the required tasks in accordance with all applicable requirements of the Internal Revenue Service.

(2) *Direct cash.* States may disburse cash prospectively to individuals self-directing their Community First Choice services and supports, and must meet the following requirements:

(i) Ensure compliance with all applicable requirements of the Internal Revenue Service, and State employment and taxation authorities, including but not limited to, retaining required forms and payment of FICA, FUTA and State unemployment taxes.

(ii) Permit individuals using the cash option to choose to use the financial management entity for some or all of the functions described in paragraph (b)(1)(ii) of this section.

(iii) Make available a financial management entity to an individual who has demonstrated, after additional counseling, information, training, or assistance that the individual cannot effectively manage the cash option described in this section.

(iv) The State may require an individual to use a financial management entity, but must provide the individual with the conditions under which this option would be enforced.

(3) *Vouchers.* States have the option to issue vouchers to individuals who self-direct their Community First Choice services and supports as long as the requirements in paragraphs (b)(2)(i) through (iv) of this paragraph are met.

(c) *Other service delivery models.* States have the option of proposing other service delivery models. Such models are defined by the State and approved by CMS.

**§ 441.550 Service plan requirements for self-directed model with service budget.**

The person-centered service plan under the self-directed model with service budget conveys authority to the individual to perform, at a minimum, the following tasks:

(a) Recruit and hire or select attendant care providers to provide self-directed Community First Choice services and supports, including specifying attendant care provider qualifications.

(b) Dismiss specific attendant care providers of Community First Choice services and supports.

(c) Supervise attendant care providers in the provision of Community First Choice services and supports.

(d) Manage attendant care providers in the provision of Community First Choice services and supports, which includes the following functions:

(1) Determining attendant care provider duties.

(2) Scheduling attendant care providers.

(3) Training attendant care providers in assigned tasks.

(4) Evaluating attendant care providers' performance.

(e) Determining the amount paid for a service, support, or item, in accordance with State and Federal compensation requirements.

(f) Reviewing and approving provider payment requests.

**§ 441.555 Support system.**

For each service delivery model available, States must provide, or arrange for the provision of, a support system that meets all of the following conditions:

(a) Appropriately assesses and counsels an individual before enrollment.

(b) Provides appropriate information, counseling, training, and assistance to ensure that an individual is able to manage the services and budgets if applicable.

(1) This information must be communicated to the individual in a manner and language understandable by the individual. To ensure that the information is communicated in an accessible manner, information should be communicated in plain language and needed auxiliary aids and services should be provided.

(2) The support activities must include at least the following:

(i) Person-centered planning and how it is applied.

(ii) Range and scope of individual choices and options.

(iii) Process for changing the person-centered service plan and, if applicable, service budget.

(iv) Grievance process.

(v) Information on the risks and responsibilities of self-direction.

(vi) The ability to freely choose from available home and community-based attendant providers, available service delivery models and if applicable, financial management entities.

(vii) Individual rights, including appeal rights.

(viii) Reassessment and review schedules.

(ix) Defining goals, needs, and preferences of Community First Choice services and supports.

(x) Identifying and accessing services, supports, and resources.

(xi) Development of risk management agreements.

(A) The State must specify in the State Plan amendment any tools or instruments used to mitigate identified risks.

(B) States utilizing criminal or background checks as part of their risk management agreement will bear the costs of such activities.

(xii) Development of a personalized backup plan.

(xiii) Recognizing and reporting critical events.

(xiv) Information about an advocate or advocacy systems available in the State and how an individual can access the advocate or advocacy systems.

(c) Establishes conflict of interest standards for the assessments of functional need and the person-centered service plan development process that apply to all individuals and entities, public or private. At a minimum, these standards must ensure that the individuals or entities conducting the assessment of functional need and person-centered service plan development process are not:

(1) Related by blood or marriage to the individual, or to any paid caregiver of the individual.

(2) Financially responsible for the individual.

(3) Empowered to make financial or health-related decisions on behalf of the individual.

(4) Individuals who would benefit financially from the provision of assessed needs and services.

(5) Providers of State plan HCBS for the individual, or those who have an interest in or are employed by a provider of State plan HCBS for the individual, except when the State demonstrates that the only willing and qualified entity/entities to perform assessments of functional need and develop person-centered service plans in a geographic area also provides HCBS, and the State devises conflict of interest protections including separation of assessment/planning and HCBS provider functions within provider entities, which are described in the State plan, and individuals are provided with a clear and accessible alternative dispute resolution process.

(d) Ensures the responsibilities for assessment of functional need and person-centered service plan development are identified.

**§ 441.560 Service budget requirements.**

(a) For the self-directed model with a service budget, a service budget must be developed and approved by the State based on the assessment of functional need and person-centered service plan and must include all of the following requirements:

(1) The specific dollar amount an individual may use for Community First Choice services and supports.

(2) The procedures for informing an individual of the amount of the service budget before the person-centered service plan is finalized.

(3) The procedures for how an individual may adjust the budget including the following:

(i) The procedures for an individual to freely adjust amounts allocated to specific services and supports within the approved service budget.

(ii) The circumstances, if any, that may require prior approval by the State before a budget adjustment is made.

(4) The circumstances, if any, that may require a change in the person-centered service plan.

(5) The procedures that govern the determination of transition costs and other permissible services and supports as defined at § 441.520(b).

(6) The procedures for an individual to request a fair hearing under Subpart E of this title if an individual's request for a budget adjustment is denied or the amount of the budget is reduced.

(b) The budget methodology set forth by the State to determine an individual's service budget amount must:

(1) Be objective and evidence-based utilizing valid, reliable cost data.

(2) Be applied consistently to individuals.

(3) Be included in the State plan.

(4) Include a calculation of the expected cost of Community First Choice services and supports, if those services and supports are not self-directed.

(5) Have a process in place that describes the following:

(i) Any limits the State places on Community First Choice services and supports, and the basis for the limits.

(ii) Any adjustments that are allowed and the basis for the adjustments.

(c) The State must have procedures in place that will provide safeguards to individuals when the budgeted service amount is insufficient to meet the individual's needs.

(d) The State must have a method of notifying individuals of the amount of any limit that applies to an individual's Community First Choice services and supports. Notice must be communicated in an accessible format, communicated in plain language, and needed auxiliary aids and services should be provided.

(e) The budget may not restrict access to other medically necessary care and services furnished under the State plan and approved by the State but which are not included in the budget.

(f) The State must have a procedure to adjust a budget when a reassessment indicates a change in an individual's medical condition, functional status, or living situation.

**§ 441.565 Provider qualifications.**

(a) For all service delivery models:

(1) An individual retains the right to train attendant care providers in the specific areas of attendant care needed by the individual, and to have the attendant care provider perform the needed assistance in a manner that comports with the individual's personal, cultural, and/or religious preferences.

(2) An individual retains the right to establish additional staff qualifications based on the individual's needs and preferences.

(3) Individuals also have the right to access other training provided by or through the State so that their attendant care provider(s) can meet any additional qualifications required or desired by individuals.

(b) For the agency-provider model, the State must define in writing adequate qualifications for providers in the agency model of Community First Choice services and supports.

(c) For the self-directed model with service budget, an individual has the option to permit family members, or any other individuals, to provide Community First Choice services and supports identified in the person-centered service plan, provided they meet the qualifications to provide the services and supports established by the individual, including additional training.

(d) For other models, the applicability of requirements at paragraphs (b) or (c) of this section will be determined based on the description and approval of the model.

**§ 441.570 State assurances.**

A State must assure the following requirements are met:

(a) Necessary safeguards have been taken to protect the health and welfare of enrollees in Community First Choice, including adherence to section 1903(i) of the Act that Medicaid payment shall not be made for items or services furnished by individuals or entities excluded from participating in the Medicaid Program.

(b) For the first full 12 month period in which the State plan amendment is implemented, the State must maintain or exceed the level of State expenditures for home and community-based attendant services and supports provided under sections 1115, 1905(a), 1915, or otherwise under the Act, to individuals with disabilities or elderly

individuals attributable to the preceding 12 month period.

(c) All applicable provisions of the Fair Labor Standards Act of 1938.

(d) All applicable provisions of Federal and State laws regarding the following:

(1) Withholding and payment of Federal and State income and payroll taxes.

(2) The provision of unemployment and workers compensation insurance.

(3) Maintenance of general liability insurance.

(4) Occupational health and safety.

(5) Any other employment or tax related requirements.

**§ 441.575 Development and Implementation Council.**

(a) States must establish a Development and Implementation Council, the majority of which is comprised of individuals with disabilities, elderly individuals, and their representatives.

(b) States must consult and collaborate with the Council when developing and implementing a State plan amendment to provide Community First Choice services and supports.

**§ 441.580 Data collection.**

A State must provide the following information regarding the provision of home and community-based attendant services and supports under Community First Choice for each Federal fiscal year for which the services and supports are provided:

(a) The number of individuals who are estimated to receive Community First Choice services and supports under this State plan option during the Federal fiscal year.

(b) The number of individuals who received the services and supports during the preceding Federal fiscal year.

(c) The number of individuals served broken down by type of disability, age, gender, education level, and employment status.

(d) The specific number of individuals who have been previously served under sections 1115, 1915(c) and (i) of the Act, or the personal care State plan option.

(e) Data regarding how the State provides Community First Choice and other home and community-based services.

(f) The cost of providing Community First Choice and other home and community-based services and supports.

(g) Data regarding how the State provides individuals with disabilities who otherwise qualify for institutional care under the State plan or under a waiver the choice to receive home and community-based services in lieu of institutional care.

(h) Data regarding the impact of Community First Choice services and supports on the physical and emotional health of individuals.

(i) Other data as determined by the Secretary.

**§ 441.585 Quality assurance system.**

(a) States must establish and maintain a comprehensive, continuous quality assurance system, described in the State plan amendment, which includes the following:

(1) A quality improvement strategy.

(2) Methods to continuously monitor the health and welfare of each individual who receives home and community-based attendant services and supports, including a process for the mandatory reporting, investigation, and resolution of allegations of neglect, abuse, or exploitation in connection with the provision of such services and supports.

(3) Measures individual outcomes associated with the receipt of home and community-based attendant services and supports as set forth in the person centered service plan, particularly for the health and welfare of individuals receiving such services and supports. These measures must be reported to CMS upon request.

(4) Standards for all service delivery models for training, appeals for denials and reconsideration procedures for an individual's person-centered service plan.

(5) Other requirements as determined by the Secretary.

(b) The State must ensure the quality assurance system will employ methods that maximizes individual independence and control, and provides information about the provisions of quality improvement and assurance to each individual receiving such services and supports.

(c) The State must elicit and incorporate feedback from individuals and their representatives, disability organizations, providers, families of disabled or elderly individuals, members of the community and others to improve the quality of the community-based attendant services and supports benefit.

**§ 441.590 Increased Federal financial participation.**

Beginning October 1, 2011, the FMAP applicable to the State will be increased by 6 percentage points, for the provision of Community First Choice services and supports, under an approved State plan amendment.

## Authority

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: April 24, 2012.

**Marilyn Tavenner,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: April 24, 2012.

**Kathleen Sebelius,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2012–10294 Filed 4–26–12; 4:15 pm]

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# FEDERAL REGISTER

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No. 88 May 7, 2012

Part III

## The President

Federal Register
Vol. 77, No. 88
Monday, May 7, 2012

# Presidential Documents

**Title 3—**

**The President**

**Proclamation 8813 of May 2, 2012**

## Jewish American Heritage Month, 2012

**By the President of the United States of America**

**A Proclamation**

Three hundred and fifty-eight years ago, a band of 23 Jewish refugees fled Recife, Brazil, beset by bigotry and oppression. For them, receding shores marked the end of another chapter of persecution for a people that had been tested from the moment they came together and professed their faith. Yet, they also marked a new beginning. When those men, women, and children landed in New Amsterdam—what later became New York City—they found not only safe haven, but early threads of a tradition of freedom and opportunity that would forever bind their story to the American story.

Those 23 believers led the way for millions to follow. During the next three centuries, Jews around the world set out to build new lives in America—a land where prosperity was possible, where parents could give their children more than they had, where families would no longer fear the specter of violence or exile, but live their faith openly and honestly. Even here, Jewish Americans bore the pains of hardship and hostility; yet, through every obstacle, generations carried with them the deep conviction that a better future was within their reach. In adversity and in success, they turned to one another, renewing the tradition of community, moral purpose, and shared struggle so integral to their identity.

Their history of unbroken perseverance and their belief in tomorrow's promise offers a lesson not only to Jewish Americans, but to all Americans. Generations of Jewish Americans have brought to bear some of our country's greatest achievements and forever enriched our national life. As a product of heritage and faith, they have helped open our eyes to injustice, to people in need, and to the simple idea that we might recognize ourselves in the struggles of our fellow men and women. These principles led Jewish advocates to fight for women's equality and workers' rights, and to preach against racism from the bimah; they inspired many to lead congregants on marches to stop segregation, help forge unbreakable bonds with the State of Israel, and uphold the ideal of ''tikkun olam''—our obligation to repair the world. Jewish Americans have served heroically in battle and inspired us to pursue peace, and today, they stand as leaders in communities across our Nation.

More than 300 years after those refugees first set foot in New Amsterdam, we celebrate the enduring legacy of Jewish Americans—of the millions who crossed the Atlantic to seek out a better life, of their children and grandchildren, and of all whose belief and dedication inspires them to achieve what their forebears could only imagine. Our country is stronger for their contributions, and this month, we commemorate the myriad ways they have enriched the American experience.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2012 as Jewish American Heritage Month. I call upon all Americans to visit www.JewishHeritageMonth.gov to learn more about the heritage and contributions of Jewish Americans and to observe this month with appropriate programs, activities, and ceremonies.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of May, in the year two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-sixth.

[FR Doc. 2012–11134
Filed 5–4–12; 11:15 am]
Billing code 3295–F2–P

# Presidential Documents

**Proclamation 8814 of May 2, 2012**

## National Foster Care Month, 2012

**By the President of the United States of America**

**A Proclamation**

Childhood is a time for our young people to grow and learn, protected by their families and safe in their homes. But for almost half a million children who are unable to remain at home through no fault of their own, childhood can be a time of sadness, pain, and separation. These children need and deserve safe, loving, and permanent families who can help restore their sense of well-being and give them hope for the future.

During National Foster Care Month, we recognize the promise of America's children and youth in foster care, and we commend the devotion and selflessness of the foster parents who step in to care for them. We also pay tribute to the professionals nationwide who work to improve the safety of our most vulnerable children and assist their families in addressing the issues that brought them into the child welfare system. In communities across America, dedicated men and women—in schools, faith-based and community organizations, parent and advocacy groups—volunteer their time as mentors, tutors, and advocates for children in foster care. We all have a role to play in ensuring our children and youth grow up with the rich opportunities and support they need to reach their full potential.

My Administration is committed to increasing positive outcomes for every infant and child in foster care, and to promoting a successful transition to adulthood for older youth. We are working to increase permanency through reunification, adoption, and guardianship; to prevent maltreatment; to reduce rates of re-entry into foster care; and to ensure all qualified caregivers have the opportunity to serve as foster parents. Through the Child and Family Services Improvement and Innovation Act, we are granting States more flexibility in supporting a range of services for children in foster care, including health care and treatment of emotional trauma. And through the Affordable Care Act, beginning in 2014, every State will be required to extend Medicaid coverage up to age 26 for former foster youth.

This year also marks the 100th anniversary of the Children's Bureau, an agency within the Department of Health and Human Services that carries forward a legacy of protecting our Nation's children and strengthening families through programs like the Permanency Innovations Initiative. Over 5 years, this initiative is investing $100 million in new strategies to identify permanent homes for youth in long-term foster care, including more than 100,000 children awaiting adoption, and to reducing time spent in foster care placements.

National Foster Care Month is a time to reflect on the many ways government, social workers, foster families, religious institutions, and others are helping improve the lives of children in foster care, and it also serves as a reminder that we cannot rest until every child has a safe, loving, and permanent home. Together, we give thanks to those individuals from all walks of life who have opened their hearts and their homes to a child, and we rededicate ourselves to ensuring a bright and hopeful future for America's foster youth.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2012 as National Foster Care Month. I encourage all Americans to observe this month by dedicating their time, love, and resources to helping youth in foster care, whether by taking time to mentor, lending a hand to a foster family, or taking an active role in their communities.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of May, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-sixth.

[FR Doc. 2012–11135
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# Reader Aids

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